

# Australia

by  
J. Neville Turner  
Monash University, Melbourne  
Australia

1997  
Kluwer Law International  
The Hague – London – Boston

Family and Succession Law – (January 1997)

Australia – 1



## The Author



J. Neville Turner teaches Family Law and Comparative Family Law at Monash University, Melbourne, Australia. He is a Barrister and Solicitor of the Supreme Court of Victoria, and a Solicitor of the English Supreme Court of Judicature.

He was a founder-member of the International Society of Family Law, and its first general secretary. He has published several books on Family Law, including *Das Englische Familienrecht*, in German. He has been a visiting Professor at the Catholic University of Leuven, Belgium; the University of Colombo, Sri Lanka; and the French University of the Pacific, Noumea, New Caledonia. He is the President of a large Australian Non-Government Organization, Oz Child.



**The Author**



# Table of Contents

|  |    |
|--|----|
| The Author   | 3  |
| Abbreviations  | 13 |
| Preface  | 15 |
| General Introduction                                       | 19 |
| §1. GENERAL BACKGROUND OF THE COUNTRY (DEMOGRAPHIC DATA)   | 19 |
| I. Introduction  | 19 |
| II. Demography   | 20 |
| §2. HISTORICAL BACKGROUND OF FAMILY AND SUCCESSION LAW     | 22 |
| I. Introduction  | 22 |
| II. Ecclesiastical Law in England                          | 23 |
| III. Divorce   | 24 |
| IV. Reception in Australia                                 | 24 |
| V. Marriage  | 26 |
| VI. Succession Law   | 27 |
| §3. SOURCES OF FAMILY AND SUCCESSION LAW                   | 28 |
| I. Constitution  | 28 |
| II. Legislation  | 28 |
| A. Federal Legislation                                     | 28 |
| B. State Legislation                                       | 29 |
| III. Treaties  | 30 |
| IV. Jurisprudence  | 32 |
| §4. THE COURTS ADMINISTERING FAMILY LAW AND SUCCESSION LAW | 34 |

## Table of Contents

|   |    |
|---|----|
| I. Different Courts                                 | 34 |
| II. The Family Court of Australia                   | 36 |
| III. The Unique Characteristics of the Family Court | 37 |
| IV. Appraisal of these Features                     | 38 |
| V. The Discretion of Judges                         | 39 |
| VI. Criticisms of the Family Court                  | 39 |
| <br>  |    |
| Selected Bibliography                               | 43 |
| <br>  |    |
| Part I. Persons                                     | 47 |
| <br>  |    |
| Chapter 1. The Status of a Person                   | 47 |
| §1. DEFINITION OF A PERSON                          | 47 |
| §2. CAPACITY  | 48 |
| I. Minors in Australian Law                         | 48 |
| II. Child as a Term of Relationship                 | 52 |
| <br>  |    |
| Chapter 2. Registration of Civil Status             | 54 |
| <br>  |    |
| Chapter 3. Personality Rights                       | 56 |
| §1. INTRODUCTION                                    | 56 |
| §2. MINORS' CONTRACTS                               | 56 |
| §3. MINORS' RESPONSIBILITY FOR TORTS                | 61 |
| §4. MINORS' RESPONSIBILITY FOR CRIMES               | 63 |
| §5. CRIMES AGAINST CHILDREN                         | 67 |
| <br>  |    |
| Chapter 4. Names                                    | 69 |
| §1. COMPOSITION OF A NAME                           | 69 |
| §2. SURNAME   | 69 |
| I. Acquisition of the Surname                       | 69 |
| II. Change of the Surname                           | 70 |

## Table of Contents

|   |    |
|---|----|
| §3. FORENAME                                      | 70 |
| Chapter 5. Nationality                            | 72 |
| Chapter 6. Domicile and Residence                 | 73 |
| I. Domicile                                       | 73 |
| II. Domicile of Origin                            | 73 |
| Chapter 7. Mentally Handicapped Persons           | 76 |
| Part II. Family Law                               | 83 |
| Chapter 1. Marriage                               | 83 |
| §1. THE NATURE OF MARRIAGE                        | 83 |
| §2. THE CAPACITY TO MARRY                         | 83 |
| I. Engagements                                    | 83 |
| II. Different Sex                                 | 84 |
| III. Consanguinity                                | 85 |
| IV. Marriageable Age                              | 85 |
| V. Prior Marriage                                 | 86 |
| VI. Failure to consent                            | 86 |
| A. Duress   | 87 |
| B. Mistake  | 88 |
| C. Insanity                                       | 88 |
| VII. Failure to comply with Necessary Formalities | 89 |
| VIII. Consequences                                | 89 |
| §3. FORMALITIES OF MARRIAGE                       | 89 |
| §4. EFFECTS OF MARRIAGE                           | 90 |
| I. Taking of Name in Marriage                     | 90 |
| II. Duty of Consortium                            | 91 |
| III. Sexual Intercourse                           | 93 |
| IV. Confidences in Marriage                       | 93 |
| V. Contract                                       | 94 |
| VI. Tort  | 94 |
| VII. Criminal Law                                 | 95 |
| VIII. Duty to maintain                            | 95 |

## **Table of Contents**

|   |            |
|---|------------|
| §5. VOID AND VOIDABLE MARRIAGES                       | 95         |
| <b>Chapter 2. Divorce</b>                             | <b>97</b>  |
| §1. GROUNDS   | 97         |
| §2. PROCEDURE   | 98         |
| §3. EFFECTS OF DIVORCE                                | 99         |
| I. Legal Effects                                      | 99         |
| II. A Rise in Blended Families                        | 100        |
| III. A Rise in Bitterly Contested Ancillary Matters   | 100        |
| IV. A Rise in Social Security Benefits                | 101        |
| V. Conclusion   | 103        |
| <b>Chapter 3. Cohabitation Outside Marriage</b>       | <b>104</b> |
| §1. INTRODUCTION                                      | 104        |
| §2. DEFINITION  | 104        |
| §3. THE NEW SOUTH WALES STATUTE                       | 106        |
| §4. THE VICTORIAN STATUTE                             | 107        |
| §5. THE SOUTH AUSTRALIAN STATUTE                      | 108        |
| <b>Chapter 4. Filiation</b>                           | <b>109</b> |
| §1. CHILDREN BORN IN WEDLOCK                          | 109        |
| I. The Status of Legitimacy                           | 109        |
| II. Acquisition of Legal Status of a Legitimate Child | 109        |
| A. Through Birth or Conception                        | 109        |
| B. Legitimacy of a Child of a Void Marriage           | 110        |
| C. Legitimacy of a Child of a Voidable Marriage       | 111        |
| III. Disputes as to Legitimacy                        | 111        |
| §2. EX-NUPTIAL CHILDREN                               | 112        |
| I. Legal Disabilities of Ex-nuptial Children          | 112        |
| A. Name   | 113        |
| B. Maintenance  | 113        |

## Table of Contents

|  |     |
|--|-----|
| C. Guardianship, Custody and Access  | 114 |
| D. Nationality and Citizenship   | 116 |
| E. Surname   | 116 |
| F. Inheritance   | 117 |
| <br>   |     |
| Chapter 5. Adoption and Foster-Care  | 119 |
| §1. ADOPTION   | 119 |
| I. Introduction  | 119 |
| II. Who may adopt?   | 120 |
| III. Ages and Religion   | 123 |
| IV. Consents to Adoption   | 123 |
| A. The Father  | 123 |
| B. The Mother  | 124 |
| C. The Child   | 125 |
| V. Discharge   | 126 |
| VI. Access to Information and Contact  | 126 |
| VII. Adoptees  | 127 |
| A. An Adoptee Under 18 Years   | 127 |
| B. An Adoptee Over 18 Years  | 127 |
| C. Natural Parents   | 128 |
| D. Other Persons   | 128 |
| VIII. Information Exchange and Contact Systems   | 128 |
| IX. Access to Adopted Children   | 129 |
| X. Foreign Adoption  | 129 |
| <br>   |     |
| §2. FOSTER-CARE  | 132 |
| <br>   |     |
| Chapter 6. Parental Authority  | 137 |
| <br>   |     |
| Chapter 7. Guardianship and Custody  | 145 |
| §1. INTRODUCTION   | 145 |
| §2. ADOPTED CHILDREN   | 151 |
| §3. INTERIM ORDERS   | 151 |
| §4. RESTRICTION ON REMOVAL OF CHILDREN FROM AUSTRALIA  | 152 |
| §5. PRINCIPLES ON WHICH GUARDIANSHIP CUSTODY AND<br>ACCESS AWARDS ARE MADE, AND PROCEDURE IN THOSE CASES | 153 |

## Table of Contents

|   |     |
|---|-----|
| §6. CONDUCT OF THE PARTIES                            | 155 |
| §7. HOMOSEXUALITY                                     | 155 |
| §8. THE <i>STATUS QUO</i>                             | 155 |
| I. Small Children                                     | 156 |
| §9. WISHES OF THE CHILD                               | 156 |
| I. Performance in Court                               | 157 |
| II. Preference for Natural Parents                    | 158 |
| III. Economic Factors                                 | 158 |
| §10. PRESUMPTION AGAINST SEPARATION OF SIBLINGS       | 158 |
| §11. RELIGION   | 159 |
| §12. RELATIONSHIPS                                    | 159 |
| §13. SEPARATE REPRESENTATION OF CHILDREN              | 160 |
| <br>  |     |
| Part III. Matrimonial Property Law                    | 161 |
| <br>  |     |
| Chapter 1. Matrimonial Property                       | 161 |
| §1. INTRODUCTION                                      | 161 |
| §2. PROPERTY REGIME DURING MARRIAGE AND COHABITATION  | 162 |
| §3. PROPERTY AND MAINTENANCE AGREEMENTS               | 167 |
| §4. READJUSTMENT OF PROPERTY ON SEPARATION OR DIVORCE | 169 |
| §5. ADJUDICATION OF PROPERTY DISPUTES                 | 171 |
| I. Introduction                                       | 171 |
| II. General Approach                                  | 172 |
| §6. SUPERANNUATION                                    | 175 |
| §7. VARIATION OF ORDERS                               | 176 |

## Table of Contents

|  |     |
|--|-----|
| §8. DEATH                              | 177 |
| §9. SETTING ASIDE TRANSACTIONS         | 177 |
| <br>                                   |     |
| Part IV. Succession Law                | 179 |
| <br>                                   |     |
| Introduction                           | 179 |
| <br>                                   |     |
| Chapter 1. Intestate Succession        | 181 |
| <br>                                   |     |
| §1. THE OPENING OF THE SUCCESSION      | 181 |
| I. Death                               | 181 |
| II. Missing Persons and Absentees      | 182 |
| <br>                                   |     |
| §2. THE HEIR (AND OTHER BENEFICIARIES) | 182 |
| I. Capacity to Succeed                 | 183 |
| II. <i>Commorientes</i>                | 183 |
| III. Unworthiness to succeed           | 183 |
| <br>                                   |     |
| §3. THE SYSTEM OF DESCENT              | 184 |
| I. The Classes of Heirs                | 184 |
| A. Surviving Spouse                    | 185 |
| B. Descendants                         | 186 |
| C. Ascendants                          | 186 |
| D. Collaterals                         | 186 |
| II. Representation                     | 187 |
| III. Adoption                          | 187 |
| <br>                                   |     |
| §4. THE <i>BONA VACANTIA</i>           | 188 |
| <br>                                   |     |
| Chapter 2. Testamentary Succession     | 189 |
| <br>                                   |     |
| §1. INTRODUCTION                       | 189 |
| <br>                                   |     |
| §2. CAPACITY TO MAKE A WILL            | 190 |
| <br>                                   |     |
| §3. DIFFERENT TYPES OF WILL            | 192 |

## Table of Contents

|  |     |
|--|-----|
| I. Introduction  | 192 |
| II. Privileged Testators                                 | 193 |
| §4. THE JOINT WILL                                       | 194 |
| §5. REVOCATION OF A WILL                                 | 194 |
| I. Another Will  | 195 |
| II. An Intention to revoke                               | 195 |
| III. Destruction   | 195 |
| IV. Revocation by Law                                    | 196 |
| §6. PROVISIONS IN A WILL                                 | 197 |
| §7. RESTRICTIONS – TESTATORS’ FAMILY MAINTENANCE         | 197 |
| I. Spouses   | 197 |
| II. Children   | 198 |
| III. Further Dependants                                  | 198 |
| IV. <i>De facto</i> Spouses                              | 198 |
| V. Others  | 199 |
| §8. INTERPRETATION OF A WILL                             | 200 |
| Chapter 3. Acts <i>inter vivos</i> Related to the Estate | 203 |
| §1. <i>DONATIO MORTIS CAUSA</i>                          | 203 |
| I. Introduction  | 203 |
| II. Gifts to avoid Duties                                | 203 |
| Chapter 4. Acquisition and Administration of the Estate  | 205 |
| Appendix   | 209 |
| §1. FAMILY LAW REFORM ACT 1995                           | 209 |
| Index  | 211 |

# List of Abbreviations

## 1 Officers

|      |                         |
|------|-------------------------|
| A-G  | Attorney-General        |
| CJ   | Chief Justice           |
| DCJ  | Judge (District Court)  |
| J/JJ | Justice/Justices        |
| JA   | Judge (Court of Appeal) |
| JP   | Justice of the Peace    |
| P    | President               |
| SM   | Stipendiary Magistrate  |
| VC   | Vice-Chancellor         |

## 2 Common Terms

|                  |                               |
|------------------|-------------------------------|
| Art./Arts.       | Article (of a Constitution)   |
| C, Cd, Cmd, Cmnd | command paper                 |
| <i>cf.</i>       | compare with                  |
| ch/chh           | chapter/chapters              |
| cl/cll           | clause/clauses                |
| Co               | company                       |
| Cth              | Commonwealth                  |
| ed               | edition/editor                |
| e.g.             | for example                   |
| etc.             | <i>et cetera</i>              |
| ibid.            | <i>ibidem</i>                 |
| i.e.             | <i>id est</i>                 |
| n/nn             | note/notes (i.e., footnote/s) |
| No               | number                        |
| p./pp.           | page/pages                    |
| para./paras.     | paragraph/paragraphs          |
| Pty Ltd          | Proprietary Limited           |
| R                | <i>Rex</i> or <i>Regina</i>   |
| S./SS.           | section/sections              |
| sub-s/sub-ss     | sub-section/sub-sections      |
| vol.             | volume                        |

## List of Abbreviations

### 3 Australian States and Territories

|     |                              |
|-----|------------------------------|
| ACT | Australian Capital Territory |
| NSW | New South Wales              |
| NT  | Northern Territory           |
| SA  | South Australia              |
| Tas | Tasmania                     |
| Vic | Victoria                     |
| WA  | Western Australia            |

### 4 Common Cited Law Reports

|        |   |
|--------|---|
| AC     | English Law Reports, Appeal Cases                           |
| ACTR   | Australian Capital Territory Reports                        |
| All ER | All England Law Reports                                     |
| Ch     | English Law Reports, Chancery                               |
| CLR    | Commonwealth Law Reports                                    |
| DFC    | <i>De Facto</i> (Spouse) Cases                              |
| ER     | English Reports   |
| Fam LR | Family Law Reports  |
| FCR    | Federal Court Reports                                       |
| FLC    | Family Law Cases  |
| FLR    | Federal Law Reports   |
| KB     | English Law Reports, King's Bench                           |
| NSWLR  | New South Wales Law Reports                                 |
| NSWR   | New South Wales Reports                                     |
| P      | English Law Reports, Probate, Divorce and Admiralty (1891–) |
| QB     | Queen's Bench   |
| Qd R   | Queensland Reports  |
| SASR   | South Australian State Reports                              |
| Tas R  | Tasmanian Reports   |
| VR     | Victorian Reports   |
| WAR    | Western Australian Reports                                  |
| WLR    | Weekly Law Reports  |

## Preface

A famous *Weisheit* of the German lawyer and writer, Goethe is this:

‘*Wer kennt keine fremde Sprache weiss nichts von seinem Eigenen*’ – The person who knows no foreign language knows nothing of his own.

The same may surely be said about law.

I am proud to have been invited to contribute to an enterprise such as this one – which brings the laws of the world to the world, in an accessible form.

Of all subjects appropriate for this exercise, Family Law is surely *primus inter pares*. For as the world shrinks, so do intercountry marriages increase. People travel, and settle in countries other than the one in which they were born. Children are born of interracial marriages. Problems of succession arise when people die in one country, having property in another, or living under a foreign régime of property. And then, the issues caused by rupture of a marriage may rebound in different jurisdictions.

Even an island so far away from the civilized world as Australia is affected by issues of the conflict of laws. For Australia is one of the most multiracial and polyglot countries in the world. Although its basis is the common law, Australia’s population is formed from persons from almost every country in the world. There is an ‘ethnic’ radio station in Australia that broadcasts in over 80 languages.

A difficulty of any writer on international Family Law is that the subject-matter of Family Law is not universally agreed upon. It is a protean subject. Indeed it was not a recognized discipline in common law parlance until quite recently. The term derives from civil law – *droit de famille* (*Familienrecht*). It cuts across many traditional areas of common law. It could be said to subsume them.

Even within Australia, there is a great divergence amongst teachers of this subject as to the content of the course. Marriage and divorce are universally taught. But does ‘social security’ fall within the penumbra of Family Law? Juvenile crime? Equal opportunity legislation? Domestic violence?

Certainly, it would be unusual to classify Succession Law as a branch of Family Law. This subject is regarded as *sui generis* in common law countries. And questions of status are not normally taught as part of the Family Law syllabus.

There are also some difficulties, in a work like this, of moulding the subject to suit a classification clearly designed by a civil lawyer. Some topics which assume a great importance in civil law countries are regarded as of minor significance in the common law – even glossed over. An example is the law relating to names. In

## Preface

effect, in common law countries, there *is* no law! It is almost entirely a question of custom, habit and individual choice. Yet, I know of one civil law teacher who has established his academic reputation on learned tracts dealing with Forenames and Surnames.

Likewise, the reciprocal duties of spouses, and the scope of parental duties (*'l'autorité parentelle'*) are very nebulous areas of the common law. The dominant philosophy (if common lawyers can ever be said to have a 'philosophy'!) is that these matters are best left to individual choice and negotiation in the intimacies of family life. This philosophy is, however, being severely put to the test with the growing perception of the high incidence of spousal violence and child abuse in families. The UN Convention on the Rights of the Child (in my view, the most important document since the Declaration of the Rights of Man), beyond doubt calls for overriding state intervention in the affairs of the family – well appreciated by the revivification of the concept of the state as *parens patriae* in recent Australian jurisprudence.

The common law is very volatile. Family Law is a particularly fluid area of law. One of the great problems of any academic writer is that what he writes on Monday may be out-of-date on Tuesday. And so it has happened that, between preparation of the manuscript and its eventual publication, a new statute, the *Family Law Reform Act 1995*, will have come into operation. (As is common, and highly inconvenient, this Act, although given Royal Assent in 1995, was proclaimed not to come into force until June 1996.) I have tried to accommodate the text to this new legislation, as far as possible, but the law is that which was in force in May 1996. This statute, however, is the most significant legislation on Federal Family Law since the *Family Law Act 1975* revolutionized divorce and its procedures. Its most significant innovations are new facilities for alternative dispute resolution, the institutionalization of parenting plans and a change of terminology relating to the parental order – for instance the terms 'custody' and 'access' are replaced by 'residence order' and 'contact order' – following the lead of the *Children Act 1989* (England). I have briefly described it in the Appendix.

I have, so far as possible, attempted to fit the subject-matter into the classification imposed by the General Editor. To some extent, this makes the book appear unbalanced to a common lawyer. Issues of apparent insignificance are given extended treatment, while those given great coverage in local books are seemingly glossed over. Thus, for example, I have given hardly any prominence to constitutional law matters, believing that these would appear to be esoteric to the foreign 'market' for which no doubt this series is intended.

With this in mind, I trust that the Australian reader will appreciate that the constraints imposed by the format of the series have militated against a comprehensive coverage of issues that might be appropriate for an Australian practitioner. I have also limited the citations and references to Australian legislation, cases and scholarly writings.

In sum, I hope that this book contributes to an understanding of the fundamental principles, precepts and practices that form Australian Family Law, which, in many ways, I venture to think, is worthy not merely of study, but of emulation.

**Preface**

I wish to thank my secretary, Mrs. Jan Jay, for her outstanding assistance in the preparation of the manuscript.

J. NEVILLE TURNER,  
Melbourne,  
May 1996



## Preface

# General Introduction

## §1. GENERAL BACKGROUND OF THE COUNTRY (DEMOGRAPHIC DATA)

### I. Introduction

1. Australia has been occupied by Aborigines for 40,000 years. It was not until 1788 that Europeans came to live in this large island, although it had been discovered by the Dutch several centuries earlier.

Settlement by the English first occurred when Captain Phillip landed at Port Jackson, in what is now New South Wales.<sup>1</sup> The English government considered that life in Australia was so rugged that it was an excellent place to transport convicts. As D.H. Lawrence put it in his novel, *Kangaroo*, the original white inhabitants of Australia could appreciate why the Romans preferred death to exile!

1. For the history of Australia since settlement see Manning Clark, *A Short History of Australia*, (3rd ed. New York, Penguin Inc., 1987).

2. The colonies which constituted Australia were independent entities. It was not until 1901 that the country, Australia, was formed. The so-called 'Commonwealth of Australia' emerged from decisions of the political representatives to establish a Federal Parliament. After long and protracted discussions, this was finally accomplished. But, while ceding certain limited powers to the Federal Parliament, the states retained the right to legislate on many areas of law. The tension between federal and state authorities continues – today, it has become a tension between centralization and decentralization.

3. The vastness of Australia is difficult for Europeans to comprehend. Australia is a huge, largely barren land. But, paradoxically, 90 per cent of its inhabitants live in conurbations, mostly on the coast. Australia has six states – New South Wales (capital: Sydney); Victoria (capital: Melbourne); Queensland (capital: Brisbane); South Australia (capital: Adelaide); Western Australia (capital: Perth); Tasmania (capital: Hobart). A large part of Australia, called the Northern Territory, is not a state (although statehood is planned). It is a federal territory, but it has its own legislature. Its capital is Darwin.

4. The Australian Capital Territory is another federal territory. It was created in a part of New South Wales, to accommodate the capital of the new federation, Canberra. There is great rivalry between the principal cities of Sydney and

Melbourne. When Australia became a federation, neither of these cities was willing to cede the seat of power to the other. Until 1927, however, the Federal Parliament sat in Melbourne. But in that year, the new parliament was moved to the new capital, Canberra, a splendid new city planned by the visionary American architect, Walter Burley Griffin.

Canberra has continued to grow, but it still wears the air of a small town, in comparison to the megalopolis of Sydney and Melbourne.

5. Australia also administrates certain overseas territories, Norfolk Island, Christmas Island and part of Antarctica.

The *continent* of Australia consists of all the states, the Northern Territory and the Australian Capital Territory, with the exception of Tasmania. Tasmania, which formerly was called Van Diemen's Land, is an island lying some 400 kilometres south of Victoria, distanced from the mainland by Bass Strait.

6. Australia is somewhat over-governed. Apart from the Federal Parliament and Government, each state has its own separate parliament, and there is also an extensive system of local government. It is the duty of every citizen and habitual resident to vote at every election be it federal, state or local. Failure to do so is penalized by a fine.

## II. Demography

7. Australia's population is approximately 18 million.<sup>1</sup> It is increasing at the rate of 1 per cent per year. However, the overall decline in fertility, coupled with a recent decline of immigrants, has meant that the population of children under 15 has shown less than 2 per cent growth since 1972. It has declined from 29 per cent in 1972 to 22 per cent in 1992. Males constitute 49.8 per cent of the population as a whole, but 51.3 per cent of the 0–19 age group.

These trends have been balanced by a substantial increase in the proportion of the population aged 65 years or over.

The overall population density in Australia is only 2.3 persons per square kilometre. But approximately 14 million people live in 3.3 per cent of the total land area, on the coasts of the east, south east and south west. 71 per cent of the population lives in cities of over 100,000 people. Immigrant families invariably end up living in one of the major cities.

Australia's population has grown from 4.9 million in 1913 to 17.7 million in 1993. But the fertility rate has dropped – from 3.6 in 1961 to 1.9 in 1992. The population growth in the last 30 years has been caused by migration, which has fluctuated in various periods. Australia thus has a far lower population growth rate than other countries in the Asia-Pacific region.

22.3 per cent of the Australian population have been born abroad (3.7 million people). Of those born abroad, one-third were born in the UK and Ireland and one-fourth in other European countries. But the trend has been to broaden the source of immigrants. In 1966, 54 per cent of all immigrants were from UK and Ireland. But in 1992, this proportion had shrunk to only 13 per cent. The number of immigrants

from Asia (especially South-East Asia and North-East Asia) has increased dramatically in the last 30 years. The initial impetus for this was the abandonment in the 1960s of an iniquitous 'White Australia' policy. The Vietnam war led to the influx of many boat refugees. Many Sri Lankans left their homeland for Australia upon independence from Britain – especially English-speakers, who felt that they would be prejudiced by the adoption of Sinhala as the national language. Refugees from repressive regimes throughout the world have found a welcome in Australia.

There are two radio stations and one TV station which cater for foreign speakers. The radio stations claim to have programs in at least 80 languages.

1. The demographical details set out here are to be found in P. Boss, S. Edwards and S. Pitman, *Profile of Young Australians: Facts, Figures and Issues* (Melbourne, Churchill Livingstone, 1995). This work contains a detailed account of the children of Australia in many areas relating to their well-being.

8. The indigenous people of Australia are either Aborigines or Torres Strait Islanders. (Torres Strait is to the north of Queensland, where there are many islands.) The history of these people has been a sad one. Their numbers have been reduced from about a million at the time of settlement (1788) to approximately 270,000 today, of whom about 25,000 are Torres Strait Islanders.

The methods used in the attempted destruction of the indigenous people has ranged from deliberate hunting and killing to the introduction of diseases fatal to them.

Aborigines and Torres Strait Islanders represent about 1.6 per cent of the total Australian population. They are divided, state by state, as follows: NSW: 26.4 per cent; Queensland 26.4 per cent; Western Australia 15.7 per cent; Northern Territory 15 per cent; Victoria 6.3 per cent; South Australia 6.1 per cent; Tasmania 3.4 per cent and ACT 0.7 per cent. They are likely to live in towns and rural localities (50 per cent) rather than capital cities. But in the Northern Territory they comprise a large percentage of the total population – 31.5 per cent of all the children in the Territory are indigenous.

Infant mortality among Aboriginal and Torres Strait Islander children (20/1000) is much higher than for the rest of the population (9/1000). The incidence of poverty is greater, as is their representation in the criminal statistics. In matters of health, poverty, education and housing Aborigines and Torres Strait Islanders are severely disadvantaged.

## §2. HISTORICAL BACKGROUND OF FAMILY AND SUCCESSION LAW

**I. Introduction**

9. The historical foundation of the Family Law of Australia, for the most part, is the ecclesiastical law of England, which was received by each Australian colony. Australia in fact became a separate country in 1901. Before this date, each colony had its own system of laws, and indeed laws relating to the family varied in many ways from colony to colony.

We shall see that some aspects of what is now classified in most countries as 'Family Law' is not contained in the Australian *Family Law Act*. The reason for this is that, when the Founding Fathers of Australia drafted the Australian Constitution, there was still a considerable body of opinion that held that states should retain sovereignty over the personal affairs of their citizens. The emergence of Australia as a federal country was a painful and protracted process, requiring much political skill and compromise. Even today, there is strong opposition in some quarters to any further emasculating of the remaining jurisdiction of states. Although it is possible for the Federal Parliament to acquire new jurisdiction, this may only be done by a referendum altering the Australian Constitution, or by the voluntary ceding of power by the governments of each state.<sup>1</sup>

1. The Constitution of Australia, its history and its interpretation has been the subject of much expert commentary. An excellent guide is: C. Howard, *Australian Federal Constitutional Law* (3rd ed.) 1985.

10. The Australian Constitution contains a *placitum* (51) that sets out areas on which the Federal Parliament may legislate. Relevant to Family Law are clauses (xxi) and (xxii) of this *placitum*.

*Placitum* 51 states that the Federal Parliament shall have power to make laws with respect to: (xxi) Marriage: and (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants (minors).

It was under these heads of power that the Federal Parliament has legislated for marriage laws and for divorce and nullity.<sup>1</sup> And in 1975, in order to administer divorce and nullity applications, the Family Court of Australia was set up.<sup>2</sup> But, for the reasons given above, this court has no jurisdiction over many matters clearly classifiable as laws relating to families. Thus succession law, adoption, foster-care, juvenile delinquency, termination of the parental relationship and, above all, disputes between cohabitants, are dealt with by state law in state courts.<sup>3</sup>

For none of those matters fits within *placitum* 51(xxi) or (xxii). In theory, children born outside marriage should also fall within state jurisdiction. But all the states, save Western Australia, voluntarily relinquished their powers over ex-nuptial children to the Federal Parliament in the late 1980s.<sup>4</sup> The federal *Family Law Act* was amended so as to allow for some (though by no means all) juridical aspects of ex-nuptial children's lives to be governed by uniform, Australia-wide laws.<sup>5</sup>

The significance of the ancient laws of the church in the development of Australian Family Law should not be underestimated. Indeed, the *Matrimonial*

*Causes Act* 1959 expressly provided that a court exercising jurisdiction for divorce, nullity (or other matrimonial causes) should proceed and act and give relief as readily as may be in conformity with the principles and also applied in the ecclesiastical courts in England before 1857.<sup>6</sup>

Moreover, there also exist in Australia separate tribunals for the dissolution and annulment of marriages involving one or two Roman Catholics. It is relatively easy to obtain a civil divorce in Australia. It is, however, usually imperative for a Roman Catholic to obtain a decree of the Church before he or she can remarry and remain in the faith. One-quarter of Australians are Roman Catholics, so that this parallel system of jurisprudence is of great significance. These tribunals operate entirely according to the principles of canon law. And while modern canon law has been modernized, and liberalized, its fundamental basis is, of course, the principles developed over centuries by ecclesiastical courts.<sup>7</sup>

The grounds for nullity of marriage in Australian civil law are still closely modelled on canon law.

1. The first *general* Federal Act was the *Matrimonial Causes Act* 1959 (Cth). It was closely followed by the *Marriage Act* 1961 (Cth), which (together with its amendments) is still in force.
2. Under the *Family Law Act* 1975 (Cth).
3. The relevant legislation often differs from state to state. It is dealt with, *passim*, in this book.
4. The voluntary 'reference of powers' is possible, under the Australian Constitution.
5. See *below*, Part II, Chapter 4, Filiation.
6. *Matrimonial Causes Act* 1959, S. 25(2) (Cth) (now repealed).
7. For a full account of the jurisdiction of Catholic tribunals, and the law administered in them, see E. Stuart, *Dissolution and Annulment in the Catholic Church* (Sydney, Federation Press, 1994).

## **II. Ecclesiastical Law in England<sup>1</sup>**

*II.* Canon law in England was a distinct body of law. The dispute between Henry II and Archbishop Thomas à Beckett in the twelfth century concerned those areas of law which should be the prerogative of the Church and those which should be within the province of the Crown. Although Roman Law never really gained a solid foothold in England, civil lawyers practised before the ecclesiastical courts, and both canon law and civil law were taught at the universities. Specialist canon lawyers (known as doctors) practised exclusively at the Doctors' Commons in London.

At the Reformation, the Church of England was founded. Henry VIII's matrimonial entanglements led to a disassociation from the canon law of Rome (Act for the Submission of the Clergy 1533). Thenceforth, an indigenous English ecclesiastical law and practice developed. Whereas previously, the ecclesiastical courts had enjoyed a range of jurisdiction, which included criminal and civil matters, its writ thenceforth ran only to matters of marriage and divorce, testamentary matters and matters of religious discipline and practice.

Over the centuries, English ecclesiastical law developed a special character, distinct from that in the rest of Europe. Indeed, it could be said to be a constituent part of English law. Occasional clashes of jurisdiction were usually resolved amicably, and the law of wills and succession developed a secular character.

1. See F. Pollock and F.W. Maitland, *History of English Law*, (2nd ed., 1898) Vol 2; J. Jackson, *The Formation and Annulment of Marriage* (2nd ed., 1979).

### III. Divorce

12. The Roman Catholic doctrine of indissolubility of marriage prevailed in England even after the Reformation. However, a commission set up by Henry VIII decreed that, in extreme circumstances, a marriage could be dissolved by a private Act of parliament. This procedure was both cumbersome and expensive. For the next three centuries, until 1857, it remained the only means of divorcing *a vinculo matrimonii*.

The ecclesiastical courts, however, had jurisdiction over divorces *a mensa et thoro* (known in England as ‘judicial separations’), and annulment of marriages, as well as for the exotic remedies of restitution of conjugal rights and jactitation of marriage (wrongful ‘boasting’ of a non-existent marriage!).

It was not until 1857 that judicial divorce was permitted in England, on a restricted number of grounds.<sup>1</sup> It was more favourable to men than to women. But the *Matrimonial Causes Act 1857* (England) was the crossing of the Rubicon. From that date onward, the history of divorce has been one of unrelenting liberation, both in England and in Australia. Today, the Australian divorce law is one of the most liberal in the world.

1. *Matrimonial Causes Act 1857* (Eng).

### IV. Reception in Australia

13. The system of courts on settlement of the Australian colonies was rather chaotic. While Australian settlers (mostly convicts, except in South Australia) were deemed to have brought with them the laws of England, they did not bring the court system. In particular, there were no ecclesiastical courts. As a consequence, marriages and divorces were loosely controlled. And indeed, so-called common-law marriages (*matrimonium per verba de presenti* or *per verba de futuro cum copula*) were accepted as valid by the courts of most colonies. There was also no uniform system of registration of marriages.

From this chaos, however, there gradually emerged order. But each state promulgated its own formalities, laws and courts.<sup>1</sup> Statutes controlling the celebration of marriages were passed gradually, though these were more liberal than the strict and highly complex English statutes. This is still the case. In Australia, it is ridiculously easy to get married – there are virtually no formalities, and such as exist are regarded as directory, not mandatory. A marriage may be celebrated in any place and at any time<sup>2</sup> – a striking contrast with the English position!

Following the 1857 *Imperial Act*, divorce began to be permitted by the colonies. But every colony enacted its own grounds, and these varied enormously. Despite the power given to the Federal Parliament in the 1901 Constitution, this was not exercised until 1959.<sup>3</sup> It was estimated that over 60 different grounds then existed in the various states!

1. The early history of marriage law in Australia is well described in J.M. Bennett, *A History of the Supreme Court of New South Wales* (1974); see also A. Dickey, *Family Law* (2nd ed., 1990), pp. 161–163.
2. See below, Part II, Chapter 1, Marriage.
3. *Matrimonial Causes Act 1959* (Cth); see above, p. 22.

14. In 1959, the Federal Parliament took advantage of the power which had been granted to it 58 years earlier, and passed uniform divorce legislation. For the first time in Australia's history, citizens of each state were granted an *Australian* domicile and the grounds for divorce became the same throughout Australia. This legislation also unified the law of nullity, including grounds for the annulment of both void and voidable marriages. The ancient ecclesiastical remedies, judicial separation, restitution of conjugal rights and jactitation of marriage were retained. Indeed restitution of conjugal rights became quite an important matrimonial cause, as failure to comply with an order permitted the aggrieved spouse immediately to petition for a divorce on the grounds of desertion.

The new Act accorded 14 grounds for a dissolution of marriage. The basis of divorce was still the matrimonial offence, but three out of the 14 grounds were not based on matrimonial misconduct – insanity, separation and presumption of death.<sup>1</sup> Of these, by far the most important was the ground of 5 years' separation. It could be either unilateral or consensual. But the 1959 Act permitted the court to refuse a divorce if it would be harsh or unconscionable to the innocent spouse opposing it. In practice, few petitions on this ground were ever refused.

The *Matrimonial Causes Act 1959* also regulated ancillary matters – custody/access of children, matrimonial property and maintenance. But the divorce court had jurisdiction only if there were a petition for principal relief.<sup>2</sup> So the anomalous system prevailed that these issues were subject to two different laws and practices – the various state laws applied during the subsistence of the marriage (even after separation), while uniform federal law applied *on divorce*. The *Matrimonial Causes Act 1959* established a new matrimonial property régime, based on the power of the divorce court judge to exercise complete discretion to reallocate the separate or joint property of the husband and wife *on divorce*. But during the marriage, a régime of separate property applied. Clashes of interests inevitably led to forum-shopping and unseemly jurisdictional wrangles.

It should also be noted that, although the laws of divorce were made uniform, jurisdiction still remained *vested* in state courts (exercising federal jurisdiction). The adversary system applied in all its rigour. Supreme Court procedures required great pomp and ceremony. Judges and counsel were fully robed. Salacious cases were reported in the press. Divorce was embarrassing and expensive. There were no procedures for mediation or counselling.

1. *Matrimonial Causes Act 1959* (Cth), S. 28. For a brief history of this Act see H.A. Finlay, 'Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce' (1988) 94 *Law Quarterly Review* 120.
2. Principal relief included dissolution of marriage (divorce), nullity, judicial separation, restitution of conjugal rights and jactitation of marriage.

15. A great reform of divorce law was accomplished in 1975, largely as a result of the then Attorney-General in the Labour Government, Senator Lionel Murphy.

(This controversial man subsequently became a judge of the High Court of Australia, and was the first high judicial officer to be impeached for alleged judicial misbehaviour. He died of cancer before a retrial of the case against him was completed.)<sup>1</sup>

The reform of divorce law was accomplished by the, misnamed, *Family Law Act* 1975. This Act does not contain all the Family Law of Australia. It was in effect a reform of the law of divorce and kindred causes. It was based, largely, on a Report of the English Law Commission ('The Field of Choice').<sup>2</sup> But it was far more radical than the changes then made to English law.

The most drastic reform was the abolition of all the previous 14 grounds for dissolution, and their replacement by one sole ground – irretrievable breakdown of marriage.<sup>3</sup> This must be based on a separation, unilateral or consensual, of at least 12 months, with no reasonable possibility of reconciliation.

The *Family Law Act* was passed by only one vote in the House of Representatives, and the community has remained divided as to whether it has had a beneficial effect. Certainly, it made divorce more civilized and less acrimonious, by abolishing the need to rake the mud of the spouses' conduct. But that there has been widespread dissatisfaction with this legislation is testified to by the fact that it has been the subject of two large-scale Enquiries by Select Committees of the Australian Parliament, and has been amended more than 40 times. Its original 123 sections have been augmented, so that there are now nearly 300 sections, plus complex Regulations and several Schedules.<sup>4</sup>

Perhaps the most significant reform of the *Family Law Act* was the establishment of an Australian-wide special tribunal – the Family Court of Australia. (This court operates throughout Australia except for the geographically remote Western Australia which simultaneously set up its own Family Court, with jurisdiction over both federal and state matters affecting the family.)

The nature and jurisdiction of this radical new court will be examined later.<sup>5</sup>

1. The *details* of the Act were largely the brainchild of Ray Watson QC, who subsequently became a judge of the Family Court.
2. Reform of the Grounds of Divorce: The Field of Choice, Law Com. No. 6 (Cmd 3123, 1966).
3. *Family Law Act* 1975 (Cth), S. 48.
4. The *Family Law Act* 1975 has now been supplemented by *Family Law Reform Act* 1995, which has been given the Royal Assent, but as of May 1996, is not yet proclaimed to be in force. See Appendix.
5. See below, pp. 36–37.

## V. Marriage

16. In 1961, the marriage laws of Australia were also made uniform by the Federal Parliament, in furtherance of the power granted under the Australian Constitution (placitum 51(xxi)).<sup>1</sup>

These will be examined later.<sup>2</sup>

1. *Marriage Act* 1961 (Cth).
2. Part II, Chapter 1, Marriage.

**VI. Succession Law**

17. The Australian laws of succession are closely modelled on English law. But this branch of law is governed separately by each state. The laws vary quite markedly from state to state, and will be considered in detail below.<sup>1</sup>

1. Part IV, Succession Law.

18. In essence, freedom of testation is permitted throughout Australia. A person over the age of 18, whether single or married, has power to make a will. He or she may leave his or her property to whomsoever he or she likes. There is no compulsion to make a will. Indeed, two-thirds of Australians die *intestate*, i.e., without having made a will. In these cases, the laws of the state where the deceased person was domiciled apply. They provide a detailed code of persons who will benefit by succession. If no human being qualifies under these codes, the Crown may take the estate (or part of it in some instances) as *bona vacantia*.

19. There is no provision in any Australian state for a *portio legitima*. Complete freedom of testation is permitted at common law. But there is one important exception. A disappointed relative who has not benefited may apply to the court for a *reasonable* provision from an estate. The amount – if indeed *any* amount is granted – is entirely in the discretion of the court. What is a reasonable provision depends on many factors, including the nature of the relationship of the applicant with the deceased.

This branch of law is known as Testators' Family Maintenance. It was introduced into Australia in the early part of the twentieth century, *seriatim*, by legislation varying from state to state. There is considerable variation in the designation of relatives who qualify to make an application. These laws will be considered in detail later.<sup>1</sup>

1. Part IV, Succession Law.

## Selected Bibliography

- ALSTON, P., PARKER, S. and SEYMOUR, J. (eds), *Children, Rights and the Law* (Oxford, Oxford University Press, 1992).
- ASCHE, A.H., 'Sex Discrimination in Child Custody Determinations', (1989) 3 *Australian Journal of Family Law* 218–235.
- ASTOR, H. and CHINKIN, C.M., *Dispute Resolution in Australia* (Sydney, Butterworths, 1992).
- Australian Law Reform Commission, *Discussion Paper No. 22: Matrimonial Property Law* (Canberra, AGPS, 1985).
- Australian Law Reform Commission, *Report No. 30: Domestic Violence* (Canberra, AGPS, 1986).
- Australian Law Reform Commission, *Report No. 35: Contempt* (Canberra, AGPS, 1987).
- Australian Law Reform Commission, *Report No. 37: Matrimonial Property* (Canberra, AGPS, 1987).
- Australian Law Reform Commission, *Multiculturalism and the Law* (Aitken, Smithfield, 1992).
- Australian Law Reform Commission, *For the Sake of the Kids: Complex contact cases and the Family Court* (Sydney, ALRC, 1995).
- BAILEY-HARRIS, R.J., 'Property Disputes Between *De Facto* Couples: is Statute the best Solution?' (1991) 5 *Australian Journal of Family Law* 221–240.
- BATES, F., 'Joint Custody in Australian Law: A Broad Perspective' (1983) 57 *Australian Law Journal* 343–353.
- BATES, F. and TURNER, J.N., *The Family Law Casebook* (Sydney, Law Book Company Ltd, 1986).
- BATES, F., *Australian Family Law* (Sydney, Law Book Company, 1990).
- BOSS, P., *Adoption Australia* (National Children's Bureau of Australia, Notting Hill, Victoria, 1992).
- BOSS, P., EDWARDS, S. and PITMAN, S., *Profile of Young Australians* (Melbourne, Oz Child: Churchill Livingstone, 1995).
- BREWER and SWAIN, P., *Where Rights are Wronged* (National Children's Bureau of Australia, Notting Hill, Victoria, 1993).
- BURRETT, J.F., *Child Access and Modern Family Law* (Sydney, Law Book Co., 1988).
- CARNEY, T.R., *Report of the Child Welfare Practice and Legislation review: Equity and social justice for children, families and communities* (Melbourne, Government Printer, 1984).

### Selected Bibliography

- CHARLESWORTH, H. and INGLEBY, R.S., 'The Sexual Division of Labour and Family Property Law' (1988) 6 *Law in Context* 29–49.
- CHARLESWORTH, S., 'The Impact of the *Status of Children Act* 1974 (Vic) on the Legal and Social Rights of Children Born to Unmarried Parents' (1985) 8 *Tasmania Law Review* 195.
- CHARLESWORTH, S., TURNER, J.N. and FOREMAN, L., *Lawyers, Social Workers and Families* (Sydney, Federation Press, (1990)).
- Child Support Consultative Group *Child Support: Formula for Australia* (Canberra, AGPS, 1988).
- CHISHOLM, R., 'Children and the Family Law Act: The 1988 Changes' (1988) 11 *University of New South Wales Law Journal* 153–183.
- CHISHOLM, R. and HOUSEGO, J., *Australian Family Law* (Sydney, Butterworths, 1987).
- CRAWFORD, J., *Australian Courts of Law* (2nd ed.) (Victoria, OUP, 1988).
- DAVIS, B., 'Fraud and Annulment of Marriage' (1988) 2 *Australian Journal of Family Law* 138–163.
- DAVIS, B., 'The New Rules on International Child Abduction: Looking Forward to the Past' (1990) 4 *Australian Journal of Family Law* 31–59.
- DICKEY, A., *Family Law* (2nd ed.) (Sydney, Law Book Company, 1990).
- ENDERBY, K., 'The Family Act; Background to the Legislation' (1975) 1 *UNSWLJ* 10. Family Law Council Annual Reports (1977–1995).
- FINLAY, H.A., 'Sexual Identity and the Law of Nullity' (1980) 54 *Aust. Law Journal* 115.
- FINLAY, H.A., 'The Grounds for Divorce: The Australian Experience' (1986) 6 *Oxford Journal of Legal Studies* 368–391.
- FINLAY, H.A., and BAILEY-HARRIS, R., *Family Law in Australia* (4th ed.) (Sydney, Butterworths, 1993).
- FRITZE-SHANKS, A., 'Some Models of Professional Behaviour for Family Lawyers and an Examination of Strengths and Weaknesses of those Models' (1989) 3 *Australian Journal of Family Law* 202–217.
- FUNDER, K., 'Children's Households and Families After Parental Separation' (1989) 23 *Family Matters* 47–48.
- GAMBLE, H., *Law for Parents and Children* (2nd ed.) (Sydney, Law Book Co. Ltd, 1986).
- GRAYCAR, R., and MORGAN, J., *The Hidden Gender of Law* (Sydney, Federation Press, 1990).
- GRIBBEN, S., 'Mediation of Family Disputes' (1992) 6 *Australian Journal of Family Law* 126–136.
- HAMBLY, D., 'Adoption of Children: An Analysis of the *Uniform Act*' (1968) 8 *Western Australia Law Review* 281.
- HARDINGHAM, I. and NEAVE, M., *Australian Family Property Law* (Sydney, Law Book Company, 1984).
- HARRISON, M., 'Child Support Reforms and Post-Separation Parenting: Experiences and Expectations' (1992) 6 *Australian Journal of Family Law* 22–31.
- HARVEY, J., DOLGOLPOL, U. and CASTELL-MCGREGOR, S., *Implementing the UN Convention on the Rights of the Child in Australia* (South Australian Children's Interest Bureau, 1993).

## Selected Bibliography

- HOWARD, C., *Australian Federal Constitutional Law* (3rd ed.) (Sydney, Law Book Company, 1985).
- Human Rights and Equal Opportunity Commission and Australian Law Reform Commission, *Speaking for Ourselves* (Children and the Legal Process, Issues Paper No. 18) (Sydney, ALRC, 1996).
- INGLEBY, R.S., *Solicitors and Divorce* (Oxford, Oxford University Press, 1992).
- INGLEBY, R.S., *Family Law and Society* (Sydney, Butterworths, 1993).
- JESSEP, O., 'Fraud and Nullity of Marriage in Australia' (1989) 3 *Australian Journal of Family Law* 93–96.
- JESSEP, O. and CHISHOLM, R., 'Step-Parent Adoptions and the Family Law Act' (1992) 6 *Australian Journal of Family Law* 179–187.
- Joint Select Committee *The Family Law Act 1975: Aspects of its Operation and Interpretation* (Canberra, AGPS, 1992).
- KIRBY, M., 'Medical Technology and New Frontiers of Family Law' (1987) 1 *Australian Journal of Family Law* 196–213.
- KOVACS, D., *Family Property Proceedings in Australia* (Sydney, Butterworths, 1992).
- KOVACS, D., 'Division of Property on Divorce: Farewell to the Finality Principle' (1989) 3 *Australian Journal of Family Law* 13–48.
- Law Reform Commission, 'Review of the *Adoption of Children Act*' 1965 (NSW), Discussion Paper No. 34 (Sydney, 1994).
- MCDONALD, P. (ed.), *Settling Up: Property and Income Distribution on Divorce in Australia* (Melbourne, Prentice-Hall, 1986).
- MOLONEY, L. and HARRISON, M., 'Parenting After Separation: Can the Law Do Better?' (1992) 6 *Australian Journal of Family Law* 79–88.
- NYGH, P. and COTTER-MOROZ, 'The Law of Trusts in the Family Court' (1992) 6 *Australian Journal of Family Law* 4–21.
- OCHILTREE, G., 'The Effects of Marital Disruption on Children: An Overview' (1988) 22 *Family Matters* 5–11.
- O'RYAN, S., 'A Practising Family Law Lawyer's View of Skills Required for Resolution of Family Law Disputes' (1989) 3 *Australian Journal of Family Law* 272–275.
- OTLOWSKI, M., 'The Changing Face of Adoption Law in Tasmania' (1989) 3 *Australian Family Law* 161.
- OTLOWSKI, M. and TSAMENYI, B.M., 'Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?' (1992) 6 *Australian Journal of Family Law* 137–160.
- PARKINSON, P., 'Child Sexual Abuse Allegations in the Family Court' (1990) 4 *Australian Journal of Family Law* 60–84.
- PARKINSON, P., 'Children's Rights and Doctors' Immunities: The Implications of the High Court's decision in *Re Marion*' (1992) 6 *Australian Journal of Family Law* 101–125.
- SCUTT, J.A., *Women and the Law: Commentary and Materials* (Sydney, Law Book Company, 1990).
- SWAIN, P. and S., *To Search for Self* (Sydney, Federation Press, 1992).
- SYKES, E.I. and PRYLES, M.C., *Australian Private International Law* (2nd ed., 1987).

### **Selected Bibliography**

- SZWARC, B., 'Changing Particular Care: A national survey of non-government care in Australia' (National Children's Bureau of Australia, Notting Hill, 1992).
- TURNER, J.N., 'Marriage of Minors' (1968) 8 *WA Law Review* 319.
- TURNER, J.N., 'The Rights of the Child Under the UN Convention' (1991) 66 *Law Institute Journal* 44.
- TURNER, J.N., 'Review of the *Adoption Information Act* 1990 (NSW)' (1994) 19 *Monash University Law Review* 343.
- TURNER, J.N., 'Adoption or Anti-Adoption' (1995) 2 *James Cook University Law Review* 44.
- TURNER, J.N., 'Why Don't They Take More of Our Children?' (1995) 69 *Law Institute Journal* 559.
- WADE, J.H., 'Void and *De Facto* Marriages' (1981) 9 *Sydney Law Review* 356.
- WADE, J.H., 'Discretionary Property Scheme for *De Facto* Spouses – The Experiment in New South Wales' (1987) 2 *Australian Journal of Family Law* 72–82.
- WADE, J.H., 'The Behaviour of Family Lawyers and the Implications for Legal Education' (1989) 1 *Legal Education Review* 165–182.

## Part I. Persons

### Chapter 1. The Status of a Person

#### §1. DEFINITION OF A PERSON

53. In Australian law, personality may attach to either a human being (a ‘natural person’) or to a corporation.

Every man, woman or child is deemed to be a legal person. In some situations, even the foetus may be said to have personality.<sup>1</sup> For instance, a child *en ventre sa mère* is entitled to inherit as if he or she were already born. In some situations the personality of a foetus is protected in tort, so that, if the foetus duly becomes born, he or she may sue for negligence caused by pre-natal damage.<sup>2</sup>

1. See J. Seymour, *Federal Welfare and Commonwealth Law*, Report of an Enquiry commissioned by Australian Medical Association, Canberra, 1995 for a full discussion.
2. *Watt v. Rama* [1972] VR 353; *Lynch v. Lynch* (1991) 25 NSWLR 411.

54. Corporations are either *corporations sole* or *corporations aggregate*. A corporation sole is a single entity possessing a personality separate from that of the human being who occupies the position for the time being. Thus the Archbishop of Melbourne, acting *qua* Archbishop, is the head of the Melbourne diocese. He will sign official documents not in his own name but in the name of the Archbishop. His acts bind his successors in title.

Most corporations, however, are corporations aggregate. The most common form of a corporation is a limited company, which may be either public or private. Each company must have a seal. Any act done, or document signed, which is not permitted by the memorandum and articles of the company, is *ultra vires*. In Australia, many small businesses are private companies. Incorporation gives the owners the security that they cannot be personally sued for debts or for any wrongful act.

55. It is possible in Australia for non-profit making organizations to become incorporated, for a small fee.<sup>1</sup> Many sporting clubs, arts societies and charitable non-government organizations have taken advantage of these procedures, to secure immunity from liability.

An *unincorporated* association does not have legal personality. And so the members of a sporting club which is unincorporated are liable to be personally sued.

1. E.g., *Associations Incorporation Act* 1984 (Vic); each state has similar legislation.

## §2. CAPACITY

56. All persons *sui juris* have full legal capacity. Certain categories of human beings, however, lack full capacity. Traditionally, this category included married women, as well as infants (minors) and lunatics. Since the reforms to matrimonial property accomplished in England in 1882, and in Australia shortly thereafter, married women now enjoy the same full legal capacity as if they were single (*feme sole*).<sup>1</sup>

The term, ‘lunatic’, is no longer in use. Persons with mental handicaps, however, may lack full capacity, or may have only a limited capacity – depending on the extent of their disability.

Convicted criminals and bankrupts also lack full capacity.

57. The status of minors, who used to be called ‘infants’ at common law, is complex. For there is an emerging jurisprudence, consistent with the UN Convention on the Rights of the Child, that independent capacity is acquired gradually, rather than vesting *in toto* on the age of majority.<sup>2</sup>

1. See Part III, Matrimonial Property, for a full discussion.
2. *Gillick v. West Norfolk Area Health Authority* [1986] 1 AC 112. This decision of the House of Lords has been approved by the High Court of Australia in *Secretary, Department of Health and Community Services v. JMB and SMB* (1992) 175 CLR 218. It is consistent with Article 5 of the UN Convention on the Rights of the Child, which refers to the ‘evolving capacities of the child’.

### I. Minors in Australian Law

58. At common law, a person attained full age on the day before his twenty-first birthday.<sup>1</sup> Both Federal and State legislation has lowered this age to eighteen.<sup>2</sup> A person now becomes of full age on his or her eighteenth birthday itself.<sup>3</sup>

A person who has not attained full age is now usually described as a ‘minor’, and many Statutes have been amended to record this. The term, ‘infant’, may still be found, however, and must be construed as if the word, ‘minor’, were used.<sup>4</sup> A person who attains the age of majority is usually known as an ‘adult’. Provided that no other factor limits his capacity, he is said to be ‘*sui juris*’, i.e., has ‘capacity’ at law.

A person attains full age, or any other age, at the first moment of the anniversary of the day on which he or she was born.<sup>5</sup> A person who was of or over the age of eighteen years on the date of the commencement of the relevant Act, attains full age on the day of the commencement of the Act.<sup>6</sup>

1. *Prowse v. McIntyre* (1961) 111 CLR 264.
2. Age of Majority Ordinance 1974 (ACT), S. 5; *Minors (Property and contracts) Act* 1970 (NSW), S. 9; *Age of Majority Act* 1974 (Qld), S. 5; *Age of Majority (Reduction) Act* 1970 (SA), S. 3; *Age of Majority Act* 1973 (Tas), S. 3; *Age of Majority Act* 1977 (Vic), S. 3; *Age of Majority Act* 1972 (WA), S. 5.
3. *Ibid.*
4. Acts Interpretation Act 1901 (Cth), S. 25E.
5. E.g., *Age of Majority Act* 1977 (Vic), S. 3(1)(a).
6. *Id.*, S. 3(1)(b).

59. A beneficiary under a will or other instrument which is expressed to vest at full age or who is entitled to require a disposition to be made in his favour at full age may only attain such a benefit at the age of eighteen if the will or other instrument is made after the commencement of the relevant statute reducing the age of majority.<sup>1</sup> Likewise, a person of eighteen may benefit from the reduction of the age on an intestacy if the intestate has died after the commencement of the relevant statute.<sup>2</sup>

1. E.g., *Age of Majority Act 1977* (Vic), S. 3(3).
2. E.g., *Age of Majority Act 1977* (Vic), S. 3(4).

60. The birthday of an adopted child is deemed to be the date on which he was adopted. Thus if a married couple have a natural child, born in 1985, and an adopted child born in 1984, but adopted in 1986, the natural child is considered older for the purpose of inheritance law. But the date of birth of the adopted child will be celebrated on its exact date. So that, in the example above, the adopted child will attain his majority eighteen years after his true birthday, that is, in 2002.<sup>1</sup>

1. E.g., *Age of Majority Act 1977* (Vic), S. 3(6); see F. Bates and J.N. Turner, *The Family Law Case Book*, (1985) p. 306.

61. The word, 'child', is capable of several interpretations. Except where the context does not permit, 'child' normally refers to a person under 18 years, i.e., a minor, or infant. It has, however, been held that a person of full age can be regarded as a 'child' of, for example, a testator. In this context, the word, 'child', means 'offspring'. The word, 'child', also has different meanings in some Federal and State Legislation.

Within the *Commonwealth Family Law Act 1975*, although the word, 'child', is not defined, it is necessary to distinguish different types of 'child'. A 'child' for the purpose of part of the *Family Law Act 1975*, includes an adopted and a stillborn child.<sup>1</sup> For these purposes, therefore, liability for a stillborn child may vest in its father.

A distinction is made in the *Family Law Act 1975* between a child born naturally to the husband and wife and a so-called 'child of the marriage', which expression refers to:

- a. a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- b. a child of the husband and wife born before the marriage;
- c. a child born as a result of certain artificial conception procedures.<sup>2</sup>

1. *Family Law Act 1975* (Cth), S. 60.
2. *Id.*, S. 60A(1).

62. As has been mentioned, the Federal Parliament only has jurisdiction to pass laws relating to certain family matters. As far as Family Law is concerned, that jurisdiction was limited to matters relating to 'marriage' and 'matrimonial causes'.<sup>1</sup> Several attempts to widen the definition, so as to include children who were ordinarily members of the household, though not the offspring of the husband and wife,

were declared unconstitutional.<sup>2</sup> Likewise, an attempt to widen the jurisdiction to include an ex-nuptial child of either the husband or the wife failed.<sup>3</sup> In 1986 and 1987, however, certain states referred their powers to the Federal Parliament.<sup>4</sup> The *Family Law Amendment Act* 1987, which came into force on 1 April 1988, was passed to give force to these references. And so, in New South Wales, Victoria, South Australia, Tasmania and Queensland, the Family Law Act validly gives to the Family Court of Australia jurisdiction over all children, regardless of whether they were born in marriage and regardless of whether they were conceived naturally or artificially. But in Western Australia, Federal jurisdiction is limited to ‘children of the marriage’ as defined above.

1. Australian Constitution, S. 51(xxi); (xxii). *See above*, General Introduction, Chapter 3.
2. E.g., *Cormick and Cormick* (1984) FLC 90–554.
3. *Re F; Ex parte F* (1986) FLC 91–739.
4. *See above*, p. 22.

63. A further definition of a child exists in the Family Law Act for one specific purpose: ‘child of the family’. This refers to any child who was treated by the husband and wife as a child of their family immediately before they separated.<sup>1</sup> The Family Court has jurisdiction over such extended children in respect of a declaration as to the arrangements for the welfare of children which a judge is required to make before the *decree nisi* if divorce becomes absolute.<sup>2</sup> In addition, it is only possible for a divorcing couple to obtain a divorce without appearing in court if there are no ‘children of the marriage’ who have not attained 18 years.<sup>3</sup> For this purpose, also, the expression refers to a child who was treated by the husband and wife as a child of their family.<sup>4</sup>

1. *Family Law Act* 1975, S. 55A(3).
2. *Id.*, S. 55A(1), *see below*, p. 99.
3. *Id.*, S. 98A(1).
4. *Id.*, S. 98A(3).

64. The *Family Law Act* 1975 provides specifically for the status of certain children born as a result of artificial conception procedures. Such a child is regarded as the child of the husband and wife despite the fact that either or both of the husband and wife may not be the natural progenitor of the child.<sup>1</sup> Where a child is born to a married woman as a result of artificial means, and the procedure was carried out with the consent of both herself and her husband, such child is regarded as theirs, whether or not the child is biologically the child of both of them.<sup>2</sup> The result is the same, even though the artificial conception was *not* with the consent of both of them, if a Commonwealth or state law so determines.<sup>3</sup>

1. *Family Law Act* 1975, S. 60A(1)(c).
2. *Id.*, S. 60B(1).
3. *Id.*, S. 60B(1)(b)(ii); S. 60B(2)(b); S. 60B(3)(b).

65. ‘A child of a marriage’ under the *Family Law Act* 1975 includes a child of a marriage that has been terminated by death, or by divorce or by annulment.<sup>1</sup> And it also includes a child born to a couple who have separated but have resumed cohabitation then separated again – provided that the child is born to the woman within

ten months after the period of cohabitation.<sup>2</sup> But it does not cover a child otherwise conceived as a result of a casual encounter.<sup>3</sup> A child of a void marriage – that is to say, a purported marriage which offends one of the criteria of essential validity of a marriage – is nevertheless regarded as a legitimate child for all purposes of the *Family Law Act*.<sup>4</sup>

1. *Family Law Act* (1975), S. 60A(2).
2. *Id.*, S. 60P(3).
3. *Giammona and Giammona* (1985) FLC 91–600.
4. *Family Law Act* 1975, S. 60C.

66. The neglect or correction of children and young persons, i.e., child welfare legislation, is governed by state law. The word, ‘child’, is defined differently from state to state. In New South Wales, ‘child’ means a person under eighteen.<sup>1</sup> In Victoria, it means a person below the age of seventeen.<sup>2</sup> In Queensland, it means a person apparently under the age of seventeen.<sup>3</sup> In South Australia, it means a person who has not reached eighteen.<sup>4</sup> In Western Australia, it is defined as any boy or girl under the age of eighteen.<sup>5</sup> In Tasmania, it means a person who has not attained seventeen.<sup>6</sup> In the Northern Territory, it means a person who has not attained eighteen.<sup>7</sup> And in the ACT, it means a person who has not attained eighteen.<sup>8</sup>

Although the word, ‘child’, embraces a child no matter how young, there is legislation in every state relating to the minimum age at which a child is deemed to have sufficient understanding of right and wrong to be criminally responsible for its actions. The minimum age of criminal responsibility is: in New South Wales, 10;<sup>9</sup> in Victoria, 10;<sup>10</sup> in Queensland, 10;<sup>11</sup> in South Australia, 10;<sup>12</sup> in Western Australia, 10;<sup>13</sup> in Tasmania, 7;<sup>14</sup> and in ACT, 8.<sup>15</sup>

There is no *minimum* age at which a child may be regarded as ‘neglected’ or otherwise come within the jurisdiction of Children’s Courts deciding on whether to terminate parental authority over a child.

1. *Children (Care and Protection) Act* 1987 (NSW), S. 3(1).
2. *Children and Young Persons Act* 1989 (Vic), S. 3.
3. *Children’s Services Act* 1965 (Qld), S. 8.
4. *Community Welfare Act* 1972 (SA), S. 6.
5. *Child Welfare Act* 1947 (WA), S. 4(1).
6. *Child Welfare Act* 1960 (Tas), S. 3(1).
7. *Community Welfare Act* 1983 (NT), S. 4(1).
8. *Children’s Services Ordinance Act* 1986, S. 4(1).
9. *Children (Criminal Proceedings) Act* 1987 (NSW), S. 5.
10. *Children and Young Persons Act* 1989 (Vic), S. 3(1).
11. Criminal Code (Qd), S. 29.
12. *Children’s Protection Act* 1993 (SA), S. 66.
13. Criminal Code (WA), S. 29.
14. Criminal Code (Tas), S. 13(1).
15. *Children’s Services Ordinance Act* 1986, S. 27.

67. In most states a child is not permitted to work until the age of 15. Unemployment benefits are not payable until a child has reached 16.<sup>1</sup> At common law the earliest age of consent to sexual intercourse was 14 for boys and 16 for girls. Today, a man may be guilty of the offence of unlawful carnal knowledge if he

has sexual intercourse with a girl under 16. It is also a crime to take an unmarried girl of a certain age away from the custody of her parents, without their consent. In most states the age is 16, but in Tasmania, it is 18, and in Queensland, it is 17.<sup>2</sup>

1. *Social Security Act 1947* (Cth), S. 107.
2. For a full breakdown of the laws relating to offences against children, and the relevant age limits, see the following legislation: *Crimes Act 1900* (ACT); *Crimes Act 1900* (NSW); *Criminal Code* (Qd); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code* (NT); *Criminal Code* (Tas); *Crimes Act 1958* (Vic); *Criminal Code* (WA).

68. At common law, a father had custody of a child until that child reached majority, i.e., 21 years. The age of majority having been reduced to 18 years, the custody of a child now vests in both parents of a child born within marriage up to the age of 18 years<sup>1</sup> or until he or she marries.<sup>2</sup> But custody is a diminishing 'right', and it is today not possible for a custody order to be enforced against the wishes of a child, at least of the age of 16.<sup>3</sup> The wishes of a child of any age are relevant, but not determinative, in an award of custody on the divorce of its parents.<sup>4</sup>

1. *Family Law Act 1975* (Cth), S. 63F(1).
2. *Ibid.*
3. *R v. Stanton* [1931] WAR 185; *Hawkins v. Hawkins* [1940] WALR 86.
4. *Family Law Act 1975* (Cth), S. 64(1)(b).

69. Australian courts have accepted the view of Lord Denning, put forward in the English case, *Hewer v. Bryant*,<sup>1</sup> that custody is a 'right' which dwindles as the child gets older.<sup>2</sup> Following the House of Lords' decision in *Gillick v. West Norfolk and Wisbeck Area Health Authority*,<sup>3</sup> a girl of under 16 may be given advice and assistance in contraception, notwithstanding her parents' lack of knowledge of, or even opposition to, the advice. Accordingly, the maturity of the individual child may be taken into account in determining the extent to which parents retain rights over that child. The test is therefore a flexible one.

1. [1970] 1 QB 357.
2. *Cf.*, *In the Marriage of A* (1981) FLC 91-070; *In the Marriage of Chandler* (1981) FLC 91-008.
3. [1986] 1 AC 112.

## II. Child as a Term of Relationship

70. At common law, the word, 'child', in a statute or instrument, *prima facie* referred to a child born within marriage. All Australian states except Western Australia have abrogated this common law presumption.<sup>1</sup> The use of the words, 'legitimate' or 'lawful' does not of itself rebut the presumption that the word, 'child', includes an ex-nuptial child.<sup>2</sup>

An ex-nuptial child may succeed on intestacy, and may in some circumstances apply for Testators' Family Maintenance, i.e., provision out of the estate of a deceased parent.<sup>3</sup>

For the purpose of any disposition of property, the word, 'child', is to be construed as meaning, both a child born within and a child born outside marriage.<sup>4</sup>

1. *Children (Equality of Status) Act 1972* (NSW), S. 7(3); *Status of Children Act 1978* (Qld), S. 3(2); *Status of Children Act 1974* (Tas), S. 3(2); *Family Relationship Act 1975* (SA), S. 6(2); *Status of Children Act 1974* (Vic), S. 3(2).
2. *Ibid.*
3. For a full discussion, see Part IV, Succession Law.
4. See the statutes cited at note 1, above.

71. The apparent improvement of the ex-nuptial child's position is qualified by certain statutory limitations, which show that his or her position is not the same as that of a child born within marriage. First, the liberalization of his position applies only to instruments executed before the commencement of the relevant statutes. The liberalization of the rules of intestacy apply only to deaths that took place after the Acts came into force. There is also a provision that absolves the personal representatives of the usual requirement to trace all beneficiaries.<sup>1</sup>

Moreover, no action will lie against an executor of a Will or an administrator of an Estate for disregarding a claim of a person who is ex-nuptial, or traces his or her descent through an ex-nuptial person, if the executor or administrator had no notice of the relationship on which the claim was based.<sup>2</sup>

Furthermore, where an ex-nuptial child makes a claim against his father's estate, he or she may only succeed if the paternity had been admitted or determined in the lifetime of the father.<sup>3</sup>

A claim for Testator's Family Maintenance is predicated on what a reasonable parent would provide for his or her child. It has been held that it is not unreasonable for a parent to prefer a child born within marriage to an ex-nuptial one.<sup>4</sup> It may, however, be suggested that this is rather out-dated approach.<sup>5</sup>

1. All these provisions are contained in the statutes cited at para. 70, note 1.
2. *Status of Children Act 1974* (Vic), S. 6(1); Qld, S. 6; SA, S. 12; Tas, S. 6.
3. *Status of Children Act 1974* (Vic), S. 6(2); Qld, S. 6(2); SA, S. 12(2); Tas, S. 6(2).
4. See *Re Wren decd* [1970] VR 449.
5. See further, Part IV, Succession Law, and Part II, Chapter 4, Filiation.

## Chapter 2. Registration of Civil Status

72. In each state of Australia, there is a Registry of Births, Deaths and Marriages.

All births must be registered with this registry. A birth certificate will be provided on registration.

Marriages are conducted in Australia by authorized celebrants under the *Marriage Act 1961* (Commonwealth). Three marriage certificates are prepared by the celebrant and signed by the couple at their wedding. The celebrant must send one certificate to the Registry of Births, Deaths and Marriages. Another is retained by the celebrant. The third is given to the couple.<sup>1</sup>

A death must also be registered with the Registrar of Births, Deaths and Marriages. On registration, the Registrar issues a death certificate. However, before doing so, the Registrar requires a medical certificate, signed by a doctor, which states the cause of death. The doctor is not permitted to write this certificate in certain circumstances, which give rise to suspicion. The death must then be reported to a coroner. Then the coroner orders a *post mortem* examination. If this examination shows that the death was not due to natural causes, the coroner must order an enquiry.<sup>2</sup>

1. All the above provisions are to be found in *Marriage Act 1961* (Cth), which applies throughout Australia. *See further*, Part II, Chapter 1, Marriage.
2. These provisions are to be found in various State statutes relating to registration and certification of death. (*Registration of Births, Deaths and Marriages Acts*.)

73. All certificates issued by the Registrar are conclusive evidence of the facts revealed in them. It is necessary to produce them in a variety of circumstances, for instance, for the obtaining of a passport.

A marriage certificate must accompany any application for divorce. For a divorce cannot be granted unless the Court is satisfied that there was a valid marriage.<sup>1</sup>

The death certificate is necessary to enable the executors or administrators of the deceased person to obtain a grant of Probate, or Letters of Administration, entitling them to wind up the estate of the deceased, and distribute the assets.<sup>2</sup>

1. *Family Law Act 1975* (Cth), S. 52.
2. *See* Part IV, Succession.

74. It is also possible to obtain a declaration of the validity (or invalidity) of a marriage,<sup>1</sup> or a decree of nullity of marriage.<sup>2</sup> Some states allow a declaration of maternity to be made.<sup>3</sup> A declaration of paternity may also be made in all states.<sup>4</sup>

In New South Wales, recent legislation has revised its law and practices relating the registration, of births, deaths and marriages, so as to provide an up-to-date, comprehensive system.<sup>5</sup>

1. *Family Law Act 1975* (Cth), S. 4(1).
2. *Ibid.* *See below*, Part II, Chapter 1, Marriage.
3. ACT, Northern Territory, New South Wales – under their equality of status legislation. (*See* page 53 *supra*.)

**Registration Civil Status, Part I, Ch. 2**

**74**

4. *See* Part II, Chapter 4, Filiation.
5. *Births, Deaths and Marriages Registration Act 1995* (NSW).

## Chapter 3. Personality Rights

### §1. INTRODUCTION

75. A human being *sui juris* has full capacity to make a contract, or a will. That is to say, he or she has contractual, or testamentary, capacity. He or she can sue or be sued in his or her own right. Such a person may own real property, and may – indeed *must* – vote at a Federal, state or local election.

Within certain limits, a human being *sui juris* may be called upon to serve on a jury, and may be eligible to become a member of Parliament.

76. A company or other corporation has power to make a contract, provided that it is *intra vires* the corporation's governing rules. The corporation may sue and be sued, and may hold property. Transactions by a corporation must usually be effected by a seal.

77. As has been seen, minors have a limited capacity. They have no capacity to make a will, or to marry (except with the court's permission if one of the parties is 16 or over). They are liable in tort, and may sue or be sued; but they must be represented by a *next friend* (usually a parent) or *guardian ad litem*. The minor has an independent power to bring an action in the Family Court of Australia, concerning his or her own welfare. This is, however, rarely done.<sup>1</sup>

The capacity of minors to make contracts is complex.

1. For a full description of the limitations on minors' capacity in litigation, see *Speaking for Ourselves: Children and the Legal Process* (Human Rights and Equal Opportunity Commission/Australian Law Reform Commission – Issues Paper 18, 1996, Chapter 3). See, generally, *Halsbury's Law of Australia: Minors*, on which this chapter is largely based.

### §2. MINORS' CONTRACTS

78. In accordance with the principle that an infant is of immature intelligence and discretion, a minor's contract is at common law generally voidable at the instance of the minor, although it is binding upon the other party. This is subject to certain exceptions.

The common law has been modified by statutes in every state. The law has been completely changed by Statute in New South Wales.<sup>1</sup>

It is also possible for a minor's contract to be rendered voidable under the doctrine of undue influence.<sup>2</sup>

If there is in the contract a stipulation which is of such a kind that it makes the whole contract an unfair one to the minor, then that makes the whole contract void. If there is one stipulation in the contract so much to the detriment of the minor as to render it unfair that the minor should be bound by it, then the contract cannot be enforced at all. If, however, a contract is not wholly prejudicial to a minor, but a part is beneficial, then, if the prejudicial part cannot be separated from the rest, the

agreement must be considered as a whole, and if it is found to be so detrimental to the minor as to be unfair, it will be declared void. On the other hand, if the parts can be separated, the beneficial portion will be enforced and the prejudicial part will be rejected. Some contracts of minors are binding, for example, contracts of necessities or service; others are ‘absolutely void’, namely, those that are necessarily prejudicial or show no possibility of benefit to the minor; and the remainder are voidable in the sense that they are binding unless repudiated by the minor within a reasonable time after he comes of age.<sup>3</sup>

1. See below, p. 76.
2. See below, pp. 191–192.
3. *De Garis v. Dalgety & Co Ltd* [1915] SALR 102.

79. By the *Infants Relief Act* 1874 (England), all accounts stated with an infant were absolutely void, and also contracts, whether by specialty or by simple contract, entered into by an infant for the repayment of money lent, or to be lent, or for goods supplied or to be supplied with the exception of contracts for necessities.<sup>1</sup> The Act did not invalidate contracts into which an infant, by any statute for the time being in force, or by the rules of common law or equity, can validly enter.

Both Victoria and Tasmania have legislation comparable to the *Infants Relief Act*.<sup>2</sup>

1. *Infants Relief Act* 1874, S. 1 (Eng).
2. *Supreme Court Act* 1986, SS. 49, 50 (Vic); *Infants Relief Act* 1958 (Tas).

80. Despite the language of the above Statutes, however, the minor himself or herself may sue under the statutes.<sup>1</sup> But unless there has been a total failure of consideration, the minor cannot recover money or property that he or she has delivered to the other party. Conversely, the minor himself or herself retains the property delivered to him or her under the contract.

1. *Re Henderson* (1916) 12 Tas LR 40.

81. A voidable contract may be repudiated by the minor either during minority or within a reasonable time after he or she attains full age,<sup>1</sup> or by his or her personal representatives if he or she dies in minority or after attaining full age without having actually or impliedly adopted the contract. It is binding on the minor if he or she takes no steps to repudiate it within a reasonable time after attaining full age in most states.<sup>2</sup>

In Victoria and Tasmania, however, it is provided that a promise after attaining full age to pay debts contracted during minority is unenforceable.

Furthermore, any ratification of a previous promise made during minority is ineffective in Victoria and Tasmania, regardless of whether there is any new consideration for it.<sup>3</sup>

In Queensland, South Australia, Western Australia and the ACT, a promise by a minor during minority may become binding if ratified after he or she attains full age. The ratification, however, must be in writing, signed by the minor.<sup>4</sup>

In states where ratification after full age is possible, the minor may sue for specific performance of the contract on attaining majority, as there exists the necessary mutuality to allow this equitable remedy to be brought.<sup>5</sup>

1. *Hall v. Wells* [1962] Tas SR 122.
2. *Sellin v. Scott* (1901) 1 SR (NSW) Eq 64.
3. *See above*, para. 79, note 2.
4. *See* J.W. Carter and D.J. Harland, *Cases and Materials on Contract Law in Australia* (2nd ed.) (Sydney, Butterworths, 1993) pp. 348–352, for details of the relevant legislation.
5. *Ibid.*

82. A minor is entitled to repudiate an agreement on attaining his or her majority, even though the contract be beneficial to him or her. But if a minor after coming of age continues to reap the benefit of a contract so far as it is in his or her favour, but repudiates it so far as it imposes a restraint on him, the agreement is binding on the minor. In one case, a minor entered into a contract from selling newspapers within a certain area. *It was held that*, although the contract was beneficial to the minor, he was entitled to avoid it on attaining his majority. However, after attaining his majority, he continued to reap the benefit of the agreement so far as it was in his favour, but repudiated it so far as it imposed a restraint upon him. He had therefore not avoided the agreement, and it was binding upon him.<sup>1</sup>

1. *Kell v. Harris* (1915) 15 SR (NSW) 473; 32 WN 133.

83. In another case, a minor became the purchaser of a restaurant business. The contract to purchase was beneficial to him. After attaining majority the minor did not repudiate the contract. It was held that the contract was binding upon him.<sup>1</sup>

1. *Sellin v. Scott* (1901) 1 SR (NSW) Eq 4.

84. In those states where ratification is possible, it may be by implication. Thus, in one South Australian case a minor entered into an agreement to act as a traveller for a tea merchant and remained in such employment for six months after attaining his majority. It was held that this was a ratification of the agreement.<sup>1</sup>

1. *Aroney v. Christianus* (1915) 15 SR (NSW) 118; 32 WN 16.

85. A covenant made by a minor's father when the minor was an articled clerk that he would not practise within the same town as his principal, or within 50 miles thereof, was held binding on the minor after he had continued his articles with the same principal for two years after he had attained full age. This was held by the High Court of Australia to amount to ratification.<sup>1</sup>

In some States, a new promise by the minor on attaining full age is binding, whereas a ratification is not. What amounts to a new promise? If the minor makes a promise to another person, and renews it after attaining majority, the mere fact that the new promise is identical in its terms with the old promise is not sufficient to show that it is a ratification merely of the latter, and is not an independent promise.<sup>2</sup> In one case, the plaintiff and defendant mutually agreed in Scotland, at a time when the defendant was under age, to marry. The defendant left Scotland for Australia before the proposed date of the wedding and after attaining majority, cabled the plaintiff to book a passage to Australia. It was held that these circumstances constituted a new promise, and not merely a ratification of the old promise.<sup>3</sup>

It should be noted that a contractual action for breach of promise to marry is no longer possible.<sup>4</sup>

1. *Edwards v. Dane* (1893) 15 ALT 147.
2. *See above*.
3. *Vickery's Motors Pty Ltd v. Tarrant* [1924] VLR 195. *See also De Garis v. Dalgety & Co Ltd* [1915] SALR 102; *Sultman v. Bond* [1956] QSR 180.
4. *See Part II, Chapter 1, Marriage*.

86. Any agreement by a former minor after the attainment of his or her majority to pay a loan contracted during minority is void.

87. Where an adult contracts with a minor and the minor elects to abide by the contract, the adult is bound by it even though the minor is not himself liable and an action may be brought upon the contract, either on behalf of the minor during his minority or by the minor himself or herself after the attainment of full age. On the ground of want of mutuality, however, a minor cannot claim specific performance of a contract made with him, save in the circumstances mentioned below.<sup>1</sup>

1. *See below*, paras. 80, 89.

88. The law, however, considers it to be clearly for the benefit of a minor that he should be capable of binding himself to pay for the supply of the *necessaries* of life. In order to maintain an action against a minor in respect of necessaries it must be shown that they were of a nature suitable to his or her condition in life and actually required at the time and that the minor was not at the time otherwise sufficiently provided with them.<sup>1</sup> The burden of proof is on the plaintiff and the plaintiff's absence of knowledge as to the minor's existing supplies is irrelevant.

*What are necessaries?* The relevant statutes define necessaries as 'goods suitable to (the minor's) condition in life and to his actual requirements at the time of sale and delivery'.<sup>2</sup>

Certain things are clearly necessaries, such as food, clothing, medicine and lodging. Articles suitable to and proper for a minor's position in life, although not actually necessary to his or her existence, are recognized as necessaries.

The test whether anything is a 'necessary' is whether it was of a nature suitable to the minor's condition in life and actually required by him or her at the time, and that he or she was not at that time otherwise sufficiently provided with things of that sort.<sup>3</sup>

A bicycle has been held to be a necessary where the minor owned a bicycle which he used for travelling periodically a distance of 12 to 14 miles from his work to his home. It was that the bicycle was an article of utility and was a necessary.<sup>4</sup> But a car has not been held to be a necessary, unless essential to the minor's employment.<sup>5</sup>

It has been held that materials in connection with the erection of the intended matrimonial home of a minor engaged to be married were not necessaries.<sup>6</sup>

Where necessaries are sold and delivered to a minor, he or she must pay a reasonable price for them. This is not necessarily the price specified in the contract.

Trading contracts are not contracts for necessaries, but a minor may be sued on a contract of benefit to him which enables him to make professional earnings.<sup>7</sup>

Whilst a minor may make a binding contract to buy necessaries, the loan cannot be enforced at common law if he or she borrows money for that purpose.

In equity, however, an action may be brought for the money such remedy being always in the discretion of the court. But if the contract is not for necessities, no action may be brought. Thus, in one South Australian case, a female minor aged eighteen years, who desired to emigrate from Poland to Australia, requested a relative in Australia to advance the money for her passage, and agreed to repay him the amount advanced. The relative advanced the money and the infant emigrated to Australia; she then refused to pay the amount advanced. The claim was dismissed upon the ground that the contract was not one for necessities, despite being for the minor's benefit.<sup>8</sup>

1. *See Nash v. Inman* [1908] 2 KB 1.
2. *Sale of Goods Act*, S. 7 (NSW); *Sale of Goods Act*, S. 5 (Qld); *Sale of Goods Act*, S. 2 (SA); *Sale of Goods Act*, S. 2 (WA); *Sale of Goods Act*, S. 7 (Tas); *Sale of Goods Act*, S. 7 (Vic); *Sale of Goods Ordinance*, S. 7 (ACT); *Sale of Goods Ordinance*, S. 7 (NT).
3. *Sultman v. Bond* [1956] QSR 180.
4. *Scarborough v. Sturzaker* (1905) 1 Tas LR 117.
5. *Re Mundy* [1963] ALR 264. (*SA Insolvency Ct*). *See also Alliance Acceptance Co Ltd v. Hinton* (1964) 1 DCR (NSW) 5 (NSW Dist Ct); *Contrast Mercantile Credit Ltd v. Spinks* [1968] QWN 32.
6. *Sultman v. Bond* [1956] QSR 180; *Contrast Quiggan Bros v. Baker* [1906] VLR 259.
7. *See Chaplin v. Leslie Frewin (Publishers) Ltd* [1966] Ch 71.
8. *Bojczuk v. Gregorcowicz* [1961] SASR 128.

89. Inasmuch as it is for a minor's benefit to obtain employment, a minor can bind himself or herself by a contract of apprenticeship or of service.

In a Western Australian case, a female minor, aged 17 years, entered into an agreement under seal with the Minister for Education for a course in 'teacher training'. Her father was also a party to the agreement and was described as 'guarantor'. The agreement provided that if the student's course was terminated after its commencement for any reason other than death, disease or accident, she and her guarantor would immediately forfeit and pay the total allowances received by her as bursar and student. It was also provided that if the student married during the course of training her guarantor would repay the total of the allowances. It was held that the defence of 'infancy' failed because the contract was for the benefit of the minor. Accordingly, when the teacher married, she (and her father as guarantor) was obliged to repay the allowances.<sup>1</sup>

Where a minor has entered into a contract of employment which is for his or her benefit, if he or she should leave his service before expiry of the term of the contract without reasonable cause, the imposition of a penalty for so doing does not alter the nature of the contract. It is therefore binding on the minor.<sup>2</sup>

1. *Minister for Education v. Oxwell* [1966] WAR 39.
2. *Ex parte Beddoe* (1912) 29 WN (NSW) 21.

90. Where a minor has obtained an advantage by falsely stating himself or herself to be of full age, the minor is bound in equity to restore property so acquired and to release persons whom he or she has deceived from obligations induced by the fraud. The misrepresentation must be explicit, however, and will not arise from mere inferences suggested by or drawn from the minor's conduct; nor will it bind or prejudice the minor if the person with whom he or she is dealing is in fact aware of the minority.

In a Queensland case, a minor induced a finance company to lend him money for the purchase of a motor vehicle, by fraudulently misrepresenting that he was of full age. The car was indispensable to the minor's employment. It was held that the finance company was entitled to recover the balance of the unpaid principal on the loan for the vehicle to enable the defendant to earn his living as a salesman, and the amount of the loan, being considerably less than the price of the car, was reasonable.<sup>1</sup>

Where a minor has, by fraudulently misrepresenting his or her age, induced another person to enter into a contract under which materials were supplied and work done, such person may recover the value of the goods and of the work obtained by the misrepresentation.<sup>2</sup>

1. *Mercantile Credit Ltd v. Spinks* [1968] QWN 32.
2. *Campbell v. Ridgley* (1887) 13 VLR 701.

### §3. MINORS' RESPONSIBILITY FOR TORTS

91. A child of an age at which he or she is capable of distinguishing between right and wrong is liable for the consequences of his or her own wrongful acts.<sup>1</sup> In an action for negligence against a child the reasonableness of the act is to be determined by reference to what is reasonable for a child of the same age and experience.<sup>2</sup>

In a South Australian case, during the temporary absence of the master from the schoolroom, a schoolboy aged nine years, threw a pen at another schoolboy aged eleven years. The pen struck him in the eye and caused him serious injury. It was held that the culprit was liable in tort for the assault.<sup>3</sup>

1. *McHale v. Watson* (1965) 111 CLR 384 (High Court of Australia).
2. *Ibid.*
3. *Bubner v. Stokes* [1952] SASR 1.

92. A minor is not liable for a tort which is founded on a contract on which he or she cannot be sued,<sup>1</sup> as in the case of the warranty of goods, or for a fraudulent misrepresentation as to age which induces a party to contract with him. The minor is, however, liable for any tort which, although connected with the subject matter of a contract, is a separate and independent act of a kind forbidden or not contemplated by the contract or if the action in substance arises from the tort itself.<sup>2</sup>

1. For the liability of minors in contract, *see above*, pp. 56–60.
2. *Peters v. Tuck* (1915) 11 Tas LR 30.

93. A minor is liable on a count for money had and received for money appropriated to his or her own use. Thus, in a Tasmanian case, a female minor deposited money in a bank in the name of another minor, for the purpose of avoiding possible legal proceedings. It was held that, notwithstanding her minority, the minor who used the account for her own benefit was obliged to restore the moneys so applied. The action for recovery sounded in tort, not contract, and therefore minority did not provide any defence or exculpation.<sup>1</sup>

1. *Peters v. Tuck* (1915) 11 Tas LR 30.

94. *Prima facie* a parent is not liable for a tort committed by his or her child.<sup>1</sup> Where, however, a child causes injury to others by the use of dangerous things, the parent may be liable if the parent has control of the dangerous thing which causes the injury or is negligent, either in permitting the child to use a thing which is dangerous in itself or known to be dangerous or capable of causing danger to others in not exercising proper control and supervision of the child.<sup>2</sup> A parent may also become liable where he or she has previously authorized or subsequently ratified the child's act.<sup>3</sup>

Apart from parents, any other person acting *in loco parentis*, such as a foster-parent,<sup>4</sup> a baby sister or a teacher, may be liable under these principles.

A parent who maintains control over a young child must take reasonable care to exercise that control so as to avoid exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving unreasonable risk of injury to others. The standard of care imposed on the controller is that of the reasonably prudent person. Whether it has been fulfilled is to be judged according to all the circumstances, including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected.<sup>5</sup>

A parent does not incur liability for a misuse, not reasonably foreseeable, which his or her child makes of a thing, known by the parent to be in his or her possession, which the child could reasonably be expected to use safely.<sup>6</sup> But, in considering what is reasonably foreseeable, the age and maturity of the child must be considered. In one case, a boy aged thirteen years, while engaged in play, fired a stone from a shanghai (catapult) at another boy in the eye, seriously damaging his sight. The victim sued the other boy's parents claiming damages for negligence in failing to control him and in allowing him to have and use the shanghai. There was evidence that the parents knew that their son had a shanghai, had warned him of the danger of using it, and had forbidden him to use it outside the limits of his home. There was no evidence that he had any vicious tendencies. It was held by the High Court of Australia that in the circumstances of the case the parents were not guilty of any breach of duty.<sup>7</sup>

1. *McHale v. Watson* (1965) 111 CLR 384.
2. *Ibid.*
3. *Gray v. Fisher* [1922] SASR 246.
4. For the duties of foster-parents, see *below*, Part II, Chapter 6.
5. *Smith v. Leurs* (1945) 70 CLR 256 (High Court of Australia).
6. *McHale v. Watson* (1965) 111 CLR 384.
7. *Smith v. Leurs* (1945) 70 CLR 256.

95. In some circumstances, it is possible for a minor to sue his or her own parent.<sup>1</sup> The courts do not accept that there is any general duty of care owed by parents to their children, enforceable at the suit of the children, arising merely out of the relationship of parent and child. In many cases, however, the facts will show that there is a specific duty in the circumstances owed by a parent to his child; such a duty arises whenever a parent has charge and control of a child in the immediate situation. The duty is the same in all respects as that which would arise if a stranger had assumed the charge and control of the child in the same circumstances.

Thus, in a Queensland case, it was held that a mother of a 14 year-old boy, who was supervising him while they were both water-skiing, was held to have a duty of care to her son.<sup>2</sup>

1. *Rogers v. Rawlings* [1969] Qd R 262; Contrast *Cameron v. Commissioner for Railways* [1964] Qd R 480.
2. *Rogers v. Rawlings, supra.*

96. It has been held that, for a plaintiff who sues a minor to claim a reduction of damages as a result of contributory negligence, he or she must prove negligence of the minor himself or herself. It is not sufficient to allege the negligence of the parent or other person having control of the child.<sup>1</sup>

1. *Collett v. Hutchins; Collett (Third Party)* [1964] Qd R 495.

#### §4. MINORS' RESPONSIBILITY FOR CRIMES

97. It is conclusively presumed that no child under a certain age can be guilty of any criminal offence. The age varies from state to state.<sup>1</sup> There is a rebuttable presumption that a child under the age of fourteen years does not possess sufficient capacity to know that what he or she is doing is wrong. A person over the age of fourteen years is presumed to have a degree of reason sufficient to make him responsible for his crimes.<sup>2</sup>

It is not correct to say that children are immune from criminal prosecution. For the most part most minors are bound by the same procedures in law as are applicable to adults.

A minor may be arrested, charged and tried for an adult crime. The significance of being a minor is that the Children's Courts are of a more informal nature than courts used to try adults. In most states, however, the jurisdiction over children's crime is exercised by magistrates, who are not necessarily exclusively assigned to child matters.

1. *See above*, p. 51.
2. *See* J. Neville Turner, 'The James Bulger Case' (1994) 68 *Law Institute Journal* 53.

98. In most states, special premises have been built for the hearing of juvenile proceedings. These courts hear both cases involving child delinquency and those concerned with the neglect of the child by his or her parents or others acting *in loco parentis*.

But in many suburban and country areas, cases are held in the same court-room as is used for adult cases. Usually, however, they are heard on a different day from the adult cases.

99. An attempt is made in some modern children's courts to segregate children who are charged with an offence from those who are involved in neglect or protection cases.<sup>1</sup>

1. This is certainly so in Melbourne, where a new Children's Court has been built with special arrangements for such a separation.

100. The proceedings in children's courts are heard *in camera*. They are closed to all persons except the child and his or her parents, the magistrate and court staff, and other persons, such as police, solicitors and social workers whose presence is necessary for the case.

While informality is the keynote of these courts, it is necessary to preserve sufficient procedural formality to comply with common law requirements of due process, especially where the child pleads not guilty to a charge. The proceedings are then adversary in nature. In most jurisdictions, legal representation for the child is provided, but it is rare that this is mandatory. Children rarely have a lawyer during interviews with police.

In all states, it is regarded as desirable to divert children away from the court system as far as possible. Where the child is a first offender, or the alleged offence is relatively mild, the Police may be content to admonish the child with a stern warning.

101. In South Australia and Western Australia there exist children's panels, whose object is to prevent children from being brought before the court. The panels deal with first offenders aged between 7 and 15. Not all cases, however, are diverted to the panel. Only relatively minor offences are dealt with by panels, such as wilful damage to property and shop lifting.<sup>1</sup> The panels have power to order a conditional suspension of court action against the children. They also may make supervision orders. If a child who has been before the panel commits a further offence, that child may also be charged before the court with the former offence.

The panels consist of an officer for the Department for Community Service<sup>2</sup> and a police officer. The proceedings are informal. They do not sit in a court room, but at a desk in a private room. Their purpose is to assist the child, not to punish him or her. However, the child must admit the offence before the panel will exercise jurisdiction. If the child pleads guilty, but the panel suspects that he or she is in fact innocent, the panel may refer the child to the Children's Court. Conversely, the Children's Court may refer a child to the panel, if it thinks that a less punitive outcome is desirable.

The panels' policy is normally to admonish the child, and deliver a homily on the consequences of a life of crime. The panel cannot take jurisdiction over a crime that is liable to a penalty of more than fourteen years' jail – e.g., murder or rape.

1. For a full description, see F. Gale, N. Naffine and J. Wundersitz (eds), *Juvenile Justice: Debating Issues* (Sydney 1993).
2. Or the equivalent department, known by another name, in the appropriate state.

102. The age below which a child is regarded as incapable of committing a criminal act varies from state to state. In ACT it is 8;<sup>1</sup> in New South Wales it is 10;<sup>2</sup> in Queensland it is 10;<sup>3</sup> in South Australia 10;<sup>4</sup> in Tasmania it is 7;<sup>5</sup> in Victoria it is 10;<sup>6</sup> and in Western Australia it is 10.<sup>7</sup>

If a child is above that age, but below 17 in ACT, Tasmania, Queensland and Victoria – or 18 in New South Wales, South Australia and Western Australia, he or she will be within the jurisdiction of the Children's Court, and must be tried there unless he or she is charged jointly with an adult.<sup>8</sup>

1. Children's Service Ordinance 1906 (ACT), S. 27.

2. *Children (Criminal Proceedings) Act 1987* (NSW), S. 5.
3. Criminal Code, (Qld), S. 29.
4. *Children's Protection and Young Offenders Act 1979* (SA), S. 66.
5. Criminal Code (Tas), S. 18(1).
6. *Children & Young Persons Act 1989* (Vic), S. 3(1).
7. Criminal Code (WA), S. 29.
8. The relevant statutory provisions are contained in the Statutes set out above.

103. Moreover, a child who is charged with having committed a very serious offence, such as rape or murder, will be tried in an adult court. And if a child is charged with an adult of any offence, it may be that the charges will be dealt with separately – the child in the children's court, the adult in an adult court. On the other hand, both alleged offenders may be charged jointly in the adult court.

A male under the age of 14 is presumed to be incapable of the crime of rape. But this presumption may be rebutted.<sup>1</sup>

1. See H. Gamble, *Parents and Children* (2nd ed.) (Sydney, Law Book Co. Ltd, 1986) pp. 133–134.

104. Where a child is below the age of criminal responsibility<sup>1</sup> he or she may still find himself or herself before the Children's Court, and thus subject to that court's powers of disposition, under its protective jurisdiction. Thus, in an appropriate case, he or she might be made a Ward of the State, or otherwise removed from the control of the parents.<sup>2</sup>

1. See above, para. 102.
2. See below, Chapter 6.

105. The police have power to grant or refuse bail, where a child has been arrested. If bail is refused, the child's parents can seek bail, by application to the court. The police must bring a charge as soon as practicable.

106. If the child is remanded in police custody he or she will usually be retained in a remand centre, or a reception centre. Sometimes, the child may be fostered, and there are special provisions relating to the foster-care of children who are on remand. The Director-General of Community Service<sup>1</sup> is responsible for the placement of the child pending the hearing.

The following guidelines produced by the Department of Community Services (Victoria) deal with the selection and duties of foster parents and in establishing the rights and duties of the natural parents pending the hearing.

It is provided that the following qualities are required of foster parents:<sup>2</sup>

- a) the ability to tolerate different family situations and values;
- b) the capacity for availability (i.e., to be on call and receive a child outside normal hours and for extended periods);
- c) the ability to manage the child's fears of abduction, or of being confronted by hostile parents;
- d) the ability to handle and nurture children who may have been rejected or maltreated.

The respective roles of foster parents and natural parents are as follows:<sup>3</sup>

- a) The foster-parents should be aware that the natural parents retain guardianship rights. Accordingly, the natural parents must be consulted and their permission obtained if the child is to receive anaesthetics, surgery or serious medical attention, or requires a termination of pregnancy. Likewise, they must be consulted if it is proposed to change the child's school or church. On the other hand, the natural parents may delegate the right to make urgent medical decisions by a signed consent.
- b) The natural parents' custody rights have been substantially abrogated.
- c) The natural parents are entitled to know where their child has been placed.
- d) The natural parents have an inherent right to have contact with their child.
- e) The natural parents should be involved in negotiating access arrangements.
- f) The natural parents and the child have a right that information about themselves and their family remain confidential.

A major task of the foster-care worker is, indeed, stated to be the arranging and supervising access by the natural parents.

In certain cases, foster-parenthood may not be an appropriate placement for a child on remand, for example<sup>4</sup>

where the child's behaviour is unmanageable in a normal household; when the child would be further distressed by being in an unfamiliar family; where the child poses a threat to herself or to the community, or would pose a threat to the members of the proposed foster family.

1. In some States, this officer goes by another name, e.g., Director of Child and Family Services, Director of Human Services.
2. Guidelines for Reception Foster Care Workers and Agencies, Community Services (Vic) (1987) para. 3.3.2.
3. *Ibid*, para. 4.13.3.
4. *Ibid*, para. 4.14.2.

107. When a child is prosecuted in the Children's Court, the prosecution will usually be represented by a police officer, although in exceptionally serious cases, a barrister may appear for the prosecution. If a probation order has previously been made with regard to the child, the probation officer is likely to be present.

The parents of the child are normally required to attend. Usually, the case will not proceed without their presence. A warrant may be issued for a parent's arrest if he or she refuses to attend.

The rights of the child vary from court to court, and depending on the seriousness of the charge. The child is normally allowed to speak for himself, but there are some provisions for legal representation.

The child may be granted legal aid by the magistrate, especially if the case is procedurally complicated.

Before being sentenced, a child must be found guilty according to criminal standards of proof, and in accordance with the usual adversarial rules of evidence.

Legal representation of children in a Children's Court used to be rare, but is becoming more frequent. The standard, however, often falls short of that required by Article 12(2) of the UN Convention on the Rights of the Child.

The magistrate has several powers of disposition. Usually, sentencing will be adjourned until a welfare report has been obtained.

The following dispositions may be made by the court.<sup>1</sup>

The court may:

- a) dismiss the charge;
- b) adjourn the case;
- c) issue a good behaviour bond;
- d) place the child on supervision or probation;
- e) order a fine to be paid by the child, and in some circumstances, by the parents;
- f) make the child a Ward of the State, by committing it to the Director-General of Community Services;
- g) commit the child to alternative care, such as to a 'fit person';
- h) order treatment.<sup>2</sup>

1. These dispositions are taken from the *Children and Young Persons Act 1989* (Vic). Similar provisions apply in other States.

2. For full details of the legislation of each State, see S. Charlesworth, J. Neville Turner and L. Foreman, *Lawyers, Social Workers and Families* (Federation Press, 1990), Chapter 6.

108. The parents of a child may also be charged in some states if the police consider that by their neglect the parents have caused or contributed to the crime.

They may in some circumstances be ordered to pay the victim of their child's crime, or the costs of prosecution.

109. It is possible for a child to appeal against conviction. The relevant appellate courts are:

- a) ACT, Northern Territory, Tasmania, Western Australia: the Supreme Court of that State or Territory.
- b) New South Wales: The District Court.
- c) South Australia: The Juvenile Court.
- d) Victoria: The County Court.<sup>1</sup>

1. See para. 107, note 2.

## §5. CRIMES AGAINST CHILDREN

110. There is much evidence that children are much more frequently, physically, emotionally and sexually abused by their parents or step-parents than is made known to the authorities.

The offence of incest, i.e., sexual intercourse by a person related by consanguinity, is an offence which may be committed on a child. A variety of other sexual abuses, ranging from fondling to complete sexual penetration, may also constitute offences against a child, whether committed by a relative or not.

*111.* In some states, it is mandatory for certain persons to report any offence that he or she suspects has been committed against a child. Usually, this duty is restricted to certain professions. Thus, in Queensland and New South Wales, the obligation is placed only on medical practitioners,<sup>1</sup> doctors, probation officers, child welfare officers, school teachers, professional workers in the fields of mental health, alcohol or drug dependence and workers in children's nurseries.<sup>2</sup>

In South Australia, the obligation rests on medical practitioners, dentists, nurses, teachers, members of the police force, employees of welfare organizations.<sup>3</sup>

Victoria has, at present, mandated only doctors, the police and teachers, but other professions are covered by provisions not yet in force.<sup>4</sup>

In ACT and Western Australia, there is no mandatory requirement to report suspected child abuse.<sup>5</sup>

1. *Health Act 1987* (Qld), S. 76e; *Child Welfare Act 1939* (NSW), S. 148(b).

2. *Child Protection Act 1974* (Tas), S. 8(2).

3. *Community Welfare Act 1972* (SA), S. 82d(2).

4. *Children and Young Persons Act 1989* (Vic), S. 64A.

5. For a full discussion of child abuse in Australia, see C. Goddard, *Child Abuse and Child Protection* (Melbourne, Churchill Livingstone, 1996). This book includes full details of the legislation relating to mandatory reporting, in every State, as well as the incidence of child abuse in its various forms.

*112.* Unfortunately, the rate of successful prosecution of child offenders is low in Australia, principally because of reluctance to treat children as credible witnesses. Some improvement of this rate, however, may occur in the future as a result of the introduction of closed circuit television and video-taping of children's evidence.<sup>1</sup>

1. See N. Morgan, 'Criminal Law Reform 1983–1995', (1995) 25 *University of Western Australia Law Review* 283.

## Part II. Family Law

### Chapter 1. Marriage

#### §1. THE NATURE OF MARRIAGE

146. Marriage is defined as ‘the voluntary union of one man and one woman for life to the exclusion of all others’. This definition, taken from an English case of 1866,<sup>1</sup> is incorporated into the Australian *Marriage Act*,<sup>2</sup> and must be pronounced by the celebrant unless it occurs in the usual form of the ceremony.

It is, of course, readily apparent that this conception of marriage represents an ideal, rather than the reality. Two out of every five Australian marriages end in divorce.

All elements of this definition are, however, significant. For a purported marriage that does not conform to this ideal is void. The consequences of this will be discussed later in this part.<sup>3</sup>

1. Per Wilde J in *Hyde v. Hyde* (1866) LR 1 P&D 130.
2. *Marriage Act* 1961, S. 46.
3. See below, §5, Void and Voidable Marriages.

#### §2. THE CAPACITY TO MARRY

##### I. Engagements

147. It is usual for couples who intend to marry to become ‘engaged’ beforehand. They thus commit themselves to marry each other at some future time.

Until 1976, an engagement was a legally binding contract. The consideration, which is necessary for an agreement not under seal to be binding in Australian law, was the mutual promise to marry. An engagement ring is commonly, though not always, given on an engagement, but this was not regarded as the essence of the consideration, though it was obviously strong evidence of an intention that the engagement be ‘official’. There was difficulty otherwise in determining when a couple really did express a mutual intention to marry, especially in the relaxed days of the twentieth century. The polite manners of more gracious years, the bended knees, the passionate embrace, the request of the father to give his daughter’s hand have been increasingly replaced by tacit understanding, or, at best, a curt and unromantic, ‘Let’s set the date’.

The action for breach of promise produced some spectacular and highly entertaining cases. But there was a suspicion that the action favoured ‘gold-diggers’. In any case it was not thought socially desirable that an engaged couple, one of whom genuinely felt that a marriage between them would not be a success, should be required forcibly to undertake the marriage because of threat of legal action. At any rate the action for breach of promise to marry was abolished in 1976.<sup>1</sup> But in some ways, actions brought by *de facto* spouses resemble the old breach of promise action.<sup>2</sup>

1. *Marriage Act* 1961–1976, S. 111A.
2. *See below*, Chapter 3, Cohabitation without Marriage.

148. But although the engagement is no longer a binding contract, it may give rise to an action at law, if, as a result of the engagement, property transactions have been entered into, or one of the parties has expended money in the expectation that the marriage would take place.

There are not many cases but, in order to determine any property dispute, the same rules of law are applied to the former fiancés as if they were strangers to each other. Their property rights are to be determined entirely according to the law of property. Many fiancés, however, live together before marriage. If their relationship breaks down, they may be covered by the laws applicable to *de facto* spouses.<sup>1</sup> This may depend on the length of the relationship. But, unlike the law before 1976, the question of who broke the engagement and whether this was justifiable, will usually be irrelevant to a property dispute.

A gift made by one fiancé to the other can be recovered, and it is recoverable even if the donor was responsible for the breaking of the engagement. But a gift is only recoverable if it was a condition of the gift that it should be returned if the marriage did not take place.<sup>2</sup> This is difficult to apply in practice, for it is not usual for lovers to specify the terms on which they donate favours on their beloved. No doubt the nature of the gift will often enable the court to imply a condition. A woman would hardly be expected to return a box of chocolates, or their money’s worth, on the termination of the engagement. An item of furniture would probably be regarded as an object to be used in the future matrimonial home, and thus would be recoverable. The courts may have difficulty in distinguishing between a gift donated by a man to a woman as a present between established fiancés and a gift to try and induce the woman to marry, or, put more cynically, a gift to impress!

Cases of this kind are rarely reported. In essence, everything depends on the circumstances of the gift. As in all matters relating to restitution, the court is vested with discretion, to take into account the rights and wrongs of the parties.

1. *See below*, Chapter 3, Cohabitation without Marriage.
2. *See Mills v. Harris* [1967] WAR 145.

## II. Different Sex

149. The parties must be of different sexes. This is not specifically provided for in the *Marriage Act*, but is implicit in the definition of marriage. In the English

case, *Corbett v. Corbett*,<sup>1</sup> a man married a highly attractive model. In fact, this model was born male, but he had undergone a sex change operation in Casablanca, which involved the removal of his male genital organs and the provision of an artificial female vagina. Was the marriage valid? It was held that, for the purpose of marriage, a person's sex is determined at birth and cannot be subsequently changed. Sex for this purpose is governed by biological (e.g., chromosomes, gonads) and not psychological criteria. This case has been consistently followed by Australian courts. In one case, it has been held that a hermaphrodite cannot marry at all, since he (or she) belongs to neither sex.<sup>2</sup>

1. [1971] P 83. But contrast *R v. Harris* (1988) 17 NSWLR 158, where it was held that a transsexual was a 'woman' for the purposes of the crime of indecent assault.
2. *C and D* (1979) FLC 90–636.

### III. Consanguinity

150. The parties must not be related within prohibited degrees.

A person may be related to another by consanguinity (i.e., blood) or by affinity (i.e., marriage). The law in England, based on ecclesiastical law, and in particular on Leviticus Chapter 18, provided for exceptionally wide prohibitions.

As a contrast, the Australian provisions are as follows:

'Marriage of parties within a prohibited relationship are marriages:

- a) between a person and an ancestor or descendant of the person; *or*
- b) between a brother and a sister (whether of the whole blood or the half-blood).'<sup>1</sup>

A relationship may be traced through adoption. Thus an adopted brother and sister may not intermarry even though their biological origins are quite different.

1. *Marriage Act* 1961, S. 23.

### IV. Marriageable Age

151. Both parties must be of marriageable age. These ages used to be 18 for a male and 16 for a female. But recently the law has been changed to 18 for both male and female.<sup>1</sup> It is, however, possible for a person of 16 or 17, to apply to the court for permission to marry a person of marriageable age. This will be granted if the circumstances are 'exceptional and unusual'. It has been held that this phrase means more than that the girl is pregnant!<sup>2</sup> But in practice, permission is rarely granted except where this is the case.

Furthermore, the consent of parents or guardians is required where a person seeks to marry under the age of majority<sup>3</sup> [i.e., when a person becomes of full age]. When this age was 21, this meant that parents had a considerable say in the marriage of their child. But, with the lowering of the age of majority to 18, this law has become of little importance. Parents can no longer put a substantial brake on their

children's marriage plans. In any event, a young person caught by the above provision can apply to court for an order that the parents' consent be dispensed with if it has been unreasonably refused.<sup>4</sup>

A marriage which takes place when either party is under *marriageable age* is void. But where the marriage takes place without necessary parental consent, it is nevertheless still valid. In practice, of course, such marriages are very rare, but they have occasionally happened when one of the parties has deceived the celebrant or forged a birth certificate.

It is impossible for Australians under marriageable age to avoid these restrictions by getting married abroad. Such marriages are not recognized in Australia.<sup>5</sup>

1. *Marriage Act* 1961, S. 11, amended by *Sex Discrimination Amendment Act* 1991.
2. *Re SG* (1968) 11 FLR 326. See J. Neville Turner, 'Marriage of Minors' (1968) 8 *U. West Australia* LR 318.
3. *Marriage Act* 1961, S. 15.
4. *Id.*, S. 16. See J. Neville Turner, *op. cit.*
5. See *Marriage Act Amendment Act*, 1988.

## V. Prior Marriage

152. There must be no prior existing marriage.

As has been stated, marriage in Australian law means 'the voluntary union of one man and one woman for life, to the exclusion of all others'. Accordingly, it is not possible for a person with an Australian domicile to be married to 'two wives at a time'.<sup>1</sup> But a polygamous marriage celebrated in a foreign country by domiciliaries of that country who then migrate to Australia will be recognized for most purposes.<sup>2</sup>

Difficulties sometimes arise when the status of a person wishing to marry in Australia depends on the validity of a foreign decree of divorce or nullity. Authorised celebrants of marriage have the duty to determine whether a person is free to marry. In cases of difficulty, the matter may be brought to court to determine the validity of a foreign decree.

A divorced person may not re-marry in Australia until the *decree nisi* is made *absolute* (usually one month after the *decree nisi*).<sup>3</sup> But if the first marriage is *void*, the decree is declaratory only, and there is in fact no need to wait even until the decree. In practice, however, a celebrant would not authorize the celebration of the second marriage as long as there was any doubt as to the possible validity of the first one. It is possible to enter into a void second marriage without committing the crime of *bigamy*, which requires a deliberate intent to break the law.

1. A quotation from the operetta of W.S. Gilbert and A. Sullivan, *Trial by Jury*.
2. *Family Law Act* 1975, S. 6.
3. See *below*, Chapter 2, Divorce.

## VI. Failure to consent

153. A marriage is void if either party did not consent to it, because of:

- a) duress
- b) mistake
- c) unsoundness of mind *or*
- d) otherwise.

#### A. Duress

154. In the last few years, there has been a number of spectacular cases of forced marriages. A marriage must be voluntary – ‘*consensus facit matrimonium*’. But a distinction must be drawn between a marriage reluctantly, but nevertheless voluntarily, entered into, and a marriage entered into involuntarily. The courts have had some difficulty in reconciling two contrasting public policies,

- a) that marriages should not lightly be set aside (*semper praesumitur pro matrimonio*) and,
- b) that a shotgun marriage or marriage under pressure should not be sanctioned.

155. A marriage will not be annulled simply because it was entered into for the wrong reason, e.g., to obtain a visa as the wife of a citizen which would not be available to a single foreign woman.<sup>1</sup> And yet, if a marriage takes place in order that the husband will be able to take the woman away from a horrible situation, as in the English case, *Szechter v. Szechter*,<sup>2</sup> this may be regarded as a marriage under duress. In that compelling case, the woman, *persona non grata* in her native Poland, was subjected to the most painful torture in a Polish prison, and was convinced that her health would not survive much more of this treatment. By a great act of courage, a Polish professor agreed to divorce his existing wife and marry the woman, so as to enable her to travel abroad as his wife. After much reluctance, the woman agreed to this plan. It was held that the exceptional nature of the pressure on her made it clear that the marriage was not freely entered into. The judge said, however, that only in exceptional circumstances would a marriage be annulled on this ground – only if in fact the petitioner was in fear of ‘immediate danger to life, limb or liberty’.

A similar decision was reached in *H v. H*,<sup>3</sup> where the wife petitioner married in order to avoid living in her native Hungary, where she was unpopular with the Communist government.

Unfortunately, the law on duress is in a state of confusion, because the cases conflict on perhaps the most fundamental issue – is the test of duress subjective or objective? In other words, does the ground exist if a man or woman enters marriage when he or she is in fact petrified, but when most ordinary, reasonable persons would not be frightened?

Earlier cases seem to suggest that the state of mind of the individual petitioner is all-important... ‘whenever from natural weakness of intellect or from fear – whether reasonably entertained or not – either party is actually in a state of mental incompetence to resist pressure improperly brought to bear’.<sup>4</sup> But more recent cases seem to suggest that an objective test will be applied. Thus in *Singh v. Singh*,<sup>5</sup> a Pakistani girl was compelled by her parents to marry a man whom she had never

seen, but who was represented to her to be ‘dark and handsome’. He turned out to be just the opposite. She was repelled by him, never consummated the marriage and left him almost immediately. It was held that she was not entitled to a decree. There was insufficient fear.

1. See *Al Soukmani and El Soukmani* (1980) FLC 92–107. *Deniz and Deniz* (1977) 31 FLR 114 suggests that this may amount to ‘fraud’: but this case was disapproved in *Al Soukmani* and other cases, e.g., *Osman and Mourrali* (1990) FLC 92–111.
2. [1971] P 286.
3. [1954] P 258.
4. See, e.g., *Cooper v. Crane* [1891] P 369.
5. [1971] P 226.

### B. Mistake

156. There are only two types of mistake that apply – viz. mistake as to identity, and mistake as to the nature of the ceremony. An example of the former is the case of *Allardyce v. Mitchell*,<sup>1</sup> where the woman thought that she was marrying a member of a distinguished Scottish family – in fact she married an impostor, who was after her money. In one Australian case,<sup>2</sup> it was held that a woman who married a hermaphrodite was mistaken as to his/her identity – she thought he was a *bona fide* man!

An example of mistake as to the nature of marriage is *Mehta v. Mehta*<sup>3</sup> where an English woman was able to avoid a marriage where the wedding had been conducted in Hindustani, which she thought was a ceremony of religious conversion!

1. (1869) 7 WW&A’B(M) 45.
2. *C and D* (1979) FLC 90–636.
3. [1945] 2 All ER 690.

### C. Insanity

157. Consent will be lacking if a person is incapable of giving his consent because of unsoundness of mind. He or she must be incapable of understanding the nature and effect of the marriage ceremony. The test is laid down in a remarkable English case, in which a senile man made a will and married on the same day. His will was held to be invalid but his marriage valid, for it was decided that marriage was a much simpler thing to understand than the complexities of testamentary succession: ‘To ascertain the nature of the contract of marriage a man must be mental capable of appreciating that it involves the responsibilities normally attaching to marriage.’<sup>1</sup>

This case, consistently applied in Australia, is an illustration of the maxim, *semper praesumitur pro matrimonio*.

1. *In the Estate of Park* [1954] P 112.

**VII. Failure to comply with Necessary Formalities**

158. Certain requirements of the *Marriage Act* must be carried out at the ceremony. For instance, the Act provides that a marriage shall not be solemnized unless at least two persons over the age of 18 years are witnesses. Suppose one of the witnesses is only 17. Or suppose the celebrant forgets to read the necessary notice outlining the definition of marriage. Would the marriage be void?

No, it would not. The failure to comply with a *directory* provision, as opposed to a mandatory one, does not render the marriage void. Very few formal requirements are in fact mandatory.

Unlike in most countries, a marriage in Australia may be celebrated on any day, at any time and at any place.

One month's notice of the marriage is required (although it may be waived in special circumstances). On receiving such notice, the celebrant is required to give the parties a document outlining the obligations and consequences of marriage and indicating the availability of pre-marital education and counselling. These requirements are, of course, very liberal. Neither the pre-marital requirements nor the provisions for celebrating marriages nor the requirements on capacity to enter into marriage are stringent. Indeed it may be thought that it is far too easy to enter into marriage in Australia. Australia is probably the easiest country in the world to get married in!

**VIII. Consequences**

159. If the marriage is void for any of the above reasons, either party may apply for a decree of nullity in the Family Court.<sup>1</sup>

1. See below, §5, Void and Voidable Marriages.

**§3. FORMALITIES OF MARRIAGE**

160. The formal requirements for the preparation for and celebration have been mentioned above. Australian law relating to both the celebration of marriages and the pre-marital preliminaries is extremely simple, probably too simple. The purposes of legal proscriptions on entering marriage might be classified as follows:

- a) to give interested parties adequate notice of the marriage, so that it is impossible for a couple to marry in secret;
- b) to prevent persons who lack the legal capacity to marry (where, for example, they are under age, or already married) to go through a ceremony of marriage undetected;
- c) to enable fiancés to have sufficient time to decide whether it really is in their best interests to marry.

These objects, however, are the barest *minima* that the law should seek to improve. It will be seen that Australian law does little to fulfil any of the three objects.

In view of the disastrously high divorce rate in Australia, it may be suggested that the prime object of pre-marital preliminaries should be:

1. to prevent undesirable marriages and,
2. to encourage desirable marriages.

A law which would serve object (1) is one similar to that prevailing in most jurisdictions of the United States of America, whereby all fiancés are required to undergo blood tests, to determine, *inter alia*, whether either of them has a venereal disease.<sup>1</sup>

A law which would serve object (2) is a requirement that all fiancés undergo a programme of marriage guidance. An attenuated form of this law is to be found in Australia, but it affects only a small proportion of the public.<sup>2</sup>

*161.* Some Australians quite inaccurately regard marriage as a ‘civil right’. Marriage is not in law a private contract, but a status in which the public interest is vitally concerned. Nevertheless, there would be vociferous opposition to any attempt in Australia to make marriage more difficult, and *a fortiori* to make it impossible for eugenic, or other, reasons.

At any rate, the Australian requirements for entry into marriage, both as to pre-marital preliminaries and to capacity, are inadequate.

1. See H.D. Krause, *Family Law* (2nd ed. St Paul, West Publishing Co, 1995) Chapter 3.
2. When a notice of marriage is filed, the applicants receive a list of instructions on the duties of marriage. Catholics, however, are often counselled by their priest, and sometimes are recommended to attend pre-marital courses.

#### §4. EFFECTS OF MARRIAGE

##### I. Taking of Name in Marriage

*162.* It is a customary rule that a married woman in Australia takes the surname of her husband.

The Australian law on names is extraordinarily loose. While it is impossible to change one’s Christian name, it is possible to add a new one, without formality. But a person of full age may adopt any surname he or she chooses, provided that he or she does not do so with the intention to deceive, or to gain commercial advantage.

Although an informal change of name is legally effective, it is possible to register a change of name by deed poll, and this is advisable as proof of the change.

Accordingly, it is probable that a woman acquires the husband’s name on marriage by *custom* which does not amount to a rule of law. There does not seem to be any reason why she should not use another name, including her maiden name. On the other hand, to do so would give rise to many inconveniences, and the custom is so embedded in Australian tradition that most people would assume that the woman was the mistress, not the wife, of the man.

Likewise, there is nothing in law to prevent a mistress of a man called John Smith from assuming the name, Mrs. (Jane) Smith. This is indeed very common.

The real Mrs. Smith, in these circumstances, may seek an injunction preventing the mistress from using the name, Smith, if it brings her (the wife) into disrepute, by suggesting that the real Mrs. Smith is not married! Likewise, she may sue for ‘defamation’ (*defamation* can either be *slander* – in temporary form, normally spoken – or *libel* – in permanent form, usually written).

163. It is quite unheard of for a man to take the name of his wife on marriage! But occasionally, a *man* and *woman* may agree to combine their names on marriage. Thus Mr. Jackson and Miss Cox may become on marriage Mr. and Mrs. Cox-Jackson. But this is rare, and regarded as an affectation.

A number of professional women, such as solicitors, retain their maiden name for business purposes, especially if they have established a reputation by that name before their marriage.

On divorce, it is possible for a woman to retain her ex-husband’s name. It is equally possible for the woman to adopt a new name, or revert to her maiden name, and the latter is not uncommon.

It is polite ‘form’ (although certainly not law) to address, by letter, a married woman as Mrs. John Smith, or Mrs. J. Smith, her husband being John Smith. If she is a widow or divorcee, then it is correct to address her by her own Christian name, ‘Mrs. Jane Smith’. These niceties, however, are falling into disuse.

## II. Duty of Consortium

164. It used to be asserted in all seriousness that ‘the husband and wife are one person in law’. Cynics would add in a whisper, ‘And that person is the husband’! Upon that principle depended the legal rights and duties of spouses.

It is doubtful whether the unity of spouses was applied with consistency throughout the common law, but it certainly explains a great deal about the relationship of husband and wife which survives until today, e.g., that a husband or wife cannot be compelled to give evidence against the other.

However, there has been a gradual erosion of the doctrine, as the emancipation of women has slowly been achieved. Now, a woman is able to own separate property, sue and be sued in her own name, vote, establish her separate domicile, give evidence against her husband and be guilty of theft of her husband’s property as if she were a single woman. Each of these rights was inconceivable at common law.

165. There has also been a change in the philosophy of *consortium*. It used to be said that the husband had a *right* to the wife’s consortium, while the wife had a *duty* to render it to him. Accordingly, at common law, a husband could beat his wife and confine her. It was not until 1891 that this was laid to rest.<sup>1</sup> In a famous case, a wife refused to live with her husband, who arranged that his men should seize her as she came out of church. She was then brought back home to the husband, who imprisoned her in the house, although she was allowed freedom within it. It was held that the husband had no right so to confine his wife, although it was suggested that he might have such a right to stop her from leaving the home to run away with another man.

Until 1975, it was, however, possible to obtain an order of court compelling a reluctant spouse to return to the *consortium*. This ancient remedy, known as 'restitution of conjugal rights', was not enforceable by physical means. The refusal to comply with it, rather, amounted to *desertion*. A good literary example of its use was in John Galsworthy's 'Forsyte Saga', although on this occasion, contrary to all expectations, Mr. Dartie obeyed the order and thwarted his wife's scheme.

Restitution of Conjugal Rights was abolished in 1975.<sup>2</sup>

The duties of *consortium* are now mutual.

*Consortium* means living together as man and wife. The law does not give a precise demarcation of the respective duties of man and woman. It is nowhere laid down that the husband must chop the wood or do the gardening and the wife make the beds and do the cooking. Although in some American jurisdictions it is not uncommon to encourage spouses to enter into contracts defining their duties, and some have been upheld, in Australia any such contract would be unenforceable. For there is a rule of law that domestic contracts are not enforceable on the grounds of public policy.<sup>3</sup>

The most important incident of the duty of *consortium* is that spouses must normally live together. Accordingly, they must choose a suitable matrimonial home. As long as the marriage continues, each has the right to live in that home, no matter which of them is the legal owner, or tenant, of it. Formerly, the courts rarely granted an order which had the effect of turning one spouse out of the matrimonial home, unless a petition for divorce had already been filed and the circumstances were unusually difficult for one party. But, following the recent exposures of the incidence of 'battered wives' and the hardships caused to them by insistence of cohabitation with their violent husbands, there has been a considerable change of attitude in Australia. Now, a spouse who is only part owner, or is not the owner at all, can apply to the Family Court for an order preventing the other spouse from entering the matrimonial home, or removing him or her from it, if he or she has been guilty of violent behaviour.<sup>4</sup> These remedies are in addition to those given by the criminal law, to assist 'battered wives'.

Suppose the husband and wife cannot agree on where the matrimonial home should be. In former days, it used to be the sole right of the husband to choose the matrimonial home. But, consistent with the equality of sexual expression inherent in today's doctrine of *consortium*, the spouses must make a joint decision. If they cannot agree, it seems that the decision should be made on grounds of reasonableness, though some judges would say that, in the event of a disagreement, the husband has the 'casting vote'. 'Reasonableness', a concept very familiar to lawyers, would entail an examination of the parties' finances, station in life, health and, above all, earning opportunities of both parties. Perhaps in some cases a wife would be reasonable in refusing to leave the district where the children were being educated or even where her aged parents were living, even though a move to another town would considerably enhance her husband's career. Even more difficult decisions are involved when one of the spouses suggests emigration to another country.

1. *R v. Jackson* [1891] 1 QB 671.

2. *Family Law Act* 1975, S. 8(2), repealing *Matrimonial Causes Act* 1959.

3. *Balfour v. Balfour* [1919] 2 KB 571.

4. *Family Law Act* 1975, S. 114.

### III. Sexual Intercourse

166. Another duty arising from the marriage is the mutual duty to have sexual intercourse. Because of this mutual duty at common law it was impossible for a husband to be guilty of the crime of rape of his wife, no matter how forcible the act. Exceptionally, however, he could be guilty of rape if there was a decree *nisi* of divorce or an order of separation which suspends the duty of cohabitation.<sup>1</sup> And he could also be guilty as a ‘principal in the second degree’ or as an accomplice, when he assisted another man or men to have forcible sexual intercourse with his wife. *De facto* separation did not alter the position, but if the wife has obtained a non-molestation injunction against her husband, he could be guilty of rape. As a result of pressure from women’s organizations for a change in the law, most states have now made it an offence for the husband to force sexual intercourse upon an unwilling wife.<sup>2</sup>

1. See *R v. Miller* [1954] 2 QB 282.
2. See H.A. Finlay and R. Bailey-Harris, *Family Law in Australia* (4th ed. Sydney, Butterworths, 1989, para. 408).

### IV. Confidences in Marriage

167. As the nature of marriage is one of extreme intimacy, it is essential that the communications between a husband and his wife should be treated as confidential.<sup>1</sup> Accordingly, at common law, it was impossible for one spouse to give evidence either for or against the other. But this strict rule has been considered amended by statute.

- i) In *criminal* proceedings, a spouse is *competent* to give evidence (that is, *may*, but is not *obliged* to) in favour of his or her spouse, if that spouse so wishes. For certain offences, mainly crimes of a sexual nature or crimes against a child, the spouse of the accused person is competent, but not compellable to give evidence for either the prosecution or the defence.

If the accused person is charged with committing an offence against a spouse, that spouse is *compellable* to give evidence for the prosecution.<sup>2</sup>

- ii) In *civil* proceedings, a spouse is compellable to give evidence for or against his or her spouse.<sup>3</sup>
- iii) In *matrimonial* proceedings, a statement made by either spouse to the other or to a third person with a view to attempting a reconciliation may not be put in evidence without the consent of the spouse who made it.<sup>4</sup> This is to enable confidential remarks to be made to marriage guidance counsellors, etc., without the fear that they may be repeated in a court. Without such an assurance, the work of these counsellors would be severely frustrated. But the privilege is that of the party, not of the counsellor, so that even a priest may be required to give evidence of a confession if the party making the confession waives his right to privilege.

1. See *Gibb and Gibb* (No. 2) (1979) 37 FLR 109.

2. For the full details on these issues, consult works of evidence, e.g., S. McNicol and D. Mortimer, *Evidence* (Sydney, Butterworths, 1995).
3. See above note 2.
4. *Family Law Act*, S. 19.

168. Suppose one spouse seeks to disclose confidential communication to the world, can the other spouse prevent him or her? There is a remarkable Scottish case in which it was held that either spouse might apply for an injunction preventing the revelation of secrets!<sup>1</sup> This particular case arose at the instance of a duchess, who sought to prevent the duke from revealing her private life to a newspaper, no doubt for the titillation of its readers (who could have been expected to show the usual curiosity in the love life of the aristocracy). In this case, the marriage had ended, but it was held that the privilege extended retrospectively to communications made during the marriage when it subsisted. It was also suggested in this salacious case that the privilege would apply only where the plaintiff herself had been equally scrupulous in not disclosing her husband's communications. While the duchess was no Snow White, and had indeed published some articles on her husband's secrets, it was held that she was entitled to an injunction because the husband proposed to disclose much more intimate confidences, so that, according to the judge, his breaches of confidence would have been 'of an altogether different order of perfidy'.

1. *Argyll v. Argyll* [1967] Ch. 302.

## V. Contract

169. Formerly, a married woman could not enter into a contract. Now, however, she has complete autonomy as if she were a single woman. There is no requirement, as in most European countries, that she requires her husband's consent to transactions of an important nature, or which affect a sizeable proportion of the matrimonial property. This is the logical consequence of the fact that the matrimonial property regime is separation of property.<sup>1</sup>

1. See below, Part III, Matrimonial Property Law.

## VI. Tort

170. *Tort*, a Norman-French word meaning 'wrong', is in Australian law, a breach of a duty owed to one's neighbour, and redressable by a civil action for compensation. The most common tort is negligence – other torts are defamation, trespass, false imprisonment, nuisance.

At common law, since the husband and wife were deemed to be one person, it was impossible for either to commit a tort against the other. This rule has now been abolished.<sup>1</sup>

1. *Family Law Act* 1975, S. 119.

## VII. Criminal Law

171. Where two people conspire together to commit a crime (even though the crime is ultimately not committed) they are guilty of the crime of *conspiracy*. A husband and wife cannot be guilty of conspiracy.

At common law, neither spouse could commit theft of the other's property. This rule is now changed, and either party may be convicted of committing an offence against the other's property.

## VIII. Duty to maintain<sup>1</sup>

172. There is at common law a duty on a husband to maintain his wife. And statutes have also placed a duty on the wife to maintain her husband. A parent is under a statutory duty to maintain his or her child, although there is doubt whether the parent was under such a duty at common law.

There is, however, in Australian law, no duty to maintain other relatives. Thus, there is no legal obligation on a son to maintain his aged parents. Nor is there any duty on grandparents to support their grandchild, even if the child's parents are dead, unless the grandparents become 'guardians' of the child.

1. See further, Part III, Matrimonial Property Law.

## §5. VOID AND VOIDABLE MARRIAGES

173. In Australia, 'voidable' marriages were abolished in 1975.<sup>1</sup> Now, a marriage is either valid or void. The grounds for a void marriage are as follows:

- a) Prior marriage ('bigamy')
- b) Consanguinity
- c) Failure to observe a necessary formality
- d) Lack of consent
- e) Non-age.

These grounds have already been considered.<sup>2</sup>

An application may be made for annulment of a marriage. Despite the fact that the marriage is declared to be void, the *Family Court* still has jurisdiction to determine ancillary matters, such as custody of children, maintenance and matrimonial property.<sup>3</sup>

The court cannot hear an application for divorce unless it was first determined that there is a valid marriage. Accordingly, where is any doubt about the validity of the marriage, the court must consider this issue first, even though both parties may be seeking a divorce.<sup>4</sup>

For the effect of a void marriage on the status of children born to the parties to it, see below.<sup>5</sup>

1. *Family Law Act 1975*, S. 51.
2. *See above*, Capacity to Marry/Formalities of Marriage.
3. *Family Law Act 1975*, S. 71.
4. *Ibid*, S. 52.
5. *See below*, Chapter 4, Filiation.

## Chapter 2. Divorce

### §1. GROUNDS

174. Where a marriage breaks down in Australia, it is not difficult to obtain a divorce. The only requirements are that the husband and wife must have lived separately and apart for 12 months before the application for divorce, and that there is no reasonable likelihood of a reconciliation.<sup>1</sup>

It is immaterial whether the decision to separate was mutual or the wish of one spouse only. But occasionally difficulties arise when the initial separation was made without the intention of its being permanent. A good example is where the husband goes abroad on a business trip for, say, three months. Suppose he falls in love with another woman, and writes to his wife saying that he wants a divorce. The period of 12 months' separation begins, not from the date that he left for overseas, but from the date when he forms the intention to terminate his marriage.<sup>2</sup>

Somewhat unfairly, this intention does not have to be communicated to his wife. But the Family Court will be rather reluctant to believe the husband's own uncorroborated statement that he formed an intention on a particular date, so that a letter will usually be the best evidence of this.

1. *Family Law Act 1975*, S. 48.
2. *In the Marriage of Tye* (1976) 9 ALR 529; (1976) FLC 90–028.

175. It is possible, in some circumstances, for the husband and wife to be regarded as living separately although they live under the same roof. In effect, they must be living separate lives, but a minimum of contact is permitted. For example, they may have talked to each other occasionally, perhaps about their children's well-being. The law specifically provides that one spouse might still do some household chores for the other, and yet be regarded as living separately.<sup>1</sup> But simply sleeping in separate bedrooms is not enough. The fact that they do not have sexual intercourse does not of itself mean that the husband and wife are living separately; conversely, occasional sexual intercourse does not mean that they are living together. It is really a question of the degree of togetherness.<sup>2</sup> It is as well to have corroborating evidence apart from the statements of the spouses. In practice, a decision may depend even on the predilection of the particular judge.

1. *Family Law Act 1975*, S. 49(2).
2. See *In the Marriage of Pavey* (1976) 10 ALR 259; (1976) FLC 90-051. This should be compared with a *bona fide* domestic situation in the *Social Security Act 1947* (Cth). The question of proving whether a couple who share some aspects of their lives but not all, are to be seen as cohabiting, arises in a number of settings, because of its legal connotations. At times it can be advantageous to prove separation e.g., with regard to a desired divorce, or in establishing eligibility for certain social security benefits, such as Sole Parents Benefit. At other times, a couple, or one of them, may want to prove that there *is* cohabitation, for example, the party who wants to delay the divorce, or a couple desirous of obtaining a spouse allowance in Workers Compensation payments.

176. Trial separations, however, are permitted under some circumstances. Suppose a couple split up, and live apart for three months. They then decide to try to give the marriage another try, and the husband moves back into the matrimonial home. Unfortunately, the trial fails and the husband moves out a month later. In this case the period before the separation and that after it can be accumulated.<sup>1</sup> As soon as, cumulatively, they amount to twelve months, either spouse may apply for a divorce. But they cannot keep on attempting trial separations. The *Family Law Act* allows only one trial period to be discounted.<sup>2</sup>

1. *Family Law Act* 1975, S. 50(1).
2. *Ibid.* See *In the Marriage of Keyssner* (1976) 11 FLR 542.

177. In practice, very few cases of divorce are disputed. This is quite different from the position in Australia before 1976, and it is quite different from that in many countries today, where difficult questions of adultery, cruelty and desertion might be disputed in court.<sup>1</sup>

1. See H.A. Finlay, 'Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce', (1978) 94 *Law Quarterly Review* 120.

## §2. PROCEDURE

178. In order to institute proceedings for divorce, there must be a connection with Australia. Otherwise, forum-shopping would be possible. People could come to Australia from countries with strict, or no, divorce laws to take advantage of the liberality of the Australian law.

As has been seen, however, the jurisdictional connection with Australia has itself been considerably liberalized.<sup>1</sup> Proceedings for a dissolution of marriage may be instituted if *either* party to the marriage (i.e., the applicant or the respondent) is: an Australian citizen or domiciled in Australia or ordinarily resident in Australia (one year is required).<sup>2</sup>

1. See above, p. 74.
2. *Family Law Act* 1975, S. 39.

179. Proceedings for divorce are instituted by an application. Either party may apply, or they may apply jointly. A wish by both parties to be divorced emphasizes the non-adversarial nature of the process. Indeed, cases in the Family Court are titled, *In the Marriage of X*, or *X and X*, as opposed to the normal *versus* (v.) between parties in civil and criminal proceedings, e.g., *Donaghue v. Stevenson*.

Principal proceedings for the dissolution itself are invariably held separately from those relating to ancillary relief (maintenance, property, custody) and are usually very straightforward and peremptory. If there are no children under 18, it is possible to obtain a divorce by post, without the need for the parties or their legal representatives to present at the hearing. The judge, however, must formally pronounce the decree *nisi* in open court.

Divorce proceedings, like other Family Court hearings, are open to the public, but cannot be reported in the press, without the permission of the court. If they raise a point of interest, they may be reported in the law reports.

## §3. EFFECTS OF DIVORCE

## I. Legal Effects

180. When a divorce is granted, the spouses may not remarry immediately. They must wait a month and a day. For the decree granted initially is a decree *nisi*, which does not usually become absolute until after that period;<sup>1</sup> *nisi* means (in Latin) ‘unless’. The idea behind this is that in some cases the spouses might repent their action, and become reconciled during that month. Or, occasionally, it may happen that evidence comes to light which shows that false testimony was presented to the court. This could arise when one spouse, but not the other, has second thoughts and regrets agreeing to some convenient action. In practice, it is rare that the decree absolute is refused, and indeed, in matters of urgency, it can be brought forward.

But the decree cannot be made absolute unless the judge is satisfied with the arrangements made for the children.<sup>2</sup> Unhappily, this provision, which on paper seems to provide a great measure of protection of children’s interests, is in practice rather toothless. It has become a mere formality. If both parents indicate that they are satisfied with the children’s arrangements and there is no contrary evidence it is unlikely that the judge will raise objections.

1. *Family Law Act 1975*, S. 55.
2. *Family Law Act 1975*, S. 55A. There is a provision in S. 55A(2) for the court to adjourn the proceedings pending the provision of a welfare report.

181. Pressure on counselling services means that they are used mainly when the parties are in dispute. This is logical in a court that is adjudicating between spouses, but it emphasizes the secondary nature of intervention purely in the interests of the child’s welfare.

If the couple has been married less than two years counselling is required before a divorce can be granted, unless this requirement is waived by the judge.<sup>1</sup> It should be noted that if a divorce is the only concern of the couple and there are no disputes as to maintenance, property or custody, they can be encouraged to use a self-help kit obtainable at the Registry of any Family Court.

1. A certificate from a counselling agency is required by S. 44(1B). The agency’s policy may be to insist on seeing the spouses together or they may agree to separate interviews. What the agency must attest is that reconciliation has been considered by the parties.

182. Although getting a divorce is simple, lawyers are still very much involved in the divorce. Great problems can arise in connection with what is called ‘ancillary relief’. By ancillary relief (which is not a happy phrase, for it concerns matters of great importance) is meant issues of maintenance, property and custody of children. All these matters can give rise to lengthy and bitter disputes and, in fact, occupy the courts to a far greater extent than divorce actions.

All these matters are dealt with separately in different parts of this book.

183. The consequence of the introduction of no-fault divorce in 1975 has been that the divorce rate has increased enormously.

Today, two in five Australian marriages end in divorce. Strangely enough, however, the popularity of marriage has hardly been affected. The statistics reveal that the vast majority of divorcees remarry. They do not take notice of Dr. Johnson, who, on being informed that a man who had had an unhappy marriage was about to remarry only a short time after his wife's death, opined: 'Sir, that is the triumph of hope over experience'.

What have been the consequences of this vast increase in the divorce rate?

## II. A Rise in Blended Families

184. 'The blended family' has become a term of art in Australia. It refers to a family which consists of the children of more than one spouse, living together. The writer has two friends, married to each other, who have each been divorced. Their family consists of five children: two are the wife's from her first marriage; two are the husband's from his first marriage; the fifth is a joint venture!

This has seemingly led to an increase in the abuse of children.<sup>1</sup> It has been reliably shown that a great deal of child abuse is inflicted by step-fathers and *de facto* husbands on the children of their partner. Because the relationship is not incestuous, sexual abuse of step-daughters, particularly, is apt to occur in these circumstances. The apparently considerable recent rise in child abuse cases has been attributed to the rise of divorce. It is, of course, arguable that child abuse has not in fact been rising, but rather that its detection is now more efficient. All evidence, however, suggests that the number of cases detected represents only a small proportion of actual instances.

In addition, it is often claimed that the traumas suffered by children when their parents divorce are directly or indirectly responsible for the increase in juvenile crime that appears to be endemic in all Western societies.<sup>2</sup>

1. For an excellent description of all aspects of child abuse in Australia, see C. Goddard, *Child Abuse and Child Protection* (Melbourne, Churchill Livingstone, 1996).
2. See the various USA studies of J. Wallerstein and J. Kelly. See also A. Mitchell, 'Children's Experiences of Divorce' (1988) 18 *Family Law* 460; K. Funder and S. Kinsella, 'Divorce, Change and Children' (1991) 30 *Family Matters* 20.

## III. A Rise in Bitterly Contested Ancillary Matters

185. There is a theory that the removal of matrimonial fault from the statute book has meant that embittered spouses have felt deprived of their opportunity to vent their anger in the court room. Principal relief being granted regardless of fault, they have transferred their thirst for emotional vengeance to the ancillary proceedings. Therefore, property, maintenance and most unfortunately of all, custody cases, have become more bitterly fought.

This theory tends to be countered by the fact that, in ancillary matters too, a high degree of emotional anger is today not encouraged. The whole focus is on trying to terminate the marriage in a civilized way, so that future relations will not be too bitter. This policy is reflected throughout the 'pre-trial' procedures, where a conciliatory attitude is encouraged by registrars.<sup>1</sup>

1. For the role of registrars and court counsellors in the Family Court of Australia, *see above*, General Introduction.

186. The reports of Family Law cases seem to grow and grow. The problems have proliferated as society has become more complex. New species of property, such as pension rights, rights in discretionary trusts, even the 'right' to a job, have created new problems. The rise of the middle-aged female student (often a divorcee), which all tertiary teachers will have observed, exemplifies the new approach to the married woman's role in society. No longer can she be content to be an 'alimony drone', relying on her husband's financial support as a meal-ticket for life.

#### IV. A Rise in Social Security Benefits

187. The increase of divorces has led to wives and children being left without home or the security of a regular income from a male breadwinner. Maintenance awards tend to be low, and often remain unpaid. If the husband remarries, his income may not be large enough to support both his first and second families, and he will naturally tend to prefer the new one. The wife is inevitably forced to rely on state benefits. These have escalated to huge proportions in Australia, and many people protest about having to 'subsidize broken marriages' through higher taxes.

Those are a few of the social problems consequent on a high rate of divorce.

The common law notion that a man must support his wife for life took a battering in the *Family Law Act*. Ex-wives were being encouraged to become independent, to seek employment, rather than to rely on ex-husbands to maintain them. Especially where the marriage had been short-lived, maintenance has not been awarded.

The Australian legislation expressly states that maintenance should be based on need.<sup>1</sup> The matrimonial fault of the parties is irrelevant to an award. Conduct is not to be taken into account even in 'gross and obvious' cases, when, in England, fault is relevant.<sup>2</sup> There is, perhaps, only one exception to that: where the misconduct directly results in a diminution of assets, or has caused injury to the wife which has increased her need for maintenance.<sup>3</sup> Where, therefore, an alcoholic husband made an almost murderous assault on the wife, he was required to pay sufficient 'maintenance' to cover her medical expenses.<sup>4</sup>

The philosophy of the Australian legislation is to encourage parties to come to their own arrangements. Maintenance agreements are frequent.<sup>5</sup> The registrars of the court are constantly in action to assist the parties to reach an agreement. The agreement, however, should be sanctioned by the judge. It then has the status of a court order and can be enforced through the court's processes. The 'clean break' policy (i.e., to arrive at a solution which does not require the parties to litigate further) was formerly carried to such extremes that maintenance agreements were never varied. But later an amendment to the statutory provisions widened the court's powers to vary even a sanctioned agreement, so as to avoid injustice.<sup>6</sup>

There are now signs that spousal maintenance is regaining some credibility, as a relatively high unemployment rate has made it more difficult for ex-wives to obtain regular employment.<sup>7</sup>

1. *Family Law Act 1975*, S. 72.
2. See *Soblusky and Soblusky* (1976) FLC 90–124, rejecting the English decision *Wachtel v. Wachtel* [1973] Fam 72.
3. See *Krotofil and Krotofil* (1980) FLC 90–909.
4. *Barkley and Barkley* (1976) 1 Fam LR 11, 554.
5. See below, Part III, Matrimonial Property Law.
6. See below, pp. 168–169.
7. See *Lowe and Harrington* (1995) 18 Fam LR 743.

188. Perhaps in no other area has the divorce increase been more productive of new principles than in that of matrimonial property.<sup>1</sup> A whole new jurisprudence has built up in the last few years.

The distribution on divorce of the assets accumulated during the marriage calls into play the perennially fascinating juristic dilemma of justice v. certainty. At present, Australia has a system which gives a judge complete discretion to distribute the assets of either party (whether separately or jointly owned) in a just and equitable way. True, there are some expressed criteria, but these are only factors to be taken into consideration, and do not give the judge any order of priority. Indeed, as in custody cases, the High Court of Australia has held that the judge's complete discretion is not to be fettered by any presumption, say, that a 50:50 split should be applied except in special circumstances. No! The judge has *carte blanche*.<sup>2</sup>

Many of the problems which have arisen concern the 'new property' – a term coined by the American, Charles Reich, and well applied by Mary Ann Glendon,<sup>3</sup> to describe the kind of intangible, incorporeal assets which, in many families, exceed in value visible, real or personal property. Pension rights, rights under superannuation schemes, even the qualifications for a job, are within this category. If a woman goes to work to put her husband through Law School, (which is very common, for instance, in North America) does she have an interest in his future earnings, which should be compensated if he divorces her?

Superannuation schemes give great difficulty because the benefits are usually not immediately realizable. But the benefits are no more than deferred earnings and thus assets acquired during the marriage. Several intriguing solutions have been provided, but all do acknowledge that a non-contributing spouse is nevertheless entitled to some benefits, on the basis that her (or his?) contribution was in a form other than money and enabled him to go to work.<sup>4</sup>

1. See below, Part III, Matrimonial Property.
2. *Mallet v. Mallet* (1984) 156 CLR 505.
3. M.A. Glendon, *The New Family and the New Property* (1981).
4. See below, p. 175.

189. Several problems arise when ingenious schemes are concocted which serve the purpose of depriving the Family Court of matrimonial assets for distribution on divorce.

The most usual of these subterfuges is the family company. The husband puts all his money into a company, which, according to hallowed common law principles, has a personality separate from the human beings of whom it is composed. The husband usually exercises control of this company. Frequently, such schemes are entered into for tax avoidance purposes. But it did not take long for lawyers to

realize that they could be used to avoid the jurisdiction of the Family Court on the basis that the assets of the company belonged neither to the husband nor to the wife.

Another popular scheme involves a discretionary trust, sometimes with the husband as sole trustee for himself, and members of his family as beneficiaries. Since the trustees have a discretion, it was successfully argued at first that the beneficiary had no asset worthy to be classified as 'property', but merely a *spes*, or expectation of an asset.

The history of this branch of law reveals a gradual ascendancy of the Family Court in the battle to 'pierce the veil' of the companies, and generally to acquire jurisdiction over assets which in practice are enjoyed by the parties.<sup>1</sup>

1. *See below*, Part III, Matrimonial Property.

## **V. Conclusion**

*190.* The eternal fascination of Family Law is that it deals with human vicissitudes, human frailty and the follies of mankind. It is a discipline concerned with people.

The subject rarely palls. There is infinite fascination in its variegated tapestry of human interrelationships.

What seems to be emerging, in the common law world at least, is a trend towards perceiving the lawyer as one of a team of helping professions. He is becoming more of a counsellor than an advocate, as the adversary system is seen to be more and more inappropriate to the problems of unhappy marriages.<sup>1</sup>

1. The rise of non-adversarial methods of dispute resolution in Australian family law is hastening this trend. *Cf.*, T. Altobelli, 'Family Lawyers as Mediators' (1995) 9 *Aust J of Family Law* 222.

## Part III. Matrimonial Property Law

### Chapter 1. Matrimonial Property

#### §1. INTRODUCTION

358. Matrimonial property in common law countries is governed by quite different principles from those of the civil law. Australia is no exception. (New Zealand, on the other hand, has adopted some aspects of the civil law. For example, a form of community of property exists there.)

The main difference emanates from the fact that the common law has never laid down in code form a catalogue of the rights and obligations of spouses. The dominant philosophy is that each family is different, and that husbands and wives should be free to regulate their lives in an ongoing marriage as they think fit. Indeed, at common law, there is a presumption that an agreement between family members is not intended to be legally binding, i.e., is not a legal contract.

There is no law requiring a husband to pay a specific amount to his wife for housekeeping purposes. At common law, a husband was obliged to maintain his wife. But this was a duty of imperfect obligation. It was not possible to enforce it, unless the parties were separated. In an ongoing marriage, housekeeping and other allowances are a matter for the individual parties to determine.

The dominant philosophy of the common law was that husband and wife are one person in law. While there has been modification of this artificial doctrine in relation to domestic violence, on the whole it is true to say that the rights and obligations of spouses are far less stringently controlled by Australian law than in civil law countries.<sup>1</sup>

1. *See above* Part II, Chapter 1 §4, Effects of Marriage.

359. The general rule is that husbands and wives are free to own property, either singly or jointly, as they think fit. This includes the matrimonial home. They are free to make transactions between themselves. They are free to enter into transactions with third parties without reference to the other spouse's wishes or interests.

It is only when a marriage breaks down that the courts will interfere. Often they have the impossible task of giving legal meaning to transactions which were concluded, and arrangements made, quite informally – without heed of legal consequences.

A corollary to the unity of spouses doctrine is that a pre-nuptial agreement is not binding. Indeed it is void in Australian law.

Ironically, however, an agreement between cohabitants is valid, and, indeed, in some states, encouraged.<sup>1</sup>

1. See above Part II, Chapter 3, Cohabitation Without Marriage.

## §2. PROPERTY REGIME DURING MARRIAGE AND COHABITATION

360. Australia espouses separation of property as the legal regime between spouses during marriage.

But on termination of marriage, a discretionary regime applies.<sup>1</sup>

Since 1983, it is now possible to seek relief under the discretionary provisions of the *Family Law Act* even before divorce, by virtue of a newly created matrimonial cause.<sup>2</sup>

But it is still important to consider the separate property laws which, for the most part, rest on a strict conception of *proprietary rights*, for these reasons:

1. They apply during the subsistence of the marriage – before any dispute.
2. They apply to third parties' rights *vis-à-vis* the spouses (including creditors).
3. They are applicable to *de facto* spouses, insofar as legislation is inapplicable in some states now, in other states limited in scope.<sup>3</sup>
4. They apply to disputes after death.

Property laws apply in full strictness. Some state legislation requires state courts to 'make such order as it should think fit'. This, however, has been held not to allow 'palm tree justice'.<sup>4</sup>

The common law treats spouses as if they were strangers. But there are ways in which *equity* may assist a spouse, or a *de facto* spouse.

The presumption of advancement applies where the husband places property in the wife's name, using his own money – or in joint names. It is presumed to be a *gift*.

But where the *wife* puts property in her husband's name, there is the *usual* presumption of a *resulting trust*. That is, the wife is deemed not to have surrendered her beneficial interest, and her husband holds the legal title on trust for her.

These presumptions can be rebutted by evidence of a contrary intention.

The resulting trust normally applies to property to which the parties have contributed – if in equal shares then they usually hold it beneficially, as 'joint tenants'. But if they have unequal shares, usually, in proportion to their contribution to the purchase price, they hold as 'tenants in common'.

1. *Family Law Act* 1975, S. 79.
2. *Id.*, S. 4.
3. See Part II, Chapter 3, Cohabitation without Marriage.
4. See *Wirth v. Wirth* (1956) 98 CLR 225.

361. The presumption of advancement is also applicable to transactions involving father/child and fiancé/fiancée.<sup>1</sup> But it is *not* applicable to *de facto spouses*.<sup>2</sup> The case of *Calverley v. Green* shows the application of the presumption to *de facto*

spouses (cohabitants). A house was bought for \$27,000. Mr. Calverley provided one-third of the purchase price. The rest was taken on mortgage in the joint liability. The mortgage required Ms. Green to sign the document in order to get the mortgage. Therefore the house was taken in joint names. Five years later, the relationship broke up. What was the extent of Ms. Green's share?

It was held that a trust was created. Mr. Calverley and Ms. Green were trustees.

The presumption of resulting trust applied. It was held that the presumption of advancement did not apply to this relationship. Therefore Ms. Green did not get the whole beneficial interest. Nor did she get two-thirds. But she did get one-third – for the High Court of Australia held that her *commitment* to pay this mortgage operated under the presumption of a resulting trust to give her a share, ie one-third. It did not matter that the *de facto* wife might not have paid half of the mortgage moneys – the *undertaking* to do so was tantamount to an assumption under the doctrine of resulting trust.

This case has been much criticized<sup>3</sup> on the basis that the *de facto* wife's name was on the mortgage only as a formality.

1. See *Wirth v. Wirth* (1956) 98 CLR 225.
2. *Calverley v. Green*, (1984) 155 CLR 242.
3. D. Kovacs, *Family Property Proceedings* (Sydney, Butterworths, 1992) pp. 275–284.

362. If a common interest is clear, it will bind. That is, it defeats any presumptions of law. It may, as it were, cut through the apparent ownership that the title proclaims. And this again is on the basis of a *trust*.

*Express intention* will clearly be determinative. But this is rare. 'The conception of a normal married couple spending the long winter evenings hammering out agreement about their possessions appears grotesque.'<sup>1</sup>

Because husbands and wives rarely take the same care as businessmen to record their property transactions, the law cannot adjudicate on their property rights as if they were strangers.

It may not be as rare as it once was, however, especially with second marriages. Whereas an ante-nuptial agreement is void, as between spouses, it is valid as between *de facto* spouses, and indeed encouraged by legislation.<sup>2</sup> And property bought subsequent to the marriage could be the subject of a valid agreement.

1. Per Lord Hodson in *Pettitt v. Pettitt* [1970] AC 777, 810.
2. See above Part II, Chapter 3, Cohabitation without Marriage.

363. Intention can be inferred from conduct. Until recently, proof of this was difficult. In effect, the courts generally would infer it only from the financial contributions of the parties at the time of the purchase, and even then only on clear evidence.

But in the English case, *Grant v. Edwards*,<sup>1</sup> it was held that an intention need *not* be common, but could be unilateral. Here, the *de facto* husband said to his partner, 'You can have half the house'. He never intended this, however. And his partner did not discuss the matter. But it was held that he was *estopped* from denying his intention.

It is not correct to call this a *constructive trust*, though some judges do so. It is a *resulting trust* – although not in writing.

1. [1986] Ch 638.

364. This English case has been followed by Australian courts. In *Green v. Green*,<sup>1</sup> Mr. Green had one wife, and two mistresses. He played each one off against the others. One of his mistresses was a Thai woman with no English. Together they found a house. He said to her, 'This is your house. I bought it for you.' But he placed it in his own name, for taxation purposes, so he said. Later they exchanged houses. But, again, he told her that it was hers. And he instructed solicitors to transfer the title. But it was never done. When he died, the question arose, was *she* the owner of either house? It was held that *Grant v. Edwards* was applicable. There were two requirements – (1) there must be an intention [Gleeson CJ said *common* but that is not necessary]; (2) the other party must have acted to her detriment.

This is an example of estoppel.

But what was the *detriment*? It was argued by counsel for the husband's personal representatives that she actually obtained a *benefit* from being remarried – she was able to escape from insalubrious Bangkok to beautiful Sydney – and she should have been grateful for that! Gleeson CJ thought, however, the detriment was that the man had persuaded her *not* to return home and not to have children. It was held (Maloney JA dissenting) that the intention was that they were beneficial owners, entitled to the second property as joint tenants. 'Equality is equity'. Therefore, when the man died, she took the whole on survivorship.

*Green v. Green* blurs the concepts of resulting and constructive trust.

1. (1989) 17 NSWLR 349.

365. The genuine constructive trust arises not from intention but is *imposed* on the basis that it would be unjust, or 'unconscionable', not to impose one.

It really has been given its imprimatur by the High Court in two important cases, *Muschinski v. Dodds*<sup>1</sup> and *Baumgartner v. Baumgartner*.<sup>2</sup>

In *Muschinski v. Dodds*, Mr. Dodds and Mrs. Muschinski were *de facto* spouses. They bought land for \$20,000. Mrs. Muschinski provided the whole of that. But it was put in joint names and held as tenants in common. Mr. Dodds intended to pay for a prefabricated house and make other improvements so that they would own the land and the house in equal shares. But he was refused permission to build. The relationship broke up.

In effect the contributions had been in the ratio 10:1 in Mrs. Muschinski's favour. It was held that:

1. The presumptions of resulting trust and advancement were inapplicable – there was sufficient concrete evidence for them not to be needed.
2. The intention was clearly to own equally.
3. It would be unconscionable for Mr. Dodds to retain his half of the property, despite the fact that this had been their common intention.

The result was that the proceeds of sale should be split:

1. Mrs. Muschinski and Mr. Dodds should be repaid their (10:1) actual contributions.
2. Any *surplus* (profit) should be divided 50:50.

It is to be noted that the constructive trust was used to *defeat* the parties' intention.

1. (1985) 160 CLR 583.
2. (1987) 164 CLR 137.

366. In *Baumgartner v. Baumgartner*, the parties lived together as cohabitants for four years. They had two children. The *de facto* husband bought land in his own name, and built a house on it. Both parties pooled their earnings – and both worked. But, as in most cases, there were no clear intentions at the time of purchase. Some of the joint moneys were used to pay the mortgage. On the split-up, the husband claimed the whole beneficial interest. The court held that a constructive trust would be imposed, on the basis of fairness. 'Equality is equity'. But still the husband was granted 55 per cent.

This decision can be criticized from different angles. In the first place, it definitely defeated the intentions of the parties. Secondly, there did not seem to be any detriment suffered by the wife (at least, non was adverted to). Thirdly, from the point of the wife, it could be argued that the *prima facie* 50:50 split should not have been deviated from.

It is to be observed that the concept of 'equity is equality' has been expressly discredited by the High Court in the case of husband and wife.<sup>1</sup> One commentator has referred to the majority of the High Court as 'using a sledge hammer to crack a walnut'.<sup>2</sup>

1. *Mallet v. Mallet* (1984) 156 CLR 605; *see below*, p. 173.
2. D. Kovacs, *op. cit.* 287.

367. In *Miller v. Sutherland*<sup>1</sup> a constructive trust was imposed, despite the fact that there was no pooling of resources. The *de facto* wife's father did substantial work on the house (in the *de facto* husband's name). She did some gardening and decorating. It was held that these factors gave her a quarter interest in the property.

1. (1991) DFC 95–102.

368. The requirements of the constructive trust appear to be these:

1. A family relationship;
2. Property acquired for that relationship;
3. No contrary interpretation of the actions of the party claiming an interest (i.e., no specific repudiation of the constructive trust application);
4. It would be unconscionable not to recognize the trust.

It is somewhat difficult to decide whether *detriment* remains an ingredient. *Green and Green* and some other cases suggest that it does, but it is hard to find detriment in *Baumgartner v. Baumgartner* itself.

It is also not clear whether the *Baumgartner* doctrine apply beyond *de facto* relationships. In *Balnaves and Balnaves*<sup>1</sup> the Full Court of the Family Court held that it applies to marriages. And in *Hammon v. O'Brien*,<sup>2</sup> McLelland J (NSW) assumed that it applied to a lesbian couple.

But in *Thwaites v. Ryan*,<sup>3</sup> Fullagar J confined the constructive trust doctrine to 'marriage-like relationships' – not to 'all cohabitants or all Freemasons'.

It is not clear whether the doctrine of constructive trust applies to assets beyond real estate. There seems no reason in principle why it should not do so. There is some doubt whether pooling of incomes is required. In *Tory v. Jones*,<sup>4</sup> Powell J said that it was. But in *Miller v. Sutherland*,<sup>5</sup> none existed.

The doctrine probably applies to non-financial contributions.<sup>6</sup>

1. (1988) 14 *Fam LR* 488.
2. (1990) DFC 95–091.
3. [1984] VR 65.
4. (1990) DFC 95–095.
5. *Supra*.
6. *Green v. Green, supra*.

369. It is possible that the expansion of an equitable doctrine called promissory estoppel<sup>1</sup> will allow promises even unsupported by consideration to be enforced. Perhaps mere acquiescence by the *de facto* husband in the idea that the *de facto* wife will acquire an interest might suffice to prevent him from denying an intention.

Contractual remedies, however, may be subject to the overriding common law principle of *Balfour v. Balfour*,<sup>2</sup> that domestic arrangements are presumed not to be intended as binding contracts.

*Woodward v. Johnston*<sup>3</sup> is an example. There was an arrangement whereby a woman would help in the restoration of a barge, in return for a promise of a 10 per cent interest in her *de facto* husband's dredging business. Carper J, of the Supreme Court of Queensland, held that this was not a binding contract but a 'purely family arrangement'.

But nevertheless a constructive trust was imposed.

1. Developed in *Walton Stores v. Maher* (1988) 164 CLR 387 and *Commonwealth v. Verwagen* (1990) 64 ALJR 540.
2. [1919] 2 KB 571.
3. (1981) 14 *Fam LR* 828.

370. There is still some doubt whether a contract between cohabitants is against public policy on the ground of immorality. *Hagenfelds v. Saffron*<sup>1</sup> suggests that in New South Wales it might be. But this is against the flow of all authority elsewhere.<sup>2</sup>

Legislation specifically governing property disputes of cohabitants operates in some jurisdictions. These statutes grant *de facto* spouses greater, and more concrete, rights and remedies than they have at common law. It supplements, rather than supplants, the developments discussed above.<sup>3</sup>

1. (1986) DFC 95–025.

2. See *Andrews v. Parker* [1973] Qd R 93, in which it was held that modern standards of morality did not disfavour cohabitation. At present, approximately 10 per cent of all men and women living together are in a *de facto* cohabitation rather than a marriage.
3. This legislation is discussed in Part II, Chapter 3, Cohabitation without Marriage.

### §3. PROPERTY AND MAINTENANCE AGREEMENTS

371. For many reasons, the wisest course for separating spouses is to settle matrimonial property disputes without resort to litigation. The whole tenor of the *Family Law Act* is to encourage this. It also harmonizes with a break principle known as the ‘clean break’.<sup>1</sup>

But this philosophy is less dominant than it used to be. Originally a property order of the Family Court could not be varied, save in very limited circumstances relating to a miscarriage of justice. This is no longer so.<sup>2</sup>

The most effective attack on the clean break principle has been the repeal of legislation which provided that a maintenance agreement, once approved,<sup>3</sup> could never be reviewed. It is now possible for such an agreement to be varied or discharged.

1. *Family Law Act* 1975, S. 81.
2. See below, pp. 176, 177.
3. Under *Family Law Act* 1975, S. 87.

372. ‘Maintenance agreement’ is defined in the *Family Law Act* 1975.<sup>1</sup> The term is a misnomer. It covers property as well as maintenance – and the vast part of agreements deal with property.

There are two types of agreement:

1. Under Section 86 of the Act;
2. Under Section 87 of the Act.

The distinction is that a Section 86 agreement may only be *registered* and could always be varied or set aside by consent. They are rarely used. A Section 87 agreement must be scrutinized by a judge, and formerly, was unable to be varied, even if the parties’ circumstances dramatically changed. Since the change in the law, Section 87 agreements have become less common. They used to be almost universal.

It should be noted that it is possible to agree on a property/maintenance settlement without recourse to the court at all. But this has dangers. If it breaks down, there are no remedies for enforcement. And there then is a time limit for applying for a court order – twelve months after the decree absolute of divorce.<sup>2</sup>

This time limitation, however, is subject to the words, ‘except by leave of the court’.<sup>3</sup>

There are many cases on this Section. They seem to suggest that the former strong reluctance to grant permission has evaporated, and now it is more likely – another example of the retreat from the ‘clean break’ concept.

An agreement under Section 86 is comparatively rare, since it lacks all finality.

By contrast, Section 87 agreements are binding, and used to be very popular – indeed almost invariable. Once approved, it used to be that the agreement was absolutely final – it was a mechanism for achieving a permanent solution.

It has two advantages:

- a) It may contain clauses which the court does not have power or is reluctant to make. An example might be that maintenance would cease if the wife entered into a *de facto* relationship.
- b) It encourages conciliation and cooperation. Normally a common clause is ‘The [wife] accepts the terms of this agreement in full satisfaction of all her claims...’

1. Under *Family Law Act* 1975, S. 4.
2. *Id.*, S. 44(3).
3. *Ibid.*

373. Such an agreement must have the court’s approval. In *Wright and Wright*,<sup>1</sup> Watson J gave the rationale of the approval of a judge to be:

1. the possible lack of equal bargaining power, in the emotional turmoil;
2. the possible lack of knowledge of the other spouse’s resources;
3. the interests of children [perhaps the most important one];
4. the fact that the agreement is enforceable by a court.

The following should be taken into account in deciding whether to approve:

1. Has there been adequate disclosure of resources?
2. Is the agreement a fair adjustment?
3. Is it one which the court should enforce?
4. Do the parties have capacity to perform their obligations under it?
5. Are the minor children’s interests protected?
6. Do the parties fully understand it, and in particular that it is in substitution for their rights?

It might be thought that approval would be virtually automatic if both parties join in the application (as they must). But in *Lind and Lind*,<sup>2</sup> Lambert J refused to approve an agreement, despite the fact that both parties had had the benefit of full advice, on the ground that he had not been supplied with full information on the financial history of the parties.

1. (1977) 29 *FLR* 10.
2. (1980) 6 *Fam LR* 225.

374. The *Family Law Amendment Act* 1983, by negating the virtual irrevocability of agreements, has led to a reduction in Section 87 agreements.

A Section 87 agreement may now be overturned by the following. The power is discretionary. (a) Appeal against approval.<sup>1</sup> (b) Revocation of the approval:

- i) where there is a fraud on the court;<sup>2</sup>
- ii) where there is a fraud on one of the parties;
- iii) mutual wish to revoke;<sup>3</sup>
- iv) the agreement is void, voidable or unenforceable;<sup>4</sup>
- v) impracticability;<sup>5</sup>
- vi) termination.<sup>6</sup>

1. *Family Law Act* 1987, S. 87(3).
2. *Id.*, S. 87(8)(a).
3. *Id.*, S. 87(8)(b).
4. *Id.*, S. 87(8)(c).
5. *Id.*, S. 87(8)(d).
6. *Id.*, S. 87(11).

375. Unlike in most European countries, a pre-marital agreement setting out what will happen in the event of a divorce, is of no effect – indeed, it is void as against public policy. But such an agreement may be a factor in the exercise of the court’s discretion, if entered into in a country where such agreements are valid.<sup>1</sup>

1. *Cf.*, *Hannema and Hannema* (1981) 7 *Fam LR* 542, where the husband and wife had married in Indonesia.

#### §4. READJUSTMENT OF PROPERTY ON SEPARATION OR DIVORCE

376. The Family Court of Australia has power to readjust the interest in *all* property of the parties, whether solely or jointly owned, so as to do justice to the parties, and to the children.<sup>1</sup>

1. *Family Law Act* 1975, S. 79.

377. These factors should be noted:

1. This power may now be exercised in an independent cause of action, not necessarily ancillary to an application for principal relief.
2. The judge has a complete discretion to cut through existing property rights and reallocate them. It does not matter whether it was acquired before or after the marriage. These factors may, however, be relevant to the exercise of the discretion, especially on the question of *contribution*.
3. A settlement can be made for the benefit of a child. Unfortunately this is rare, although the existence of a minor child may have a bearing on the form of the order. For instance, it may not be desirable to make an order which removes the child from the security of his or her existing home or environment. Children are rarely, if ever, separately represented in matrimonial property issues.<sup>1</sup>
4. The jurisdiction does not extend to *de facto* spouses. But it may extend to ex-wives and -husbands, subject to time limitations of S. 44.<sup>2</sup>
5. Settlements can be varied, in circumstances slightly different from maintenance orders or agreements.

1. See above, Part II, Chapter 6, Parental Authority.
2. See above, p. 167.

378. ‘Property’ is defined in the *Family Law Act* as follows: “‘Property’, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.”<sup>1</sup>

The term ‘property’ is not limited to corporeal property.<sup>2</sup> The term has been given a very wide interpretation.

It includes shares, goodwill, trademarks, options, rights under contracts, interests in possession or reversion (and, probably, in remainder), and certain choses in action. It even includes a right to damages for an assault.<sup>3</sup>

Special difficulties have arisen with regard to certain species of property:

1. discretionary trusts;
2. companies, especially those set up for tax minimisation;
3. superannuation and long service leave entitlements.

1. *Family Law Act*, S. 4.
2. *Nelson and Nelson* (1977) 2 *Fam LR* 11, 628.
3. *Barkley and Barkley* (1976) 1 *Fam LR* 11, 554.

379. The Family Court’s attempts to deal with these items, and gradually extend its jurisdiction over them, will be dealt with later.<sup>1</sup> Essentially, however, it has been held that a beneficiary of a discretionary trust does not have a property interest, because he or she has a mere *expectation* that the trustees will favour him or her. The separate personality of a company has been recognized – so that even if the husband is the sole shareholder an order or injunction cannot be made against the *company*. Nevertheless, in certain circumstances, the Family Court may not be without all power over a company. Finally, an interest in a superannuation fund has been held to be a ‘financial resource’. Schemes differ, but usually the interest is *not* property because it is not certain to vest – the trustees have a discretion.<sup>2</sup>

1. See below, pp. 175–176.
2. Cf., *Crapp and Crapp* (1979) FLC 90–615; *Whitehead and Whitehead* (1979) 5 *Fam LR* 303.

380. Superannuation is property when it *vests* on death, and thus becomes part of a deceased spouse’s estate. It may therefore be available for reallocation<sup>1</sup> if the spouse dies while proceedings under Section 79 are pending.<sup>2</sup>

1. Under *Family Law Act* 1975, S. 79(8).
2. *Evans and Public Trustee* (WA) (1991) FLC 92–231. For a discussion of superannuation, see below, pp. 175–176.

381. The *Family Law Act* sets out matters to be taken into account by the Family Court in the exercise of its discretion.<sup>1</sup> Amongst these are the ‘financial resources’ of each party.<sup>2</sup> These may include interests which would not be classified as ‘property’ under Section 4 of the *Family Law Act*.

Although the court, therefore, cannot make an order directly reallocating or otherwise dealing with such an interest, it may make an order over *other* property

which takes this into account. Thus, with a superannuation interest – the court may take into account the expectation of the husband to receive a benefit in the future by ordering him to transfer his interest in the matrimonial home to the wife.

The Act states that the court shall take into account ‘the income, property and financial resources of each of the parties’. In *Kelly and Kelly*<sup>3</sup> the Full Court of the Family Court said that the words ‘financial resources’ must add some meaning not covered by the terms ‘income’ and ‘property’, so as to include benefits which a party was *likely* to receive, whether legally entitled to them or not. In that case it was held to include the assets of a family company and a trust in which the husband had no legal interest, but over which in fact he had full control.

1. *Family Law Act* 1975, SS. 75(2), 79.
2. *Id.*, S. 75(2)(b).
3. (1981) FLC 91–108.

382. Before an order under Section 79 can be made, the court must be aware of the value of all the property, usually at the time of the hearing. It often happens that the valuers for the wife and the husband reach different conclusions. In *Lineham and Lineham*<sup>1</sup> the Full Court stated the obvious – that in such a case it was a dereliction of the court’s duty to take a midway point between the two extremes. The court must take into account the reality of the situation – including such factors as the need for an expeditious sale, if that is a likely consequence of the court’s order.

Of course, the parties must make a full disclosure of their assets. Failure to do so may result in the court making an order detrimental to the offender. ‘The court should not be unduly cautious about making findings in favour of the innocent party.’<sup>2</sup>

It will also amount to fraud, justifying variation or rescission of the order.

The intrigues of the notorious Australian artist, Brett Whiteley, who died in mysterious circumstances in 1993, are documented in the law reports.<sup>3</sup> The case explores the difficulty of estimating the value of works of art.

1. (1987) FLC 91–814.
2. Per Full Court in *Weir and Weir* (1993) FLC 92–338.
3. *Whiteley and Whiteley* (1992) FLC 92–304. *See below*, p. 174.

## §5. ADJUDICATION OF PROPERTY DISPUTES

### I. Introduction

383. The extraordinarily wide discretion given to Family Court judges has been much criticized. But, it can be argued that it allows for flexibility lacking in rigid community property regimes. Provided that the adjudication process is in the hands of judges who are ‘by reason of training, experience and personality... suitable person(s) to deal with matters of family law’,<sup>1</sup> surely there is little likelihood of abuse. In practice, most resolutions are made by Judicial Registrars or Registrars. And, indeed, most matrimonial property settlements are the result of private ordering – bargaining in the shadow of the law.

Cries have therefore been heard for specific guidelines, so as to ensure a degree of predicability and uniformity.

1. *Family Law Act 1975*, S. 22.

384. There are, however, safeguards against complete arbitrariness:

1. The appellate process.
2. A corpus of decided cases.
3. Some guidance from the statute itself.

It must, however, be repeatedly emphasized that previous cases do not provide precedents. Moreover, the statute (which prescribes factors to be taken into account) merely provides guidance, since the weight to be attached to each factor and the priority of factors are not adumbrated. In *Mallet v. Mallet*<sup>1</sup> the High Court of Australia emphatically held that adjudication under Section 79 was discretionary.

1. (1984) 156 CLR 605.

385. It is, however, an improper exercise of discretion for a judge or other adjudicator completely to ignore a relevant factor.

The Act itself states the factors that shall be taken into account:<sup>1</sup>

- a) The financial contribution to the acquisition, conservation or improvement of any property. It may be direct or indirect.
- b) Any other non-financial contribution to the property.
- c) The contribution made to the welfare of the family (which, in this context, refers only to the nuclear family) in the capacity of homemaker or parent.
- d) The effect of any order on the earning capacity.
- e) The matters appropriate to a maintenance order so far as they are relevant.
- f) Any other order made under the Act.
- g) Child support obligations.

It has been held that matrimonial conduct *per se* is *not* to be taken into account.<sup>2</sup> But some conduct may be relevant in assessing not merely a party's contribution to the assets, but also to non-financial contribution to the welfare of the family, and to the quality of a person's capacity as homemaker or parent.<sup>3</sup>

1. *Family Law Act 1975*, S. 79(4).
2. *Soblusky and Soblusky* (1976) 2 *Fam LR* 11, 528; *Ferguson and Ferguson* (1978) 4 *Fam LR* 312.
3. *See below*, p. 175.

## II. General Approach

386. There are two major High Court of Australia cases, which are precedents, on the approach, *Norbis v. Norbis* and *Mallet v. Mallet*.

*Norbis v. Norbis*<sup>1</sup> emphasized that it was a mistake to make a punctilious examination of every single asset, so as to arrive at an exact quantification of the contribution of each party. Rather, the court should take a ‘global’ account.

1. (1986) 161 CLR 512.

387. The typical approach under Section 79 emerged from the early case of *Pottholf and Pottholf*,<sup>1</sup> where the husband built up a farm, while, for the most part, the wife stayed at home and carried out her duties as a mother, homemaker and worker on the farm ‘in an exemplary way’. The trial judge awarded 80 per cent to the husband; 20 per cent to the wife.

On appeal, Fogarty J said, ‘I must say for my own part that where a court . . . is dealing with jointly owned assets . . . in a marriage which has lasted for a number of years, equality is . . . at least the proper starting-point. One should then look to the particular circumstances of the individual case to see whether a change from that position is justified.’ In fact, the appeal was allowed – the wife was granted 40 per cent of the assets.

This approach (equality as a starting point) often resulted in the wife getting a 60:40 advantage, on the basis that the husband in the future was likely to earn more. It was almost universally adopted, as a basis for a settlement.

But in 1984, the High Court of Australia, in the leading case, *Mallet v. Mallet*,<sup>2</sup> categorically rejected it, as a ‘misconception’. In particular, the High Court emphasized the need for a careful analysis of a non-working spouse’s contribution as homemaker.

1. (1978) 4 Fam LR 267.
2. (1984) 156 CLR 605.

388. Contributions must be taken into account.

Contributions may be either financial or non-financial. They may not necessarily come from the parties themselves. A parent may make a contribution, either financial (as a gift) or non-financial (for instance as working on the property).

Gifts on marriage have traditionally caused problems. At common law, in the absence of an express intention, gifts originating from one side of the family or from friends were presumed to be intended for the spouse who belonged to that side of the family, or was a friend of the donor.<sup>1</sup>

The case of *Gosper and Gosper*<sup>2</sup> suggests that this presumption should apply to gifts as a contribution to the total property. But if the marriage is of long duration, the gift may be merged into the general pool of family assets, on the global approach.

1. *Samson v. Samson* [1960] 1 WLR 190.
2. (1987) FLC 91–818.

389. Windfalls have caused difficulties. In one case,<sup>1</sup> a Lotto win of \$700,000 on a ticket solely bought by the wife shortly before the break-up of the marriage, was held to be a contribution of the wife, despite the fact that she exhibited no skill in obtaining this money. But contrast the case of *McTaggart and McTaggart*<sup>2</sup> where it was held that a windfall that occurred during a marriage was not a contribution by either party.

1. *Holmes and Holmes* (1990) FLC 92–181.
2. (1988) FLC 91–920.

390. Inheritances are generally regarded as a contribution by the spouse to whom the inheritance fell due. But much might depend on the length of the marriage and the relationship of the non-related spouse to the deceased.

391. Whose name property is in is sometimes relevant in demonstrating the contribution of that person. But it in no way prevents the court from allocating it, or the proceeds of sale, to the other party on settlement, or from otherwise dealing with it.

392. Non-financial contributions are more difficult to assess. Originally, the *Family Law Act* required that there be a nexus between the contribution and the particular asset. But the Act in 1983 was amended so as to allow contributions to the general welfare of the family to be taken into account. The case of *Whiteley and Whiteley*,<sup>1</sup> an intriguing case in all respects, shows how a non-financial contribution can actually be made to the acquisition or improvement of an asset. The artist Brett Whiteley's wife, who was formerly his model, claimed that her non-financial contribution to his paintings was in the form of inspiration. Some evocative literature testified to this:

‘It was like a kind of coding, an understanding without necessarily having to go into long intellectual diatribes about the emotion put into this painting about what a line meant, about where a space went. We shared a lot.’

As his lover, she seemed to inspire the sexual overtones of most of his work, and was also an intelligent critic of it. Thus she was held to have contributed 30 per cent to it. As the estate was valued at over \$11 million, this was quite a reasonable result for her.

1. (1992) FLC 92–304.

393. Some feminist critics have argued that, in practice, the courts do not give equal weight to the non-financial contributions of wives and reinforce the disadvantages borne by the sexual division of labour endemic in Australian society.<sup>1</sup>

But the courts are prepared to grant a wife a share in her husband's business assets even when she has made absolutely no contribution to the success of the business.<sup>2</sup> Again, however, feminists have criticized the jurisprudence on this, on the ground that the wife/homemaker is rarely awarded a 50 per cent share.

Contribution as a homemaker does not limit the contribution to the home or family assets: it could extend, as an ‘indirect’ contribution, to business assets. In an appropriate case the wife may be awarded an amount far beyond her reasonable needs on the basis of her contribution.<sup>3</sup>

1. See, e.g., H. Charlesworth, ‘Domestic Contributions to Matrimonial Property’ (1993) 3 *Aust J of Family Law* 147.
2. See *W and W* (1980) FLC 90–872; *Dawes and Dawes* (1990) FLC 92–108.
3. See *Napthal and Napthal* (1989) FLC 92–021; *Ferraro and Ferraro* (1993) FLC 92–335.

394. The strange term ‘negative contribution’ is used to describe the diminution of assets, income or earning capacity by virtue of reprehensible behaviour by sins of commission or omission.

In effect, it introduces fault into the equation – and not just economic fault.

The approaches of courts to economic misconduct are as follows:<sup>1</sup>

1. A party who causes damage to marital assets may be required to bear that loss. E.g., damage to furniture, excessive personal expenditure, failure to maintain the house.
2. Deliberate, wilful refusal to work may be compensated.
3. Evasion of tax, requiring arrears, fines, and legal expenses, may be regarded as a negative contribution.
4. Waste of assets may be taken into account.<sup>2</sup>

1. See D. Kovacs, *op. cit.* 205–211.

2. *Cf.*, *Benson and Benson* (1984) FLC 91–485 – where the husband’s gambling and alcoholism had diminished the assets.

395. The very inclusion in the legislation of a criterion relating to a party’s contribution as a homemaker and parent, and his or her contribution to the welfare of the family, presupposes that an enquiry may be necessary into the value and quality of that contribution. While this inevitably introduces fault into the process, some feminists have argued that this is desirable, especially in the light of the prevalence of domestic violence. There has been perhaps some tendency to investigate the quality of the wife’s contributions (as a non-income-earning homemaker).

#### §6. SUPERANNUATION

396. Although under most schemes, a superannuation ‘entitlement’ does not constitute ‘property’ (because payment is in the discretion of the trustees), it does constitute a financial resource. Therefore it forms part of the general pool of assets available for reallocation under Section 79 of the *Family Law Act*.

Indeed, Section 79(7) expressly refers to superannuation. ‘Superannuated’ is a cynical word meaning, in effect, ‘on the scrap heap’. Superannuation is the deferred earnings of the superannuant.

A beneficiary does not have an enforceable entitlement to a benefit as such, but only a hope or expectation that the trustees of the fund will benefit him. An additional difficulty of superannuation is that it is usually contingent on resignation, retirement or death, and the amount will vary considerably, with the event that causes the interest to vest. Moreover, under some schemes, an employee who is dismissed for a good cause may not receive any benefit.

Nevertheless, superannuation is an important form of ‘new property’, and features prominently in several cases.

397. The possible orders that could be made include the following:<sup>1</sup>

1. A deferred order – i.e., a statement of a fraction of the superannuation to be distributed, or re-allocated, when it vests.  
This is rarely done, principally because circumstances can change so much in the future as to make a just order impossible to make in advance.
2. A deferment of the application itself. This is in effect sanctioned by Section 79(5), enabling the court to adjourn property proceedings where superannuation is involved.  
This is not often done, but may be if the working spouse is near retirement.<sup>2</sup> It has two disadvantages:
  - a) It runs counter to the clean break principle (but we have seen that this has been considerably emasculated since 1975).
  - b) It may result in an injustice if death occurs before retirement.  
Nevertheless, it is often the *fairest* solution.
3. A mathematical formula may be used, based upon years of marriage, years to go before the fund falls in, etc., and by that calculation a figure can presently be arrived at which may be the subject of an order.  
This has been attempted in a few cases.<sup>3</sup>
4. The interest may be taken into account in some vague way, and reflected in the orders made with regard to *other* property.  
This is the most common way of dealing with superannuation.

Section 79(4)(d) requires the court to take into account the effect of any order on the earning capacity of either party to the marriage.

Often this means that the court will not order the sale of an income-earning property, such as a farm. But this is not an absolute rule.<sup>4</sup>

1. Per Fogarty J in *Crapp and Crapp* (1979) 5 Fam LR 47.
2. See *Finnis and Finnis* (1978) 4 Fam LN, para. 365, note 2.
3. See *Thomas and Thomas* (1981) FLC 91–018; *Jenner and Jenner* (1984) FLC 91–544.
4. See *Lee-Steere and Lee-Steere* (1985) FLC 91–626.

## §7. VARIATION OF ORDERS

398. In the original *Family Law Act*, it was possible to alter an order under Section 79 only in very limited circumstances – in effect, where the order had been obtained as a result of fraud.<sup>1</sup>

This was consistent with the clean break principle.

An extension to the court's powers was made in 1979 following *Taylor v. Taylor*, so as to include 'miscarriage of justice by any other circumstance'.

Otherwise, no variation of a property order was possible, as opposed to a *maintenance* order, which was always variable.

1. *Taylor v. Taylor* (1979) 5 Fam LR 289.

399. The 1983 Amendment Act, however, radically changed this position, considerably extending the grounds.

Section 79A provides that the court, in its discretion, may vary an order or set it aside (substituting a new order if it thinks fit) in these circumstances:

1. Miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or other reason.
2. Impracticability – in circumstances that have arisen since the original order.
3. Default by one person. It could be either party.
4. Where the welfare of a child demands – in circumstances that have arisen since the original order.

§8. DEATH

400. In certain circumstances, proceedings begun but not completed when one of the parties died, may be continued by, or against, personal representatives (executors or administrators).<sup>1</sup>

1. *Family Law Act 1975, S. 79(8)*,

401. State law applies to wills, intestacy and Testators Family Maintenance.<sup>1</sup>

1. *See below, Part IV, Succession Law.*

402. Section 79(8) of the *Family Law Act* was enacted in 1983 to alleviate the situation where a divorcing spouse had disinherited the other spouse but died before a property order under Section 79 had been made.

§9. SETTING ASIDE TRANSACTIONS

403. The power exists in the Family Court to set aside, or to restrain the making of, any instrument or other transaction which would deprive the Family Court of assets otherwise available for distribution under Section 79.<sup>1</sup>

A much greater use is now being made of this power than formerly.

Most cases concern the retrieving of property already disposed.

It is to be noted that the transaction must have the effect of defeating an existing or anticipated order. But the section specifically negates the necessity of any *intention*.

In some early cases, it was held that this power could not be used to set aside a transaction entered into before proceedings had commenced. But these cases no longer represent the law.

1. *Family Law Act 1975, S. 85.*

404. The interest of a *bona fide* purchaser should be taken into account. In one case,<sup>1</sup> Baker J stated that the courts should be reluctant to set aside a transaction made with full value with a *bona fide* purchaser. But in that case the husband sold

property to a third party for far less than the Valuer General's valuation, clear evidence of *mala fides*.

But collusion is not always necessary. In the case of *Heath v. Westpac Bank Interviewing*,<sup>2</sup> a transaction was made by a bank, who lent moneys to the husband when a Section 79 application was pending. The husband absconded with the moneys. The bank was foolish, but not collusive. Nevertheless, the transaction was set aside.

1. *Abdullah and Abdullah* (1981) FLC 91-003.
2. (1983) 9 Fam LR 97.

## Part IV. Succession Law

### Introduction

405. There are two means in Australia by which property can be distributed on death – by will or by the rules of intestacy. On settlement, Australia embraced the philosophy, developed by the common law, of complete freedom of testation. The common law reached this position only in the nineteenth century, by which time the feudal system had broken down. Then, however, it was subject to certain devices which enabled real property to remain in the family.<sup>1</sup> Strict settlements and entails, and the rights of dower and curtesy, however, are now almost extinct. The history of the English law of property – a complex maze of common law, equity, ecclesiastical law and custom, has not been paralleled in Australia. In essence, there is a regime of complete freedom of testation.<sup>2</sup>

Accordingly, a man, or woman, in Australia had an unlimited power to dispose of his or her property on death. This is quite different from the system that obtains in civil law countries, where a *legitima portio* is reserved to heirs or next-of-kin.<sup>3</sup>

1. For the history of English inheritance law, see W. Holdsworth, *A History of English Law*, vol. 3 (London, 1935).
2. A brief history of Australian law can be found in: Lee, *Manual of Queensland Succession Law* (3rd ed.), (Sydney, Law Book Co. Ltd, 1991).
3. The *legitima portio* also obtains in some common law jurisdictions, especially in USA. In some states of USA, the 'homestead' cannot be freely devised by will.

406. But this *carte blanche* is now subject to a caveat that was introduced into the common law world by New Zealand in 1900.<sup>1</sup> This is known as Family Provision, or Testators' Family Maintenance. By this legislation, the testator is still free to make whatever provision he likes in his will, but disappointed relatives may seek a reasonable provision from the court. Whether they succeed or not depends on the court's discretion. And the *amount* that they receive is also discretionary. It will be seen that this scheme which operates in England as well as Australia, is very different from the *legitima portio*. Its main disadvantage lies in the fact that the onus is on the relatives to bring an action after death. For reasons of expense and embarrassment, many relatives who have been cut out of an inheritance, do not pursue their claims.

Whether this scheme of qualified freedom of testation is preferable to the more rigid scheme of inheritance rights favoured by civil law countries is debatable.

It does, however, produce many anomalies. For succession in Australia is governed by state laws. There is an astonishing diversity in the Testators' Family

Maintenance Laws of the various Australian states, especially in the category of relatives who have the statutory right to claim.<sup>2</sup> In some states, for instance, a *de facto* spouse (i.e., a non-married cohabitant of the deceased) has a right to claim: in other, this is not so. But even those states where such a *de facto* spouse may claim, the circumstances which permit such a claim vary widely.

1. *Testator's Family Maintenance Act 1900 (NZ)*.
2. *See below*, pp. 197–200 for a full description of the Testators' Family Maintenance legislation.

407. The very great distinctions existing in Australian succession law also apply to the rules of intestacy and to the laws relating to the validity and construction of wills. It is a perennial problem, posed by the constitutional division of federal and state power.

The priority given to freedom of testation, and the clumsy machinery and arbitrary formulae that govern intestacy laws, would suggest that it is imperative for Australians to make a will. But this is not the case in practice. Only about 35 per cent of Australian adults die, having made a valid will. The remaining 65 per cent die *intestate*.

It is something of a mystery why so many Australians fail to make a will. It is not an expensive procedure. Indeed, it is possible, though rather unsafe, to make a will without consulting a lawyer. Will-forms are available at post offices. But solicitors generally charge low fees for drafting wills, for they realize that, after death, they themselves are likely to be involved in the formalities required to give effect to the will, for which, of course, they may charge fees!

408. The advantages of leaving a will are many. In addition to the ability to dispose of property in the manner most desired, a *testator* (*testatrix*, if female) may make arrangements for the guardianship of his children, may specify the type of funeral and disposal of his body (including the music to be played at the funeral), and, most importantly, can appoint whom he wishes to act as his personal representatives.

'Personal representatives' are either *executors*, in the case of a will, or *administrators*, in the case of an intestacy. Their role is to collect all the assets, and distribute them correctly. This function is known as 'winding-up the estate'. It is an onerous and responsible role. If there is no will, the court must appoint an appropriate administrator, who will usually be the deceased's widow or widower, or one or more of the next-of-kin. It is clearly far preferable to make a will in which the personal representatives are specifically chosen by the testator. A wise testator will include a professional executor, such as a solicitor or perhaps an Executor and Trustee Company, to act as one of the executors.<sup>1</sup>

1. For a full description of the personal representatives' role *see below*, pp. 205–207.

## Chapter 1. Intestate Succession

### §1. THE OPENING OF THE SUCCESSION

409. If there is no will, or if the will is invalid, because the deceased lacked testamentary capacity or failed to observe necessary formalities,<sup>1</sup> a person is said to die fully *intestate*. It sometimes happens, however, that a person can make a valid will, which does not completely dispose of all his property. For instance, he might have inserted a clause in his will giving property to a person who is in fact already dead, i.e., has pre-deceased the testator. In such a case, the deceased is said to have died *partially intestate*.

1. For a full description of the requirements for a valid will, *see below*, pp. 192–193.

#### I. Death

410. The intestacy clearly arises on death. But the actual ability to succeed does not vest until the personal representatives have been given a grant to wind up. If there is a will the executors must apply for *Probate*.<sup>1</sup> If there is no will, there must be a so-called *grant of general administration*. In theory, the Supreme Court makes the grant, which then enables the appropriate personal representatives to collect the assets and distribute the property. But in practice, the obtaining of a grant is a formality. Appropriate forms must be filed, together with a certificate of death. The proceedings are said to be ‘non-contentious’. In 99 per cent – of cases, a Registrar of the court will make the grant without any proceedings and without seeing the applicants.

If, however, there is likely to be a dispute as to the validity of a will or the appropriateness of the applicant as a personal representative, any person interested may lodge a *caveat* at the court registry. The proceedings then become *contentious*. The court must hear the arguments of the parties to the dispute, and determine the issues raised. After the hearing, a grant is made ‘in solemn form’.

1. *See below*, pp. 205–207.

411. ‘Death’ is generally simple to determine. In Australia, however, a death certificate must be signed by a qualified medical practitioner. If there is any doubt as to the cause of death, an inquest must be held by a *coroner*. This may involve a *post-mortem* examination. In these circumstances, the formal determination of death, and the consequent issue of the certificate, may be delayed, sometimes for a considerable time.<sup>1</sup>

Although in most circumstances ‘death’ is a straightforward determination, there are certain situations when it is not easy to say whether a person is still alive, or is dead. Suppose, for instance, a man is in a coma, for a lengthy period, but is kept breathing by a life-support system. Is he dead or alive? According to certain statutory definitions, he might well be regarded as ‘clinically dead’.<sup>2</sup> There appears to be

no Australian case in which the question as to whether he would be dead for the purposes of succession law has been determined.

1. For the role of the coroner, and a description of inquests, see G. Thurston, *Coroners' Practice* (1958).
2. See, e.g., *Human Tissue Act* 1982 (Vic.) S. 41.

## II. Missing Persons and Absentees

412. The rule relating to presumption of death at common law survives in Australia: if no news has been heard about person by those who are likely to have heard of him for *seven years*, then there is a presumption that he is dead.<sup>1</sup> Formerly, until 1975, a spouse could apply for a dissolution of the marriage on the ground of presumption of death.<sup>2</sup> Thereafter, he or she could re-marry with impunity. But the procedure no longer is available, having been rather unwisely abandoned in the *Family Law Act* 1975.<sup>3</sup>

1. See *Axon v. Axon* (1937) 59 CLR 395.
2. *Matrimonial Causes Act* 1959 (Cth) S. 28(o).
3. The *Family Law Act* 1975 (Cth) S. 48 provides only one ground for dissolution of marriage – irretrievable breakdown. It appears that the possibility of a dissolution on the ground of presumption of death (provided by the 1959 Act) was inadvertently omitted.

413. If a grant of probate or general administration is made by the court, acts done under it will be valid, even if the missing person subsequently appears.<sup>1</sup> This scenario was movingly treated in a poem by Tennyson, *Enoch Arden*. This poem has in fact led to the occasional nomenclature of laws relating to presumption of death of 'Enoch Arden Laws'. This poetic term, however, is far better known in USA than in Australia.

1. This is provided for by the relevant legislation in each state. See *below*, pp. 205–207.

### §2. THE HEIR (AND OTHER BENEFICIARIES)

414. At common law, under the feudal system, it was the '*heir*' who succeeded to the *real* estate, that is to say land and buildings. Under the rules of primogeniture, the heir was the oldest son of the deceased. In the absence of sons, the daughters shared equally.

But, since the nineteenth century, there has no longer been any differentiation between the devolution of real and personal property. The statutory schemes that apply on intestacy both in England and Australia make no mention of heirs, and all property (real or personal) devolves in accordance with the rules set out in them. The term, '*heir*', has ceased to have any significance in Australia. (In England, presumably it remains significant for the devolution of a title, such as Lord, Earl or Baronet. But these titles do not exist in egalitarian Australia!)

The rules that follow, therefore, apply to all beneficiaries and other claimants.

### I. Capacity to Succeed

415. The rules relating to succession to an intestate's estate are set out in the various state Acts.<sup>1</sup> These Acts establish an order of priority among relatives of the deceased. If there are no relatives who qualify, the estate passes to the Crown as *bona vacantia*.

All the rules relating to human qualifiers ('beneficiaries') are subject to several caveats that apply to both wills and intestacies.

1. See below, pp. 184–188.

416. First, the human being must have a legal capacity to hold property. That is to say, the person must not be disabled by some incapacity. For instance, a minor may be debarred from holding real property.<sup>1</sup> Minors can generally own personal property, but it is usual for property of substance to be held by *trustees* on their behalf, until they attain majority at the age of 18. In certain circumstances, the court will administer a minor's property.

Persons who are disabled mentally may also not be capable of holding property. Again, they will not be deprived of legacies and entitlements under an intestacy. Rather, such entitlements will be held by an institutional guardian, such as the Public Trustee.

An entitlement of an undischarged bankrupt cannot vest in him. It will not lapse, but will vest in his Trustee in Bankruptcy, or Receiver.

1. See above, Capacity, Part I, Chapter 2.

### II. *Commorientes*

417. When two persons die in the same accident, it is sometimes difficult to determine who died first. If in fact there is express evidence, on the balance of probabilities, which does disclose the order of death, then this prevails, so as to enable a court to make a declaration of the order of death even if both persons die in the same accident or disaster.<sup>1</sup>

If there is no such determining evidence, however, there is a presumption that the elder died earlier.<sup>2</sup> It applies wherever there is a doubt as to order of death, even though the deaths did not take place in the same accident.<sup>3</sup>

1. See *Re Zappulla* [1966] VR 390.
2. The presumption is enacted in several statutes in Australia.
3. See *Halbert v. Mynar* [1981] 2 NSWLR 659.

### III. Unworthiness to succeed

418. There is one most important rule that applies to testamentary gifts and shares in intestacy – a person may not profit from his own crime. At common law, this was an absolute rule, applicable to deaths caused to the victims by the intended beneficiary. A murderer thus *forfeits* any benefit from the estate of the person whom

he killed.<sup>1</sup> But suppose the homicide did not amount to murder. It is possible in Australian law for a person to be convicted of *manslaughter*, for instance if the killing was provoked, or if it was negligently, but not intentionally caused. In such a case, does the perpetrator lose his or her claim?

Recent cases in Australia suggest that the moral culpability of the perpetrator should be taken into account in cases of manslaughter.<sup>2</sup> In one case, a wife who killed her husband after suffering for many years serious domestic violence from him, was convicted of manslaughter. It was held that she was not subject to the forfeiture rule.

It is interesting to speculate on whether this *ad misericordiam* jurisprudence would be applied to so-called ‘mercy-killing’ which, save in the Northern Territory, is undoubtedly a form of murder.<sup>3</sup>

1. See K. Mackie, ‘Manslaughter and Succession’, (1988) 62 ALJ 616.
2. See *Public Trustee v. Evans* [1985] 2 NSWLR 138; *Public Trustee v. Fraser* (1987) 9 NSWLR 433.
3. In the Northern Territory recent legislation has sought to permit euthanasia in certain circumstances: see *Rights of the Terminally Ill Act* 1995.

### §3. THE SYSTEM OF DESCENT

#### I. The Classes of Heirs

419. The devolution of an intestate’s estate follows an order of priority. The ratings of particular relatives vary considerably from state to state. Moreover, the amounts and proportions received also vary. And in some, but not all, states, particular items (such as household chattels) are singled out for special treatment.

Even the definition of ‘spouse’ (a neutral term for husband or wife) varies from state to state! In some states a *de facto* spouse (cohabitant) may qualify. But even within this class, the qualifying circumstances vary.

The confusion in this branch of law is particularly serious by virtue of the fact that the majority of Australians die intestate.<sup>1</sup>

1. There is an excellent overview of the Australian law of distribution on intestacy in K. Mackie and M. Burton, *Outline of Succession*, (Sydney, Butterworths, 1994), chapter 9. See also L. McCredie, *Wills, Probate and the Administration of the Estates of Deceased Persons in Victoria* (Sydney, Butterworths, 1989).

420. The system, as a whole, is as follows: qualifiers are divided into six classes, which, generally, rank in order of priority:

1. surviving spouse
2. children and grandchildren (i.e., ‘issue’)
3. parents
4. other members of the immediate family (e.g., brothers/sisters)
5. ‘next of kin’
6. the Crown.

This is similar to the classification adopted by the civil law: (a) ‘surviving spouse’; (b) descendants; (c) ascendants; (d) collaterals (with the addition of the rights of the state to *bona vacantia*). Accordingly, the civil law classification will be adopted here.

#### A. *Surviving Spouse*

421. Suppose that a man died intestate without leaving children, or grandchildren, but leaving a widow.

In five Australian jurisdictions, in such a case, the widow will take the whole of the property.<sup>1</sup> (The same applies, *mutatis mutandis*, to widowers.)

But in three other jurisdictions, she would *only* be entitled to the whole if the man left no surviving brother or sister and no parent. In these states, the widow takes a statutory portion (which varies from state to state, but is, for instance, \$50,000 in Queensland) *plus* one-half of the remainder.

In two states,<sup>2</sup> the surviving spouse also is entitled to the ‘household chattels’ and in four others,<sup>3</sup> he or she is entitled to the ‘personal chattels’ of the intestate. These definitions are not identical. The latter is wider than the former. For instance, a ‘motor-car’ comes within the description of ‘personal chattels’, but is not a ‘household chattel’!

1. ACT, New South Wales, South Australia, Tasmania and Victoria. See K. Mackie & M. Burton, *op. cit.* 153.
2. New South Wales, Western Australia.
3. ACT, NT, SA, Vic.

422. Now, suppose a man dies intestate leaving a widow and children, or grandchildren. In one state, Queensland, the whole of the estate is divided into proportions. If there is only one child, the widow takes half: if there is more than one child, the widow takes one-third and the children divide the other two-thirds.

But in the other states, the widow is entitled to an initial fixed *sum*, before any apportionment is made. This sum varies enormously, from \$10,000 in South Australia to \$150,000 in New South Wales. And so, if the estate does not exceed this sum, the widow takes all, and the children receive nothing. But if the estate exceeds the sum, the balance is then divided between the widow and the children. In three states,<sup>1</sup> the division is 50:50. But in Western Australia and the Australian Capital Territory, the division is 50:50 if there is only one child, but 33.33 per cent: 66.66 per cent if there is more than one child – in this case, of course, the eligible children take their two-thirds allocation in equal shares.

1. New South Wales, South Australia, Tasmania.

423. As has been pointed out, in some states, a so-called *de facto* spouse (cohabitant) also has a right on intestacy. If a man dies with no legal wife, the *de facto* spouse will take as if she were his wife (subject, of course, to her qualifying under the definition of a *de facto* wife). But complications arise when a man dies with both a live-in mistress (or mistresses!) and a legal wife. In South Australia, in these circum-

stances, the two women share equally. But in New South Wales and the Northern Territory, their entitlement is determined by a so-called ‘tie-breaker’ provision.<sup>1</sup>

1. See *Wills, Probate and Administration Act 1898* (NSW), S. 61B(3A).

### B. Descendants

424. ‘Descendants’, in common law parlance, are called ‘issue’. The term refers to children, grandchildren and great-grandchildren – that is lineal descendants, no matter how remote. The more remote issue usually<sup>1</sup> stand in the shoes of their ancestor, *per stirpes*. That is to say, where a child dies before the intestate, that child’s children share what would otherwise be the amount allotted to their father or mother.

‘Issue’ includes adopted children,<sup>2</sup> and legitimate children.<sup>3</sup> The position of ex-nuptial children, and those claiming through ex-nuptial children is more difficult. *Prime facie*, an ex-nuptial child is treated as if he or she were born in marriage. But the state legislation granting equal status to ex-nuptial children is still discriminatory against them, if their father had not acknowledged them in his lifetime. Moreover, personal representatives are not obliged to seek out ex-nuptial children whose identity was not brought to their attention.<sup>4</sup>

The legislation of all states provides that where a person dies intestate, *without* leaving a spouse, the surviving issue are entitled to the whole estate, in equal shares (subject to the *per stirpes/per capita* rule, mentioned above).

1. This is the case in all Australian jurisdictions except South Australia and Queensland, where all grandchildren take shares equally *per capita*.
2. See Part II, Chapter 5, *supra*.
3. See Part II, Chapter 4, *supra*. Note that a child includes a foetus; and, in one recent case, it has been held in Tasmania that it includes a frozen embryo: *In the Estate of K* (1996) Supreme Court of Tasmania, Slicer J (unreported).
4. For a full discussion on this unjust discrimination, see *above*, Part II, Chapter 4, pp. 117–118.

### C. Ascendants

425. Parents and grandparents share in the intestate’s estate where there is no surviving spouse or issue – except in Western Australia, where *siblings* (brothers and sisters) of the deceased take priority.<sup>1</sup> In some states a surviving parent is entitled to a *share*, even when there *is* a surviving spouse.<sup>2</sup>

1. K. Mackie and M. Burton, *op. cit.*, 158.
2. *Supra*, p. 185.

### D. Collaterals

426. Where there is no surviving spouse, issue or parent, more remote relatives are entitled, as next-of-kin. The classification of these varies from state to state, as does their proportion of entitlement.<sup>1</sup>

1. The detail is to be found in K. Mackie and M. Burton, *op. cit.* 159.

## II. Representation

427. Suppose a widower has three sons, aged 24, 16 and 5. His 24-year old son, having qualified as an accountant, wishes to set up in practice. He persuades his father to give him \$60,000 to enable him to buy a partnership in an existing firm, or to set up his own firm. Three months later, the father dies leaving \$600,000.

Under the rules of intestacy, his three sons would take \$200,000 each. But this would be unfair on the two younger sons. The common law required the \$60,000 given to the eldest son *inter vivos* to be represented in the intestacy, that is, taken into *hotchpot*. In other words, the notional estate of the father would be deemed to be \$660,000, and divided one-third each among the three sons, \$220,000 each. But as the eldest son had already received \$60,000, his entitlement on intestacy would be \$160,000, while each of the other sons would receive \$250,000.

428. In five Australian jurisdictions, the hotchpot doctrine is in force.<sup>1</sup> The other jurisdictions have abolished it.

What is 'hotchpot'? It does not apply to every gift or loan made by a parent, but only to one that is made as a portion to establish a child in life. In some states, it applies only to gifts made within five years of death.<sup>2</sup> And it is expressly made subject to any express or implied contrary intention.

1. ACT, NT, South Australia, Tasmania and Victoria.
2. See, e.g., *Administration and Probate Act 1919 (SA)*, S. 72(k).

## III. Adoption

429. Unlike in many civil law countries, there is no obligation in Australian law to provide a compulsory portion for heirs. Conversely, it is not necessary for a person to provide that he is the *heir* or other relative of a deceased person in view to benefit from a testamentary disposition. Therefore, at common law, adoption of adults has never been required as a condition of entitlement to an inheritance. Indeed, adoption is a very recent concept in common law countries, including Australia, and has been almost exclusively restricted to children.<sup>1</sup>

It is true that adoption of adults is now possible in most Australian states, but it is rare. Usually, it occurs when a child, who has been brought up by adults in a *de facto* adoption or foster-care arrangement, attains adulthood, and all the parties wish to 'regularise' the arrangement by a formal adoption.

An example of an adult adoption occurred in the New South Wales case, *Re R*.<sup>2</sup> There was a family trust under which the beneficiaries were nominated to be the children of Mr. Z. C. and M., aged 18 and 23 respectively, had been brought up and educated by Mr. and Mrs. Z. They applied for an adoption order so that they could benefit from that trust. Young J. held that, although adult adoption orders should not be made for purely collateral purposes, the two applicants were mature adults

and had made a conscious and independent decision to seek adoptive status. The application was granted.

1. For a full discussion of adoption, *see above*, Part II, Chapter 5.
2. (1988) 12 *Fam LR* 263.

430. Traditionally, adoption of a child establishes a new relationship with the adopters, and destroys any relationship that the child had with her natural parents. Accordingly, the child cannot claim on the intestacy of her natural mother.<sup>1</sup> The concept of ‘open adoption’, however, raises the question whether it is in the best interest of an adopted child not to be granted any rights in the estate of her natural mother who had been granted, and enjoyed, frequent access to the child. The statutory exclusion from inheritance claims in such a circumstance sits ill with the now-favoured concept of open adoption.<sup>2</sup>

1. For a complete analysis of the effect of adoption orders in every State, *see* P. Boss, *Adoption Australia* (National Children’s Bureau of Australia, Melbourne 1992).
2. For a full discussion of this issue, *see* J. Neville Turner, ‘Adoption or Anti-Adoption? Time for a National Review of Australian Law’ (1995) 2 *James Cook University Law Review*, 43, 79.

#### §4. THE *BONA VACANTIA*

431. If no relative is alive who may succeed to the intestate’s estate, it passes to the ‘Crown’ (i.e., the state in which the intestate was resident at the date of his death). But in three states, the Crown may make *ex gratia* provisions for more distant relatives of the deceased who do not qualify under the statutory scheme.<sup>1</sup>

1. New South Wales, Tasmania, Western Australia. (*See* K. Mackie and M. Burton, *op. cit.* 159.)

## Chapter 2. Testamentary Succession

### §1. INTRODUCTION

432. A will is the most satisfactory means of arranging for the devolution of a person's property after death. There are formalities for making a will, which are based on English common law. Some states have modified these rules, so as to liberalize the occasions when a will will be declared valid.

433. A will is binding until death. There is no time limit when it falls into desuetude. A will, however, may be revoked either by the testator expressly or impliedly or by operation of law.

The making of a new will impliedly revokes any former will, although in practice, it is usual for a specific clause to be inserted specifically declaring that the testator thereby revokes all previous wills and testamentary dispositions. But, although a will is automatically revoked by a new will, it is possible to make a *supplementary* testamentary document which does not revoke the previous will but operates together with it. This is known as a *codicil*. It is also possible to incorporate a non-testamentary document into the will, provided that that document was already in existence. The person who makes the will is known as a testator (feminine: testatrix).

434. After death, the last will (and any codicil) must be *proved* by the executors appointed by the testator. A grant of *probate* must be obtained. This enables the executors to collect all the property of the testator and distribute it according to the provisions of the will.<sup>1</sup>

1. The duties and responsibilities of executors are considered in Chapter 4, below, pp. 205–207.

435. Any person of either sex, and of full age, may be chosen as an executor (feminine: executrix). It is usual to appoint two executors, one of whom would be a professional person (either a solicitor or an accountant), the other a relative. It is clearly wise for a testator to appoint persons younger than himself to be executors. It is possible to appoint an executorship company to act.

It is also usual for a writer to appoint a special literary executor, whose role is to look after the publication of posthumous works, the distribution of royalties and the protection of copyright in any work.

The role of executors and administrators is a demanding one. They have an absolute duty to ensure that all property is collected and to see that every provision of the will is obeyed. They can be personally sued if they fail in either of these tasks. They can be liable to any beneficiary if they wrongly distribute the estate, or fail to trace an asset. In practice, it is usual for executors and administrators to take out an insurance bond to cover any potential personal liability. Legislation exempts them from liability in some circumstances – for instance, if they fail to take into account the existence of an ex-nuptial child of whom they had no knowledge.<sup>1</sup>

It is possible, and usual, for an executor himself to be a beneficiary under a will. But it is not normally permitted for an executor to charge for his services, for a person of trust must not make a profit from the trust. It is, however, possible for a professional executor to charge for his services if the testator has expressly provided for this in his will. ‘Charging clauses’ are therefore commonly inserted in wills by the solicitors who prepare them.

1. See above, Part II, Chapter 4, Filiation.

436. As will be seen, a will must be witnessed by two persons. It is possible for a beneficiary to be one of the witnesses, but it is exceedingly unwise. In some states, the law (based on English legislation of 1837)<sup>1</sup> requires that a beneficiary, or the spouse of a beneficiary, who witnesses the will automatically forfeits any benefit under it.<sup>2</sup> In the other states, this law has been abolished or modified. In any case, it is narrowly construed – so that, an unmarried beneficiary who *subsequently* married a witness some years later was not disqualified from taking under the will.<sup>3</sup>

In Victoria, a beneficiary who witnesses a will (or his or her spouse) may still take a share if he or she would have been entitled on the intestacy of the testator – but this benefit is limited to the lesser amount of that provided by the will and that which would have been receivable on intestacy.<sup>4</sup> In New South Wales and Tasmania, the gift will be permitted if the *other* beneficiaries so agree, or if it is proved that the testator freely made the gift, with full knowledge.<sup>5</sup>

1. *Wills Act 1837* (Eng).
2. This remains the law in ACT, NT, Qld and WA. See K. Mackie and M. Burton, *op. cit.* 69.
3. *Thorpe v. Bestwick* (1881) 6 QBD 311.
4. *Wills (Interested Witnesses) Act 1977*.
5. *Wills, Probate and Administration Act 1989*, S. 13(2) (NSW); *Wills Act 1992*, SS. 44–46 (Tas).

## §2. CAPACITY TO MAKE A WILL

437. In order to make a will, a testator must have full legal capacity. In the first place, he or she must have attained the age of majority, that is 18.<sup>1</sup> There are, however, three exceptions to this. First, the case of a ‘privileged’ will, where the testator is a soldier or sailor.<sup>2</sup> Secondly, in some states a married minor may make a will.<sup>3</sup> And thirdly, in some states the court may approve a will proposed to be made by a minor.<sup>4</sup>

1. In all states, the former, common law, age of 21 has been reduced to 18.
2. See below, pp. 193–194.
3. NSW, Qld, SA and Tasmania.
4. NSW, SA and Tasmania.

438. More significantly, the testator must have sufficient mental capacity to make a will. He must be ‘of sound mind, memory and understanding’.<sup>1</sup> Moreover, a will may be set aside if it is shown that the apparent consent of the testator was induced by fraud, or undue influence, or was otherwise tainted.

This test, however, does not require that the testator understand every clause of the will; and certainly, he need not comprehend the legal jargon in which his wishes

have been expressed. Nor does it require that a will be negated because it is couched in eccentric or extravagant terms. Many people have utilized the will to express themselves in a more forthright manner than they were accustomed to do in daily intercourse.

Senility of itself is not sufficient to amount to lack of mental incapacity. But where there is evidence of senility, it is desirable for the will to be witnessed by a medical practitioner. An habitual drunkard may make a valid will in an instant of sobriety, or even when affected by alcohol, provided that this did not render him completely incapable of understanding.<sup>2</sup>

A delusion, however, may be so fundamental that it prevents a testator from appreciating the moral claims of relatives and other would-be beneficiaries.<sup>3</sup> In one case, a testatrix was convinced, quite erroneously, that her nephews had forged her signature on some documents, and excluded them for that reason. The will was held to be void.

1. See Hood J, in *In the Will of Wilson* (1897) 23 VLR 197, 199.
2. See *Timbury v. Coffee* (1941) 66 CLR 277.
3. *Bull v. Fulton* (1942) 66 CLR 295.

439. It is necessary that the will be intended to express the serious intentions of the testator to dispose of his property. A will signed as a joke would not be valid. Usually, however, the strict formalities required of a will ensure that the testator will be fully aware of its significance. But, there are occasionally difficulties with privileged wills, which do not require writing. If a soldier on active service makes a declaration with regard to the disposition of his property, this may itself be a will – for privileged wills require no formality. On the other hand, it may be mere evidence of a wish or even an unformed idea. In such a case, everything depends on the evidence.<sup>1</sup>

1. See the English case, *In the Estate of Knibbs* [1962] 2 All ER 829.

440. The solemn requirements attached to the making of a will raise a presumption that it has been validly executed. But sometimes sufficient suspicion is raised as to the circumstances in which it was prepared as to rebut that presumption or to shift the onus on to those who seek to prove the will to establish its validity. This would be the case if the drafter of the will himself obtained a benefit from it, at least if it were substantiated.<sup>1</sup> While preparation of the will by a beneficiary does not abrogate the gift (*contrast* the rules relating to witnesses and their spouses),<sup>2</sup> it is manifestly unwise for a solicitor who knows that a testator intends to benefit him or a relative of his should require him to seek the independent advice of another solicitor, and refuse to draft his will.<sup>3</sup>

1. *Re Proud* (1922) 18 Tas LR 10.
2. *Supra*, p. 190.
3. See also *Thomas v. Jones* [1928] P 162, where a will benefited the solicitor's daughter.

441. It is also possible for a will to be void because of *undue influence* or fraud. In the common law of contract, there are relationships in which undue influence is presumed, such as parent/child, religious adviser/disciple and doctor/patient. In

other cases, undue influence may be positively proved. It may not be difficult to show that a would-be beneficiary exerted improper influence on the testator, especially if that beneficiary had some special opportunity to exert pressure on him. An obvious example is the case of a doctor or, perhaps even more likely, a nurse who ministers to a dying patient. For this reason, it is wise for a doctor or nurse whom a grateful patient has expressed a wish to benefit to refer the patient to an independent adviser. Fraud may also vitiate a will or part thereof. An excellent example is the English case, *Wilkinson v. Joughin*,<sup>1</sup> where a man bigamously married a woman who told him that she was a widow. A gift ‘to my wife Adelaide’ was held to be void. But the remainder of the will was upheld.

1. (1866) LR 2 Eq 319.

442. Although it is difficult to do so, in some circumstances it may be possible to adduce evidence that the signed will does not represent the testator’s true intentions. At common law, a court might be willing to expunge, or omit, words which have been shown to be mistakenly inserted. The court would not, however, add any new words so as to give effect to the supposed real intention of the testator.<sup>1</sup> Some Australian states, however, have amended the common law, so as to allow rectification, even to the extent of inserting words which had been accidentally omitted from the will.<sup>2</sup>

1. See *Perpetual Trustee Co v. Williamson* (1929) 29 SR (NSW) 487.
2. New South Wales, Queensland, South Australia and Tasmania have so enacted. The legislation is slightly different in its wording, and in its operation. See K. Mackie and M. Burton, *op. cit.* 49–51.

### §3. DIFFERENT TYPES OF WILL

#### I. Introduction

443. The usual will must be in writing, signed by the testator in the joint presence of two adult witnesses, who must also sign the attestation of the will in the testator’s presence. There is only one exception – a holograph will is possible in the case of a soldier on active service or a sailor.<sup>1</sup>

‘Writing’ includes printing and typing. And any material may be used on which to write the will. In a recent Australian case, a valid will was written on a wall.<sup>2</sup>

The ‘signature’ of the testator can take the form of a mark.<sup>3</sup> The will may also be signed by another person, where, for instance, the testator is too weak to sign. The testator, however, must be present, and direct the signature.<sup>4</sup> It has also been held that, where the testator uses an assumed name, this suffices, provided that the testator is identifiable by that name.<sup>5</sup>

Originally, all Australian jurisdictions followed English legislation,<sup>6</sup> requiring that the will be signed at the ‘foot or end’. But three states have abrogated this.<sup>7</sup> Sometimes a signature on an envelope containing the will has been held to suffice.<sup>8</sup> The court will hear extrinsic evidence to determine whether the signature was intended to give effect to the will or merely to identify the contents of the envelope.<sup>9</sup>

It is imperative that the testator sign or acknowledge the will in the presence of two witnesses. But if the will is already signed, the witnesses must see the signature. It is not necessary – and indeed it is often undesirable – for the witnesses to read the will itself. The will is a private document – at least until after the death of the testator. But the witnesses must be present at the same time to see the testator sign or acknowledge the will. They then must ‘attest’ the signature – that is, they must themselves sign a clause stating that they saw the testator sign the will. For this purpose, however, they need not be present at the same time. A typical form of attestation reads: ‘Signed by the above named testator as his last will in the presence of us, both present at the same time, who in his presence at his request and in the presence of each other, have hereunto subscribed our names as witnesses’.

If there is no such attestation clause, the will is not invalid. But it is then necessary for the witnesses to prove that they witnessed the will, usually by affidavit.

1. See below.
2. *Estate of Slavinski* (1989) 53 SASR 221.
3. *Re Male* [1934] VLR 318.
4. See *In the Goods of Clark* (1839) 2 Curt 329; 163 ER 168.
5. Cf., *Re Sister Albinos* [1924] NZLR 88.
6. *Wills Act 1837* (Eng).
7. New South Wales, South Australia, Western Australia.
8. See *In the Will of Spence* (1969) 89 WN P & I (NSW) 641.
9. Cf., *In the Goods of Mann* [1942] P 146; contrast *In the Estate of Bean* [1944] P 83.

444. The above formalities used to be stringently interpreted, with the result that many documents clearly intended to be testaments failed to be accepted by the courts. Thus the intentions of testators were thwarted.

To obviate this, most Australian states have passed legislation permitting the court to grant probate of a document which breaches one of the formal requirements, where it represents the testator’s intention to be a testamentary instrument.<sup>1</sup> The legislation differs from state to state: some states are more liberal than others in the circumstances in which they will accept a failure to observe a formality as harmless.

1. See K. Mackie and M. Burton, *op. cit.* pp. 65–69, for the relevant legislation, and some cases interpreting it.

## II. Privileged Testators

445. As has been mentioned, a limited class of persons may make an informal will. The strict requirements for a formal will need not be observed – indeed the will may be oral. Privileged wills date back to seventeenth century England,<sup>1</sup> which was, of course, ‘received’ by the Australian colonies.

1. See Statute of Frauds, 29 Car. 2, c3 (1677).

446. Australian law now varies from state to state. New South Wales has abolished informal wills completely.<sup>1</sup> The other states embody it in differently phrased legislation. Typically, the privilege applies to a soldier on active service, and a

sailor who is at sea. The sailor, therefore, does not have to be serving in a military capacity. Three states have abolished the privilege for sailors, while retaining it for soldiers.<sup>2</sup> Those that retain it apply the doctrine widely to personnel of ships, including all personnel, from the captain down to the deck-hand – and indeed to the secretarial and nursing staff.

Likewise, the concept of military service has been liberally interpreted to include an Australian soldier serving in a contingent force sent by Australia to assist the Malayan government to quell a terrorist uprising.<sup>3</sup>

1. *Wills, Probate and Administration (Amendment) Act 1989* (NSW).
2. ACT, Northern Territory, South Australia.
3. *In the Will of Anderson* (1958) 78 WN (NSW) 334.

#### §4. THE JOINT WILL

447. A joint will is possible, where two or more persons join together to express their separate intentions. On the death of one of them, the will is admitted to probate. When the other dies, it may again be submitted to the court.

Joint wills are very rare, and are not recommended.

448. Slightly more common are ‘mutual wills’, usually made by a husband and wife. Each one usually agrees that he (or she) will not revoke the will without the consent of the other. If one of them does so, the other may enforce the agreement, by seeking a declaration that it constitutes a constructive trust.<sup>1</sup>

Again, the inconveniences and complexities attached to mutual wills make them undesirable.

1. *See Birmingham v. Renfrew* (1937) 57 CLR 666.

#### §5. REVOCATION OF A WILL

449. A will is always revocable, until the death of the testator. Sometimes, however, a testator may make an agreement with a beneficiary not to revoke the will. A typical example may be that of an elderly man who agrees to leave property to a woman, on condition that she nurses him. This constitutes a contract, for there is valuable ‘consideration’ for the man’s promise. Nevertheless, this agreement cannot be enforced. The will is still able to be revoked. The disappointed lady, however, will be able to bring an action for damages for breach of the contract, against the personal representatives of the man.

A will may be revoked either by the express action of the testator, or by the operation of the law itself.

There are three ways in which a will may be voluntarily revoked:

- a) By another will.
- b) By an express intention to revoke, made in the same manner as a will [i.e., this must comply with the formalities set out, above].<sup>1</sup>

c) By destruction.

1. See pp. 192–193 above.

### I. Another Will

450. Although it is not necessary, most wills contain a clause such as: ‘I hereby revoke all former wills and testaments made by me’. So common is this practice in Australia that the clause is usually inserted in *every* will, even if it is the first will ever made by the testator. The merit of this is that it obviates the need for executors to search for previous wills.

It is possible to revoke specific clauses of a will, while leaving the rest of it intact.

451. As has been stated, however, a new will usually impliedly revokes a previous will. But sometimes, it may be disputable whether it was the intention to supplement the previous will. This may be the case if the two wills are not inconsistent. The second will may thus operate as a kind of *codicil*.

A codicil is a formal document which varies, but does not revoke, a will.

### II. An Intention to revoke

452. A will may be revoked by any other written instrument, provided it is executed with the same formalities as are required for a will.

### III. Destruction

453. A will may be revoked ‘by the burning, tearing or otherwise destroying . . . with the intention of revoking the same’.

Some formal act of destruction is necessary, although the *whole* of the will need not be destroyed. Merely throwing the will in a waste-paper basket is not sufficient, even if the testator indicates to a third person that he considers it to be an act of revocation.<sup>1</sup> Conversely, an inadvertent destruction of the will does not revoke it.

1. *Cheese v. Lovejoy* (1877) 2 PD 251.

454. If a testator lacks the mental capacity to make a will, he also lacks the capacity to revoke it. It is possible for a testator to direct someone else to destroy the will for him. But it must be in the testator’s presence.

455. New South Wales is the only state to have liberalized the requirements of revocation by destruction, or by writing. According to new legislation in that state, the revocation will be effective whenever an intention to revoke can be gleaned from the testator’s writing or conduct.<sup>1</sup>

1. *Wills, Probate and Administration Act* 1989, S. 17(3)(c) (NSW).

#### IV. Revocation by Law

456. At common law, a will was revoked by marriage.

All Australian states adopted this rule, but recently some states have amended it.

The rule was always subject to a major exception. A will made expressly in contemplation of a marriage is not revoked by that marriage. Again, some Australian jurisdictions have modified the conditions of that exception. In order for this exception to apply, a statement in the will that it is made in the contemplation of a *particular* marriage suffices – but not a statement relating to marriage in general. The will is only valid if the marriage takes place – it is, in effect, a *conditional* will. The exception may also be applied when it can be inferred that the will has been made with a specific marriage in mind. Thus, a will benefiting ‘my fiancée’ or ‘my intended wife’ has usually been held to be a will in contemplation of marriage.<sup>1</sup> But if the testator, in his will made before the marriage, describes his fiancée as ‘my wife’, it depends on the circumstances whether that is merely descriptive of the person or whether it can truly be said that he is making the will in the contemplation of making her his wife.<sup>2</sup> Evidence of the testator’s intention is not admissible, although some courts will allow evidence of the *surrounding circumstances* to be adduced.<sup>3</sup> And the state of Queensland has expressly abrogated that evidentiary limitation.<sup>4</sup>

1. See *In the Estate of Langston* [1953] P 100.
2. Contrast the Victorian case, *Re Taylor* [1949] VLR 201 with the more recent NSW case, *In the Will of Foss* [1973] 1 NSWLR 180.
3. *In the Will of Foss*, *supra*.
4. *Succession Act* 1981, S. 17(1) (Qd).

457. As well as Queensland, Victoria, New South Wales and Tasmania have amended their legislation so as to repeal the limitation on general marriages. In those states, a will made in contemplation of marriage in general is not revoked by a specific marriage. And Queensland, New South Wales and Victoria now all permit a statement that a will was made in contemplation of marriage to be made independently of the will or to be adduced from the surrounding circumstances. Victoria and Tasmania even allow a will made with some *possibility* of a marriage taking place to be construed as a will in contemplation of marriage.<sup>1</sup>

1. For the details of the relevant legislation see K. Mackie and M. Burton, *op. cit.* 93, 94.

458. Four Australian jurisdictions now provide that a will is revoked by divorce or annulment. In Tasmania, the whole of the will is revoked, unless the testator’s intention to the contrary is either expressed or may be inferred.<sup>1</sup> In the other three jurisdictions (Queensland, New South Wales, ACT), only dispositions made in favour of the ex-spouse are revoked – again, subject to any contrary intention of the testator or testatrix.<sup>2</sup>

1. *Wills Act* 1992, SS. 20, 21 (Tas).
2. *Succession Act* 198, S. 18 (Qd); *Wills, Probate and Administration Act* 1989, S. 15a (NSW); *Wills Act* 1968, S. 20A (ACT).

§6. PROVISIONS IN A WILL

459. There are no restrictions on the terms of a will. Some testators have used their will to express homilies, to gain posthumous revenge, to vent spleen, and to pour out emotions in death which bashfulness prevented them from doing in life.

It would seem that a testator may make defamatory remarks with impunity, since an action in defamation dies on the death of a defendant.

460. A will is principally used to give effect to the wishes of the deceased regarding the devolution of his property and assets, or to establish trusts for the future over them. Executors of the testator will usually be appointed in the will. It is also common for testators to give directions as to the manner of the funeral and consequent burial or cremation. If there are minor children of the testator, or adult children with a disability, the will may appoint a guardian. Such appointment, however, is subject to the overriding supervisory powers of the court with regard to the welfare of the child.

461. There are no limitations on the contents of a will. It is, however, possible in some circumstances that the court might strike out scurrilous, vexatious or libellous matter before granting probate to a will.

§7. RESTRICTIONS – TESTATORS’ FAMILY MAINTENANCE

462. As has been stated, there is no requirement in Australia that a person provide a portion to an heir or other relative. There is no *legitima portio*. Freedom of testation is the hallmark of the common law.

The caveat to this is, however, Testators’ Family Maintenance (or Family Provision) legislation, whereby a disappointed relative may apply to the court for a reasonable provision. This power is available not merely to those whose expectations have been thwarted by a will. It may be used to amend an injustice caused by the harsh operation of the intestacy laws. It is convenient to deal with this topic here.

The Court is given a wide power to do justice. But only a limited number of persons – relations, dependants or intimates of the deceased – have the right to apply. The initiative rests on them to do so. In all jurisdictions, there is a time-limit for applications.<sup>1</sup>

The range of possible applicants varies considerably from state to state.

1. It varies from 3 months (from grant of probate) (Tasmania) to 18 months (from date of death) (NSW). For the details, see K. Mackie and M. Burton, *op. cit.* 166–67.

**I. Spouses**

463. Either a widow or a widower may apply.

# Index

*All references are to paragraph numbers*

- Aboriginals: 1, 8  
Adoption: 220, 276  
    Aboriginal children, of: 234  
    access to child, on: 263  
    access to information: 247–262  
    ages: 225, 231, 236  
    assessment for: 232–235  
    capacity for: 225–238  
    child’s wishes, on: 243  
    consents: 239–245  
    contact on: 247–263  
    criteria: 232  
    custody on: 331  
    *de facto* spouse, capacity for: 229  
    discharge of: 246  
    duties on: 300  
    father, putative, rights of: 239  
    foreign: 264–274  
    foster care distinguished: 222  
    guardianship on: 331  
    information exchange: 260  
    inter-country: 264–274  
    mother, natural, rights of: 241–242  
    non-relative: 230  
    open: 222  
    relative, by: 230  
    religion: 237  
    Roman Law: 220  
    succession: 429–430  
    suitability for: 225–238  
    wishes as to: 238, 243
- Bankrupts: 56  
Births, registration of: 72  
*Bona vacantia*: 188
- Canberra: 4  
Canon Law, *see* Ecclesiastical Law  
Capacity, *see also* Minors: 56–71  
    contractual: 78–90  
    testamentary: 77  
    tort, in: 91–96  
Capitals, Australian: 3–4  
Catholic Tribunals, *see* Roman Catholic  
    Tribunals  
Centralization: 2  
Child Abduction: 333–336  
Child Convention, *see* UN Convention on  
    the Rights of the Child  
Child Support Scheme: 25, 37, 210, 303–306  
    assessment of: 304  
    departure order on: 304  
    formula: 304  
    negotiation on: 303  
Child, *see also* Child Support Scheme  
    Custody of Children  
    abuse: 110–112, 184  
    adopted, *see also* Adoption: 60  
    artificial conception of: 64  
    control of: 321  
    crime against: 110–112  
    criminal responsibility of: 66, 97–108  
    definition of: 61, 66  
    *en ventre sa mère*: 53  
    ex-nuptial, *see* Ex-Nuptial Child  
    family, of: 63  
    marriage, of: 65  
    punishment of: 323  
    responsibility for crime: 97–108  
    separate representation of: 353–357  
    void marriage, of: 201

## Index

- voidable marriage, of: 201–202
- Children's Courts: 37, 66, 97–108, 277–278
- Children's Panels: 101
- Citizenship: 26, 121–122
- Cohabitation, *see De facto Relationship*
- Common Law Marriage: 13
- Confidences, Marital: 167–168
- Consanguinity: 150
- Consent to Marriage: 153–157
- Consortium: 164
- Constitution, Australian: 9–10, 13–14, 20–21, 210
- Contracts, of minors: 56–71
- Corporation: 54
- Counselling: 181, 351–352
- County Courts: 37
- Crime, against child: 110–112
  - child's responsibility for: 97–108
  - spousal: 117
- Cross-vesting legislation: 26, 38, 335
- Custody of Children, *see also* Child, Ex-nuptial Child, Guardian, Guardianship, Parental Responsibility: 315–357
  - adults, relationship with, affecting: 351
  - appeals on award of: 339
  - assistance of court counsellor in conduct, affecting award of: 344, 352
  - death, on of parent: 324
  - discharge of: 329
  - discretion of court in: 339
  - duration of: 325
  - economic factors, affecting: 348
  - father, putative, by: 330
  - grandparent, by: 329
  - guardianship, distinguished from: 321
  - homosexuality, affecting: 341
  - interim: 326, 332, 342
  - joint: 327
  - natural parent, preference for: 347
  - non-separation of siblings, on: 349
  - principles of award of: 337–352
  - religion, affecting: 350
  - status quo* preferred: 342
  - supervision of: 329
  - third person, by: 324
  - variation of: 328
  - welfare organization, by: 335
  - welfare of child paramount, on: 337
  - wishes of child, on: 344
- Death
  - certificate of: 72
  - determination of: 72, 411
  - presumption of: 412
- De facto Relationship, see also* Ex-nuptial Child, Filiation: 148, 191–196
  - contract: 192–195, 375
  - definition of: 192
  - legislation on: 194–196
  - property of: 360–375
  - succession by: 423, 467–470
  - trusts relating to: 360–370
- Decentralization: 2
- Declaration of validity of marriage: 74
- Decree absolute, of divorce: 180, 306
- Decree *nisi*, of divorce: 152, 179, 180
- Discretion, judicial: 46, 49, 360, 377
- Discrimination: 133–138
- Divorce, *see also* Decree *nisi*, Decree Absolute: 12, 14–15, 174–190
  - a mensa et thoro, see* Judicial Separation
  - bitterness on: 185
  - effects of: 180–189
  - foreign: 127, 152
  - grounds for: 174–177
  - jurisdiction on: 178
  - procedure: 178–179, 306
  - rate of: 183
  - separation required for: 174–176
- Doctors' Commons: 11
- Domicile: 26, 28, 123–128
  - choice, of: 125
  - dependency: 125
  - origin, of: 124
- Ecclesiastical Law: 11
- Education, legislation on: 29
- Engagement, *see also* Promise of Marriage: 147–148
- Equal Opportunity, *see also* Discrimination: 137
- Estoppel: 363–364, 369
- Estate Planning: 482–483

## Index

- Evidence, of spouses: 167–168  
Exclusive Brethren: 350  
Executor, *see* Personal Representatives  
Ex-nuptial Child, *see also* Custody of Children, Filiation  
    citizenship of: 214  
    disabilities of: 206–219  
    name of: 207, 215  
    inheritance by: 216–219  
    nationality of: 214  
    status of: 204, 330  
    surname of: 215
- Family Court of Australia, *see also* *Parens Patriae* Jurisdiction: 10, 15, 23, 37, 39–52, 189, 205, 210, 322, 326
- Family Law  
    history of: 10–16  
    prestige of: 45  
    sources of: 20–36
- Family Law Act 1975: 15, 23, 47, 61, 63, 210  
    criticism of: 43–45, 47–52
- Family Law Reform Act 1995: Appendix [1–10]
- Family Provision, *see* Testators' Family Maintenance
- Feudal System: 405
- Filiation, *see also* Ex-nuptial Child: 197–219
- Formalities of Marriage: 16, 160–161  
    failure to comply with: 158
- Foster-Care: 106, 275–291  
    arrangements for: 276  
    choice of parents for: 278  
    court, role of, in: 277  
    criteria for: 279  
    duties on: 281, 289–290  
    guardianship on: 287–288  
    kinds of: 275  
    liability of foster-parents: 285  
    natural parents, rights of: 284, 286  
    rights on: 283, 287
- Foster-Parenthood, *see* Foster-Care
- Guardian, *see* Guardianship, Parental Authority
- Guardianship: 315–338  
    *ad litem*: 77, 301  
    court, role of: 322  
    custody, distinguished from: 321  
    death of parent, on: 316–317  
    disagreements on: 320, 322  
    discharge of: 325  
    duration of: 325  
    duties of: 318, 321  
    ex-nuptial child, of: 211–212  
    interim: 332  
    joint: 320–321  
    parent, equal eligibility of: 322  
    particular purpose, for: 319  
    property, of: 319  
    responsibilities of: 318  
    testamentary: 317  
    variation of: 329
- Guardianship and Administration Board: 139, 144
- Habeas corpus*, writ of: 286
- Handicapped Persons, *see* Mentally Handicapped Person, Physically Handicapped Person
- Henry VIII: 11
- High Court of Australia: 37
- History of Family Law: 9–16
- Hotchpot: 427–428
- Intestacy: 409–431  
    adoption, on: 429–430  
    ascendants: 425  
    *bona vacantia*: 431  
    capacity to succeed on: 415–416  
    collaterals: 426  
    *commorientes*: 417  
    crime, affecting: 418  
    definition of: 409  
    *de facto* spouse: 423  
    descendants: 424  
    heir: 414  
    hotchpot, doctrine of: 427–428  
    representation on: 427  
    spouse, surviving: 421–423  
    unworthiness to succeed: 418
- Lawrence, D.H.: 1

## Index

- Legal representation, of child: 107, 243, 353–357
- Legislation: 22–29  
Federal: 23–27  
State: 28–29
- Legitimacy: 198–203  
disputes on: 203  
presumption of: 199, 203
- Life Insurance: 484
- Lunatic, *see* Mentally Handicapped Person
- Magistrates' Courts: 37, 50
- Maintenance, *see also* Child Support  
Agency, Maintenance Agreements: 187  
adult child, of: 312–313  
child, of: 187, 302–314  
spouse, of: 310
- Maintenance Agreements: 187, 310, 371–375  
advantages of: 372  
approval by court: 373  
definition of: 372  
types of: 372  
revocation of: 374  
variation of: 374
- Marriage, *see also* Consortium, Formalities of Marriage: 16, 146–173  
bigamous: 152  
capacity for: 147–159  
certificate of: 73  
common law, *see* Common Law Marriage  
consanguineous: 150  
consent to: 153–158  
contracts on: 169  
crimes within: 171  
declaration of validity of: 74  
duress in: 154–155  
duties of: 164–168, 172  
effects of: 162–172  
foreign: 126  
insanity, effect of: 157  
jactitation of: 142  
mistake as to: 156  
nature of: 146  
polygamous: 152  
prior: 152  
privilege: 167  
promise of: 85, 147–148  
sex, different needed: 149  
torts in: 170  
validity, of: 74, 126  
void: 158–159, 173  
voidable: 173
- Matrimonial Causes Act 1857 (England): 12, 13
- Matrimonial Causes Act 1959: 10, 13–14
- Matrimonial Home: 165, 311
- Matrimonial Property, *see also*  
Superannuation: 188–189, 310, 358–404  
adjudication of: 383–397  
advancement, presumption of: 360–361  
child, settlement on: 377  
common law principles: 358  
contributions, affecting: 388–395  
death, affecting: 400–402  
definition of property, for: 378  
discretionary régime on: 360, 377, 383–385  
discretionary trust on: 378–379, 483  
financial resources on: 381  
fraud affecting: 382  
homemaker, contribution as: 393–395  
misconduct affecting: 395  
readjustment of: 376–382  
separate régime of: 360  
setting aside transactions: 403  
State legislation on: 360  
unity of spouses, on: 358–359  
value of: 382  
variation of: 398–399
- Mediation Appendix: 2
- Mentally Handicapped Persons, *see also*  
Insanity: 130–145  
administration of: 142–144  
contracts of: 131  
discrimination against: 132–138  
guardian of: 139–140  
will of: 131, 143
- Minor, *see also* Capacity, Child: 57–69, 77–112  
contractual capacity of: 78–90
- Murphy, Lionel: 15, 39
- Name: 113–120, 162–163  
change of: 118–119

## Index

- forename: 113–114, 120, 162  
marriage on: 162–163  
surname: 115–119, 162–163  
Nationality: 121–122  
Necessaries, contract for: 79, 88  
Next friend: 77, 301  
Norfolk Island: 5  
Northern Territory: 3, 5, 8  
Nullity, *see also* Marriage, Void Marriage: 10  
  
Opas, Mr Justice: 40  
  
*Parens patriae* jurisdiction: 23, 145  
Parent, duty to child: 94–95, 281, 285, 289–290  
    liability of: 94, 285, 289  
Parentage, declaration of: 205  
Parental Authority: 292–314  
Parenting Order: Appendix, 8  
Paternity, declaration of: 204  
Personal Representatives: 408, 434–435, 486–495  
Philip, Captain: 1  
Physically Handicapped Persons: 132, 145  
Population, Australian: 7–8  
*Portio legitima*: 19, 405–406  
Powers, reference of: 10  
Privilege, on Marriage: 167–168  
Probate: 73, 410, 413, 434  
Promise of Marriage: 85, 147–148  
Property, *see* Matrimonial Property  
Public Advocate: 139  
Public Trustee: 416  
Putative Spouse: 196, 469  
  
Radio Stations: 7  
Reception, of English Law: 13  
Reference of powers: 10  
Reformation, The: 12  
Registrars, powers of: 383  
Registration of civil status: 72–74  
Religious freedom: 21  
Removal of Children, *see also* Child Abduction: 333–334  
Reporting, of Child Abuse: 111  
Representation of children, *see* Separate Representation of Children  
  
Residence: 129  
Restitution of Conjugal Rights: 14, 165  
Roman Catholic Tribunals: 10  
  
Separate Representation of Children: 353–357  
Separation: 15, 174–176  
    trial: 176  
Sex, different, for marriage: 149  
Sexual Intercourse, duty of: 166  
Social Security: 27, 187  
Specific performance: 81  
Succession, *see also* Intestacy, Testators' Family Maintenance, Wills: 17–19, 37, 405–495  
    *donatio mortis causa*: 480–481  
    gift to avoid duties: 482–485  
    probate on: 410, 413, 434  
Superannuation: 378–381, 396–397, 484  
Supreme Courts: 37  
  
Tenancy in Common: 485  
Tenancy, Joint: 485  
Tennyson, Alfred Lord: 34, 413  
Testation, freedom of: 18, 405–407  
Testators' Family Maintenance: 19, 70, 400, 462–473  
Torres Strait Islanders: 8  
Tort: 170  
    capacity to commit: 91–96  
    parental liability for: 94–96, 285  
    spouses, against: 170  
Treaties: 30–32  
Trust,  
    constructive: 363, 365–368  
    discretionary: 378–379, 483  
    resulting: 360–363  
TV Stations: 7  
  
Undue influence: 78, 441  
UN Convention on the Rights of the Child: 30–32, 107, 120, 264, 283, 294, 296, 323, 345, 357  
Unincorporated association  
UN Declaration on Mentally Retarded Persons: 145

## Index

- Van Diemen's Land: 5
- Vicarious Liability, of parent: 94, 285
- Violence, family: Appendix, 9
- Void Marriages: 158–159, 173
- Voidable Marriage: 173
- Voting, compulsory: 6
  
- Watson, Mr Justice: 40
- Welfare Reports: 344
- White Australia Policy: 7
- Wills, *see also* Succession, Testators' Family
  - Maintenance: 11, 432–461, 474–479
  - armchair rule on: 475
  - capacity to make: 437–442
  - codicil to: 433, 451
  - form of: 443–444
  - formalities: 443–446
  - informal: 445–446
  - interpretation of: 474–479
  - joint: 447
  - marriage, effect of: 456–458
  - privileged: 445–446
  - provisions of: 459–461
  - revocation of: 449–458
  - signature to: 443
  - types of: 443–444
  - witness to: 436, 443
- Wishes, of Child: 243, 344