

BOOK REVIEWS

Guide to the Family Law Act 1975, by P. E. Nygh, (Butterworths Pty Ltd, Australia, 1975), pp. i-xvi, 1-162. Recommended Australian Price \$8.00.

This book is not intended to be a practice book. Its purpose, as appears from the preface, is to serve as a guide and an introduction to the Family Law Act 1975. It fulfils this purpose very well indeed. Amongst its virtues are brevity and simplicity. The author has been able to describe in 154 pages of actual text not only the effect of all the important provisions of the Act, but also to point out and explain the many differences between these provisions and the various laws which the Act is intended to replace.

The introductory chapter is in essence a summary of what the Act sets out to achieve. In it, reference is made to the moral and social notions upon which the superseded laws rested. These notions were in the main derived from ecclesiastical law and upon a social structure in which marriage was the sole or predominant career opportunity for women. "It is hard to imagine most Australians pursuing "duty" rather than personal happiness in marriage, or find Australian women who live out their lives solely in devotion to their families.¹ The recognition by the legislature of these changed moral and social attitudes is the rationale underlying the new Act, as the author perceives it. The Introduction also deals shortly with the constitutional validity of the Act and the scope of the subject matter which the Act is intended to cover. Brief as the treatment of questions of constitutional validity may be, it does sound warnings that serious questions may yet arise as regards the validity of provisions intended to deal with property disputes between spouses in cases where proceedings for principal relief have not been instituted or completed. In this connection reference is made to *Lansell v. Lansell*.² Similarly, as a perusal of *Lansell v. Lansell* will show, the problem whether the legislation is valid insofar as it purports to deal with questions of custody where no proceedings for principal relief have been instituted or completed, will yet have to be determined. The accuracy of the statement³ that "the scheme of the Act clearly excludes the inherent jurisdiction of the superior Courts to declare a child a ward of the Court in situations where the Family Law Act applies: "*Troutbeck v. Fisher*"⁴ may well depend on the view which the High Court might take hereafter. The wardship jurisdiction of the State Courts is not confined to questions of custody: it extends to the protection of the person and the property of infants in numerous situations.⁵ As I understand the author, he has not expressed any opinion on the effect of the Act upon these other aspects of the parental jurisdiction of the Courts.

Another topic briefly referred to in the Introduction relates to the transitional arrangements intended to accommodate pending proceedings instituted under the old laws. These arrangements would need to be dealt with much more fully in a practice book. The reference on page 13 of the book to subsection 4 of section 9 appears to be erroneous; it would seem that the author intended to refer to subsection 8 of section 9.

The second chapter deals with marriage. The reader will gain a good working knowledge of what a marriage is for the purposes of the Act, what the formal

¹ Nygh 3.

² (1964) 110 C.L.R. 353.

³ Nygh 79.

⁴ (1974) 5 A.L.R. 279.

⁵ See *Director of Social Welfare v. J.* [1976] V.R. 89.

requirements of a valid marriage are and how the existence of a marriage might be proved. The Act itself does not define what a 'marriage' is, and consequently, reference is made in the book to judicial decisions in which the concept of what a marriage is in law, is dealt with. The reader will also find reference to various sections of the Marriage Act 1961 in the discussions on the formal validity of a marriage.

The remaining chapters deal with the following subjects: 3, Marriage Counselling and Reconciliation; 4, Courts and Jurisdiction; 5, Dissolution of Marriage; 6, Annulment; 7, Welfare and Custody of Children; 8, Financial Provisions; 9, Overseas Orders; 10, Injunctions, Enforcement and Procedure.

In the last chapter reference is made to a number of the Family Law Regulations 1975.

In my view, the book is a very useful one. It does not only provide a guide and an introduction to the Act, but it can also be described as a concise book of reference on Family Law as it now is. The reader will find in the text citations of a number of reported decisions. For most practical purposes these citations will be found to be an adequate selection of case material for the purposes of argument or advice. For the more difficult problems, they provide a good starting point for further research.

Most of the contested litigation in the future is likely to be concerned with disputes over the custody of children and financial provision for spouses. These subjects have been treated quite fully. It remains to be seen whether the author's hope that matrimonial conduct will play only a minimal part in decisions on custody, and no part in decisions on financial provision for spouses, will be fulfilled.

One other feature worth noting is that the book contains a well ordered and comprehensive index and this, in my view, is a most helpful feature in a reference book.

The Family Law Act 1975 has made many profound changes in the content and administration of family law. Few legal subjects have as widespread and immediate a connection with the lives of citizens or are as of frequent concern to the profession as Family Law. Professor Nygh is to be commended for providing at so early a time a competent commentary on this new law.

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Declaratory Orders, by P. W. Young, (Butterworths Pty Ltd, Australia, 1975), pp. i-lxiii, 1-205. Recommended Australian Price \$12.50.

In 1945 in *Toowoomba Foundry Pty Ltd v. Commonwealth*¹ the High Court dealt with an application for a declaration that the decision of a statutory board was a nullity. The action was brought against the Commonwealth and not the board and the Court held that the remedy had been sought against the wrong defendant. Latham C.J., in a judgment with which McTiernan J. agreed, offered an additional reason for the decision. His Honour said 'that the cases have never gone so far as to allow the decision of an independent tribunal acting under a statute or regulation to be challenged in an action claiming only a declaration that the decision is invalid.'²

There can be no doubt that in 1945 there were few precedents to support the use of the declaration as a supervisory remedy over the decisions of statutory tribunals. However, in the years that have followed there have been a number of significant changes in the law which have led to the emergence of the declaratory judgment as the most convenient remedy available to the citizen who wishes to challenge the

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¹ (1945) 71 C.L.R. 545.

² *Ibid.* 571.