

NEW DEVELOPMENTS IN MAINTENANCE AGREEMENTS

DOROTHY KOVACS*

It is poor Family Law practice to subject the family in distress to the further emotional and financial damage wrought by litigation where this can be avoided. To this end the out-of-court agreement negotiated at arms length and with independent legal advice for the parties is perhaps the most significant measure provided in the *Family Law Act* 1975 (Cth). Part VIII of that Act regulates such contracts, or "maintenance agreements". After eight years of experience under the Act the law with respect to these agreements was becoming settled when the *Family Law Amendment Act* 1983 (Cth) introduced changes, some of which were far reaching in their effect. Many of the new provisions appeared in the Act without having been introduced in the original bill. They were brought in at the eleventh hour at the behest of the Family Law Council. In the result, substantial departures in policy have been enacted without the usual opportunities for extensive debate in the Parliament, in the legal profession or in the general community.

It is proposed to examine in this work the new legislation relating to maintenance agreements. The opportunity is also taken to discuss recent case law developments.

A. AGREEMENTS GOVERNED BY THE FAMILY LAW ACT

Not every contract entered into between the parties to a marriage is within the purview of the *Family Law Act*. The Act is concerned only with a maintenance agreement which in section 4(1) is defined as:

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

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

"[M]atters with respect to

- (a) the maintenance of one of the parties;
- (b) the property of those parties or of either of them; or
- (c) the maintenance of children of the marriage."

* LL.B. (Melb.), LL.M.(Mon.) Senior Lecturer in Law, Monash University.

Thus, far from being confined to agreements concerning maintenance, a maintenance agreement may settle a broad range of matters.

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

1. SECTION 86 AGREEMENTS

A section 86 agreement is designated in section 86(1) as one to which section 87 does not apply. It is similar to a consent order but is not in fact an order at all as there is no formal appraisal by the court which registers it except for the purposes of ensuring that it is not "in substitution for future rights" in which case registration is refused. The formal requirements are minimal (regulation 169) and registration is automatic. Once registered the agreement is enforced under section 88 as if it were an order of the court.¹

It is always open to a party to seek inconsistent orders however, by applying to vary maintenance provisions (section 86(3)) or for property orders under section 79.² It is now well established that the court is free to depart from the terms of the agreement, even where it is substantially executed.³ There is no presumption that the agreement is to be adhered to absent a vitiating circumstance.⁴

The lack of special status of section 86 agreements has in the past led to a view amongst legal practitioners that they are not worthwhile for resolving family financial disputes. In fact they may achieve a number of objectives.

(a) *A matrimonial property contract*

It has always been possible to register a section 86 agreement during an ongoing marriage, but the property provisions could not in the past be varied until section 79 jurisdiction became available on commencing principal relief proceedings. Now that section 79 orders no longer need await principal relief⁵ there may be scope for varying the property provision in a section 86 agreement during an ongoing marriage. This may enable parties to enter into their own matrimonial property contract and to update it as circumstances require. We have seen however that the court is not obliged to give credence to such an agreement if a party wishes to abandon it. Nevertheless the registered agreement may be strong evidence of what the parties felt was fair at the time it

¹The "court" referred to in this work is the Family Court, or with the parties' consent the Magistrates' Court (section 46 *Family Law Act*). The Family Court only is specifically referred to for the sake of brevity.

²The section 79 procedure was settled by the Full Court of the Family Court in *Candlish and Pratt* (1980) F.L.C. 90-819.

³*Candlish and Pratt* (1980) F.L.C. 90-819 *Burgoyne and Burgoyne* (1978) F.L.C. 90-467.

⁴*Candlish and Pratt* (1980) F.L.C. 90-819, *Sykes and Sykes and Dotch* (1979) F.L.C. 90-652.

⁵See section 4(1) (ca)(i).

was entered into. An unregistered agreement may be of equal evidentiary value however.

(b) *Severance of a joint tenancy*

It has been held in *Re Pozzi*⁶ that a section 86 agreement will be effective to sever a joint tenancy if that is the intent of the agreement. In that case the parties had agreed that the wife would occupy the jointly owned matrimonial home until the children of the marriage became self-supporting and that the home would then be sold and the proceeds divided equally between the parties. The husband died while the wife and children were still in occupation. The wife argued that she had acquired the entire home by survivorship. The section 86 agreement, she urged, was not a final order because of the freedom of the court to depart from its terms. Thomas J. of the Supreme Court of Queensland held that the agreement was final unless and until the court discounted its terms and, given the undertaking to sell the house and share the proceeds it was effective to terminate the joint tenancy on "the long standing principle that a joint tenancy may be severed by an agreement . . . to deal with the property in a way which involves severance".⁷ Accordingly the husband's interest fell into his estate and the wife did not acquire it by any *jus accrescendi*.

(c) *An alternative to consent orders*

Prior to the amendments of 1983, orders arrived at under section 79 were virtually unvariable.⁸ They were accordingly very attractive to parties for whom finality was a priority. The 1983 amendments have significantly eroded the rigidity of section 79 orders.⁹ The effect of this development may be that while the section 79 order remains more difficult to alter than the section 86 agreement, the decrease in finality may, given the simplicity of registration, enhance the popularity of the agreement option.

(d) *Finalising financial arrangements on the death of a party*

The 1983 *Family Law Amendment Act* has significantly extended the ability of the Family Court to make financial orders after the death of a party to a marriage.¹⁰ However, it is still not possible to initiate maintenance and property proceedings after the death of a party. It follows that once a section 86 agreement has been registered its provisions effectively become final if no conflicting proceedings are initiated during the lives of both parties.

The effect of section 86 agreements after a death has for the first time been spelt out in section 86(3A) which causes a registered agreement to operate *prima facie* after death except in relation to periodic payments unless the

⁶ (1982) F.L.C. 91-262.

⁷ (1982) F.L.C. 91-262, 77, 469.

⁸ *Taylor v. Taylor* (1977) F.L.C. 90-266.

⁹ Section 79A now provides liberal grounds on which the order may be varied or set aside and a new order made.

¹⁰ Section 79(8).

agreement specifies otherwise. Lawyers acting for beneficiaries of maintenance orders should therefore take the precaution of arranging lump sum provision or providing specifically for periodic payments to remain enforceable against the liable party's estate.

(e) *The role of section 85A*

Section 85A is a new provision added by the *Family Law Amendment Act* 1983. It enables the Court to make such orders as it considers just and equitable in respect of any property dealt with by ante-nuptial or post nuptial settlements made in relation to the marriage. While section 85A aims to give the Court access to assets which may be subject to discretionary trusts, some section 86 agreements may be termed a settlement within the meaning of section 85A. The separation of property agreement in *Sykes and Sykes and Dotch*¹¹ might be a case in point, although it seems that an agreement to divide property because the parties are divorcing would not.¹² Section 85A provides that the contribution tests in section 79(4) shall be applied so far as they are relevant. What then is the significance of proceeding under section 85A rather than under section 79?

One consequence may be that the provisions relating to variation of section 79 orders and proceedings under section 79 in relation to deceased estates do not apply. Section 79 orders may be set aside or varied under Section 79A but section 79A has no application to section 85A orders. Similarly a proceeding which has not been completed under section 79 may be continued after the death of a party under section 79(8) but by analogy with *Sims and Sims*¹³ there seems to be no equivalent power if the court chooses to proceed under section 85A. It would seem that far from expanding the court's powers in relation to nuptial settlements including some section 86 agreements, the jurisdiction under section 85A is in many respects more truncated than that under section 79. This is almost certainly unintended and the Act should be amended to overcome this problem.

In other respects section 86 agreements have undergone little change in the recent amendments to the *Family Law Act*. However in comparison to the new section 87 provisions they have acquired a number of incongruous features, some of which may have arisen unintentionally. As most of these relate to the enforcement provisions of the Act they will be discussed in that context.¹⁴

2. SECTION 87 AGREEMENTS

(i) *When is an agreement one under section 87?*

Section 86(1) causes agreements under section 86 and those under section 87 to be mutually exclusive. The essence of the section 87 deed is that it provides that the agreement shall operate with respect to the financial matters it

¹¹ See fn. 4 supra.

¹² *Young v. Young* (no. 1) 1962 P. 27.

¹³ (1981) F.L.C. 91-072.

¹⁴ See p. 107 infra.

deals with in substitution for any rights of the parties under Part VIII of the Act (section 87(1)). This is usually spelt out expressly in recitals in the deed but *Papas and Papas*¹⁵ holds that the absence of such express recitals is not conclusive. The court will look at the substance of the agreement and not at the form to determine whether its true effect is to conclude the financial affairs of the parties and foreclose further recourse to Part VIII orders. In *Papas*, Murray J. decided that the agreement was a section 87 agreement despite the absence of the usual recitals. It is submitted that in the *Papas* situation the court must take special care that both parties comprehend the consequences of approval. The husband in that case resiled before the court could approve the deed. The wife argued that merely by submitting the deed for approval she had caused it to be registered as a section 86 deed. Upon rejecting this argument Murray J. emphasized that a deed which was in essence a section 87 deed could not be registered under section 86 even where the registration requirements of the regulations were complied with. It is suggested that a deed which was not approved because it was not in essence a section 87 deed (because it failed to provide in effect that its provisions were final) could, unlike the ineligible agreement in *Papas*, be registered in accordance with section 86.

(ii) *Unapproved agreements*

Section 87(2) provides that an agreement which is not approved is of no effect. This has been understood to preclude a party in section 79 proceedings from adducing evidence of an agreement which was signed by both parties but which was not approved after a party resiled (*Gardiner and Gardiner*¹⁶). Nygh J. emphasized this position in *Heath and Heath: Westpac Banking Corporation*¹⁷ where he held that a transaction (a mortgage) could not be set aside using section 85 merely because it had the effect of defeating an unapproved section 87 agreement. The unapproved agreement could not even be regarded as an "anticipated order" within section 85(1) because of the provision in section 87(2) that it was of no effect. This may be taking section 87(2) too far. Arguably Nygh J.'s view does not accord with the now accepted understanding of an anticipated order in section 85(1) as being one which is reasonably foreseeable.¹⁸ Nygh J.'s strict reading of section 87(2) may be contrasted with that of Lambert J. in *Kenny and Kenny*.¹⁹ Lambert J. declined to accept evidence of the terms of an unapproved agreement in section 79 proceedings but adopted a procedure now well developed under the aegis of the doctrine of part performance in Statute of Frauds contracts. He held that where an unapproved agreement had been carried out or where a party had acted in reliance upon it then the court, while not admitting evidence of the agreement itself would

¹⁵ (1983) F.L.C. 91-358.

¹⁶ (1978) F.L.C. 90-440.

¹⁷ (1983) F.L.C. 91-362.

¹⁸ See *Holley and Holley* (1982) F.L.C. 91-257.

¹⁹ (1983) F.L.C. 91-350.

nevertheless receive evidence in later Section 79 proceedings of what the parties had done in reliance upon the agreement. Any change of position could then be taken into account when the court made section 79 orders.

(iii) *Obligations of the court approving a section 87 agreement*

The serious consequences of approving a section 87 agreement have given rise to special obligations for the judge who approves such a deed. The extent of his obligation has been the subject of a long running debate. How searching must be the court's enquiries to verify that the agreement was arrived at fairly and with independent legal advice? Does the court need to be satisfied that neither party has struck a bad bargain? Indeed the jurisdic nature of the act of approval is itself the subject of dispute. Pawley J. in *Hutchinson and Hutchinson*²⁰ and Toose J. in *Oliver and Oliver*²¹ have insisted that no order is being made by the court because no true judicial discretion is being exercised, while the Full Court in *Carew and Carew*²² has asserted that the court is making an order on approving a deed. A more agnostic position has been taken recently by Strauss J. who observed in *Suters and Suters*²³ that "the true jurisdic character of the court's approval has never been finally determined. It may be that the kind of supervisory jurisdiction which the court has . . . doesn't readily fit into a system [with] adversary presentation of evidence". His Honour then expressed the view that the court's function was "not inquisitive but adjudicatory".²⁴

The debate concerning the extent of the obligation of the court to satisfy itself as to the propriety of the terms of the agreement has not abated in the eight years of the operation of the Act. In *Veney and Veney*²⁵, Hogan J. tended to treat a section 87 deed rather like a consent order and downgraded the responsibility of the judge to independently satisfy himself as to its terms. Rather, his Honour was prepared to rely on the "maturity of the parties, their freedom of choice, . . . their motives, reasons for wanting approval, the subjective value to each of what the deed confers . . . also the mere fact that the parties want finality."²⁶ Perhaps Hogan J.'s willingness to give over the responsibility for the deed was somewhat generous given that the proceedings before him were initiated by a wife seeking extra time to appeal after she underwent a change of heart as to its terms. Moreover *Veney's* case is probably inconsistent with the recent full Court decision in *Suters'* case which insists that it is not enough that the parties are satisfied with the terms of a deed. Nor can the judge rely on the fact that they have discussed matters fully at a regulation 96 conference. The judge is obliged to satisfy himself that the provisions of the deed are proper

²⁰ (1979) F.L.C. 90-691.

²¹ (1978) F.L.C. 90-482.

²² (1979) F.L.C. 90-698.

²³ (1983) F.L.C. 91-365.

²⁴ *Id.* at p. 78, 457.

²⁵ (1983) F.L.C. 91-355.

²⁶ *Id.* at pp. 78, 376 -7.

and he is required for that purpose to have before him sufficient financial information from both parties to make his own judgment that the result is within the range of orders produced by a contested hearing. Failure by the judge to proceed in this manner is a misuse of his discretion and his decision is appealable. The Full Court in *Suters'* case appears to have restored the guidelines established in *Wright and Wright*.²⁷

An aspect of the court's obligation on approving a deed which may have been affected by the 1983 amendments is the requirement, suggested by Evatt C.J. in *Wright and Wright*²⁸ that the marriage has irretrievably broken down. This has never been a statutory requirement and indeed Watson J. pointed out in *Macsok and Macsok*²⁹ that whatever the merits of so doing the court has jurisdiction to approve a section 87 deed in the absence of principal relief proceedings. It is suggested that an indirect effect of some of the 1983 amendments may be to decrease the obligation of the court to satisfy itself on the question of marriage breakdown. The new ability of the court to revoke its approval if the agreement subsequently proves impracticable (section 87(8))³⁰ removes the anxiety associated with an immutable agreement imposed upon a fluid marital situation expressed by the Chief Justice in *Wright's* case. The new jurisdiction over property during an ongoing marriage which arguably is claimed in section 4(1) (ca) (i) is a compatible trend.

(iv) *The limits of the finality concept*

The finality concept has undergone considerable erosion due to the 1983 *Family Law Amendment Act*. Approval may be revoked rather more easily than in the past. We shall consider this aspect in our discussion of termination of agreements.³¹

It has never been possible to finalise child maintenance. The ability to vary child support arrangements which are no longer proper has been extended to arrangements for children over the age of 18. The right to vary adult child arrangements in section 87(14) is aligned to the jurisdiction in section 76(3) to order maintenance for such children in order to enable the child to complete its education or because the child is handicapped.

Section 87(14) fills a gap which was discovered in the 1975 Act. Maintenance provision for children may be varied under section 86(13) and (14) on a finding that the arrangements in the agreement are "no longer proper".³² *Vartikian and Vartikian*³³ holds that the arrangements contemplated here are express arrangements set out on the face of the deed. The court will not vary the agreement on account of understandings concerning child maintenance

²⁷ (1977) F.L.C. 90-221.

²⁸ *Id.* at p. 76, 146.

²⁹ (1976) F.L.C. 90-045.

³⁰ See p. 109 *infra* 19.

³¹ See p. 108 *infra* 16.

³² This concept is considered in *Borzak and Borzak* (1979) F.L.C. 90-688.

³³ (1983) F.L.C. 91-334.

which may underpin an agreement without being specifically spelt out in its terms.

A further exception to the finality concept resides in that the restriction to further court orders relates only to further orders under Part VIII of the *Family Law Act*. It was pointed out in *Borzak and Borzak*³⁴ that an approved agreement cannot foreclose access to the injunction provisions of the Act as these appear not in Part VIII but in Part XIV. An occupancy order which, since the High Court decision in *Mullane v. Mullane*³⁵ may be referred to section 114, may therefore be obtained in relation to a house to which the applicant may have surrendered title. It may therefore be prudent for practitioners to specify that occupancy clauses are not to be referred to section 114, but are maintenance provisions. (*Mullane's* case held that occupancy orders may be made either as maintenance orders or as injunctions). It is to be hoped that the court will discourage circumvention of the finality concept by the granting of injunctions but the use of section 114 may in the future generate some powers of intervention by the court after approval.

B. ENFORCEMENT OF MAINTENANCE AGREEMENTS

1. ENFORCEMENT OF SECTION 87 AGREEMENTS

The ongoing battle between the Supreme Court and the Family Court as to whether there is concurrent state jurisdiction to enforce a section 87 agreement is a feature of the 1975 Act which has been resolved by the 1983 amendments. The Full Bench of the High Court did at last resolve that dispute, albeit too late, as the Act by then was already amended, when it handed down its decision on February 14, 1984 in *Pelzman and Pelzman*.³⁶ The wife in *Pelzman's* case was seeking specific performance of an undertaking by the husband in a section 87 deed to purchase for her some real estate of an agreed value. When she turned to the Family Court she was told that that court was unable to order specific performance of that undertaking. She then sought orders from the Supreme Court of New South Wales. These were granted and upheld by the Court of Appeal despite the husband's protestation that the wife's proceeding was a matrimonial cause and that accordingly the Supreme Court had lost jurisdiction by the proclamations made under section 40(3) *Family Law Act*. The Supreme Court's assertion of concurrent jurisdiction was upheld by the Full Bench of the High Court, where the definition of a matrimonial cause in section 4(1) was analysed closely and found by the Full Bench not to apply to a proceeding to enforce a section 87 agreement.

The Court ruled unanimously that under the law until November 1983 the enforcement jurisdiction of courts proceeding under section 88 of the *Family*

³⁴ See fn. 32 supra

³⁵ (1983) F.L.C. 91-303.

³⁶ (1984) F.L.C. 91-500.

Law Act was not exclusive and that state courts could also enforce section 87 agreements. The High Court expressly overruled *Carew and Carew*³⁷ where the Full Court of the Family Court held that the federal jurisdiction was exclusive, and approved decisions of the Supreme Courts in New South Wales (*Ellinas v. Ellinas*)³⁸ and Queensland (*Noble v. Noble*).³⁹ While much of the High Court reasoning is, in the light of the amendments, of historical interest only, *Perlman's* case will remain a seminal decision on the interpretation of concepts which survive in the matrimonial cause definition (section 4(1)) after the 1983 amendments. In particular the High Court's views on when proceedings "arise out of the marital relationship" are of the utmost relevance to the new property matrimonial cause in section 4(1) (ca) (i). Moreover three members of the Court pointed out that the proclamations terminating Supreme Court jurisdiction predated the renumbering by Act No. 62 of 1976 of the matrimonial cause provisions so that they do not specifically include section 4(1) (ca). The discovery that some Supreme Court property jurisdiction may have survived in error since that time will hopefully activate further proclamations to cure this omission.

The 1983 amendments sought to overcome two major areas of difficulty revealed in case law. The first was the serious deficiencies exposed in the enforcement powers conferred by the *Family Law Act*. It had become apparent that the Family Court could not order interest to be paid on overdue moneys (*Harding and Gibson*)⁴⁰ specific performance (*Perlman and Perlman*)⁴¹ rectification of the deed (*Kokl and Kokl*)⁴² nor make declarations (*Smith and Smith*)⁴³ or award damages (*Noble and Noble*).⁴⁴ The second problem was to some extent a product of the first and that was the running debate now resolved by the High Court in *Perlman's* case concerning concurrent jurisdiction which had been claimed by the Supreme Courts of Queensland and New South Wales.

Both of these problems have been addressed in the 1983 *Amendment Act*. The enforcement of maintenance agreements has been designated a matrimonial cause in section 4(1) (ea) thereby giving exclusive jurisdiction to the Family Court. The general principles of law and equity are then invoked in the matter of remedies by section 87(11) and the court acquires by section 87(11)(a) the same powers in relation to contracts as are exercised by the High Court in its original jurisdiction. This provision supplies jurisdiction to make orders for declarations, rectification, specific performance and damages which was lacking prior to the amendments.

³⁷ See fn. 22 supra.

³⁸ (1979) F.L.C. 90-649.

³⁹ (1983) F.L.C. 91-338.

⁴⁰ (1979) F.L.C. 90-665.

⁴¹ (1983) F.L.C. 91-308.

⁴² (1981) F.L.C. 91-078.

⁴³ (1979) F.L.C. 90-642.

⁴⁴ See fn. 39 supra.

Do the state courts retain any jurisdiction in relation to maintenance agreements? Section 4(1)(ea) requires that the proceedings be between the parties to the marriage so it may be that proceedings involving a third party to a deed do not fall within the exclusive jurisdiction of the Family Court. Moreover agreements sanctioned under section 87(1)(k) of the *Matrimonial Causes Act 1959 (Cth)* are expressly consigned to the state courts where they are enforced as contracts by the operation of section 87(16). This section replicates section 87(10) of the pre-amendment legislation which according to a well entrenched body of authority⁴⁵ restricts such agreements to the Supreme Courts.

A further role possibly retained by the Supreme Courts is the enforcement of contracts which are collateral to a section 87 agreement. The New South Wales Court of Appeal has enforced such a collateral contract in the recent case of *Chapman v. Chapman*.⁴⁶ The Family Court had approved the parties' deed which by oversight had failed to include a term that the wife undertook to take over the repayment of a loan advanced by her mother to the husband. When the wife failed to repay the loan her mother sued the husband in the Supreme Court and he joined the wife as a third party, pleading the collateral agreement which, the Court accepted, was spelt out in correspondence between the parties. The New South Wales Court upheld the husband's defence. The majority, Mahoney and Priestley J.J.A., (Hutley J. dissenting) found that the collateral agreement survived the approval of the deed despite the deed purporting to relate to the whole of the financial matters between the parties personally. This was because its terms were not inconsistent with those of the deed. Moreover the action to enforce the collateral contract was not a matrimonial cause.

Chapman's case is based on the *Family Law Act* prior to the 1983 amendments and some of the reasoning is now superseded. Nevertheless it remains possible to argue that a contract collateral to a section 87 deed is enforceable in the state courts. It is submitted that the success of this argument turns on whether the collateral contract action is a proceeding "in relation to the enforcement or otherwise" of a section 87 agreement within the definition of matrimonial cause in section 4(1) (ea) (iii).

The wording of section 4(1) (ea) (iii) also casts doubt on the position of parties such as those in *Hayes and Hayes*.⁴⁷ An important item of partnership property had not been included in the deed in that case, because the parties had been unable to agree in relation to that property. When the husband sought further orders under section 79 in respect of this item, Nygh J. held that Family Court jurisdiction was foreclosed by the terms of the ouster clause in the recitals in the deed. The wife was therefore permitted to proceed in the Supreme Court for the appointment of a receiver. Does the enactment of sec-

⁴⁵ *Penberthy and Penberthy* (1977) F.L.C. 90-225; *Lakajev and Lakajev* (1978) F.L.C. 90-448; *Gipps and Gipps* (1978) F.L.C. 90-523.

⁴⁶ (1983) F.L.C. 91-357.

⁴⁷ (1982) F.L.C. 91-205.

tion 4(1) (ea) (iii) prevent a proceeding such as the wife's in *Hayes'* case from being heard in the Supreme Court? Failure to deal with an item of property would not appear to be a ground for revoking the agreement. To close access to state proceedings would there leave the parties in limbo. *Hayes'* case contains important drafting lessons in relation to property which is not dealt with in a section 87 agreement. The deed should specifically exempt such property and liberty to apply under Part VIII should be preserved in relation to it.

2. ENFORCEMENT OF SECTION 86 AGREEMENTS

The enforcement matrimonial cause, section 4(1)(f) does not apply to section 86 agreements as there is no "decree"⁴⁸ made when a section 86 deed is registered. A new matrimonial cause associated specifically with the enforcement of section 86 agreements (section 4(1)(ea)(v)) has been added by the 1983 *Amendment Act*. How has this altered the law on this subject?

We have seen that the 1983 Act has reformed the law relating to section 87 agreements so that remedies under the *Family Law Act* have been extended and so that enforcement is now to be concentrated under the Act (section 4(1)(ea)(i)). The law with respect to the enforcement of section 86 agreements has undergone neither of these changes. The benefits of remedies such as damages, declarations, rectification and specific performance which now pertain to section 87 agreements do not apply, it seems, to deeds registered under section 86. Moreover section 4(1)(ea)(v), the matrimonial cause provision relating to section 86 agreements, provides only that the enforcement of such an agreement **under this Act** is a matrimonial cause. Given that enforcement in the Supreme Court as a contract can be said not to be enforcement under the *Family Law Act*, the contracts option would appear to remain open.⁴⁹ This interpretation is reinforced by the decision of the High Court in *Pertman's* case which insists on strictly reading the matrimonial causes provisions on the matter of enforcement.

The explanatory memoranda to the 1983 bill give no indication as to whether the retention of dual jurisdiction in relation to section 86 agreements is intentional. It is clearly to the advantage of a party who is anxious to enforce a section 86 deed without risking a variation to proceed on the contract in the state courts. It may be that dual jurisdiction has been retained by oversight rather than by design. This may be attributable to the somewhat indecent haste with which the amendments to the agreements provisions were rushed through the Parliament.

A further change to the provisions of the *Family Law Act* pertaining to the enforcement of maintenance agreements is the insertion of section 84(1A). This makes it clear that if a party does not comply with the requirement in a section 86 or a section 87 agreement that he execute a deed or instrument, an

⁴⁸ "Decree" is defined in section 4(1) as including a "decree, judgment or order".

⁴⁹ I am indebted for this observation to Dr. Ian J. Hardingham of Melbourne University Faculty of Law.

officer of the court may be appointed to carry out that obligation. Section 84(1A) gives declaratory effect to the decision in *Harding and Gibson*.⁵⁰ It should be noted that *Corry and Corry*⁵¹ holds that section 84 does not apply where the party who has failed to comply with the requirement to execute a deed or instrument has died.

C. TERMINATION OF AGREEMENTS

1. SECTION 87 AGREEMENTS

Prior to the *Family Law Amendment Act 1983* the only statutory grounds for revocation of the approval of a section 87 deed were those in section 87(6). (Fraud, undue influence and mutual wish of the parties). The death of a party also had the effect of terminating a section 87 agreement in the normal course due to the operation of section 87(5). Apart from these statutory modes of termination there were some case law developments, the chief of which emanated from *Van der Veer and Van der Veer*⁵² where it was held that the mere act of appealing against the approval of a section 87 deed which had been effected by a magistrate caused that agreement to be terminated.

What principles currently govern the termination of section 87 agreements? *Van der Veer's* case has, it seems, been overruled by the Full Court in *Hartig and Hartig*.⁵³ The decision in *Van der Veer* had proceeded on the basis that *Gardiner's* case had enjoined the court from approving an agreement where one party did not consent to approval. As section 96 caused appeals from magistrates to proceed *de novo* it followed, in Pawley J.'s view in *Van der Veer* that the appeal judge was unable to approve the agreement and it automatically ceased to be binding. This reasoning was approved in *Robinson and Willis*⁵⁴ and in *Smith and Smith*⁵⁵ but was rejected by the Full Court in *Hartig's* case on the ground that *Gardiner's* case had held not that the court could not approve a deed where one party resiled but that it should not do so. Accordingly it followed, it was said in *Hartig*, that the appeal should be heard on its merits.

The death of a party to a section 87 agreement once caused the agreement to cease. This position previously taken in section 87(5) has now been reversed in section 87(10), consistently with the general expansions in jurisdiction after death effected in the 1983 amendments.⁵⁶ In this regard it should be noted that the 1983 Act may have retrospectively altered those earlier agreements which failed to stipulate the consequences of the death of a party. It is arguable, however, that in accordance with general principles of statutory in-

⁵⁰ (1979) F.L.C. 90-665.

⁵¹ (1983) F.L.C. 91-343.

⁵² (1981) F.L.C. 91-043.

⁵³ (1983) F.L.C. 91-361.

⁵⁴ (1982) F.L.C. 91-215.

⁵⁵ (1982) F.L.C. 91-256.

⁵⁶ See fn. 10 *supra*.

terpretation⁵⁷ no retrospective operation should be attributed to provisions which change substantive rights in the absence of a special intent on the face of the legislation.

Turning now to the general statutory provisions governing termination of section 87 agreements, two sections appear to be in point. Section 87(8) now sets out grounds for revocation of approval including two new grounds in section 87(8)(c) and section 87(8)(d). Revocation is effected by the court in which the agreement is deemed to be registered (usually the court that approved it) (section 87(6)). The effects of revocation are then specified in section 87(9). Section 44(3A) specifically exempts from the operation of time limits for bringing Part VIII applications, such applications initiated after the approval of a section 87 deed has been revoked. In addition to revocation of approval under section 87(8) it is submitted that section 87(11) may cause agreements to be discharged or set aside by attributing to them the same validity, enforceability and effect that they would have according to the principles of law and equity. Doctrines such as fundamental breach, frustration, mistake, undue influence and unfair advantage will acquire a new prominence in the family jurisdiction. The relationship between section 87(8) and section 87(11) has yet to be addressed. It is conceivable that same facts may allow the court to use either provision. For example the court could revoke its approval of a void agreement under section 87(8)(c) or set the deed aside under section 87(11). In the event that it chooses the latter course it should be appreciated that section 87(9) is not relevant and the usual time limits in section 44 will apply. It may be that the appropriate course for a court faced with a choice of proceeding under section 87(8) or section 87(11) should give pre-eminence to the revocation option under section 87(8), applying the maxim that *generalia specialibus non derogant*. Let us examine these methods of termination more closely.

(a) *Revocation of approval section 87(8)*⁵⁸

While revocation of approval was available previously only on proof of some impropriety associated with the obtaining of the agreement or its approval events arising subsequently to approval may now be grounds for revocation (section 87(8)(c) and (d)).

(i) Section 87(8)(a). The approval was obtained by fraud.

This would appear to be confined in its scope to a fraud on the court. This provision may be contrasted with previous fraud provision in section 87(6) which referred not only to a fraud on the court but also to a fraud on the other party to the agreement. Presumably fraud on a party is now caught by section 87(8)(c) or alternatively by the general provisions of section 87(11).⁵⁹ Undue

⁵⁷ *Newell v. R.* (1936) 55 C.L.R. 707.

⁵⁸ For a discussion of the principles applied prior to the *Family Law Amendment Act 1983* Cth. see: D. Kovacs, "Maintenance Agreements Under the Family Law Act", (1983) 7 *Uni. Tas. L.R.* 249.

⁵⁹ See p. 111 *infra* 20.

influence which was also a ground for revocation of approval is now presumably also caught by either section 87(8)(c) or section 87(11). In regard to a fraud on the court *Fryda and Johnson (No. 2)*⁶⁰ which holds that the court has a discretion not to revoke even on proof of fraud, still seems in point. *Green and Kwiatek*⁶¹ points out a heavy burden of proof is on the party seeking revocation on the ground that the court was actively misled by the other party's fraud.

(ii) Section 87(8)(b). The parties to the agreement desire the revocation of the approval.

This provision is often invoked when the parties reconcile and they do not wish to proceed with the agreement. *Borzak's*⁶² case held that the mere fact of reconciliation does not bring an agreement to an end. Both parties should approach the court for revocation under section 87(8)(b). However the Full Court decided in 1983 in *Banhidy and Banhidy*⁶³ that this provision may be invoked by one party if on the faith of a reconciliation he has altered his position. The other party may then be estopped from denying consent to revocation. While estoppel may now be less important since the extension of the revocation grounds in section 87(8), *Banhidy's* case adds a judicial extension to the grounds in section 87(8)(b). *Banhidy's* case, like many others, provides us with drafting lessons. An agreement should provide for the possibility of a future reconciliation either by stipulating that the parties will (if that occurs) undertake to seek revocation of approval or alternatively if the parties prefer not to risk a hard-won agreement by a precarious reconciliation they should specify that reconciliation per se will not be construed as a waiver of rights under the agreement.

(iii) Section 87(8)(c). The agreement is void, voidable or unenforceable.

Commercial contracts principles will be relevant here. Fraud and undue influence have already been referred to as instances of voidable contracts. Agreements which are void will include those void for uncertainty. The order in *Simpson's* case⁶⁴ provides an example of a void term. It obliged the husband to build a house of unspecified value and to an unspecified stage of completion for the wife. Unenforceable agreements may include those which offend public policy. Arguably an agreement such as that which Fogarty J. declined to approve in *Bailey and Bailey*⁶⁵ whereby the parties agreed that the wife would resort to social security rather than maintenance from the husband would, if approved, come within the ambit of section 87(8)(c).

(iv) Section 87(8)(d). In the circumstances that have arisen since the

⁶⁰ (1981) F.L.C. 91-058.

⁶¹ (1982) F.L.C. 91-259.

⁶² See fn. 32 supra.

⁶³ (1983) F.L.C. 91-302.

⁶⁴ (1983) F.L.C. 91-349. The order in this case was in fact made by consent under section 79.

⁶⁵ (1981) F.L.C. 91-041.

agreement was approved it is impracticable for the agreement to be carried out or impracticable for a part of the agreement to be carried out.

This provision, if interpreted liberally by the court could in large measure erode the finality concept which has always been the hallmark of section 87 agreements. While revocation was previously available only where the circumstances preceding the agreement were improper or where both parties wished for revocation, this provision now makes revocation possible in the light of subsequent events where it becomes impracticable to carry out the agreement. Section 87(8)(d) confers a potentially wide discretion to revoke an approval which may generate serious uncertainty as to the future of many agreements. It has, unfortunately brought about a situation whereby lawyers must now advise clients that no truly final agreement can with certainty be achieved in Australia. The concept of impracticability was considered by Nygh J. in *Parker and Parker*.⁶⁶ That case involved not section 87(8) but the matter of impracticability in carrying out a section 79 order for the purposes of section 79A. Nygh J. considered that "impracticability is not a term of art as would be the legal doctrine of frustration. It is a question of fact and degree in each case".⁶⁷ Both parties agreed in *Parker's* case that it was impracticable to carry out a term of a section 79 order which required the husband to buy a replacement house for the wife, as they were unable to agree on the value of the replacement residence. Accordingly, Nygh J. made new orders under section 79A.

It should be noted that the impracticability in section 87(8)(d) need relate only to a part of the agreement for the entire agreement to be overturned. Hopefully not too small a part will suffice.

(b) *The role of section 87(11)*

We have noted that in addition to revoking approval under section 87(8), the court may refuse to enforce some agreements or set them aside under section 87(11). Section 87(11) may also provide answers to some problems which proved intractable prior to the amendments of 1983. A case in point is *Kokl and Kokl* where the court resorted to unorthodox means to set aside a deed which erroneously divided the parties' shares to property by reference to an amount of money rather than by allocation of percentage shares.⁶⁸ It is submitted that the court would now rectify the deed using section 87(11) rather than abandon the agreement. Section 87(11) would also seem to resolve the matter of whether the court is able to extend the time for payment of a sum of money specified in a section 87 deed. Watson J. in *Makin and Makin*⁶⁹ was prepared to extend time to pay applying ordinary contract notions as to whether time was of the essence. Gee J. in *Power and Power*,⁷⁰ more appropriately it is submitted, was of the view that the course adopted in *Makin's* case was contrary to the nonvariability tenet of section 87 itself. The matter

⁶⁶ (1983) F.L.C. 91-364.

⁶⁷ *Id.* at p. 78, 443.

⁶⁸ See fn. 58 *supra*.

⁶⁹ (1980) F.L.C. 90-818.

⁷⁰ (1980) F.L.C. 90-878.

would appear now to have been put to rest in favour of the approach in *Makin's* case by section 87(11) conferring on the agreement the effect it would have at law.

Occasionally parties seek to achieve an agreement which is truly irrevocable by agreeing that no application shall be made to the court for revocation of the approval. In *Gardiner and Gardiner*⁷¹ the Full Court of the Family Court indicated that it was undesirable to exclude the jurisdiction of the court under section 87(6) of the 1975 Act and that such a clause should not be approved. The temptation to insert such clauses will no doubt increase with the extensions to grounds for termination in the 1983 Act. The Full Court in *Suters and Suters*⁷² considered the effect of such clauses which are common in agreements which have been approved. In *Suters'* case, the agreement contained two clauses which purported to oust the operation of section 87(6); one clause whereby the parties covenanted that their agreement had not been brought about by misrepresentation, non-disclosure or undue influence, and the other which consequent upon the first clause provided that there was no right to seek revocation except by mutual consent. The Full Court held that such clauses were void. Wood J. regarded them as being contrary to public policy. Strauss and Lambert JJ. held that these ouster clauses were contrary to section 87 itself. The majority reasoning is significant. As it is not limited to considerations of fraud, non-disclosure or undue influence it would also render void clauses ousting jurisdiction to revoke approval of agreements which proved voidable, unenforceable or impracticable after the 1983 Act. The whole Court in *Suters'* case agreed that while such clauses were void they were severable and did not cause the entire agreement to be struck down.

(c) *The Effects of Termination*

The Act has not in the past spelt out the legal effects of revocation. Conflicting views were expressed in cases as to whether revocation operated *ab initio*⁷³ so that the agreement was ineffective on being revoked to pass property, or only prospectively so that "whatever transactions that have taken place with respect to property which has passed to either party under the agreement between approval and the date of revocation are not affected by revocation".⁷⁴ The 1983 Act addresses this problem by adding section 87(9) which stipulates that where approval is revoked the agreement ceases for all purposes to be in force. This provision does not resolve the issue however as it fails to specify when such cessation occurs. It is submitted that the view that cessation is *ab initio* should be resisted in view of the uncertainties of title that it generates particularly in purchasers for value from a party acquiring property under the agreement before revocation. The matter may however be regarded as

⁷¹ See fn. 16 supra.

⁷² See fn. 23 supra.

⁷³ This view was expressed in *Kokl and Kokl*. (See fn. 42 supra).

⁷⁴ Per Ferrier J. in *Fryda and Johnson (No. 2)* (1981) F.L.C. 91-058 at p. 76, 470.

academic for parties to the marriage as section 87(12) now makes it clear that they may return for further Part VIII orders. In these proceedings the court is able to take account of whatever may have transpired under the agreement (section 87(9)(b)). We have already noted that section 44(3) has been amended to prevent the usual time bar (12 months after dissolution) in relation to initiating proceedings, from operating in that event (section 44 (3A)(ii)).

2. SECTION 86 AGREEMENTS

A common method of terminating a section 86 agreement is for a party to seek inconsistent orders under Part VIII of the Act. The court may also set the agreement aside under section 86(3) if there has been fraud, undue influence or where both parties seek the setting aside of the agreement. Fraud presumably bears the same meaning in section 86(3) as it does in section 87.⁷⁵

A section 86 agreement does not, except in relation to periodic maintenance, die with a party to the marriage (section 86(3A)). Indeed where a party dies before any section 79 proceedings have been initiated the section 86 agreement may effectively become fixed in regulating the parties' property.⁷⁶

A party seeking inconsistent orders under Part VIII will need to observe the time constraints imposed in section 44(3). If leave to proceed out of time is declined by the court the agreement may effectively become final. In that event the estoppels suggested by Nygh J. in *Dupont's case*⁷⁷ may become significant.

We have seen that a further mode of termination has been added by the amendments in relation to section 86 agreements which may be regarded as marriage settlements.⁷⁸ The property which is the subject of the settlement may be distributed by the court under section 85A.

D. THE POSITION OF THIRD PARTIES TO MAINTENANCE AGREEMENTS

We have seen that the definition of a maintenance agreement specifically contemplates the inclusion of parties other than the husband and wife. It may be prudent, for example, to include as parties, creditors or debtors of the husband and wife who are directly contemplated in the terms of the agreement. Mortgagees who agree to the assignment of a mortgage or superannuation funds or other trustees who agree to make specific payments in accordance with undertakings between the parties are cases in point.

There are to date no reported decisions on the position of third parties to maintenance agreements. It is possible, however to indicate problems which may arise.

⁷⁵ The Full Court in *Green and Kwiatek* (see fn. 61 supra) defined fraud under section 87 as bearing the same meaning as it has at common law in the tort of deceit.

⁷⁶ See p. 108 supra.

⁷⁷ *Dupont and Dupont* (1980) F.L.C. 90-881.

⁷⁸ See p. 100 supra.

(a) CONSTITUTIONALITY

The High Court of Australia has upheld in the family law context the competence of the Federal Parliament to legislate upon the involvement of third parties in custody proceedings⁷⁹ and in proceedings for injunctions affecting property.⁸⁰ In *Ascot Investments v. Harper and Harper*⁸¹ the High Court designated limits to the ability of the Family Court to determine the legal rights and responsibilities of a third party — in that case a family company. It was held there that the court may not make an order if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which that party would not otherwise be liable to perform. Arguably the third party's rights and obligations under the agreement are already determined by the general law of contract which forms the basis for the agreement. A Family Court which bound a third party to a contract into which he had entered would thus not be derogating from his extant rights and obligations, (unlike the Court in *Ascot's* case which attempted to cause a company to behave in a manner which violated well-established immunities accorded under the general principles of corporate liability). Certainly established principles relating to third party intervention in proceedings between the parties to a marriage would need to be observed. For example the third party must have an opportunity to be heard.⁸² However, restrictions on the way in which the power is exercised do not negate the existence of jurisdiction in respect of third parties. Indeed the 1983 amendments extend the provisions relating to third parties in a number of respects.

The enforcement powers of the court are extended in section 87(11)(a) so that it may have the same regard to the right of third parties as does the High Court in relation to contracts. On revocation section 87(9) provides that the court can order the transfer of property or the making of other orders for the protection of not only the parties to the agreement (which may include third parties) but also of any other interested person. Nothing in the Act confines such orders to temporary orders. The Full Court has decided in *Landell-Jones and Landell-Jones*⁸³ that the court has jurisdiction in revocation proceedings to order inspection of documents of account prepared by accountants and companies.

These extensions to third party jurisdiction have stopped short of including third party proceedings in the definition of matrimonial cause. However such proceedings may, it is submitted properly be supported by section 31(1)(d) of the *Family Law Act*; the role of which has been explicated by the Full Bench of the High Court in *Perlman v. Perlman*.⁸⁴

⁷⁹ *Robertson v. Robertson* (1977) F.L.C. 90-214; *Vitzdamm-Jones v. Vitzdamm-Jones* (1981) F.L.C. 91-012.

⁸⁰ *Antonarkis v. Delly* (1976) F.L.C. 90-063.

⁸¹ (1981) F.L.C. 91-000.

⁸² *Barro and Barro (no. 2)* (1983) F.L.C. 91-317; *Prince and Prince* (1984) F.L.C. 91-501.

⁸³ (1983) F.L.C. 91-346.

⁸⁴ See fn. 36 supra.

(b) THE FORUM FOR HEARING THIRD PARTY PROCEEDINGS

A proceeding to register a section 86 deed or approve one under section 87, could, if it is submitted, be referred, when a third party is involved to section 4(1)(f) in combination with section 4(1)(d). Section 4(1)(f) has frequently in the past been invoked where third parties have been involved in other contexts.⁸⁵ However a proceeding to enforce a section 87 agreement cannot, it was held in *Perlman's* case be referred to section 4(1)(f). Such a proceeding is not one "in relation to" the approval of the agreement within the meaning of section 4(1)(f). Applying the reasoning in *Perlman's* case, a proceeding to enforce a section 86 deed would *a fortiori* not be one in relation to its registration. Furthermore the new enforcement matrimonial cause relating to maintenance agreements (section 4(1)(ea)) requires that proceedings be between the parties to the marriage.

It would appear to follow, in this writer's view, that strangers may become parties to approval proceedings under section 87 and to proceedings relating to the validity and effect of such agreements within section 87(11)(a). They could even initiate revocation proceedings under section 87(8) and benefit from a consequential order under section 87(9). Similarly a third party could cause a section 86 agreement to be set aside using section 86(3). All of these proceedings would be matrimonial causes within section 4(1)(f) in combination with section 4(1)(d). However enforcement proceedings by or against a third party would be referable to neither section 4(1)(ea) nor, in the light of *Perlman's* case to section 4(1)(f). Thus while the Family Court could entertain such proceedings under section 87(11) and section 88 respectively, enforcement actions by or against third parties would not appear to be a matrimonial cause. The Supreme Court would, it follows, retain concurrent jurisdiction in such litigation.

E. A NOTE ON SECTION 90 OF THE FAMILY LAW ACT

One of the principal uses made of maintenance agreements in the past has been to transfer property with the benefit of the exemption from state duties conferred by section 90 of the Act. Subsequently to the High Court's decision in *Gazzo v. Comptroller of Stamps*⁸⁶ holding section 90 to be unconstitutional, that provision has been redrafted in the 1983 Act so as to stress that the agreement must be associated with marital breakdown. The ultimate fate of section 90 is less important in Victoria where state duties laws exempt those transactions which section 90 aims to reach. It may however be the case that even as recast section 90 fails to meet the objection in *Gazzo's* case that a law with respect to state duties has insufficient connection with either marriage or divorce to be within the federal power.

⁸⁵ See *Smith and Saywell* (1980) F.L.C. 90-856 and *Vitzdamm-Jones* (Fn. 79 supra).

⁸⁶ (1981) F.L.C. 91-101.

CONCLUSION

The *Family Law Amendment Act* 1983, to a significant extent, and recent case law to a lesser extent, have effected important changes to the law relating to maintenance agreements. An attempt has been made here to describe and evaluate those changes. They have resulted in the clarification of some uncertainties. Deficiencies have been made good. The overhauling of the jurisdiction to enforce section 87 agreements is an instance of unquestionable achievement. On the other hand opportunities have been missed. Section 86 agreements might for example have been accorded greater weight than in the past so that further litigation would be discouraged. Moreover the failure to incorporate into the section 86 provisions a comprehensive system of remedies is a serious *casus omissus*. Another appropriate measure might have been the inclusion of section 87(1)(k) *Matrimonial Causes Act* agreements into the scheme of the *Family Law Act*.

Indeed, this writer feels that not all the innovations are to be welcomed. The loss of finality of section 87 agreements occasioned particularly by section 87(8)(d) is a matter for regret.

The scope of these provisions has yet to be tested in decisions of the Family Court. Answers may be forthcoming to such longstanding conundrums as the nature and extent of the jurisdiction relating to third parties to maintenance agreements. We await further developments with interest. They will no doubt provide ample material for future academic reviews.