VARIATION OF NUPTIAL SETTLEMENTS UNDER THE FAMILY LAW ACT

IAN McCALL*

Origins

The *Matrimonial Causes Act* 1857 introduced into England judicial divorce as we now know it. The Act contained certain financial provisions. On the one hand it provided for what now may be termed periodic or lump sum maintenance orders to be made against a husband in favour of a wife.[1] On the other hand it provided that in the case of a guilty wife, the court could, if it appeared that the wife was "entitled to any property either in possession or reversion" order such settlement as it thought reasonable to be made of such property for the benefit of the innocent party or of any children of the marriage or either of them.[2] The provisions recognised that by the middle of the nineteenth century a wife could often be a person of means, and the power to order settlement of her property was complementary to the power to order maintenance against the husband.

Very soon after the passage of the Act the settlement power was recognised as being ineffective. The power was only to be exercised with respect to the property of the wife, or property over which she had a power of disposition. The provision relating to settlement had overlooked the fact that, at that time if a wife had property, it was almost invariably settled by a marriage settlement.[3] The interest of the wife under settlements of this kind was held not to be property and therefore could not be dealt with by the settlement power.[4]

* A Judge of the Family Court of Western Australia
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1 Matrimonial Causes Act 1857, s 32

2 Id , s 45

3 For the common form of settlement of real and personal property see Graveson & Crane, *A Century of Family Law*, (1957), 232-36

4 Norris v Norris and Gyles (1858) 1 Sw & Tr 174

In 1859 the *Matrimonial Causes Act* was amended and for the first time was introduced the power to inquire into the existence of ante-nuptial or post-nuptial settlements and the court was empowered to "make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or their respective parents as the court shall deem fit".[5] This amendment did not restrict the enquiry into a settlement made on the wife alone but included settlements made on each party to the marriage. By a further amendment, in 1878, it was made clear that these powers could be exercised notwithstanding there were no children of the marriage.[6]

The power has been reproduced over the years in the various English Acts relating to divorce and is currently to be found in s. 24 of the *Matrimonial Causes Act* 1873.[7] The principles governing the exercise of the power[8] are similar to the maintenance considerations contained in s.75(2) of the *Australian Family Law Act* but also include a consideration relating to contribution to the welfare of the family in broadly similar terms to that contained in s.79(4)(c) of the Australian Act.

The settlement and variation power of the original English Acts was reproduced in various forms in the Acts of the Australian States. With the passage of the Federal *Matrimonial Causes Act* in 1959 the powers were again reproduced in that Act.[9] Section 86(1) gave to the court the power to order a settlement of property, and s.86(2) gave the court the power to deal with the whole or part of the property dealt with in an ante- or post-nuptial settlement. The settlement power in s.86(1) was widely construed. It was held to include a straight out transfer and charge, but it had to deal with property to which the parties were, or either of them was, entitled whether in possession or reversion. In addition, what constituted a post-nuptial settlement was also widely construed. For example, it included the transfer of property to the parties as joint tenants; *Dewar* v. *Dewar*.[10] This decision followed the pattern set in England in *Smith* v. *Smith*.[11] The relationship between the maintenance power, the

5 Matrimonial Causes Act, 1859, s 5

6 Matrimonial Causes Act, 1878, s 3

7 Section 24 reads "(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage,before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage, (2) The court may make an order under subsection (1)(c) above notwithstanding that there are no children of the family

8 Matrimonial Causes Act 1873, s 25

9 Matrimonial Causes Act 1959, s 86

10 (1960) 106 C L R 170

11 (1945) 1 All E R 584, at 586

settlement power, and the variation power were explained by the High Court in *Sanders* v. *Sanders*.[12]

When the *Matrimonial Causes Act* 1959 was replaced with the *Family Law Act* 1975, presumably the draftsman considered that by widening the settlement power into the form in which it now appears in s.79(1), whereby the court is given the power to alter the interests of the parties in their property, including making a settlement for either or both of the parties and the children of the marriage, it was unnecessary to reproduce the power to vary post- and ante-nuptial settlements. For the first time, then, for over 100 years such a power was omitted from the general financial provisions concerning the re-arrangement of property and income between the parties following dissolution.

It was not long before a similar problem arose in Australia as had arisen in 1857 in England. In many cases there was property from which one or other party to the marriage could benefit, but which could not in strict law be held to be property of the parties. Accordingly, such property fell outside the reach of the powers of the court.

This problem was brought to the attention of the Joint Select Committee on the *Family Law Act*. It was explained in the submission by the Family Court Judges as follows:

> Although the Court has wide powers to deal with property under s.79, it can deal directly only with legal and equitable interests which a spouse holds in relation to property. The Court cannot deal directly with the unascertained interest which a spouse may have in a discretionary trust. Nor can it make orders to transfer or settle property owned by a company even though a spouse has a controlling interest in that company.[13]

The Family Law Advisory Committee of the Law Council of Australia, in its submission, recommended that one way of dealing with the problem of family property vested in trusts and companies was to insert a wider definition of property along the lines of that contained in the *Bankruptcy Act*[14] but conceded that such an amendment would not solve the problems of the lack of jurisdiction in the court where the assets in question were under the control of persons other than parties to the marriage.[15]

12 (1967) 116 C L R 366

13 *Report of the Joint Select Committee* (1980), para 5 117

14 "Property means real and personal property of every description whether situate in Australia or elsewhere and includes estate interest or profit whether present or future vested or contingent arising out of or incidental to any such real or personal property"

15 *Report of the Joint Select Committee* (1980), para 5 121

The Family Law Practitioners of Tasmania did not agree. The solution advanced by them was to permit the court to adjourn a claim for maintenance or settlement in cases where there were family trusts, company interests, or superannuation benefits and have the case called on again when subsequently the benefit was received by the spouse from one of these entities. In the meantime it should be provided that the beneficiaries should be ordered not to dispose of such benefit, and should notify the other party upon receipt of such benefit. It could further be provided that the trustees of the fund be required to inform the Registrar of the court on the payment of a sum of money to the beneficiary and the Registrar be required to do his best to inform the claimant at his or her last known address.[16]

The power of adjournment was, in fact, inserted into the Act by the 1983 amendments,[17] but this was done specifically with prospective superannuation benefits in mind to enable the court to finally dispose of the case after the benefits had fallen due.

Finally, the Family Law Council brought the matter to the attention of the Attorney-General and recommended the re-introduction of a section similar to s.86(2) of the *Matrimonial Causes Act* 1959 as a possible way of dealing with family property held in trusts. It noted, in 1980 in its 4th Annual Report, that the powers under s.86(2) were rarely invoked prior to their repeal in 1976, except in relation to settlements constituted by a joint tenancy. It recognised there may be some doubt as to the constitutional validity of such a provision but it also noted that there had not been a challenge in the past to s.86(2). In the circumstances it recommended that the Attorney-General obtain definitive advice on whether the power could be validly conferred on the Family Court.[18]

This advice was reiterated in the following year as the Council expressed the opinion that any power which would assist the Court in dealing with property held under discretionary trusts would be of great assistance in dealing with family property disputes.[19] The provision then did reappear in the bill which became the *Family Law Amendment Act* 1983 and now appears in its present form as s.85A.

With respect to the present provision in the Act, it is interesting to note two things:

(a)The terminology, namely ante- or post-nuptial settlement, has been retained. The reason no doubt is the same as that given by

16 Id , para 5.122
17 Family Law Act, s 79(5)
18 Family Law Council, *Annual Report 1980*, paras 122-127
19 Family Law Council, *Annual Report 1981*, para 167

the Law Commission (UK) in its report on financial provision in matrimonial proceedings:

> We have considered whether some clearer expression could be substituted for 'ante- or post-nuptial', but are unable to suggest anything better. The existing expression is familiar to lawyers and the courts, hallowed by long usage, and, in meaning, now reasonably definite; to change it would be likely to do more harm than good.[20]

(b) The reason for the re-introduction of the provision in 1983 was almost identical with the reason for the initial introduction of the provision in England in 1859 - *plus ca change, plus c'est la meme chose*!

Emergence of the Problem in Australia

During the 1960s and 70s the discretionary trust became one of the favourite vehicles for splitting income amongst family members to reduce the incidence of income tax.[21] It was not long before the Family Court, when dealing with a property case, was faced with the problem of how to deal with property settled and held by the trustees of a discretionary trust. In *Stacy*[22] the Court held that the interest of a beneficiary under a discretionary trust was not property within the meaning of the Act and therefore could not directly become the subject of an order under s.79. This was followed in later cases, for example, *Whitehead*.[23]

Similarly the interest of a party under a superannuation scheme has been held to fall into the same category. It was not property within the meaning of the Act until the interest in the supperannuation scheme vested in the party.[24] Further, property held by a family company has been held not to be property of the parties even though one or other of the parties to the marriage is able to exercise control over the company in such a way as, if he or she thought fit, the property could be enjoyed as if it were the property of that party.

In all of these cases although the order of the court could not operate directly upon the property held by, for example, the trustees of the discretionary trust, the company, or the trustees of the superannuation fund, nevertheless in appropriate circumstances the court has taken into account this property as being a financial resource of the party concerned pursuant to s.75(2)(b) of the Act.

20 United Kingdom Law Commission *Report No 25* (1969) para 66

21 The nature of the usual discretionary trust, relying on Truesdale v F C T (1970) 120 C L R. 353, with a non-family member as settlor and a parent subsequently "feeding" the trust has been fully documented elsewhere See I Hardingham and R Baxt, *Discretionary Trusts* (1975) para 7 02

22 Stacy v Stacy (1977) 31 F L R 34, F L C 90-324

23 Whitehead v Whitehead (1979) 37 F L R 302, F L C 90-673

24 Bailey v Bailey (1978) F L C 90-424, 33 F L R 10, Crapp v Crapp (No 2) (1979) 35 F L R 153, F L C 90-615

In *Whitehead*, for example, assets of the husband were taken to include his superannuation entitlement calculated as if he had retired at the date of separation. On the other hand, in that case, the wife's assets were calculated to include the funds that were held by the discretionary trust. The ultimate re-allocation of the property of the parties was made on the basis that each one had a financial resource which included this property. There was, of course, other property. The order of the court then operated on this other property but taking into account the financial resources represented by the trust's property and the superannuation money. The principle applied has been affirmed by the Full Court in the later cases, of *Tiley* v. *Tiley,*[25] *Kelly* v. *Kelly (No. 2),*[26] and *Yates* v. *Yates (No. 1).*[27]

But the property belonging to a third person or entity is regarded as a financial resource only if the party has the appropriate measure of control over the entity or body. In the case of the family trust, the right to appoint and remove the trustee is indicative of this type of control. In the case of the family company, not only the legal control in the sense of having the voting power by the appropriate shareholding, but also de facto control, has been held to be sufficient for the company and its assets to constitute a financial resource.[28]

This paper is not intended to be a close analysis of the way in which the concept of financial resources referred to in s.75(2)(b) has been utilised to enable the court in s.79 applications to take into account property which is strictly not property of the parties, in that it is property over which the parties do not have an immediate right to enjoyment and disposition. Nor am I examining the nature of the control required over the property for it to constitute a financial resource. A recent examination of these and related questions, can be found in a recent but as yet unpublished paper by Fowler.[29]

The concept of financial resources, however, is a wide one. It includes, as Fowler has pointed out, regular gifts made by the wife's father over a number of years,[29a] and other regular but voluntary payments made to a party and which could be reasonably expected to continue to be made in the future.

What has happened, therefore, in these cases is, by resorting to a wider meaning of financial resources, the court can take into account property which is not that of either party and make a larger adjustment in favour

25 [1980] F.L.C 90-898
26 [1981] F L C 91-108
27. [1982] F L C. 91-227
28 See Kelly v Kelly (No.2) [1981] F L C 91-108
29 Fowler, 'Using the Concept of Financial Resources to Lift the Corporate Veil' (unpublished paper delivered at the New South Wales College of Law, August 1982).
29a.See also Trenerry v Trenerry (1976) 16 F L R. 406

of a party out of the available property that could otherwise have been justified had only the property of the parties, strictly so called, been taken into account.

This is all very well, and a just end result can be achieved where there is sufficient property of the parties to enable an appropriate award to be made in favour of the applicant. But where there is not sufficient such property, what then? In one case, *Tiley* v. *Tiley,*[30] where the husband had complete control over a company, in that he had legal control via his voting rights, the court employed the use of a mandatory injunction. It required the husband to exercise his powers to sell the main asset of the company which, in turn, gave the company the liquidity to pay moneys it owed to the husband, which he could then pay to the wife. But there are limitations to the exercise of an injunction in these circumstances. The pre-requisite to making an order such as in *Tiley's Case* is that there is a loan account in existence whereby the company owes the husband money. In effect, the husband was being required to recover the moneys owing to him which, in turn, would put him in funds to satisfy an order of the court. As the court pointed out in *Tiley*, the power to make orders which affect the assets or interest in a company must be used with caution. The court clearly has the power to alter the interests of the parties to the marriage in the company, but it was pointed out that it did not follow that a court could order the transfer of assets held by a company, or alter the interests of shareholders other than husband and wife in the assets of a company.

Fowler has suggested that a mandatory injunction power could be extended to some other situations or used in other ways. He has said it presumably would have been in the power of the Family Court to order the husband to exercise his control over the company resulting in the sale of company asset, for example the matrimonial home, to himself at a proper price and then requiring him to transfer the asset to the wife. Or alternatively, perhaps a mandatory injunction could have been made requiring the husband to use his powers as a director to cause the company to sell a particular asset of the company to the wife, at an appropriate price, and require the husband to pay the purchase price to the company, whether by cash payment or by debiting it to a loan account or otherwise.[31] The substitution of a particular asset of the company with another asset in the form of a debt due from the husband to the company, may require careful scrutiny before the court would be tempted to make such an order. The interests of other shareholders may well be

30 [1980] F L C 90-898

31 Fowler, supra n 29

affected to their detriment by such a substitution of assets in the books of the company.

The Nature of the Power in Section 85A

Although originally the settlements to which the provision was directed were those with which conveyancers were familiar, namely the formal marriage settlement which created interests in succession, it has long been recognised that nuptial settlements of this sort are not the only ones which can be affected by the power. The word "settlement" now has been extended to almost any disposition of property made by one spouse in favour of another if it is intended to be a permanent provision or a continuing provision for the financial needs of the other.

In modern times the test to be applied to decide whether a settlement is a post- or ante-nuptial one is to be found in the frequently-quoted case of *Prinsep* v. *Prinsep*. In that case Hill J. said:

> Is it upon the husband in the character of a husband or on the wife in the character of a wife? If it is it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state.[32]

This description of a settlement was taken a step further in *Smith* v. *Smith* by Denning J. when he said:

> Where a husband makes a continuing provision for the future needs of his wife in her character as a wife which is still continuing when the marriage is dissolved, the provision is a "settlement" which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband, or by each or either for both.[33]

In *Smith's Case* the conveyance of the matrimonial home to a husband and wife as joint tenants was held to be a nuptial settlement and accordingly the court's power to vary the settlement could be invoked in such a way as to pass the property to the husband alone. It is interesting to note that this decision was given prior to the power to transfer or settle property of both husband and wife, as part of property adjustment orders, had been given to the English courts. This power to transfer was given

32 [1929] P 225, at 232
33 [1945] 1 All E R 584, at 586

in the *Matrimonial Causes Act of 1970.*[34] One wonders whether the liberal interpretation of "settlement" would have been the same had the power been available to the court directly to order a settlement or a transfer of an interest in property from one party to another.

Various transactions have been held to constitute a settlement. A covenant by one spouse to pay a yearly sum to another, as in *Dormer* v. *Ward;*[35] a separation agreement, as in *Worsley* v. *Worsley*[36] and *Tompkins* v. *Tompkins;*[37] an insurance policy effected by one spouse under which the other one obtains an interest, as in *Gulbenkian* v. *Gulbenkian*[38] and *Brown* v. *Brown.*[39]

It matters not how the settlement came into existence, whether orally or by writing or by operation of law;[40] but what does matter is whether it is a disposition in the form of an absolute, unqualified, and immediate transfer of property; if it is not, it is not a settlement.[41] Although this distinction may have had some significance in former times, it matters little now that the court's powers include the power to transfer or settle property.

Substance Not Form

The English courts throughout have always insisted it was the substance and not the form of the settlement that must be regarded. Accordingly, if a settlement recites the fact of a particular marriage or specifically refers to it, it is clearly very relevant to determining if the settlement is nuptial. But the fact that the marriage is not referred to does not prevent the settlement from being held to be nuptial. In such cases, as was said in *Josh v. Josh,*[42] the court puts itself in the position of the settlor and takes, in effect, as recited the relevant facts which include the then existing marriage and the issue of that marriage. In that case the husband settled property on himself with power to charge or assign income from the trust funds "in favour of any child or children of his" and also to appoint by deed or will to "any wife who may survive him". Neither his wife nor the children were named in the settlement. The court nevertheless held it was a post-nuptial settlement, as it must be considered to have been made "because of" the marriage.

34 See Matrimonial Causes Act 1970, s 4. Before this it appears that the settlement power could only settle a guilty wife's property for the benefit of the husband or children
35 [1901] P 157
36 (1869) L.R 1 P & D 648
37 [1948] 1 All E.R. 237
38 [1927] P 237
39 [1948] 2 All E R 778.
40 Cook v Cook [1962] P. 235.
41 Prescott v. Fellowes [1958] P 260
42 [1943] P. 18

What the court is not concerned with is the motive that prompted the creation of the settlement. This was made clear in *Melvill* v. *Melvill & Woodward.*[43] Pearce J., in *Parrington* v. *Parrington,*[44] in referring to the dicta in *Melvill* that motive was irrelevant, pointed out that this dicta was directed to arguments of counsel in the cases where, in the particular circumstances, it was unlikely that the respective settlors wished to benefit the petitioners. He went on to say, however, that he did not think the dicta were intended to lay down the principle that in ascertaining whether any transaction is a post-nuptial settlement the court must shut its eyes to the surrounding circumstances. This has been the general approach of the courts ever since.

What it means, therefore, is that, taking into account the terms of the deed, together with surrounding circumstances, the court must decide whether the settlement is nuptial or not.

The Nuptial Element

From the earlier cases it is clear that the benefit must be for a spouse or children of the spouses. In this respect there seems to have been some question arising as to whether a settlement could be a nuptial settlement if the termination of the marriage was contemplated by its terms.

In *Young* v. *Young (No. 1)*[45] a deed was executed between the making of the decree nisi and the decree absolute wherein the husband covenanted to make periodical payments by way of maintenance for the wife during the joint lives and for the children for certain periods. Some time later the wife re-married and the husband applied to vary the deed on the basis that it was a post-nuptial settlement. On appeal it was held that this was not a nuptial settlement. It had been entered into on the footing that the marriage was to be dissolved and was not to continue. Accordingly, there was no nuptial element present anymore, even though one or two payments were to be made before the decree was made absolute.

This case can usefully be compared with *Melvill's Case.* There, after the husband had filed a petition, the wife executed a settlement relating to property settled on her by her parents upon the parties' marriage. She settled this property on herself for life with remainder to all or any of her children. A general power of appointment was reserved, and after the decree absolute she executed a deed exercising the power of appointment giving to herself for her separate use any income under the settlement. This was held by the Court of Appeal to be a post-nuptial settle-

43 [1930] P 259
44 [1951] 2 All E R 916, at 919
45 [1961] P 27

ment. The court simply looked to the fact that the executed deed constituted a settlement and it had taken place after the marriage. The settlement was to benefit the children of the two parties to the marriage and therefore was a nuptial settlement in that it was settling property on one of the main objects of the marriage, namely, "the procreation of children".[46]

In addition, separation agreements, even though they may signal the de facto termination of the marriage but not the legal termination of the marriage, have always been held in the past to be post-nuptial settlements.

Which Marriage?

In *Burnett v. Burnett,*[47] the husband married a first time. During the course of this marriage he assigned certain investments to trustees upon a discretionary trust to pay the income for the benefit of any one or more of the settlor, his wife and issue. The trust was varied on two later occasions. The husband was subsequently divorced by his first wife and married again. By the second marriage he had no children, whereas by the first he had two children. On the eve of his second marriage he executed a power of appointment appointing his proposed second wife as the beneficiary of certain of the funds settled to take effect upon his death, and during her life to pay her the interest on these funds. The second marriage was dissolved. The husband, on dissolution of the second marriage, applied to vary the settlement on the basis that it was an ante-nuptial settlement in respect of his second marriage although it was a post-nuptial settlement in respect of his first marriage.

The appointment made just prior to this second marriage was dependent upon the principal settlement which had been made during the course of the first marriage and at a time when no second marriage was contemplated. It was held that the settlement constituted by the appointment had to stand or fall by the original settlement. The court decided that the legislature did not intend the spouse of an existing marriage to contemplate a second marriage so as to be able to execute a settlement, which was ante-nuptial in respect of such contemplated marriage, at a time when, being already married, the party was incapable of entering into the contemplated marriage.

To bring the section into play there had to be a marriage which was the subject of the decree of divorce and in contemplation of this marriage, and because of this marriage the settlement must have been made. The original settlement was not made because of the marriage which was

46 [1930] P 159, at 177
47 [1936] P 1

the subject of the decree. If anything, it was made because of the first marriage which was subsisting at the time and was therefore a post-nuptial settlement in respect of the first marriage, but not an ante-nuptial settlement in respect of the second marriage.

Settlement by Will

With the increasing accumulation of wealth in Australia it is not inconceivable that in the future testators may well make complicated provision in wills providing for their children and grandchildren in such circumstances that would, apart from the fact that the provision is made by will, constitute a post-nuptial settlement. To take a simple example: a testator, being pleased with his daughter's marriage and the grandchildren she has produced, decides to settle upon his executors and trustees a particular fund to pay income to his daughter, to her husband, and to the children of the marriage. There may be various provisions as to the ultimate destination of the corpus of the fund. Some time after the death of the testator the marriage runs into difficulties and proceedings are instituted in the Family Court. It may well be that in the circumstances it appears to the Family Court that a greater proportion of the income from the fund should be paid to the husband to whom custody of the children has been given. The question that arises is, is the trust established under the will a post-nuptial settlement for the purposes of s.85A?

Before 1970 in England it was thought, and held in a number of cases, that the power to vary post and ante-nuptial settlements did not extend to such settlements created by will. By the *Matrimonial Proceedings and Property Act* 1970 an amendment was made to the section of the Act (s.4(c) of the 1970 Act), adding the words "including such a settlement made by will or codicil".[48] It is clear now that in England, provided the settlement has the character of a nuptial settlement within the meaning of the Act, it is a settlement whether it is made *inter vivos* or by will, and can attract the court's powers. There are no such qualifying words "including settlements by will" in s.85A. The question, however, is, even though no such specific words are contained within the section, is it possible for the powers to operate on a settlement created by will?

The authority for the proposition that without the specific words the power to vary post-nuptial settlements did not apply to a settlement created by will, is frequently cited as *Garratt* v. *Garratt*.[49] The decision of Hill J. in that case simply relied upon the decision of the Court of Appeal in *Loraine* v. *Loraine*.[50] In *Garratt's Case* the father of the husband left by will the sum of 5,000 pounds to the trustees of a marriage settlement

48 See now Matrimonial Causes Act 1973, s 24(1)(c)
49 [1922] P 230 See also United Kingdom Law Commission *Report No 25*, para 66
50 [1912] P 222

to be held on the trusts established by the settlement. The ante-nuptial settlement was made in 1890. The will was made in 1903. A decree absolute relating to the marriage was made in February 1908. The testator died in July 1908. The question was whether the order varying the ante-nuptial settlement included the 5,000 left by the will. Hill J. said:

> In the present case the interest of the parties in the second 5000 is created by the will and not by any marriage settlement; if anything further were needed it is created by the will of a testator who died after the marriage had been dissolved.

The result was the court held it had no power to alter the terms of the will.

This case does raise the question of the material date. Is it the date of death of the testator, or the date of the execution of the will? Presumably, the rule that the will speaks from the date of death has been applied, so that the settlement did not come into effect until after the dissolution. In such circumstances it could hardly be a nuptial settlement. It is important, therefore, to look to the reasoning of the Court of Appeal in Loraine to see whether the reasoning is applicable to s.85A. The wife in that case was entitled under the will of her father for her separate use, without power of anticipation, to the income of a fund settled by his will, subject to her mother's prior life interest. After her death the fund so settled was to be held on trust for her child or children as she should by deed or will appoint. She had one child. After the parties were divorced the husband petitioned for a settlement pursuant to s.45 of the *Matrimonial Causes Act* 1857. The Registrar of the Court recommended that, upon the death of the wife's mother, the trustees of the will of the wife's father should pay two-fifths of the income from the fund to the husband and after his death one-third of the income during the minority of the child of the marriage to the guardian, or until the child completed his education. This report by the Registrar was confirmed at first instance by the President and it was against his order that the appeal was taken.

Firstly, the Court of Appeal pointed out that, under s.45, the court could only make an order against her property whatever that may be. If she was restrained from anticipating the income, the court had no power under s.45 to make an order which would, in effect, get rid of that restraint of anticipation. It had no power to vary under that section.

The court then went on to consider whether there was power under s.5 of the 1859 Act to vary the settlement created by will in the terms ordered by the President at first instance. It was here that the observations of Kay L.J. in *Midwinter* v. *Midwinter*[51] were relied upon. There it was said:

51 [1892] P 28, at 38

> The circumstances here are very peculiar. It seems that information has already been obtained that the wife has - not by a marriage settlement, which by s.5 of the Act of 22 & 23 Vict. c.61, could be altered, but under the will of her father which cannot, by any of the statutes, as I understand them, be altered at all - a life interest for her separate use in property devised by that will, as to which she is restrained from anticipation; and, therefore, while the coverture exists, that is until after the decree absolute has been pronounced, she has no power to settle that property, and the Court, as I read the statute, has no power to either make a settlement, or compel her to do so, of that property. The order for settlement must be made after the decree absolute has been pronounced.

Midwinter's Case dealt with an application under s. 45 for a settlement of property also. The wife's property was a leasehold house vested in trustees of her father's will, for which she was entitled to possession, and a further income of about 60 pounds a year under a post-nuptial settlement. The trusts of both the will and the settlement gave her a life interest for separate use without power of anticipation. The application was that the wife upon the decree becoming absolute should settle the property constituted by the trust under the will and the post-nuptial settlement on new trusts to pay the petitioner an annuity of 700 pounds and after his death to pay the same amount to the children of the marriage. Orders in those terms were made at first instance. On appeal the same question arose whether orders of this sort could be justified under the settlement power of s.45. The answer was that it could not because there was no property of the wife. It was in this context that Kay L.J. then considered the question of whether the variation power under s.5 of the 1859 Act could be applied, which would have the effect of altering the trusts under the will. The only justification for arriving at the conclusion that the variation power could not apply to a settlement contained in a will appears to be that there was no power "in the statutes" at that time to alter the provisions of a will.

These cases were, of course, decided long before the *Inheritance (Family Provision) Act* which was first passed in England in 1938 which gave the court the power to alter the dispositions made under a will. What would have been the position under the cases referred to above if there had been an *Inheritance (Family Provision) Act* in existence at the time?

The general reasoning in the first of these cases, which has been followed in the later ones, is not seen to be very strong and the question arises whether in Australia the courts would follow such reasoning. Why should post- and ante-nuptial settlements be interpreted to mean only settlements created by deeds *inter vivos* and not by settlement established by a will

of a testator? If this is the case, then there is clearly an area of operation of s.85A that has not yet been fully explored.

Overseas (Off-Shore) Settlements

For reasons frequently associated with putting either property or income beyond the reach of various Australian authorities, it has not been uncommon for some time past to find that this object was sought to be achieved by the establishment of complex corporate and trust structures which were located (resident or domiciled) in a foreign country. The success or otherwise of these schemes is of no concern to me in this paper. The question that arises which concerns family lawyers is, if these structures otherwise satisfy the description of post-nuptial settlement, does the mere fact that they are located overseas put them beyond reach of the court under s.85A?

It would seem that in the past the English courts have adopted a fairly robust approach to this problem. The mere fact that the settlement is located overseas, or that the property is overseas, has not seemed to have deterred the court in exercising jurisdiction under the predecessor of s.85A. In the case of *Nunnerley* v. *Nunnerley* & *Marrian*[52] the question was whether the court had the power to vary an ante-nuptial settlement which had been made by the wife. At the time of making the settlement she was domiciled in Scotland. The settlement related to realty and personalty situated in Scotland and the settlement was in Scottish form. The trustees of the settlement objected to the arrangement agreed upon between the parties and which came before the court, in effect for consent orders, on the ground that it was for the Scottish court to decide what should be done. According to Scottish law the property settled would all devolve upon the children, as by reason of the wife's adultery she was to be regarded as having died.

The President, Sir James Hannan, had little difficulty in finding the English court had jurisdiction. He said :

> The language of the Act is extremely wide. I am clearly of opinion that the power thereby conferred extends to a settlement though made in another country and according to the law of that country. It is clear that the present respondent, who was up to the time of her marriage a Scotchwoman, by marrying an Englishman acquired her husband's English domicile and became subject to the law of England.

The court was obviously not concerned where the property was situated, but having found it had jurisdiction over the person (by virtue of domicile)

52 [1890] 15 P D 186

it was then prepared to exercise the jurisdiction to vary the settlement. Not only was the property situated out of England, but so also were the trustees of the settlement.

Forsyth v. *Forsyth*[53] followed Nunnerley. There the parties were married in Scotland. The settlement in question was in Scottish form; the trustees in Scotland; and the property settled was situated in New Zealand, India and Scotland. At the time of dissolution the parties were both domiciled in England. Juene J. held in that case the power extended to the settlement. He said :

> *Nunnerley* v. *Nunnerley* seems to me to go the whole length of deciding that whatever be the law applicable to the settlements, the effect of s.5 of the 22 & 23 Vict. c.61, is to give this Court power to vary the settlements in its discretion according to the principles laid down in that section.

The fact that the parties were domiciled in Scotland at the time of their marriage did not prevent the application of the power.

In the later case of *Goff* v. *Goff*,[54] a limitation was imposed on the apparently wide statement of principle in the earlier two cases. The limitation, however, was one relating to service rules, and enforcement of foreign judgments pursuant to the rules of private international law. In that case the settlement was made in New York and governed by New York law. The property (being investments) was settled on New York trustees and was located in America. The trustees were served outside the jurisdiction of the English court without leave. Objection was taken to the jurisdiction of the English court on the ground that, pursuant to New York law, no action on the judgment in the English court would be enforced in New York courts unless the defendant (in this case the Trustees) had been personally served within the jurisdiction of the English court. The application by the Trustees was to set aside service on them. In the light of this evidence the President, Sir Boyd Merriman, set aside service on the Trustees because the evidence before him indicated that any order made by him against the Trustees would be futile in New York, where it would have to be enforced.

However, it was pointed out that by one article of the settlement, the settlor (the husband) was empowered to modify, alter or revoke the settlement in whole or in part. That being the case, it was indicated in the judgment that although it might be impossible to make an effective order against the Trustees, this did not prevent an effective order against the

53 [1891] P 363
54 [1934] P. 107

husband. That, in turn, would depend upon whether any order *in personam* on the husband requiring him to take action under his revocation or modification power of settlement, would be effective in New York. The case was not about this question and beyond making the above comment the court was not prepared to express any opinion.

Goff followed the principle laid down in *Tallack* v. *Tallack,*[55] where the court refused to order a settlement of the wife's property situated in Holland for the reason that the Netherlands courts were unlikely to give effect to the court's order. The President went on to say any decree of the English court to partition the property of the wife would be an idle and wholly ineffectual process.

In the later case of *Wyler* v. *Lyons*[56] Sir Jocelyn Simon refused to set aside a transaction entered into to defeat a maintenance order for the same reason. There the husband had established a trust in Lichtenstein with a Swiss advocate as the trustee. There was no right to revoke the trust. The husband transferred substantial sums to the trust. The Trustee objected to the jurisdiction of the court, which again was successful. But again, the President indicated there might be some other way of achieving the purpose sought by the wife. He concluded by saying :

> There may be in this case, as Sir Boyd Merriman, P., found there might be in *Goff* v. *Goff*, some way of protecting the wife and the jurisdiction of the court from the steps that have been taken by the husband. That, however, does not arise on this issue and in my judgment the plaintiff is entitled to succeed.

These cases were distinguished in *Cammell* v. *Cammell*[57] by Scarman J. who, although accepting the principle of *Tallack* v. *Tallack* pointed out that although the court has jurisdiction in such cases, it will decline to exercise the jurisdiction where any order that it might make would be wholly ineffective. "In other words, the jurisdiction exists by ordinarily will not be exercised where there is any chance of the court's order being ineffectual". The question, as he then pointed out, became one of discretion. In that case neither the husband nor the property was within the jurisdiction; the court of his domicile (France) would make no order in the circumstances, nor would it recognise or enforce an English order if made.

Cammell's Case dealt with an order for maintenance for the wife. However, the judge was not persuaded that the court's order would be totally ineffectual. There was a real probability the husband would come

55. [1927] P. 211
56 [1963] P. 274
57 [1965] P 467

to England for the hearing of the suit. If he did, the court's order could be enforced against him *in personam*. The distinction between this and *Tallack's Case* it was said, was that the order in Tallack was directed to property situated abroad and that there was no comparison between that and an order (in *Cammell*) requiring a person resident in France to make weekly payments for the maintenance of a child in England. Accordingly, the court saw fit to exercise the discretion in favour of jurisdiction.

With these cases can be contrasted the case of *Razelos* v. *Razelos*.[58] In that case Baker J. was prepared to exercise jurisdiction over property situated in Greece pursuant to s.17 of the *Married Woman's Property Act*. The respondent husband was a Greek national and a Greek domiciliary. He had been present in England when the summons was issued and took part in the proceedings at the beginning of the hearing. He later left the United Kingdom before the hearing concluded. It was argued that there was no jurisdiction to make an order in respect of the foreign land. This was on the ground that the court had no jurisdiction to entertain an action for the determination of title to foreign immovables unless there was power to exercise jurisdiction in personam and this would only be if the respondent was in England at the time of the service of the writ.

The cases of *Cammel, Tallack, Goff* and *Wyler* were all considered. Despite the reasoning of these cases, the President was prepared to exercise jurisdiction concerning the property situated abroad. His reasoning seems to be based on the fact that the husband was present when the proceedings commenced and once the court was competent it was always competent. There does not appear to have been any evidence as to the effectiveness of any orders the court might make in the Greek courts. Nor did this seem to weigh heavily in coming to be based on the ability of the wife to pursue her claim in the foreign court. Baker J. concluded his judgment in the following way:

> But there is a final matter which also persuades me to make an order relating to the Greek property. The wife dare not go to Greece to establish her case there. She might be prevented from leaving that country because he says the judicial separation is of no validity and he has already threatened to prevent her leaving and has made various other threats. There is no evidence that she can establish her case in the Greek courts without her presence. He was here in this court. I therefore make an order in respect of Skoufa 5 and the South Peloponnese land for what it may be worth in respect of the property now. It the Greek courts will enforce such order, so much the better. If not, there is still the probability that he will

58 [1969] 3 All E R 929

> return to England and the chance of enforcement *in personam*. In the absence of such an order the wife would be left without any means of recovering property which I find was obtained . . . fraudulently, being dishonestly bought in his name with her money.[58a]

From an examination of these English cases it seems that although the court has jurisdiction in some cases it may well decline to exercise the jurisdiction on the grounds that the order will be ineffectual. This, in turn, seems to have been construed in a number of ways. What is clear is that it matters not whether the property, the trustees, the trust, or the respondent is overseas, if the court initially has jurisdiction within the meaning of that term in the international law sense.

The actual wording of s.85A may impose a further restriction. The court is not given the general power to vary post- and ante-nuptial settlements, but the power to make orders with respect to "the whole or part of property *dealt with* by ante-nuptial or post-nuptial settlements...". This clearly contemplates an order affecting property. Nevertheless, it must be implicit that in the exercise of the power the terms of the settlement will be varied. It is difficult to conceive how an order affecting property settled will not have a consequential effect of varying the terms of the settlement. If the property is located out of Australia, the principle of effectiveness may be more readily applied resulting in the court declining to exercise the power. In many cases, however, the location of the trustees or the property holder may be out of Australia but the property is in Australia, but in most cases the respondent is amenable to the jurisdiction of the court. In these circumstances, provided the transactions constitute a nuptial settlement, the combination of s.86A and the power to grant mandatory injunctions may well bring within the reach of the Court property that previously has been effectively put out of its reach by being settled in such a way as to take it outside the ambit of s.79.[59]

Taxing Acts

Fiscal legislation has always been the stimulus for the exercise of ingenuity by the legal and accounting professions to devise means of circumventing the provisions of such statutes. Income tax and death duties are two areas which, in the past, have always attracted this skill. The creation of complex structures and devices to minimise the incidents of these taxes in the past has been to well documented in recent times to need repeating here. With respect to income taxes, partnerships, trusts,

58a Id

59 See generally P. Nygh, *Conflicts of Laws in Australia* 4th ed (1984) 64

and companies have been the main vehicles used. With respect to death duties both companies and other devices have been used to achieve the main purpose of generation skipping.[60]

Partnerships create no problems because there is property of the parties which can be dealt with directly under s.79.[61] Trusts have been dealt with as mentioned above by the expanded concept of "financial resources", but only in an indirect way. Trusts are, in particular, the vehicle that may well be more affected by this section than other devices. It was, of course, the trust - and in particular the discretionary trust - which was at the very heart of most marriage settlements of the last century. The court may have little difficulty in finding that the modern discretionary trust is a nuptial settlement.

Companies

With respect to companies it has been suggested that they may in certain cases be held to be nuptial settlements and thus attract the powers under s.85A.[62] The case here is nowhere near as strong as that relating to trusts, but nevertheless some comments may be worthwhile. The question is whether a proprietary company formed after marriage in which husband, wife and children are shareholders with varying degrees of control, voting rights, and dividend rights, can be regarded as a post-nuptial settlement. As said earlier, the motive for creating such an entity is irrelevant. Whether it was created for the purpose of minimising income tax or estate duties, or simply to obtain the benefits of limited liability for good commercial reasons, would not matter. The question is, what has in fact been done or achieved?

In some earlier suggested drafts of s.85A it was specifically spelt out that the section was applicable to trusts and companies. However, in the form that the section has ultimately taken this approach was not adopted. It will, therefore, fall to the courts to determine in a particular case whether the corporate structure that has been created falls within the meaning of post-nuptial settlement.

In some cases an examination of the surrounding circumstances leading to the creation of the company, together with the rights and powers of the family members within the new structure, could lead to a very good argument that a post-nuptial settlement has been created.

There are, however, a number of difficulties. What is the property dealt with by the settlement? Is it the shares of the new company or the assets

60 It is appreciated that at the present time there are no death duties in Australia, but for how long can this last? See Pedrick, 'Oh to Die Down Under!' (1982) 14 *U W A Law Review* 438

61 See Re Ross Jones, Ex parte Beaumont (1979) F L C 90-606

62 Broun, in *Current Issues in Tax Planning* (1984) 65

acquired by the company? Take the simplest case. A sole trader forms a company to which the business and assets of the business are transferred. The shareholding and control is all within the family members. Presumably in such a case the assets, namely the business formerly carried on by the husband which is transferred to the new corporation, would constitute the property dealt with by the settlement. But if the company acquired further businesses or assets, or if the company commences with nothing but a debt to the bank and as a result of successful trading becomes asset rich, what then is the property dealt with by the post-nuptial settlement? Presumably once the settlement has been created, the fact that it acquires or is fed further assets does not prevent such further assets from being property dealt with by the settlement. This, in fact, would have been the case in *Gaffatt's Case* except for the fact that the further assets brought into the settlement were by will and not *inter vivos*.

It would not be to the point to talk of the company's shares as being the property dealt with by the settlement, because these in any event can be dealt with by a direct order under s.79 - unless, of course, the shares are vested in trustees for the parties. In that case the settlement may well be the trusts so created and the property dealt with would then be the shares held by the trustees.

Companies and Third Parties

A further difficulty arises in the case of companies if there are shareholders outside the family members. Does this prevent the settlement from being a nuptial settlement? The fact that third parties have taken some part in the transaction, or received a benefit under the settlement, has not necessarily in the past prevented the transaction from being held to be a settlement. However, the court, in exercising its discretion if it is not possible to make orders that will not be to the detriment of the strangers to the marriage.

The fact that third parties take part in the initial transaction, i.e., in the establishment of the company, would not seem fatal to the holding that a settlement has been created. In many of the early marriage settlements third parties such as a parent or other relative of the parties about to be married created the settlement and brought the property into it. The fact that third parties took some benefit or had an interest in the settlement has not been fatal to a finding that the settlement was nuptial. In the settlements that contained interests limited in succession it was common for there to be reminders over if the immediate objects of the settlement failed. These remainders over could be brothers and sisters and their issue, or the property could revert back to the settlor and his issue or next of kin. That third parties took an interest did not prevent these transactions from being nuptial settlements.

In these cases the court was more concerned about whether its orders would derogate from the interests of these parties if they did not consent.

Typical was the case of *Morrissey* v. *Morrissey*.[63] The wife had settled property in trust on herself for life, on her death for the husband and default of any issue for her surviving brothers and sisters and the children of any deceased brothers and sisters dying in her lifetime. The wife divorced the husband. They had no children, and at the time of the application her sister and brothers were unmarried. The wife sought a variation of the settlement which would extinguish the interest of the husband and of the brothers and sisters and which would result in the reconveyance to her of the property. The purpose of the application, it was said, was to enable the wife to make provision for any future children she may have if she remarried. The object of the original settlement made by the wife was to provide for herself and her children. In the events which had happened any children that she may have if she married again would not be entitled to take anything under this settlement.

The respondent husband, the brother and sisters all consented to the order being made. They were the only living persons who could be interested under the terms of the settlement. In these circumstances the Court made the order sought and directed the trustees of the settlement to reconvey the property of the wife freed from the trusts of the settlement.

The cases are reviewed by Bateson J. in *Webb* v. *Webb*[64] where the principle he extracts from the earlier decided cases is that the court will not vary a settlement unless the interests of any living persons will not be prejudiced, except where such persons consent. It appears though, that the court will not take into account the interests of unborn children of volunteers under the settlement.

Does this then mean that in the case of a company, even though third parties may have some interest, nevertheless the court can find that it is a nuptial settlement and vary the settlement provided the third parties' interests are in no way affected? If so, then the significant question is the original question of was the settlement made upon the wife and child, qua wife and child of the husband, or in some other capacity?

But in the case of companies the occasions where s.85A might be sought to be invoked would in most cases be where a particular asset of the company is the object of the order sought. If the company owns the matrimonial home or other matrimonial assets this is understandable and is the case more likely to find favour with the court. If the asset is a commercial asset, the shares of the company are more likely to be the subject

63 [1905] P 90
64 [1929] P 159

of a property order under s.79. But who can tell? Property is of such varied nature that it is impossible to predict the cases in which the asset of the company rather than its shares are more attractive to the applicant.

Alienation of Income

Another device used for income splitting is the permitted assignment of income pursuant to Division 6A of the *Income Tax Assessment Act*.[65] In such arrangements the right to future income is assigned for a period of seven years or more. What if during this period the marriage breaks down and the husband, who has assigned the income, wishes to terminate the arrangement. Is there any reason why such an arrangement could not be construed as a post-nuptial settlement? If so, again what is the property dealt with which would become subject to the order? The income producing property or the chose in action being the right to the income assigned? The former again could be subject to a s.79 order, so for s. 85A to be of use it would have to be the latter.

These illustrations taken from the field of tax planning show the possible scope of s.85A. There are no doubt many more arrangements and will be more in future. If these arrangements remove the property from being the property of the parties and so outside the ambit of a s.79 order, then s.85A may be called in aid to bring the property within the reach of the Family Court.

Jurisdictional Limitations

Jurisdictional Questions

Two questions arise with respect to the exercise of the jurisdiction under s. 85A.[RN66] The first is the jurisdiction of the Court and when it can exercise the power given under the section. The second, is whether the Family Court has exclusive jurisdiction to deal with property dealt with by a post- or ante-nuptial settlement. The distinction is clearly drawn by Dawson J. in *Perlman* v. *Perlman*[67] where he said:

> [The jurisdiction of the Family Court] is not limited to matrimonial causes and extends to matters in which jurisdiction is conferred on it by a law made by the Parliament. See s. 31 (l)(d). But a clear distinction is drawn in the Act between matrimonial causes and other proceedings (see s. 39) and that distinction is observed in the proclamation excluding the Supreme Court from hearing and deter-

65 See generally B Marks, *Alienation of Income* (1978)

66 The question of constitutional validity of the section is not discussed in this paper It is noted that there was no challenge made to the validity of the predecessor to the section, namely, s 86(2) of Matrimonial Causes Act 1959

67 (1984) 58 A L J R 78 at 92, F L C 91-500 at 79,070

> mining proceedings under the Act by limiting the exclusion to matrimonial causes.
>
> Again in the same case Wilson J. said:
>
> Section 31 (l) describes the jurisdiction of the Family Court in terms which distinguish between "matrimonial causes instituted or continued under this Act" (para. (a)) and "matters in which jurisdiction is conferred on it by a law made by the Parliament (para. (d)). The words last quoted are clearly apt to refer to any law of the Parliament, including the Act.[68]

Accordingly, although the power to deal with ante-and post-nuptial settlements is not a specific matrimonial cause as defined in s.4(l) of the Act, nevertheless, it is a matter which falls within s.31 (l)(d) being a matter "with respect to which proceedings may be instituted in the Family Court under this Act or any other Act". Although there is no doubt as to the jurisdiction of the court, the occasions when the jurisdiction can be invoked is a different matter and depends upon an interpretation of the section itself. The section commences with the following words:

> "The court may, in proceedings under this Act, make such order as the court considers just and equitable...".

Does the use of the words "in proceedings under this Act" imply that there must be other proceedings "on foot" in the Court before an application for relief under this section can be made, or are the words of the section wide enough to permit an initiating application being brought without there being any other proceedings commenced? In short is the pre-requisite to the exercise of the power under s.85A the fact that there are current proceedings, be they for dissolution, property settlement or any other orders in respect of which the court has jurisdiction? Further, if it is necessary to have other proceedings are they to be pending, or, is it possible to bring an application under this section after such other proceedings have been completed.

Similar questions arose with respect to s.85, the section giving the court the power to set aside instruments or dispositions made to defeat existing or anticipated orders.

The former s.85 began "In proceedings under this Part, the Court may set aside...". In a number of cases, including *Page* v. *Page,*[69] *Rickie* v. *Rickie,*[70] *Whitaker* v. *Whitaker,*[71] and *Schmidt* v. *Schmidt*[72] it was held that before this section could come into operation there has to be proceedings

68 Id at 88, 79,065
69 (1978) 35 F L R 101, F L C 90-525.
70 (1979) 35 F L R 327, F L C. 90-626
71 [1980] F L C 90-813
72 [1980] F.L C. 90-873

"on foot" between the parties under Part VIII of the Act. By the 1983 amendments the opening words to s.85 were amended to read "In proceedings under this Act, the court may set aside...". There would be no reason to think that the Family Court would not apply a similar interpretation to that applied under the previous section and find that there had to be some proceedings "on foot" under the Act before an application under the section to set aside could be made.

By analogy, exactly the same process of reasoning would be expected to be applied by the court when dealing with applications under s. 85A. In addition, however, there is a distinction to be drawn between the opening words of s.85A and the opening words of other sections of the Act which clearly enable an initiating application to be made in respect of the subject matter dealt with in those sections. For example, s.79 provides that "in proceedings with respect to the property of the parties to a marriage or either of them the court may...". Similar words are used with respect to an application concerning maintenance in s.74 of the Act. In s.48 it is provided that "an application under this Act for a decree of dissolution of marriage shall be based on the ground that...". Accordingly, it appears that with respect to both s. 85 and s. 85A it is intended that the power given in the section is only to be invoked if there are other proceedings under the Act.

This does not answer the subsidiary, but the more difficult question, of whether the other proceedings must be pending or whether it is possible to bring proceedings for a variation of an ante-nuptial settlement after the other proceedings have been completed. The question was adverted to by Nygh J. in *Whitaker's Case* with respect to s.85. He said:

> An interesting question which has not yet arisen and was not really argued before me is whether the reference to "proceedings under this Part" include proceedings instituted and completed prior to the commencement of this Act under the Repealed Act, as was the case here with the original proceedings for property settlement, child maintenance and costs. In my view s. 85 does include such proceedings. Sub-section (l) refers to "an existing order... in those proceedings" by which is clearly meant the "proceedings under this Part" referred to in the opening part of the sub-section. Hence despite the reference made by Tonge J. in *Page v. Page* to "proceedings on foot" the section envisages that proceedings may actually have been completed.[73]

But the reasoning is not necessarily applicable to s.85A. As Nygh J. pointed out s.85 is a proceeding to set aside a disposition which includes

73 [1980] F L C 90-813 at 75,128

a proceeding to set aside a disposition made to defeat an existing order. This contemplates that proceedings have taken place resulting in an order and are therefore completed. It is, accordingly, inherent in the terms of the section that the proceedings be available in respect of completed proceedings under the Act. The same, however, cannot be said of s.85A. There is nothing within the terms of the section which would justify an interpretation the the s.85A proceedings are available in respect of completed proceedings under the Act. The definition of "proceedings" in s.4(l) does not help.

At first sight this may not be of much significance as one would expect proceedings under s.85A to be brought in the course of proceedings for a property settlement pursuant to s.79. In many cases the purpose of s.85A proceedings is to enable settled property to be dealt with in the overall readjustment of the financial relationship of the parties. On the other hand, it could be that because of the nature of the settlement the only order being sought is an order dealing with the property dealt with by the settlement. The "proceedings under this Act" referred to in the opening words of s.85A need not necessarily be proceedings for property settlement. They could be proceedings for dissolution or custody of children. In conjunction with such proceedings what is being sought is that the property dealt with by the settlement be rearranged to make financial provision for a spouse, or, to provide for maintenance for children the subject of the custody proceedings. In such cases if the proceedings have to be current then it would appear that jurisdiction under s. 85A could not be invoked once the custody order had been made or once the decree had become absolute.

This may have been deliberately done. It may have been the policy of the legislature that s.85A proceedings be only brought in conjunction with property proceedings or at a time when the proceedings for divorce or custody were current and not sometime after these proceedings had been concluded. If that be the case then it represents a significant limitation on the occasions when the jurisdiction of the court to deal with post- and ante-nuptial settlements can be exercised.

The second question that arises is whether the Family Court has exclusive jurisdiction under s.85A. As was pointed out by the High Court in *Perlman's Case* there is a distinction between the jurisdiction of the Family Court and its exclusive jurisdiction. The jurisdiction of the Court is contained in s. 31 of the *Family Law Act* and encompasses not only matrimonial causes, as defined, but also any other matter in respect of which proceedings can be instituted and provided for either in the *Family Law Act* or any other Act of Parliament. On the other hand, the exclusive jurisdiction is created by the combined effects of ss. 8(l), 40(3), 40(4) and proclamations made pursuant to s.40(3). The effect of the last proclama-

tion issued under s.40(3), dated the 23rd November 1983, together with the sections of the Act above referred to is that if a matter is a "matrimonial cause" within the definition in s.4(1) then, but only then, does the Family Court have exclusive jurisdiction. If a s.85A proceeding is not a matrimonial cause as defined, and by the law of a State, jurisdiction to deal with post- or ante-nuptial settlements is conferred upon a State Court then the effect would be that such proceedings could be brought in the State Court. In the case of State Family Courts unless the s.85A proceedings are a "matrimonial cause" it would appear that such courts have no jurisdiction.[74]

In the first place none of the paragraphs under the definition of "matrimonial cause" specifically refers to a proceeding to deal with property dealt with by a post- or ante-nuptial settlement. Depending upon the exact terms of the settlement, and what it achieves or does, there are a number of paragraphs under which the jurisdiction could fall. Firstly, paragraph (Ca) would not appear to be applicable. If the parties under the settlement have interests in property there is no need to invoke the power of s. 85A. The interests in property can be dealt with directly pursuant to an application under s.79. Section 85A will normally only be invoked where there is property in a settlement but no proprietary interest, whether in possession, reversion or reminder, is given to the parties. In such a case paragraph (Ca) would not apply as this refers only to a proceeding with respect to the property of the parties.

The settlement by its terms may make some provision for a child to be a prospective discretionary beneficiary under a trust as to either income or capital (or both). The trust would of course have to contain property from which income was being produced, and which represented the capital. The order sought may be to rearrange the settlement in such a way as to provide an immediate and certain income provision during the minority of a child, or to give the child a vested and accelerated capital provision. If the variation of the terms of the settlement are for the purpose of benefiting a child it would not be difficult to argue that the proceedings are thereby proceedings either for the maintenance of a child (paras. (Cc), (Ce)) or proceedings with respect to the welfare of a child of the marriage (para.(Cf), (Cg), (Ch)).

If the order sought is not specifically to benefit a child of the marriage but a spouse then other paragraphs will have to be relied upon to constitute it a "matrimonial cause". It could be argued that it falls within paragraph (e) being "proceedings between the parties to a marriage for

74 See the arguments of counsel in *Anguston* v. *Anguston* (1985) F L.C. 91-643

an order... arising out of the marital relationship...". Bearing in mind that the settlement must be a nuptial settlement or in other words a settlement of property that was only entered into because of the marriage, and that now the circumstances surrounding the marriage have changed radically, namely, the marriage relationship has broken down, again it would not be too difficult to argue that an order seeking a variation of the settlement is an order that has arisen out of the marital relationship.

However, perhaps paragraph (f) of the definition of "matrimonial cause" is the strongest paragraph upon which to rely. By this paragraph a "matrimonial cause" is "any other proceedings... in relation to concurrent pending or completed proceedings of a kind referred to in any of the paragraphs (a) and (eb)...".

In *Re Ross Jones; Ex parte Green*[75] Gibbs C.J. referred to the consideration he had given to the meaning of the words "in relation to" in *Perlman's Case* as follows:

> I there expressed my opinion as to the meaning of para. (f) as follows, at FLC p.79,056; A.L.J.R.p.81: "The words 'in relation to' import the existence of a connection or association between the two proceedings, or in other words that the proceedings in question must bear an appropriate relationship to completed proceedings of the requisite kind: see *Re Ross-Jones; Ex parte Beaumont* (1979) 141 C.L.R. 504 at p.510. An appropriate relationship may exist if the order sought in the proceedings in question is consequential on or incidental to a decree made in the completed proceedings (so that, for example, an application by a divorced wife for a settlement and transfer of property is a proceeding in relation to the completed proceedings for the divorce: *Re Ross-Jones; Ex parte Beaumont*, at C.L.R. pp. 510-511, 520). It may exist if the order sought in the later proceedings would reverse or vary the effect of the order made in the former (e.g., where an application under s. 61(4) of the Act is brought by a surviving parent for custody of a child when that custody has been awarded to the other parent, since deceased; *Dowal* v. *Murray* (1978) 143 C.L.R. 410 at pp. 417, 423, 427; or where an application for custody of a child of a marriage since dissolved is made by a stranger to the marriage who has been granted custody by an order in previous proceedings: *Fountain* v. *Alexander* (1982) 56 A.L.J.R. 321 at pp.324-325, 326-327, 334)." I do not suggest that this recital is exhaustive but it serves to indicate the nature of the relationship that must exist between the two set of proceedings if one of them is to fall within para. (f).[76]

If an order for settlement of property under s.79 bears the appropriate

75 (1984) 59 A L.J R 132, F L C 91-555

76. Id at 136; at 79,485

relationship to proceedings for divorce it would be difficult to see a court holding that an order dealing with property in a nuptial settlement under s.85A does not equally bear the same relationship. Perhaps in some cases the order under s.85A is the only effective way in which to provide for an appropriate settlement for a spouse.

The same principles apply to the exercise of the power under applications under s.79 and s.85A. Section 85A(2) provides that in considering what order if any should be made under s.1 the court shall take into account the matters referred to in Sub-section 79(4) as far as they are relevant. It is clearly envisaged by the legislature that whatever orders are made varying settlements they are to be made by reference to the same contribution and needs principles that are applied when determining whether a property settlement should be made.

In any event, is not a proceeding to deal with property dealt with under a nuptial settlement incidental to a proceeding for settlement of property? It may well be that only by exercising both powers can a just and equitable order be made redistributing the property of the parties. Because the combination of both powers is necessary to achieve the objective provided for in the Act it would appear that the appropriate connection or association between the two proceedings would be established. The same would apply in the case of an order sought to benefit a child. The association between the custody or maintenance proceedings concerning the child and the s.85A proceedings is such that the variation proceedings are "in relation to" the proceedings concerning the maintenance or welfare of the child.

The conclusion to be drawn is that although there are inherent within the section some temporal restrictions on the institution of the proceedings there is no doubt that the court has jurisdiction to exercise the power under s.85A and further it would also appear reasonably clear that proceedings under this section are exclusive to the Family Court.

Section 85A and a Property Regime

It is not for me to predict the outcome of the matrimonial property inquiry, nor do I do so. If the outcome is that Australia retains a discretionary system for dealing with matrimonial property it would seem clear from past experience that the retention of s.85A is required to fulfil the purposes of the legislation. But if some form of property regime is considered desirable for Australia, is there a place in such a regime for a power similar to that contained in s.85A? One would think that there is little doubt that such a power is a necessary if not an essential one for the Court to possess. The primary purpose of s.85A power is to bring within the reach of court orders, property which is not the property of

the parties, but which is property from which one or other party may enjoy or expect to enjoy a benefit. In the overall readjustment of property matters this is property that should not only be taken into account, but also should become the subject of a court order. Property regimes traditionally have the same defect as s.79, viz that they can only deal with property of the parties. This being the case, there would seem to be every good reason for the inclusion in any property regime of a power the equivalent of s.85A.