MAINTENANCE AGREEMENTS UNDER THE *FAMILY LAW ACT*

by

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Many married couples choose to regulate their mutual property and maintenance obligations by agreement. They may choose to do this before they marry by antenuptual settlement or agreement, or by an agreement dealing with any or all of their assets during the marriage. Alternatively, if the marriage breaks down they may prefer to resolve property and maintenance matters by agreement rather than involving the family in costly and socially damaging litigation. Such agreements are for the most part governed by the provisions of Part VIII of the *Family Law Act* 1975 (Cth). As the Act has now been in operation for seven years a sizeable jurisprudence has grown up on the matter of matrimonial agreements and questions relating to their validity, formation and enforcement are, to a greater or lesser extent, being settled.

Accordingly, it is sought to examine here the principle features of the law relating to agreements under the *Family Law Act.*

The parties to a marriage cannot agree to resolve financial matters between them in a way which ousts the jurisdiction of the courts. A private agreement which purports to do this has been held to be unenforceable since *Hyman* v. *Hyman.*[1] However an agreement to which the court has given its imprimatur does not offend against this public policy principle. To this end the *Family Law Act* like its precursor, the *Matrimonial Causes Act* 1959 (Cth) specifically contemplates ratification by the court of an agreement between the parties to a marriage. The agreement is then registered or deemed to be registerd in the court[2] and enforceable accordingly.

Scope of Agreements Governed by the Family Law Act

In the Act a matrimonial agreement is known, somewhat misleadingly, as a 'maintenance agreement'. Definitions are set out in s. 4 (1) which defines a maintenance agreement as—

> [A]n agreement in writing made, whether before or after the commencement of this Act, between the parties to a marriage, being an agreement that makes provision with respect to financial matters, whether or not there are other parties to the agreement and whether or not it also makes provision with respect to other

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1 [1929] AC 601.

2 Ss. 86 (1), 87 (7).

> matters, and includes such an agreement that varies an earlier maintenance agreement.

The essential characteristic of a maintenance agreement is therefore that, whatever else it may set out to do, the agreement 'makes provision with respect to financial matters'. The concept of 'financial matters in relation to the parties to a marriage' is itself defined in s. 4 (1) to mean:

> [M]atters with respect to
> (a) the maintenance of one of the parties;
> (b) the property of those parties or of either of them; or
> (c) the maintenance of children of the marriage.

It would appear from these definitions that the whole gamut of family rights and obligations may validly be regulated by a maintenance agreement. That appearance is misleading. Limitations exist on Commonwealth constitutional power. Other restrictions have been imposed by the courts in respect of the parties' ability to deal with certain subject matter by a maintenance agreement and in respect of the time at which certain agreements may be finalised.

RESTRICTIONS ON THE CONTENT OF MAINTENANCE AGREEMENTS

A. Constitutional Limitations

Proceedings between the parties to a marriage for approval or registration of an agreement or revocation of approval are a matrimonial cause within s. 4 (1) (d) of the *Family Law Act*. It has been held in *Russell* v. *Russell*; *Farrelly* v. *Farrelly*[3] that s. 4 (1) (d) is a valid exercise of the marriage power and as such jurisdiction in respect of agreements exists independently of jurisdiction to grant principal relief. This position may be contrasted with that relating to property orders under the Act which are an exercise of the matrimonial causes power[4] and are only available in association with principal relief proceedings. Thus, while an agreement may be registered or approved prior to dissolution as a matter of constitutional power, orders declaring the parties' rights to property under s. 78 or altering their interests in property under s. 79 can only be made after an application for principal relief is filed (i.e. after twelve months' separation for dissolution of marriage).[5] Parties wishing to resolve property and financial matters by agreement are therefore not limited in the same way as those seeking the aid of the court by way of property orders. So much is clear as a matter of constitutional competence. However, other constitutional problems may arise in the event that parties other than the parties to the marriage are included in the agreement. These problems relate to the scope of marriage power, which, essentially limits the competence of Commonwealth legislation so as to confine it to matters between the parties to the

3 (1976) FLC 90-039.
4 Ibid.
5 S. 48.

marriage.[6] Indeed, s. 4 (1) (d) defines the relevant matrimonial cause as contemplating proceedings between the parties when the court is involved in registering or approving an agreement or in revoking registration or approval. However, the definition of a 'maintenance agreement' specifically provides that other parties may be party to the agreement. Agreements involving third parties are in fact approved daily by the courts exercising jurisdiction under the *Family Law Act*. The definition of a maintenance agreement therefore exceeds the scope of the matrimonial cause in s. 4 (1) (d). The question arises whether it is also beyond the competence of the Commonwealth. The definition of a maintenance agreement was not drawn to the attention of the High Court in *Russell* v. *Russell*. Gibbs J. did refer to the possibility that where third parties were included in the agreement 'there would be constitutional problems, particularly in relation to enforcement'[7] but took the matter no further in the absence of argument. At this date there remains a dearth of decided cases on the competence of a court exercising jurisdiction under the *Family Law Act* to approve an agreement to which a stranger is a party or to enforce such an agreement against the stranger. Recent High Court doctrine restricting the ability of the Family Court to grant injunctions in respect of companies which may properly be felt to be 'third persons' may suggest that the power would be a fairly restricted one if it exists at all.[8]

On the other hand, there is now venerable precedent of both the High Court and the Full Court of the Family Court upholding injunctions against third persons.[9] There is also a wide jurisdiction enabling third parties to acquire custody, access and guardianship rights under the Act.[10] In each case, the extension of jurisdiction to third parties has been viewed as an exercise of the matrimonial cause in s. 4 (1) (f), viz. 'proceedings including... enforcement [proceedings] in relation to concurrent, pending or completed proceedings [of a kind referred to in any of the other paragraphs defining matrimonial causes]'.

It is this writer's view that the Commonwealth may legislate on this matter. It is submitted that any extension of jurisdiction under the Act to third parties to agreements should be viewed as an exercise of the matrimonial cause in s. 4 (1) (f) adapting the authorities *mutatis mutandis*. S. 4 (1) (f) was regarded as valid in *Russell* v. *Russell* on the reasoning that as s. 4 (1) (f) was derivative of the other 'matrimonial causes' in s. 4 (1) it could be regarded as being dependently valid once the defects in the remainder of those matrimonial causes were cured. Accordingly it is suggested that when the court registers or approves the agreement, in so far as it involves a stranger, the initial

6 *Russell* v. *Russell, supra* n. 3.
7 At pp. 75, 162.
8 *Ascot Investments Ltd.* v. *Harper & Ors* (1981) FLC 91-000.
9 *Antonarkis* v. *Delly* (1976) FLC 90-063; *Smith and Saywell* (1980) FLC 90-856.
10 *Robertson and Robertson* (1977) FLC 90-214; *E. and E.* (No. 2) (1979) 90-645; *Dowal and Murray* (1978) FLC 90-516.

proceedings concerning the stranger might be viewed as a proceeding under s. 4 (1) (f) in relation to a concurrent proceeding between the parties under s. 4 (1) (d). Similarly, enforcement proceedings in respect of such an agreement could be seen as falling within s. 4 (1) (f) viz. 'enforcement' of the 'order' made under s. 4 (1) (d). To adopt this view would not poach on the High Court doctrine in the *Ascot Investments* case, it is submitted. It was held there that the court may not make an order if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which that party would not otherwise be liable to perform. Arguably the third party's rights and obligations under the agreement are already determined by the general law of contract which forms the basis for the court's jurisdiction with respect to agreements.[11] A Family Court which bound a third party to a contract into which he had entered would thus not be derogating from his extant rights and obligations, unlike the court which attempted to cause a company to behave in a manner which violated well-established immunities accorded under the general principles of corporate liability. Certainly established principles relating to third party intervention in proceedings between the parties to a marriage would need to be observed e.g. the third party must have an opportunity to be heard.[12] However, restrictions on the way in which the power is exercised do not negate the existence of jurisdiction in respect of third parties. Jurisdiction may be said to exist under s. 4 (1) (f) of the *Family Law Act* and the many agreements involving third parties (such as the children of the parties to whom property is being transferred by the agreement, or a creditor of the parties) which have been approved or registered are valid and enforceable. The position taken in clause 3 of the *Family Law Amendment Bill* 1983 (s. 4 (1) (ea)) that the enforcement of maintenance agreements is a matrimonial cause as between the parties to the marriage but not third parties may therefore be regarded as needlessly restrictive.

B. Other Limitations

The ability to plan marital property and financial relationships by a maintenance agreement, under the *Family Law Act* is subject to limitations as to the time at which such an agreement may be approved and to restrictions on the subject matter of the agreement. The nature of these restrictions is dependent on the type of agreement which is sought to be made. It is proposed therefore to examine the types of maintenance agreement which may be made under the Act.

The *Family Law Act* provides for two types of maintenance agreement: those which are in substition for the rights of parties to apply to the court for maintenance and property orders (s. 87) and agreements under s. 86 which leave the parties' rights to seek court orders intact.

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11 *Makin and Makin* (1980) FLC 90-818.
12 *Harris and Harris* (1980) FLC 90-812.

A s. 86 agreement is designated simply as one to which s. 87 does not apply. It is similar to a consent order but is not in fact an order at all as there is no formal approach to the court which registers it except for the purposes of ensuring that it is not 'in substitution for future rights' in which case registration is refused. The formal requirements are minimal (regulation 169) and registration is automatic. Once registered the agreement is enforced under s. 88 as if it were an order of the court. It may be set aside by the court under s. 86 (3), i.e. if it is satisfied that the concurrence of a party was obtained by fraud or undue influence or that the parties desire the agreement to be set aside. If a party seeks to vary the agreement, however, and no accord can be reached then it remains open to that party to seek to vary any of the maintenance or property provisions of the s. 86 agreement.

On the other hand, a s. 87 agreement is a final agreement. It requires court approval for it to operate at all. S. 87 (2) provides that an agreement under that section which has not been approved by the court has no effect. Appoval may only be given under s. 87 (4) after the court is satisfied that the provisions of the agreement with respect to financial matters are proper. We shall see that a court can only be 'satisfied' of this after some considerable perusal of the parties' financial situation. Titles to land are routinely subpoenaed, mortgagees are advised of proceedings and statements of financial circumstances must be previously filed. The court must also be satisfied that the parties fully comprehend that the effect of approval by the court is to foreclose their rights to further approach the court for orders in respect of the financial matters dealt with in the agreement. S. 87 agreements are the only way to achieve true finality with respect to financial matters under the Act (*cf* maintenance orders made under s. 74 of the Act may be altered in subsequent variation proceedings). The only financial arrangements which may not be finally settled under s. 87 are provisions in the agreement with respect to children under the age of eighteen. The court retains a paternalistic jurisdiction under s. 87 (9) to alter provisions for children where they are no longer proper. The agreement may be set aside under s. 87 (6).

The 'court' referred to in both s. 86 and s. 87 is any court exercising jurisdiction under the *Family Law Act*, including a magistrate's court.

(i) *Section 86 Agreements: Limitations*

The ready availability of jurisdiction in the court to adjust the terms of the agreement obviates the need for statutory or judicial safeguards to be imposed with respect to registration of s. 86 agreements, however there are restrictions on what may be achieved by a s. 86 agreement.

Restrictions as to time of making: There would seem to be no restriction on the time at which such an agreement may be made. Agreements entered into prior to marriage have been regarded by the courts as valid under s. 86[13] and there is an absence of restriction on the subject matter

13 See *Sykes and Sykes and Dotch* (1979) FLC 90-652.

of a s. 86 agreement. Parties to a marriage might use a s. 86 agreement as the basis for a cohabitation contract if they desire to do so provided of course it is registered after the marriage.

Restrictions on enforceability: However, it must be realised that an antenuptial agreement will have limited credence in the court should the parties be involved in a dispute with respect to property, e.g. in the event that the marriage breaks down. This was made apparent in the case of *Sykes and Sykes and Dotch*[14] where the parties registered a s. 86 agreement during the currency of the marriage although it had been made years previously as an antenuptial agreement. The effect of the agreement was that each party would own the property to which he or she had legal title. The dispute concerned a large and valuable grazing property which was in the wife's name but in respect of which it was conceded the parties had throughout the marriage arranged their affairs as though the husband had an interest. For the wife it was argued that the court should proceed to enforce the agreement because it was a contract freely entered into by the parties and in respect of which each had been legally and independently advised. The husband asked that the court use its powers under s. 79 to alter their interest in the property to give him some interest.

This case raises the question of the extent to which the court is required to adhere to the agreement. Pawley J. held that the court's discretion to make inconsistent orders was never lost in respect of a s. 86 agreement. However, while the discretion remained the court would not, in exercising that discretion, make orders which countermanded the terms of the agreement provided that the parties had themselves abided by the agreement. Here the parties had themselves departed from those terms so the court could freely alter the interests of the parties in a way which conflicted with the terms of the agreement.

Sykes' case therefore establishes that if a party wishes to seek orders conflicting with the terms of the agreement, then the court always remains free to depart from that agreement. This would appear to limit the status of the agreement to mere evidence of the intentions and expectations of the parties with respect to the subject property.

The extent of the court's freedom to depart from such an agreement was emphasised in *Candlish and Pratt.*[15] There the parties entered into an agreement on the breakdown of their marriage. Assets had been transferred and the lump sum of $9000 had been paid out under the agreement, when eighteen months after the divorce the wife remarried and sought to exercise an option under the agreement to purchase the home. The husband who had been the major contributor to the property during the marriage and who had settled on the agreed terms in the frame of mind where the wife was facing the future alone reneged on the agreement. He sought property orders from the Family Court that were more favourable to him, e.g. he requested that title to the jointly owned

14 Ibid.
15 (1980) FLC 90-819.

house be vested in him. Barblett J. determined that he should treat the agreement as a matter of 'great weight' and effectively allowed the wife to enforce it. The husband successfully appealed to the Full Court where he was 'reimbursed' for overpaid maintenance by an order that he acquire the wife's joint interest in the home cheaply.

The Full Court in *Candlish and Pratt* created further limitations on the efficacy of a variable agreement in determining the financial affairs of the parties. Firstly, the court's freedom to depart from its terms was not fettered by the fact that the agreement had already been put into effect. It would have even survived enforcement of the agreement. Secondly, it was not sufficient that the agreement was an appropriate arrangement of the parties' affairs at the time it had been made. The *Candlish* agreement had been quite fair and appropriate at that time but was no longer fair at the date of the hearing of the application for inconsistent orders under Part VIII. In short, the court which was asked to make such orders would only tend to abide by the terms of the agreement which may be regarded as fair at the date of the later application. Moreover it was stressed that the court does not start off with a presumption that the agreement is to be adhered to absent a vitiating circumstance.

In *Dupont and Dupont (No. 3)*[16] Nygh J. applied *Candlish and Pratt* to arrive at s. 79 orders in favour of the wife which were very much more favourable than the terms of the agreement. He emphasised that the s. 79 enquiry was at large and that the agreement provided no 'starting point'. His task was to arrive at orders which were fair at the date of the hearing of the later application and the terms of the agreement would prevail only if and to the extent that they reasonably approximated 'such order as would in the circumstances be proper' within the meaning of s. 79 (4).

Effectively, the court faced with property and maintenance applications under Part VIII will feel little constraint to abide by the terms of a s. 86 agreement — even if it has been carried out by the parties. It must be shown at the date of the application that the agreement represents what has been and still remains an independently advised and fair settlement of their financial and property affairs, and that they themselves have adhered to its terms. The agreement is little more than evidentiary material suggesting to the court what the parties personally have felt to be fair in the circumstances in which it was entered into. The only form of priority suggested in the case law is Nygh J.'s indication in *Dupont (No. 3)*[17] that a sort of estoppel may arise where a party 'allows the other to assume by tacit acceptance of compliance with the agreement that no claim will be made under section 79 and that other party acts on that assumption to . . . his . . . detriment'.

16 (1981) FLC 91-103.
17 Ibid at p. 76,763.

The one reported decision where an unwilling party has been held to a s. 86 agreement is *Maddock and Maddock*,[18] also a decision of Nygh J. — but there the agreement was merely an interim measure pending the availability of jurisdiction under s. 79.

Indeed one may question whether after the cases of *Sykes, Candlish and Dupont* there is any value in registering an agreement under s. 86 of the *Family Law Act*. The actions of the parties in question in *Sykes* related to a period when substantially their agreement remained unregistered. Pawley J. expressed the view that had the parties abided by an unregistered agreement then the court would on the Part VIII application take note of their expectations and would make orders which were in accordance with the terms of the agreement. In *Candlish* it appears that the deed was never registered, yet Barblett J. was prepared to adhere to its terms and the Full Court's unwillingness to do so in no way turned on the failure of the parties to obtain registration. In *Maddock* Nygh J. simply dispensed with registration under reg. 15. From this it may follow that registration under s. 86 while ostensibly conferring the benefits of enforcement under the Act is an unnecessary procedure which confers few tangible benefits in most cases as the court may readily be persuaded to make further orders under Part VIII of the Act. It would follow that the principal benefits of registration of an agreement under s. 86 are that:

(1) They provide an opportunity for parties to examine issues which may create problems in the marriage in the future. This role is prophylactic.
(2) In the event that a dispute does arise a registered agreement may be strong evidence of what the parties felt to be a fair resolution at the time it was entered into. An unregistered agreement may have equal probative value however.
(3) Additionally a registered s. 86 agreement may be effective to sever a joint tenancy on 'the long standing principle that a joint tenancy may be severed by an agreement . . .to deal with the property in a manner which involves severance', *per* Thomas J. in *Re Pozzi*.[19]

Restrictions on the ability to vary: S. 86 (2) confirms the availability of orders under Part VIII (maintenance and property). That subsection enables the court to exercise powers under s. 83 as if the agreement were an order of the court. S. 83 in turn sets out the powers of the court to modify maintenance orders. The legislation, however, nowhere gives the court explicit power to vary property provisions in a maintenance agreement. Both s. 86 (2) and s. 88 contemplate that for the purposes

18 (1981) FLC 91-031.
19 Queensland Supreme Court (1982) FLC 91-262 at p. 77,469. The wife argued that a s. 86 agreement for the ultimate sale and division of the jointly owned home was not binding because it was 'not final'. Thomas J. held that it was binding until the Family Court made inconsistent orders and that the wife did not take the whole home by survivorship. The husband's half went into his estate because the agreement to sell the home and equally share the proceeds was effective to sever the joint tenancy.

of variation of maintenance provisions and of enforcement, respectively, the provisions of the agreement are to be regarded as if it were an order of the court. However, it is a characteristic of property orders made under s. 79 of the Act that they are not variable.[20] Does it follow then that the property clauses in s. 86 agreements — if they are to be treated as orders of the court — are not open to variation if one party reneges on the agreement? This would appear to follow from s. 86 (2) and s. 88. Yet the essence of a s. 86 agreement is its variability by subsequent court order. The Full court considered this point in *Burgoyne and Burgoyne.*[21] It 'did not disagree' with the argument as to property orders but proceeded to make inconsistent orders under s. 79 nevertheless. Pawley J. confirmed in *Sykes* case that this was the appropriate course to take as there is no power in the Act to vary a property provision. Pawley J. was able to explain this by pointing out that although ss. 86 (2) and 88 had the effect that provisions in a s. 86 agreement may be regarded as if they were orders for the specific limited purposes they contemplated (i.e. variation of maintenance clauses under s. 83 and enforcement respectively) there was in fact no property order associated with such an agreement. The automatic nature of the registration procedure meant that at no stage was the court involved in a judicial enquiry which could give rise to property *orders.* Accordingly there was no s. 79 order already on foot when the court was approached to alter the property arrangements contemplated in the agreement. From this it followed that the right to a s. 79 order had not been invoked previously and was therefore still available to the parties. In short, the correct procedure for seeking inconsistent orders with respect to property on a s. 86 agreement is to apply directly under s. 79.[22]

One question remains however. It is common to register s. 86 agreements prior to marital breakdown. If dissolution of marriage is not available because the twelve months' separation has not matured under the Act or no dissolution is contemplated, what is the correct procedure for altering property clauses in an agreement in the event that a party seeks inconsistent orders? S. 79 orders may only be sought in association with principal relief. The legislation would not seem to deal with this hiatus concerning variation of property clauses where principal relief is not available and to date nor does the case law. Moreover, it would seem to follow from *Russell* v. *Russell* that it may be beyond the constitutional power of the Commonwealth Parliament to do anything about it.

(ii) *Agreements Approved under s. 87: Limitations*

Foreclosure of rights to future court orders: S. 87 (1) enables a maintenance agreement to provide 'that the agreement shall operate in relation to the financial matters dealt with in the agreement in substitution for

20 *Taylor and Taylor* (1977) FLC 90-226.
21 (1978) FLC 90-467.
22 See *Sykes and Sykes and Dotch, Candish and Pratt, Burgoyne and Burgoyne, Dupont and Dupont (No. 3) infra.*

any rights of the parties . . . under this Part' (Part VIII). A s. 87 agreement is one which on its face states that it is in substitution for rights to Part VIII orders. It is of no effect unless and until it is approved by the court.[23] It would be void at common law in the absence of approval on the public policy ground in *Hyman* v. *Hyman*.[24] An agreement which is approved by the court has the effect of determining forever the financial rights and obligations of the parties. Effectively, the court by approving the agreement denies itself further jurisdiction to regulate the rights of the parties with respect to matters covered by that agreement.

The first problem then may be to determine which are the rights that the parties have purported to deal with in the agreement. The agreement may set out to finalise the parties' rights to property by transferring certain items from one party to the other and clarifying questions of title to certain other items. If a further item of property is nowhere mentioned in the agreement then one may infer either that —

(i) that title to the property is to remain with its present owner, i.e. that the agreement contemplates that it shall remain where it is; or
(ii) that the unmentioned property is not dealt with in the agreement at all but, is open to future Family Court jurisdiction; or
(iii) that the agreement forecloses Family Court jurisdiction in relation to that property but leaves it open to the parties to proceed in another court.

On the first construction the title to the unspecified property remains irrevocably with its owner. On the second view, however, the question of rights to that property is quite open to alteration by the court making orders under s. 74 and s. 79. On the third view the clause in the agreement foreclosing further access to the Family Court under Part VIII operates, on its construction (depending on its drafting) to preclude further Part VIII proceedings but not proceedings in another court. The problem arose in *Williams and Williams*[25] where the effect of the agreement was *inter alia* that the husband would settle a lump sum of $100,000 on the wife. The agreement stipulated that it was to 'operate in relation to financial matters dealt with . . . in substitution for rights under Part VIII'. It was not expressly stipulated that the wife agreed to forego any future maintenance claims under the Act. Did the agreement foreclose the right presumably by the lump sum including a maintenance component? Alternatively, was the wife still able to claim maintenance under s. 74? In the Full Court a majority held without giving reasons, that the agreement would be effective to bar a maintenance application by the wife. Hogan J., however, felt that these terms were 'quite equivocal'. The problem arose in a different way in *Goldberg and Goldberg*.[26] There the agreement stipulated that the wife agreed to take a sum of money. She was also to have the right to occupy the matri-

23 S. 87 (2).
24 See n. 1 *supra*.
25 (1977) FLC 90-248.
26 (1977) FLC 90-233.

monial home for a number of years after which the home would be sold and the proceeds shared. She agreed to do this in lieu of any future maintenance or property rights for herself. The husband did not pay the money due under the agreement. Long before the home was to be sold the wife sought to enforce the agreement. The husband requested immediate sale of the home. The court was prepared to entertain his application on the reasoning that although the agreement excluded application by the wife, its terms did not prevent the husband from seeking orders under the Act. It is this writer's view that the court in *Goldberg* was in error. The finding that the husband's rights were not foreclosed is certainly open on the face of the agreement. However, it is submitted that by allowing the husband to seek orders in respect of the home which were contrary to the terms of agreement the court would effectively be altering the wife's rights under the agreement to that property. (In the result the parties agreed to a 'stand off' so that the offending order was not actually made.) An example of the third situation arose in *Hayes and Hayes.*[27] The agreement approved under s. 87 made no mention of certain partnership property of the parties for the reason that they could not agree about it. The wife sought half: the husband presumably felt entitled to more than half. With hindsight the husband's lawyers should have specifically exempted the partnership property from the operation of the agreement. By not referring to it at all the recitals in the agreement ('the agreement herein relates to the whole of the financial matters between them personally... and is intended to operate in relation to such matters in substitution for any rights of either party under Part VIII') had the effect of foreclosing the husband's further access under Part VIII. That being so the Family Court could not alter the wife's half interest in that property and Nygh J. held that he could not leave the property in limbo by preventing her from requesting the Supreme Court to appoint a receiver. *Hayes'* case provides an important drafting lesson in relation to property which is not dealt with by a s. 87 agreement. The recitals under s. 87 (1) should specifically exempt such property from their operation and liberty to apply in relation to that property should be preserved.

Thus it should be appreciated that a s. 87 agreement may deal with —

(i) some rights of the parties but not others (e.g. property but not maintenance as in *Williams*);

(ii) some property of the parties but not all of their property (*Hayes*);

(iii) one party's rights but not the other's (*Goldberg*).

Restrictions on subject matter: We have noted that the subject matter which can be contained in an agreement is very extensive.[28] For example, the agreement may cover the property and maintenance arrangements of children as well as of the parties and may provide for the setting up of trusts or companies to facilitate these. Ostensibly custody

27 (1982) FLC 91-205.
28 See text at n. 1 *ff supra.*

and access matters may be dealt with as well but the court in *Gardiner* viewed this as an undesirable practice and indicated that such clauses should be deleted and that separate consent orders should be obtained relating to custody and access. However, it should be remembered that approval under s. 87 only prevents further orders being made under Part VIII of the Act[29] so that inclusion of custody provisions would not bar further orders of that nature.

The limits of finality: It has been held that an agreement approved under s. 87 subsequently to divorce which had the effect of transferring the title to the home to the husband would not bar a subsequent application by the wife for an injunction allowing her to occupy the home. This was held in *Borzak and Borzak*[30] on the reasoning that the occupancy order, being made under s. 114 which appears in Part XIV of the Act is not barred by s. 87 (1). *Borzak's* case, however, predates the dispute concerning the nature of occupancy orders which were hitherto termed s. 79 property orders by the Family Court but which the Hight Court recently in *Mullane*[31] referred either to the maintenance sections or to the injunction provisions of the Act. Accordingly an occupancy order may, consistently with *Borzak* be acquired after an agreement has been approved, provided that the applicant can establish grounds for an order under s. 114.

The truly variable aspect of an approved s. 87 agreement is the provision in s. 87 (9) allowing the court to make orders under Part VIII in respect of children under eighteen if the court is satisfied that the arrangements in the approved agreement relating to the child are no longer proper. This variation was also made in *Borzak's* case[32] where the approved agreement contemplated in general terms that the husband would maintain the child and that the child would live with him. The child, aged thirteen, subsequently chose to live with the wife. In that event the court felt that the generally expressed obligation on the husband to maintain the child was no longer 'proper'. There was a need for a formal payment arrangement. The husband was accordingly ordered to pay the wife $50 per week for the child's maintenance. S. 87 (9) should be borne in mind when the agreement provides for lump sum maintenance. If such lump sum maintenance is agreed upon in respect of children the husband runs the risk that if the wife wastes the sum or simply uses it all further maintenance orders may be made against him. It will not avail him to establish that she has mismanaged the money. Moreover, care must be taken in the event that a lump sum is agreed upon to stipulate that this is solely for the maintenance of the wife, if that is intended. Any child maintenance component that may be attributed to a lump sum provision will render that provision variable.

29 S. 87 (1).
30 (1979) FLC 90-688.
31 *Mullane and Mullane* (1983) FLC 91-303.
32 Ibid.

Restrictions on time of approval: We have noted a s. 86 agreement may be registered at any time, and provided it is registered after marriage it is also effective as an antenuptial settlement. However, there may be occasions on which the indefinite nature of the s. 86 agreement makes it unsatisfactory. Particularly where the parties' fortunes are very large there may be understandings on the disposition of wealth within the marriage which they seek to achieve for once and for all to protect their property from the vagaries of their marital fortunes. Are they able to regulate their marital property relationships at the outset by an immutable agreement approved under s. 87? In *Macsok and Macsok*[33] Watson J. held that there was unquestionably jurisdiction to approve a s. 87 agreement where no proceedings for dissolution are able to be commenced. This may be contrasted with s. 87 (1) (k) of the repealed *Matrimonial Causes Act* 1959 (Cth) which only enabled the court to approve such an agreement on *decree nisi* or later. There may well be cases in which the court would be justified in approving a s. 87 agreement during an ongoing marriage, *e.g.* in an unreported case[34] the very wealthy wife was so concerned that her husband had entered into the marriage 'for her money' that she was ready to dissolve the marriage if that was what she needed to do to safeguard her financial interests at that point. The parties were not young. Counsel for the wife, anxious to secure approval to avoid a separation was able to convince the court that to approve the agreement at that stage, i.e. before any separation took place, would be a furtherance of the policy of preserving marriages which s. 43 expressed as a basic tenet of the legislation. Approval was granted. There are also instances such as *Macsok* of agreements approved under s. 87 where the parties are separated and the marriage has clearly broken down although it is too early to seek a dissolution. However, a court may only finally resolve the financial relationship of the parties if 'it is satisfied that the provisions ... with respect to financial matters are proper' (s. 87 (4)). In an ongoing marriage, when the parties' future fortunes are largely as yet untold, e.g. if more children might be conceived, it is arguable that a court could not usually be satised that arrangements made at that point of time were a 'proper' provision for all that might eventuate subsequently. Pawley J. has refused to approve an agreement when the situation was still too fluid to be able to say whether or not the agreement was proper.[35] It is this writer's view that it would be a rare case in which s. 87 (4) could be satisfied in an ongoing marriage. Moreover it has been held that if the couple reconcile after a s. 87 agreement has been approved during separation, the approved agreement is not invalidated by their reconciliation.[36] The approved s. 87 agreement would then foreseeably constitute

33 (1976) FLC 90-045.

34 Discussed by Mr J. Kay at seminar on premarital agreements given at Law Institute of Victoria on 18 March 1981.

35 Unreported decision discussed at 28-058 CCH *Australian Family Law and Practice*.

36 *Borzak and Borzak supra.*

a source of future conflict unless both parties agreed to its revocation under s. 87 (6). This problem could be resolved by inserting a clause whereby the parties shall seek revocation of the agreement in the event that they reconcile. Nevertheless, it would seem that a s. 87 agreement may rarely be approved in a marriage which has not proceeded to a separation which will result in divorce. Its use in the antenuptial context would appear to be even more restricted. Parties who wish to define their financial relationships for once and for all on entering into a marriage are with possible rare exceptions effectively unable to do so.[37]

Unapproved s. 87 agreements are of no effect: S. 87 (2) provides that a s. 87 maintenance agreement has no effect until it is approved by the court. The serious consequences of approval render it undesirable that a court should approve an agreement unless both parties wish it to be approved. Parties should be free to withdraw from such an agreement at any time before approval without being concerned that it may be used against them. Accordingly, the Full Court in *Gardiner and Gardiner*[38] refused to approve an agreement which no longer satisfied one of the parties, and further, refused to receive evidence of the provisions of the unapproved agreement to indicate the parties' own attitudes to their property relationship in subsequent proceedings for orders under Part VIII. This embargo on receiving evidence of the provisions of an unapproved agreement in *Gardiner and Gardiner* was lifted slightly in *Slater and Slater.*[39] The wife in *Slater* resiled from the agreement before it was approved. The husband was prepared for the agreement to be approved or for its terms to be substantially incorporated into orders to be made by the court under Part VIII. Dovey J. considered the wife's claim under Part VIII and found that the agreement was more favourable to her than orders which she could obtain on the merits of her Part VIII application. Accordingly, Part VIII orders were made in the agreement's terms. The wife appealed to the Full Court on the grounds that the judge had taken the unapproved agreement in evidence in contravention of *Gardiner and Gardiner.* The Full Court dismissed her appeal, holding that Dovey J. was entitled to receive the agreement in evidence provided that it was used only in her favour. *Slater's* case, therefore, restricts the rule in *Gardiner* so as only to exclude in Part VIII applications evidence in the form of unapproved agreements which might prejudice a party in the Part VIII proceeding.

The requirement of a proper agreement: The court must be satisfied that an agreement is 'proper' before approving it under s. 87. *Bailey and Bailey*[40] holds that the Court, in order to find that an agreement is 'proper' has a duty to the public at large not to approve an agreement

37 *E.g.* in *Wright and Wright* Evatt C.J. stated 'In cases where there has been no decree of dissolution the Court should be sure that the marriage has broken down and that there is no prospect of reconciliation' (1977) FLC 90-221 at p. 76,146.
38 (1978) FLC 90-440.
39 (1979) FLC 90-621.
40 (1981) FLC 91-041.

whereby the wife agrees to be supported by social security payments instead of looking to the husband for maintenance which he is able to pay. On the other hand parties who separated immediately after marriage and agreed to forego all rights to apply under Part VIII had an agreement which was held in *Sabbagh*[41] to be proper for the Court to approve even though it made no disposition of property or provision for maintenance.

In the normal course, an agreement between disputing parties as to financial matters will have been drawn up at arms' length by independent, separate, legal advisers. The question arises, therefore to what extent does the court have an obligation to verify that the agreement was arrived at fairly and with independent legal advice — or indeed an obligation to supervise the contents of the agreement to ensure that neither party has struck a bad bargain The case law discloses changes in judicial mood on this question. S. 87 as it was originally drafted did not refer to any order of the court being involved in approval proceedings. Approval was felt originally, therefore, not to entail the court in the role of closely supervising the content of agreement so much as directing its enquiries to questions of fair dealings as between parties. While an approval under s. 87 was always regarded as no mere formality nor even simply a consent order it was felt that 'an independent lengthy investigation is not envisaged'.[42] Essentially the court relied on the parties' legal advisers to safeguard their clients' interests. Thus the court's role for the most part was directed at ensuring the probity of the circumstances in which the agreement was arrived at and at establishing that the parties understood that the effect of approval was to extinguish future litigation rights. In time it became apparent, however, that legal advisers are sometimes poor guardians of their clients' interests.[43] Moreover, magistrates' courts have jurisdiction under the *Family Law Act* to approve maintenance agreements (s. 39) and a number of them appeared to have made rather too light of the matter of approval under s. 87 (4).[44] It became established, therefore, that a lack of due enquiry by the court was grounds for appealing from an approval.[45] In April 1979 the Act was amended in response to certain difficulties associated with the fact that an approval was not expressed in the Act to be in the form of an order of the court.[46] Whatever the previous law may have been, the fact that the court was after this time involved in a judicial enquiry that would result in an order being made meant that it was now clear that some real exercise of the discretion of the court was contemplated. No longer was it enough that parties desired approval and had been independently advised, or even that the

41 (1982) FLC 91-224.
42 Per Evatt C.J. in *Wright and Wright.*
43 E.g. *Lindner and Linder* (1977) FLC 90-240.
44 Ibid.
45 *Wright and Wright supra. Siewert and Siewert* (1980) FLC 90-892.
46 *E.g.* an appeal could not be taken against an approval or against a decision under s. 87 (6) as appeals (ss. 94, 96) are only in respect of decrees (orders)— see *Oliver* v. *Oliver* (1978) FLC 90-482.

agreement on its face appeared to fairly divide assets between them. Marshall J. in *Lind and Lind*[47] insisted that in addition he wanted evidence of the financial history of the marriage in order to be confident that the agreement was proper. Additionally, while the court did not generally need to make direct enquiries of the parties where they were legally represented to ensure that the parties understood the effects of approval, nevertheless this might be required in 'rare but as yet undefined' cases, e.g. if it appeared that a party had been pressured into agreeing.[48] The need for fairness did not dictate that the terms of the agreement should reflect what the outcome of a contested hearing might be. In *Siewert and Siewert* the fact that the wife acquired somewhat more than half the marital assets under the agreement did not prevent the agreement being regarded as proper, particularly as she had foregone maintenance and had no independent earnings. The agreed division of property only had to come within the broad range of orders which might have been made by the court in contested proceedings.

In *Siewert* the Full Court affirmed that an agreement which unequally divided the property between the parties might be 'proper' in certain circumstances. However, it is often felt by legal practitioners that such an agreement, particularly where it is the wife who is to acquire less than half of the assets may not be approved by the court.[49] Frequently, a party may have valid reasons for accepting a lesser share. It is submitted that the judge, in that event, should confine his enquiries to ensuring that the parties have been independently advised and that it is understood by the disadvantaged party that he or she might insist on more in the normal course. If approval is still sought after that point, then, it is submitted, the court should proceed to approve the agreement rather than to effectively compel the parties to litigate under Part VIII.

ENFORCEMENT OF MAINTENANCE AGREEMENTS

A. Enforcement of s. 87 Agreements

(i) *The principles applied*

S. 88 provides that a maintenance agreement that has been registered or is deemed to have been registered in a court may be enforced as if it were an order of that court.

S. 87 (7) causes an agreement which has been approved by a court to be deemed to be registered in that court.

Under the *Matrimonial Causes Act* the effect of sanctioning an agreement under s. 87 (1) (k) was simply to remove the public policy bar to the ousting of future jurisdiction in the courts. The agreement was then enforced as an ordinary contract *inter partes* in the general courts with appropriate contracts jurisdiction. S. 87 (10) of the *Family Law Act* seeks to preserve the validity of s. 87 (1) (k) agreements in these terms,

47 (1980) FLC 90-858.
48 *Siewert and Siewert.*
49 Personal observation by this writer confirms the 'rumour'. Many judges regard it as their role to protect the rights of the wife.

'Nothing in this Act affects the operation of an agreement sanctioned under s. 87 (1) (k) of the repealed Act or the rights and obligations of a person under such an agreement'. It has been held by the Family Court on a number of occasions that the effect of s. 87 (10) is to confine enforcement of s. 87 (1) (k) agreements to the ordinary contracts courts. The jurisdiction of the Family Court to enforce such agreements is excluded.[50] These decisions reflect the view that to allow the parties to enforce s. 87 (1) (k) agreements under the *Family Law Act* would alter their rights (specifically their enforcement rights) in contravention of s. 87 (10). The aim of the *Family Law Act* is to consolidate family litigation within the umbrella of the Family Court. It is submitted therefore that the specific exclusion of one class of maintenance agreements is unlikely to have been the aim of s. 87 (10) which almost certainly was to maintain the validity of s. 87 (1) (k) agreements and to ensure that their nonvariable nature was retained. It is unnecessary to deny them the benefits of enforcement under s. 88 in the Family Court. However, that practice is for the moment entrenched as a matter of *stare decisis.*

When agreements approved under the 1975 Act are enforced under s. 88, the principles applied by the Family Court would appear to be these. 'Once a contract being a maintenance agreement is approved in accordance with s. 87 it becomes a valid contract enforceable between the parties... by the Family Court with the additional powers available under the *Family Law Act* (*e.g.* the wide general powers conferred in s. 80 and those conferred by the regulations made under s. 106)... It would appear that unless the *Family Law Act* otherwise specifically provides the relevant law of contract applies, including the remedies for breach of contract'.[51] Thus the court essentially administers the law of contracts when it exercises enforcement jurisdiction under s. 88 with the aid of additional enforcement powers, and specific remedies for breach contemplated in the Act.

Sometimes it may be difficult to know to what extent general contracts principles are abrogated by statutory methods of enforcement. For example, it is not known whether revocation may take place by a breach of an essential term so as to revive the jurisdiction of the court under Part VIII. It is arguable that common law principles relating to breach give way to the narrower grounds for revocation under s. 87 (6) as an instance of specific contrariety.[52] Another instance of contrariety between the Act and general contracts principles has arisen in respect of payment of interest. The Family Court unlike the Supreme Court in its contracts jurisdiction has no inherent power to order interest on amounts which are unpaid in proceedings for enforcement of a s. 87 agreement.[53] Accordingly, legal advisers should protect payees under such an agree-

50 *Penberthy and Penberthy* (1977) FLC 90-255, *Lakajev and Lakajev* (1978) FLC 90-448, *Gipps and Gipps* (1978) FLC 90-523.
51 Per the Full court in *Harding and Gibson* (1979) FLC 90-665 at p. 78,547.
52 See *Infra* text at n. 70 *ff.*
53 *Harding and Gibson supra.*

ment by inserting in the agreement itself a provision that interest is payable on non-compliance. Similarly the *Family Law Act* does not enable the Family Court to order the rectification of a deed. Nor can it make declarations as to the meaning of the terms should an ambiguity arise.[54] And while it has sequestration powers those of the Family Court are inferior to the Supreme Court's.[55] The absence of general equitable jurisdiction, in this writer's view also involves the consequence that a court exercising jurisdiction under the *Family Law Act* may not extend the time contemplated in the agreement for the performance by a party of an obligation under the agreement, i.e. s. 88 only enables one party to enforce the agreement as it stands against the other. To hold otherwise would be to use s. 88 as a source of power in the court to remould the terms of the agreement in contravention of the nonvariability principle of s. 87.[56]

On the other hand, s. 88 does attract enforcement procedures under the Act which may not be available in the civil courts which treat the agreement as a mere contract. Principally s. 84 enables the court exercising jurisdiction under the *Family Law Act* to appoint an officer (e.g. instruct the Registrar) to execute all the requisite documents and take the steps needed to effect the transaction if a party refuses to comply with the terms of the approved agreement. A nice point which has not yet been the subject of any decision on s. 88 is whether arrears of maintenance under a s. 87 agreement are treated entirely as arrears of maintenance under a maintenance order. It is established that if a maintenance order made under s. 74 or s. 76 of the Act falls into arrears the court has a discretion as to whether and how much of those arrears may be recovered in proceedings to enforce the maintenance order and in any case it is unusual to enforce more than twelve months of arrears.[57] Arguably s. 88 which causes a maintenance provision in an agreement to be enforced as if it were an order of the court has the same effect. If that were so then there may be an as yet unrecognised capacity for alteration of maintenance orders effected by s. 88 in the event that a maintenance provision falls into arrears. Thus a man whose wife had remarried and was clearly no longer in need of maintenance might well be advised, if the agreement had not provided for cessation of maintenance on her remarriage, to simply stop paying and hope that the court would not assist her to recover arrears. On the other hand, the insistence of Gee J. (in respect of a property provision) in *Power and Power*[58] that s. 88 may not be used to create in the court an ability to remould an agreement, might prevail. In that event the husband could not avoid the indefinite maintenance obligation contemplated in the agreement.

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54 *Smith and Smith* (1979) FLC 90-642.

55 *E.g.* the Family Court cannot require the property to be sold. *Chernischoff and Chernischoff* (1980) FLC 90-848.

56 Per Gee J. in *Power and Power* (1980) FLC 90-878 contradicting Watson J. in *Makin and Makin* (1980) FLC 90-818.

57 *Spry and Roet* (1977) FLC 90-301.

58 See n. 56 *supra*.

(ii) *The choice of forum*

We have seen that when a s. 87 agreement is enforced under the *Family Law Act* the court applies the general principles of contracts law with the necessary modifications associated with enforcement methods available under the Act. The question arises whether it is open to a party to enforce the agreement as a simple contract in the State courts, approval having removed the public policy bar. This might be preferable in some instances (e.g. to overcome limitations in remedies under the federal Act; e.g. the unavailability of interest on overdue sums of money).[59] The survival of State jurisdiction will depend on whether proceedings to enforce s. 87 agreements are to be regarded as a matrimonial cause and thus within the exclusive province of courts exercising jurisdiction under the *Family Law Act*.[60] The relevant matrimonial cause as defined in the Act itself would appear to be that in s. 4 (1) (f), i.e. a 'proceeding with respect to the enforcement of a decree . . . in relation to the [proceedings under s. 4 (1) (d) for approval of the agreement]'. The case law on the subject, proceeds on the basis that s. 4 (1) (f) by its terms requires that there be a *decree* to enforce. The concept of a 'decree' is further defined in s. 4 (1) to 'mean decree, judgment or order'. Therefore it would seem that for s. 4 (1) (f) to be operative the approval of the agreement originally would need to be by way of 'decree, judgment or order'. Now until the amendments to s. 87 in April 1979 approval was not expressed to be by *order* of the court. In this statutory context three judges of the New South Wales Court of Appeal held[61] in *Ellinas* v. *Ellinas* that as the original approval of the s. 87 agreement had not been by order or decree s. 4 (1) (f) was not satisfied and there was no matrimonial cause involved in the enforcement of such an agreement. It followed that although s. 88 enabled a party to enforce the agreement *as if* it were an order of the court under the *Family Law Act* such a proceeding was not a matrimonial cause as no order of the court had in fact been made. Accordingly, the Supreme Court retained concurrent jurisdiction to enforce the agreement as a contract.

If the Court of Appeal's reasoning in *Ellinas* were correct it would seem to follow that the 1979 amendments to s. 87 created two classes of agreements. After the amendments in April 1979 approval is effected by order of the court. Previously approved agreements did not involve an order of the court. Adapting the reasoning in *Ellinas* enforcement of agreements approved by order would then be a matrimonial cause and beyond the jurisdiction of the Supreme Court. However, those agreements approved before the amendment had not been approved by order. Enforcement of the pre-amendment agreements would not be a matrimonial cause and therefore could be effected in the Supreme Court (as well as under s. 88 *Family Law Act*). This partial loss of jurisdiction has not, it seems, been conceded by the New South Wales Court of

59 See *Harding and Gibson supra.*
60 S. 8 *Family Law Act.*
61 (1979) FLC 90-649.

Appeal as the position in *Ellinas* has recently been reasserted in *Perlman and Perlman*[62] apparently without qualification on the grounds both of *stare decisis* and of the desirability of preserving superior Supreme Court relief in enforcing s. 87 agreements. *Perlman* involved an agreement approved in July 1978 so that when the New South Wales Court denied that enforcement was a matrimonial cause it may fortuitously be correct on its facts. However to the extent that *Perlman* purports to state a general rule the absence of any reference in the judgments to the 1979 amendments would, in this writer's submission, render the decision *per incuriam*. Be that as it may it is clear that at least one Supreme Court feels it has concurrent jurisdiction to enforce s. 87 agreements regardless of when they were approved.

However, it would appear that the Family Court does not agree with the view taken by the Supreme Court in *Ellinas*. In *Carew and Carew*[63] the Full Court considered an agreement which had been approved in 1978 (i.e. prior to the amendment) and expressly disagreeing with the Supreme Court in *Ellinas* found that proceedings for the enforcement of the agreement were a matrimonial cause under s. 4 (1) (f). The Full Court of the Family Court was accordingly of the view that there was no State jurisdiction to enforce a s. 87 agreement whenever approved. The court in *Carew* held that approval always involved the exercise by the court of its discretion. There was always sufficient enquiry by the court for the approval procedure to be regarded as an order of the court whether approval was before or after the amendment. The obvious question that then arises is why was the trouble taken to amend the Act so that approval and revocation of approval were to be by order of the court? This was answered by the Full Court in *Hutchinson and Hutchinson*[64] where Evatt C.J. and Cook J. determined that the words 'by order' were added *ex abandanti cautela* to clarify the status of the existing practice. It would follow from the decisions in *Carew and Hutchinson*, therefore, that the Full Court of the Family Court regards the enforcement of a section 87 agreement as being and having always been exclusively under the *Family Law Act*. In *Hutchinson* the Full Court was contemplating two decisions at first instance (*Oliver and Oliver*[65] and *Hutchinson*[66] itself) which had decided that approval did not entail an order of the court. The consequence of so holding in *Hutchinson* was that the appeal provisions of the Act did not apply to approved agreements as these also depend on there being a decree (order) of the court from which to appeal.[67] While this may have been correct as a matter of legal analysis the Full Court was understandably anxious to avoid this embarrassing result which entailed a finding that numerous appeals from s. 87 approvals had already been heard without jurisdiction. The

62 (1983) FLC 91-308.
63 (1979) FLC 90-698.
64 (1979) FLC 90-691.
65 (1978) FLC 90-482.
66 (1978) FLC 90-492.
67 See ss. 94 and 96.

emphatic assertion that approvals were and always had been by order both before and after the amendment is therefore not a surprising outcome in *Hutchinson's* case. The position would thus appear to be that after the amendment approval is unquestionably by order and, enforcement is a matrimonial cause within s. 4 (1) (f) but approvals given prior to the amendment and perhaps even after that date have not been viewed in that way in at least one Supreme Court which has been prepared to exercise concurrent jurisdiction in respect of the enforcement of such agreements. As the Family Court cannot by its judgments bind the Supreme Courts it is therefore theoretically open to a party to attempt to enforce an agreement, especially one approved prior to 5 April 1979, in the Supreme Court. A party who was anxious to recover interest on unpaid moneys for example might attempt this course so that a choice of forum may be felt to be a benefit, for all its conceptual untidiness. Its validity can only finally be determined in the event that the matter is taken before the High Court. A rather better solution, it is submitted, would be to amend the *Family Law Act* so as to:

(i) make it clear that approval and revocation of agreements are by order of the court and are deemed to have been by order of the court; and
(ii) improve methods of enforcement available under the Act so as to cure the defects exposed by cases such as *Harding and Gibson, Carew and Carew*[68] and *Power and Power.*[69] Regrettably no such measures have been contemplated in the 1983 Bill.

These proposed amendments would centralise enforcement jurisdiction in courts acting under the *Family Law Act* and improve existing enforcement procedures.

B. Enforcement of s. 86 Agreements

We have noted that registration makes the agreement enforceable under s. 88 as if it were an order of the court in which it was registered. The question arises, however, whether as an alternative to enforcement under the *Family Law Act,* a s. 86 agreement might be enforceable simply as a contract *inter partes* in a State Supreme Court. In *Burgoyne* the Family Court was of the view that it was not open to the wife in that case to enforce the agreement simply as a contract because such proceedings constitute a matrimonial cause and, therefore, could only take place under the *Family Law Act.*[70] However Burgoyne predates the debate in *Oliver and Hutchinson* where this question has been argued extensively in respect of the enforcement of s. 87 agreements. It is submitted that when the reasoning in the cases on s. 87 agreements is applied in respect of s. 86 agreements, the absence of a court order associated with the registration of a s. 86 agreement would have the effect that

68 Limitations associated with sequestration powers were considered in this case.
69 See *supra* text at n. 52 *ff.*
70 (1978) FLC 90-467.

there was no matrimonial cause involved within the meaning of s. 4 (1) (f) and that it would therefore be open to the Supreme Court to hear such proceedings as an alternative to enforcement under the *Family Law Act*. This choice of forum may, in the case of s. 86 agreements be regarded as a benefit. The Supreme Court has no choice but to enforce the agreement as a contract. It may not entertain applications for inconsistent orders. A party who is anxious to enforce a s. 86 agreement may prefer to proceed in the Supreme Court rather than to chance a variation of its terms by a court acting under the *Family Law Act*.

TERMINATION OF AGREEMENTS

A. Termination of s. 87 Agreements

(i) *How is a s. 87 agreement terminated?*

A s. 87 agreement may be terminated by the following events.

(a) By order under s. 87 (6) where the court is satisfied that the agreement was obtained by fraud or undue influence or that the parties agree to the court revoking the approval.[71]

(b) Where the approval was given by a Magistrate's Court then an appeal to the Family Court *ipso facto* causes the magistrate's approval to be revoked.[72]

(c) There may be common law methods of termination, i.e. methods additional to those contemplated in the legislation.[73]

(d) A s. 87 agreement ceases to be in force upon the death of a party to the agreement, as a consequence of s. 87 (5), unless the agreement otherwise provides.

We shall now consider these modes of termination.

(a) *Termination by order under s. 87 (6):* Once a s. 87 agreement has been approved the court can revoke it only if it is satisfied that there was fraud associated with obtaining court approval or that the concurrence of a party was obtained by fraud or undue influence — or that both parties seek revocation (s. 87 (6)).

(i) *Undue influence:* There is no presumption of undue influence arising out of the fact of marriage.[74] Accordingly, the party alleging that the other obtained the agreement by undue influence has the burden of proving on the balance of probabilities that some illegitimate means of persuasion was used by the other party and that this was one of the reasons (although not necessarily the prevailing reason)[75] that the complaining spouse entered into the transaction.

(ii) *Fraud:* Fraud is established when the conduct of the fraudulent party would satisfy the requirements of the tort of deceit as in *Derry* v.

71 S. 87 (6) *Family Law Act*.
72 *Van der Veer and Van der Veer* (1981) FLC 91-043.
73 See nn. 78 *Infra*.
74 *O'Brien and O'Brien* (1980) FLC 90-094.
75 Ibid.

Peek.[76] However an equitable fraud suffices[77] — e.g. the husband in *Dupont*[78] did not disclose negotiations to sell the property to a third party at a much higher price than that at which the wife was settling her claim. This nondisclosure would have sufficed. In that case however the wife failed to prove that the alleged negotiations predated his representations to her as to the value of the property. In the result the approval was not revoked. In *Fryda and Johnson (No. 2)*[79] the husband was able to obtain an order under s. 87 (6). The wife represented that she would be staying in Perth (where the couple had lived) and that she would be dependent on his support, whereas she had in fact agreed to marry another man and to take the children to America to live there with him. Ferrier J. held that the terms of the agreement (under which the husband was fairly generous) had been obtained by fraud of the wife and that the agreement should be set aside. He also held that the operative date for determining whether an approval had been obtained by fraud under s. 87 (6) was the date of the approval. A fraud arising after the agreement was made was therefore a basis for revocation. However, it seems that proving fraud will not inevitably result in the court ordering revocation under s. 87 (6). Even after proof of fraud, revocation is at the discretion of the court. Ferrier J. considered the factors on which the discretion should depend.[80]

> Without taking into account any penalty for... fraud the court must assess whether it should throw open to the parties the right to litigate or relitigate their financial relationships. In certain circumstances, bearing in mind the age of the parties, the duration of time between approval and the hearing of the application of revocation, the existence and placement of children and the respective financial circumstances of the parties, it would be inappropriate to revoke an approval.

The Full Court affirmed the discretion in *Green and Kwiatek*.[81] There a distinction was drawn between a fraud on the Court which approved the agreement, in which case the party seeking revocation has the burden of proving that the Court was actively misled by the deception or nondisclosure, and a fraud on the other party where the misrepresentor bears a strong tactical onus of disproving that the misrepresentation induced the innocent party to join in the agreemeent. The wife in *Green* omitted in her financial statement to disclose an interest in a small boutique, while the husband in his statement indicated that he knew of the existence of her interest but not of its extent. His application for revocation was dismissed as he failed positively to establish that the Court was misled by the wife's nondisclosure. She, on the other hand, was able to prove that her omission was not a material inducement to the husband's entry

76 (1889) 14 AC 337 see *Green and Kwiatek* (1982) FLC 91-259.
77 *Dupont and Dupont* (1980) FLC 90-881.
78 Ibid.
79 (1981) FLC 91-058. *Fryda* would appear to overrule *Dupont* on the question of the timing of the fraud.
80 At p. 76,470.
81 *Green and Kwiatek* (1982) FLC 91-259.

into the agreement. The decision stands as an authority against a party exploiting a technical nondisclosure as a pretext for having an agreement called off.

(iii) *Both parties seek revocation:* Usually this ground will require an application joined in by both parties. However it was suggested in dicta by a majority of the Full Court in *Banhidy*[82] that in appropriate circumstances it might be sufficient to show that one party desires revocation while the other may be estopped from denying his consent to revocation where his conduct had indicated consent to revocation if that conduct had induced the first party to act to that party's detriment. On *Banhidy's* facts the estoppel did not arise because when the parties reconciled that 'conduct' was negated by their entry into further contracts to put the original agreement into effect. However a reconciliation may in future put an agreement at risk and this somewhat stretched reading of the requirement in s. 87 (6) that 'the parties ... desire ... revocation' by estoppel may, if it finds acceptance, significantly extend the revocation power. It is this writer's view that this doctrine is not in keeping with the aim of finality of s. 87 agreements and that it should not be encouraged. Again the lessons of *Banhidy* are drafting lessons. The agreement should provide for the possibility of a future reconciliation either by stipulating that the parties will undertake to seek revocation of approval or, alternatively if the parties prefer not to risk a hard-won agreement with a precarious reconciliation they should specify that a reconciliation *per se* will not be construed as a waiver of rights under the agreement.

(b) *Termination by appeal from an approval by a Magistrates' Court:* An appeal from a decision of a magistrate to the Family Court is a hearing *de novo* (s. 96 (4)). Where a party wishes to appeal from an approval by a magistrate that party is, in the *de novo* hearing, in the position of a party who does not wish the agreement to be approved by the Family Court. Pawley J. in *Van der Veer*[83] held that it followed from *Gardiner's* case[84] that as the Family Court should not approve an agreement against the wishes of a party, then the appeal *ipso facto* has the effect of revoking the magistrate's approval. This is because the Family Court's refusal to approve the agreement has the consequence under s. 87 (2) that the agreement is of no effect. This decision would seem on principle to be correct. It also indirectly diminishes the power of the Magistrates' Courts in an area where their role is controversial.

(c) *Revocation at common law:* It is not clear whether revocation by court order can only take place under s. 87 (6) or whether there are additional grounds for revocation created by case law, i.e. common law

82 *Banhidy and Banhidy* (1983) FLC 91-302—*per* Evatt C.J. and Underhill J.

83 *Van der Veer and Van der Veer* (1981) FLC 91-043 upheld by the Full Court in *Robinson and Wills* (1982) FLC 91-215 and in *Smith* (1982) FLC 91-256.

84 See *Supra* text at n. 34 *ff*.

grounds. This writer is of the view that ss. 87, 88 and 89 comprise a code detailing powers of the court in relation to final maintenance agreements. On ordinary principles of statutory interpretation the order which the court may make must be within the four corners of the legislation. However, further grounds for revocation have been suggested in case law.

One view is that one party's breach of an esseential term entitles the other party to rescind.[85] Another form of revocation was suggested in *Kokl and Kokl*[86] where Gee J. held that as neither party had performed their part of the agreement and it remained executory on both sides they had by mutual consent agreed to it being avoided *ab initio*. As to this ground it is submitted that such avoidance ought not to occur, in the interests of certainty, until an order is obtained from the court under s. 87 (6) revoking the approval by consent of both parties.

An alternative form of revocation in Gee J.'s view was if the parties, subsequently to approval, obtained an order from the Family Court inconsistent with a term in the approved agreement. As to this ground it is submitted that such an inconsistent order would simply be made without jurisdiction due to s. 87 (1) unless the revocation order was first obtained under s. 87 (6). In *Kokl* the terms of the agreement required the wife to pay the husband a sum of money in return for a transfer by him of his interest in a home unit. The wife reneged on the agreement before the husband transferred the unit. The husband brought enforcement proceedings before Baker J. who ordered that the property be sold and the husband be paid the agreed sum of money. The wife was to receive the rest of the proceeds. The property had increased greatly in value during the period of litigation so the husband was actually receiving rather less than half the increased value of the property if he accepted the agreed sum. He applied to Gee J. to discharge Baker J.'s orders. Gee J. found that the agreement was revoked, that Baker J.'s orders were made under s. 79 and that they therefore could be set aside under s. 79A.

Although Baker J.'s orders in fact departed from the terms of the agreement, it would seem that the learned judge may have believed he was simply enforcing the agreement. The departure from its terms may have been a judicial error. Certainly it would have been preferable for the husband to appeal against Baker J.'s decision rather than proceed by way of s. 79A. The husband's proper course would have beeen to apply under s. 87 (6) for an order revoking the agreement on the grounds that the wife's refusal to perform her obligations under the agreement be treated as a desire on her part that the agreement be revoked.[87] Mr Kokl's problems were attributable to a poorly drafted agreement which gave him a fixed price instead of a proportion of the market value of

85 E.g. *Vandyke and Vandyke* (1976) FLC 90-139.
86 *Kokl and Kokl* (1981) FLC 91-078.
87 This reading of s. 87 (6) is not orthodox, but arguably amounts to a situation where both parties 'desire revocation'.

the property in a rising market. It also lacked provisions determining the parties' rights in the event of noncompliance. Gee J.'s eagerness to assist Mr Kokl in his plight was commendable but required an unsafe degree of judicial inventiveness in the twin doctrines of revocation by nonperformance and by inconsistent court order. Certainly there appears to be no reference to any statement by Baker J. to the effect that he believed himself to be revoking the agreement. It was therefore tendentious of Gee J. to assume that Baker J.'s order must have been appropriately made and to then deem it to have been made under s. 79 when in fact the circumstance that it departed from the terms of the agreement probably means that it was made without jurisdiction at all. Indeed the doctrine of revocation by inconsistent court order would appear to entitle a party to seek orders in enforcement proceedings which are inconsistent with the agreement and thereby, contrary to the whole scheme of s. 87, re-open the jurisdiction of the court under Part VIII. While *Kokl's* case provides the lawyer with stern lessons in drafting it is this writer's view that it is bad law and that s. 87 agreements should only be terminated in accordance with the provisions of the *Family Law Act*. Revocation at common law produces uncertainty and complexity and it is open to a Full Court so to hold.

(d) *Revocation by death of a party:* An agreement under s. 87 ceases to have effect on the death of either party to the agreement unless the agreement specifically provides otherwise (s. 87 (5)). Accrued maintenance and property obligations predating death are enforceable against an estate under s. 105 (3). The Act does not make express provision for enforcement of accrued obligations by an estate and although this is probably feasible,[88] clarifying amendments to the Act are desirable. If clause 40 of the 1983 Bill is enacted it will reverse the position so that in future s. 87 (5) will cause agreements to operate after death except in relation to periodic maintenance unless the agreement otherwise provides. For the moment lawyers should protect clients' interests by drafting agreements so as to provide for the continuation of obligations under the agreement after the death of a party.

(ii) *Effect of termination of an agreement*

The legislation does not spell out the legal effects of revocation. It is not clear, for example, whether revocation operates *ab initio* or merely *in futuro* nor does the legislation provide for the revival of the financial jurisdiction of the court under Part VIII of the Act as a consequence of revocation. In the result the legal effects of revocation are expressed in contradictory case law. Clearly there is a need for amending legislation. In *Kokl and Kokl* Gee J. held that revocation by subsequent court order caused the agreement to be avoided *ab initio*. This view is con-

88 J. H. Wade suggests that this can be done under s. 105 (2) and reg. 129 (e), see 'Maintenance Agreements and Inter-spousal Agreements Relating to Finance', in *Family Law and Property*, 3 essays CCH 1980.

sistent with the common law view of rescission of contracts for fraud and undue influence.[89] By contrast, Ferrier J. in *Fryda and Johnson (No. 2)* was of the view that an order under s. 87 (6) rescinding the agreement for fraud operated only prospectively which 'presumably means that whatever transactions that have taken place with respect to property which has passed to either party under the terms of the agreement between the date of approval and the date of revocation are not affected by revocation'.[90]

On the question of revival of Part VIII jurisdiction this writer is of the view that if revocation occurs under s. 87 (6) then it should follow from the terms of that section that as revocation of *approval* takes place the position becomes as if there had been no approval.[91] The same would be true of revocation by appeal from the approval by a magistrate.[92] In that event the court's discretionary jurisdiction under Part VIII should revive and the court, in exercising its regained powers under ss. 74 and 79, can then take into account transactions which may have taken place under the agreement. The Full Court has recently confirmed that this is the position in *Green and Kwiatek*[93] and in *Banhidy*.[94] This view is to be preferred to that expressed by Hutley J.A. in *Vandyke and Vandyke*[95] that the clause in the agreement ousting further recourse to the court operates to foreclose further jurisdiction in the absence of a provision in the agreement expressly providing for renewed access to the court in the event of rescission.[96] The latter view encourages the parties to turn for relief to the Supreme Court where they may be met by another refusal of jurisdiction on the grounds that the matter is a matrimonial cause and thus within the exclusive jurisdiction of the Family Court.[97] Indeed it may be argued with some force that as s. 87 (3) which ousts jurisdiction under Part VIII does so only for so long as 'the approval has not been revoked', (s. 87 (3) (b)) on revocation Part VIII jurisdiction can freely revive. Again clarifying amendments are desirable.

Occasionally parties seek to achieve an agreement under s. 87 which is truly irrevocable by agreeing that no application shall be made to the court under s. 87 (6). In *Gardiner and Gardiner*[98] the Full Court of the Family Court indicated that it was undesirable to exclude the jurisdiction of the court in this way and that the practice would be to refuse to approve such a clause.

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89 *Ilati* v. *Kruger* (1955) 94 CLR 216.
90 At p. 76,470.
91 See *supra* text at n. 34 *ff*.
92 See *supra* text at n. 83 *ff*. The same reasoning is not obviously applicable in the case of common law revocation but this writer has expressed the view that this mode of revocation is not valid.
93 See n. 81 *supra*.
94 See n. 82 *supra*.
95 See n. 76 *supra*.
96 *Vandyke* was a decision on s. 87 (1) (k). This writer feels that this case has no *ratio decidendi* as there is no majority view as to whether the husband was seeking rescission or enforcement of the agreement.
97 S 8 *Family Law Act*.
98 (1978) FLC 90-440.

B. Termination of s. 86 Agreements

The common method of ending an agreement under s. 86 (or part of such an agreement) is to obtain orders from the court varying or discharging maintenance orders or for inconsistent property orders under s. 79. This method has been discussed.[99] We shall consider three other possible methods of termination —

(a) by order under s. 86 (3);
(b) by the death of a party to the agreement;
(c) by common law rescission or revocation by the court at common law.

(a) *Termination under s. 86 (3)*

The court in which the agreement is registered may set aside the agreement for fraud, undue influence, or on the wish of the parties. These are also grounds for revocation of approval under s. 87 (6) and the comments on that provision[100] apply *mutatis mutandis* to s. 86 (3).

(b) *Termination by death of a party to the agreement*

There is no provision equivalent to s. 87 (5)[101] causing a s. 86 agreement to terminate on death. It would seem, therefore, that death *per se* does not end rights and obligations under s. 86 agreement. Once registered it would appear to be the case that the agreement causes maintenance and property clauses to continue after death unless the terms of the agreement provide otherwise. While maintenance orders made under the Act normally end on death (s. 82 (2)) there is no reason to apply s. 82 to a s. 86 agreement as s. 82 is not an enforcement provision so as to be attracted by s. 88. Moreover, the express incorporation of s. 83 (variation, discharge) in s. 86 (2) tends to exclude the operation of s. 82 which is not referred to in s. 86. Accordingly, it would seem that maintenance provisions in a s. 86 agreement may remain valid and enforceable to the extent that the Act permits action by or against an estate[102] until an order discharging the maintenance obligation is obtained pursuant to the death under s. 83 (2) (a) (iii).

Property provisions, on the other hand, by the operation of s. 88, could be enforced once the agreement is registered, notwithstanding the death of either party. Moreover, it would seem that an inconsistent s. 79 order could not be sought by or against an estate in view of the decision in *Sims and Sims*[103] that proceedings under that section must be instituted and completed during the joint lives of the parties. From this it would follow that if one party is close to death a s. 86 agreement provides a quick and apparently final resolution of property matters between the parties.

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99 See *supra* text at n. 20 *ff*.
100 See *supra* text at n. 71 *ff*.
101 See *supra* text at n. 87 *ff*.
102 Ibid.
103 (1981) FLC 91-072.

Clause 38 of the 1983 Bill proposes that s. 86 agreements will *prima facie* operate after a death except in relation to periodic maintenance unless the agreement provides otherwise.

(c) *Termination at common law*

It is not known to what extent common law methods of rescission[104] apply to s. 86 agreements. There is a dearth of case law on the subject. It will rarely be critical to resolve this problem as the freedom to seek inconsistent orders means that the status of the agreement upon breach or upon mutual nonperformance or upon the court making inconsistent orders is largely academic. Conceivably it may be important where a breach occurs prior to the death of a party if the other party it seeks to enforce or resist enforcement of property provisions in a s. 86 agreement from which the court may be free to depart if the agreement is no longer on foot.

CONCLUSION

The legal principles pertaining to maintenance agreements under s. 80 and s. 87 of the *Family Law Act* are now largely established. An agreement under s. 86 may be made at any time during the parties' marital history. Registration is automatic. It is useful to parties who agree as to their financial relationship but who are not ready for the finality of a s. 87 agreement either because they need to allow for future contingencies or because there is some present bar to court approval under that section. The essence of the s. 86 agreement is therefore the continued ability of the parties to go back to the court for future maintenance and property orders. However, the s. 86 agreement would appear to have failed as a mechanism for regulating financial matters between all but the most compliant parties. The Family Court itself has encouraged parties to such an agreement to try their luck in the court by seeking inconsistent orders, even after the agreement has been performed.[105] Decisions such as *Candlish and Pratt*, it is submitted, conduce to noncompliance with the terms of s. 86 agreements and have contributed to the destruction of that device as a method of out of court resolution of financial disputes between the parties to a marriage. Some reversal of this trend in future cases is to be hoped for.

S. 87 agreements on the other hand are now widely used where parties wish to resolve matters of maintenance and property for once and for all. The principle of finality has been rigidly adhered to in the decisions so that effectively it requires proof of an impropriety associated with the agreement under s. 87 (6) to cause it to be set aside. Some slight scope for further 'variability' by the court of s. 87 agreements may exist in specific situations, e.g. in the event of breach of an essential term or by obtaining an injunction under s. 114 of the Act, or by the court refus-

104 See *supra* text at n. 83 *ff*.
105 See *supra* text at n. 16 *ff*.

ing to enforce arrears of maintenance if s. 88 may be so interpreted. However, these possibilities are as yet largely untested in the courts and for the present the full rigours of the finality doctrine probably apply despite the decision in *Kokl.*

However, a s. 87 agreement is unobtainable in many situations. Apart from the parties having to satisfy the court that the terms of a proposed agreement are proper before it will be approved, the cases may restrict the use of s. 87 agreement to a marriage which is effectively over. In the main it is impossible for a couple in Australia to arrive at an agreement during the currency of their marriage which conclusively resolves their financial relationship in a way which precludes future recourse to the court if the marriage breaks down. This position may or may not be a desirable one to adopt, but it appears to have evolved gradually over a number of decisions rather than having been the outcome of a declared legislative policy. It is suggested that some conscious articulation of legal objectives is now overdue.

This writer has suggested amendments to the legislation to achieve better methods of enforcement of agreements both under s. 86 and s. 87 of the Act. Moreover, the current duplication of enforcement jurisdiction under the *Family Law Act* and under state contracts law should be terminated so as to cause all enforcement proceedings to be brought under the federal legislation. To this end s. 87 (10) should be amended so as to cause agreements which were sanctioned under s. 87 (1) (k) *Matrimonial Causes Act* to be enforced under the *Family Law Act* and not in the State Supreme Courts.

Several areas of legal uncertainty remain associated with maintenance agreements but none is more urgent to resolve than the question of the validity of s. 4 in so far as it contemplates third parties to agreements. The jurisdiction of the federal court to enforce such agreements against third parties is also questioned on constitutional grounds. Numerous agreements which involve third parties have now been approved or registered. It can only be a matter of time until a recalcitrant third party precipitates litigation which directly raises the constitutional issue. When that occurs, this writer has urged that the question should be resolved so as to uphold the validity of the Act and that recent decisions taking a restrictive view of Commonwealth competence over third parties may be distinguished.

The best family law is a law which aims to resolve problems within the family by promoting out of court conciliation procedures and discouraging litigation. The law with respect to maintenance agreements is perhaps the most important attempt at such procedures under the *Family Law Act.* It is to be hoped that any further legal developments will reflect that objective.