WILLS AND INTESTACY IN AUSTRALIA AND NEW ZEALAND*

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This book is the second edition of Wills and Intestacy in Australia and New Zealand, which first appeared in this form in its first edition in 1983. It was then a revision and consolidation of two separate works, *The Law of Wills*, by the same authors in 1977, and *The Law of Intestate Succession in Australia and New Zealand*, by I.J. Hardingham in 1978. In all its versions the work fills a significant gap in the literature available to students, scholars and practitioners of succession law in Australia. It places the English law into the Australian and New Zealand context, with local cases and local statues, and provides a critical commentary upon that law by three of the leading legal scholars in this country.

The book is divided into three parts: Part I, "Wills"; Part II, "Intestacy"; and Part III, "Miscellaneous Matters". All the Parts are broken into clearly headed paragraphs. Part I on wills has retained its structure from its first appearance as *The Law of Wills* in 1977. The reader is taken through a number of topics in the law of wills proceeding in a roughly 'chronological' sequence beginning with "The General Nature of a Will" and then progressing through, for example, the

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* I.J. Hardingham, M.A. Neave and H.A.J. Ford, 2nd edition, Law Book Company, 1989, pages i-xivi, 1-561, with Table of Cases, Table of Statutes and Index, ISBN 0 455 20896 4 (cloth), 0 455 20897 2 (pbk).

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formalities relating to execution of wills, the testator's mental capacity, revocation of wills, and failure of gifts through ademption and lapse. There is also one chapter devoted to the construction of wills and another to contracts relating to wills.

Part II also follows the original track set in Dr Hardingham's intestacy book in 1978. Apart from the general sections, such as "Should a Person Make a Will?", "The Historical Setting" and the very practical chapter on "Division Per Stirpes and Per Capita", this Part of the work divides the chapters mainly into a jurisdiction by jurisdiction consideration of the law of intestacy in Australia and New Zealand. This is compelled by the code-based nature of the law and the differences in the various codes. But the Part also draws out the similar features between the codes such as the chapter on "Children Taking on Intestacy" and on "Personal Chattels and Matrimonial Homes". Part III contains only two chapters, "Family Provision Claims" and "Survivorship".

Of the manner in which the authors present their material, much has already been said in praise, with which this Reviewer heartily concurs. Of Part I, as the *Law of Wills* in its original incarnation, a Book Review in the *Australian Law Journal*[1] drew attention to the critical approach of the work and lauded the fact that the authors had not confined themselves to mere exposition. This continues to be a hallmark of the style of the work as a whole, but of Part I in particular. The authors state the principles clearly but then in many cases subject these principles to cross-examination. One example of this is the consideration in Chapter 7 of "Secret Trusts". The authors discuss the troublesome aspects of the time of communication of the testator's intention in the 'half-secret' trust (paragraph 733), suggesting some confusion in the development of this aspect of secret trusts with the probate doctrine of incorporation by reference. Other such examples are the consideration of the doctrine of delegation of will-making power, especially in relation to hybrid powers of appointment (Chapter 5, especially paragraph 506); the discussion of anti-lapse legislation (paragraph 916); and the jurisdiction of the Probate court to correct mistakes of testators in their wills (paragraph 316). Such doctrines are analysed from within and their weakness exposed.

One New Zealand reviewer, R.J. Sutton,[2] found this focus on the "technical imperfections" of the law a limitation of the work as *The Law of Wills* when he reviewed the work in 1978. He would have preferred a focus on what he described as "that more basic malfunctioning [of the existing law] which becomes apparent only when it is examined from a wider social perspective".[3] With respect, that is not entirely fair to the authors of the book under review. While this Reviewer agrees with Sutton that the role of family provision law is not given the prominence it deserves (which is raised later in this Review),

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1 R.A.S., (1978) 52 *ALJ* 584-5.

2 (1978) 8 *New Zealand Universities Law Review* 211-216.

3 *Ibid* at 211.

when it comes to the law of wills, discussed as 'the Law of Wills', students and practitioners need to understand what that law is and its technical imperfections. To know this is a strength, not a weakness. It is from that strength of understanding that the broader social and theoretical questions of the current place of that law, in its imperfections, can best be answered.

The extent of research in the work has also attracted comment before.[4] This also continues to be an admirable keynote of the work in its second edition. The text is supported with cross-jurisdictional references and abundant references to articles, comments, casenotes and, above all, Australian and New Zealand case law. This edition builds on the first with such references, but in an edition which is largely an updating of the previous edition it is a pity that the references were not checked as thoroughly as perhaps one would like. This is not to detract from this Reviewer's praise of the overall work, but such thoroughness in detail is expected in a new edition, even though such checking over nine jurisdictions is itself an unenviable task. For example, the paragraph on page 95 which states the Northern Territory provisions in relation to privileged wills has remained the same throughout the versions of the work. However the section referred to in the text, section 11 of the *Administration and Probate Act*, was already repealed by the time of the consolidated reprint of the Act in 1980. The references to the various adoption legislation on page 485 and in Chapter 27 also needed some updating to take into account the new *Adoption Act* 1988 (SA) and the *Adoption Act* 1988 (Tas); and the amendments in the Act to the legislation affecting the status of children anticipated in the first edition of the work[5] and repeated on page 425, note 28 of this edition, were introduced by the *Children (Equality of Status) Act* 1988.

One slip the authors can perhaps be forgiven is in relation to the reference to the *Wills, Probate and Administration (Amendment) Act* 1989. This amendment Act represents some significant changes in the law of New South Wales particularly in relation to the formal requirements for the execution and revocation of wills and although it had not been proclaimed to commence by the cut-off point of the research for this edition (stated by the authors to be 1 May, 1989), the Act had been passed and assented to on 18 April 1989, and it was clear by this time that the Act was a 1989 Act and not one of 1988 as consistently referred to throughout this work. It is a small point, but in relation to significant legislation like this (and particularly from the point of view of New South Wales reviewer) one would have hoped that the authors would have made at least a last minute check as to its progress before publishing. To be fair, they do discuss its provisions, as to which more will be said below. While on the subject of legislative reform in this area, one other item sadly omitted in this new edition, is a reference to John H. Langbein's major study of the

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4 R.A.S., (1978) *ALJ* at 585; W.A. Lee, (1979) 11 *University of Queensland Law Journal*, 107-110; Sutton, at 211.

5 At page 397, note 27a.

operation of powers to dispense with wills formalities, in "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law" published in 1987.[6] No doubt such details will be picked up in the next edition.

On the positive side, this edition does include and discuss the principal changes in the relevant law since the first edition: for example, the New South Wales Court of Appeal's decision in *Harris* v *Ashdown* [1985] 3 NSWLR 193 in relation to the construction of wills (discussed in paragraph 1103); the introduction of legislation defining the status of artificially conceived children (discussed in paragraphs 2705, 2721); the inclusion of de facto spouses in the scheme of distribution on intestacy in New South Wales (discussed in paragraph 2602); the introduction of revocation of wills on divorce in Tasmania (discussed on page 137); and the amendments in New South Wales in relation to execution, revocation, witnessing and rectification of wills. Of the latter, however, perhaps more could have been said. Only very brief mention is made of the power to rectify wills under section 29A on page 85. This power is expressed in very wide terms and is therefore likely to have a major impact in New South Wales. For instance, there could be considerable inroads into the area traditionally separated off as "construction" of wills. The problem is that the discussion of s.29A appears to be tacked on to the previous material rather than being integrated into the work. This comment could also be made in relation to the discussion of the dispensing powers which have been introduced now in South Australia (which led the field here), Queensland, Western Australia, Northern Territory and New South Wales. While there is a reasonable discussion of such provisions in paragraph 204 of this edition, the effect of such dispensing powers in other areas of the law covered by the work is not developed. For example, no mention is made of such powers in the discussion of secret trusts, where if the information about the trust is communicated or recorded in the form of a document, it could well be that the doctrine of secret trusts in such cases (with the weaknesses as analysed by the authors) is overtaken by the question of whether such documents 'purport to embody testamentary intentions' and, if so, should they now be admitted as wills, rather than left to equitable doctrine for their enforcement. The same comment could be made in relation to the discussion in paragraph 608 regarding revocation by written declaration of intention to revoke. Even where such written declarations are not formally attested, they could be effective as revocatory documents, at least in New South Wales and Western Australia, through the exercise of dispensing powers in relation to them. This also is not mentioned. This edition therefore does not integrate into the text as a whole the impact of such reforms. It does deal with them, but only tacks the discussion onto the previous material. For the future, this Reviewer would like to see

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6 (1987) *87 Columbia Law Review* No 1, 1-54.

discussion of the reform permeate through the whole of the work as those reforms permeate the whole fabric of succession law.

One matter of serious concern raised by the work is the relegation of "Family Provision Claims" into the part inelegantly named "Miscellaneous Matters". While Parts I and II hang together reasonably well as a marriage of the two original component parts, the handling of family provision matters in the work hardly does justice to the significance of family provision law both in regard to wills and intestacy. Moreover, it sits very uncomfortably with the chapter on "Survivorship" which could be placed in Part I with cross-referencing back to the topic in Part II. While the coverage of the chapter dealing with family provision is again well researched and amply footnoted (although it still remains largely as the point form summary in which it appeared in its earliest version), Family Provision really deserves to be Part III in its own right. To anyone involved in the practice of Succession law, Family Provision is hardly a "miscellaneous matter". Indeed in New South Wales it is perhaps the biggest growth area of the practice of succession lawyers, both solicitors and barristers alike. And for the student of succession law the model posed for them in this work that family provision is only a "miscellaneous matter" fails to convey the manner in which family provision law, from a theoretical point of view, has in many ways reshaped the structure of succession law and with it the whole notion of testamentary freedom in Australia and New Zealand.[7]

Putting such criticisms to one side, the authors of *Wills and Intestacy in Australia and New Zealand* are to be applauded for their landmark work in this field. It has fulfilled the prediction of W.A. Lee in 1979, made in relation to *The Law of Wills*, that it "must become the standard text on wills in Australia".[8] As a second edition of the work, however, it is not as thorough a reworking and updating of the first edition as it might have been. For the future, this Reviewer would like to see a further rethinking of the overall structure of the book, particularly in the manner the authors deal with family provision law; a greater integration of the reform material throughout the work; and also some consideration of the conflict of laws aspects of the topics covered. For the present, the book will continue as it began, to be a vital inclusion in all legal libraries; and, to the praise of this work by students, colleagues and previous reviewers, this Reviewer respectfully adds her own "Encore!".

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7 This comment is made while noting the reference in the first paragraph of the work to the fact that "freedom of testation is subject to the power of a court under family maintenance legislation" (page 3). For this Reviewer, this is not enough.

8 (1979) *11 University of Queensland Law Journal* at 109.