
Book Review

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De Facto Property Proceedings in Australia, Dorothy Kovacs, Butterworths, Sydney, 1998 i-xvii, 1-182 pp

Since the mid 1980's, there has been a rapid development of case and statute law which relates to various aspects of de facto relationships, in particular any rights in relation to property owned by one or both partners that may arise as a result of the relationship. During the same time, there has been a corresponding increase in the number of academic publications in the area, the most recent one being "De Facto Property Proceedings in Australia" by Dr Dorothy Kovacs, an Associate Professor of Law at Monash University. "De Facto Property Proceedings in Australia" is a 182 page text published by Butterworths, the law being stated as at 14 July 1998. The work includes an index which readers will find useful. The table of cases and statutes is up to date and covers the leading authorities in the area.

There are 18 chapters in this work, each chapter containing numbered paragraphs, the index referring to paragraph rather than page numbers. In the longer chapters, headings (and, in one case, subheadings) are used which practitioners may find useful for speed of reference. In the smaller chapters of between 3-5 pages, such headings are not necessary and have not been used. For some topics, the author summarises points she considers to be of significant practical importance under the heading "Practice points". Dr Kovacs' work is succinctly written and is very accessible. It provides a good overview of the key statutory and case law

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references in the area of property distribution on the breakdown of a de facto relationship. After only a brief review of the relevant part of this text, a practitioner should be able to identify whether or not his or her client may have a cause of action.

As the title of this work suggests, it concerns proceedings brought by a de facto partner in relation to property. While there is brief mention (in chapter 9) of the extent to which a testator's family maintenance claim may be brought on the death of a partner, the focus of the book is almost exclusively on the rights a partner has in relation to property on the breakdown of the de facto relationship. The text begins with a brief overview of the various statutory and general law regimes which govern this area of the law. The text is then divided into two parts. Part A deals with the statutes which operate in New South Wales, Victoria, the Northern Territory, the Australian Capital Territory and South Australia, while Part B deals with the general law remedies. Part A begins with an examination of the relationships that are governed by the legislation (chapter 1), deals with the circumstances in which an order for property distribution can be sought (chapters 2-3), and examines the matters which are relevant in determining whether the order is just and equitable (chapter 4). The author devotes a separate chapter to the treatment of superannuation in this kind of litigation (chapter 5). Comparisons are made with the position under the *Family Law Act* 1975 Cth (chapter 6). Chapter 8 looks at ancillary powers that courts have under the various state statutes, such as the power to order adjournments, to set aside previous orders of the court, and to provide injunctive relief. Cohabitation and separation agreements that can be entered into between de facto partners are examined in chapter 7. Chapter 9 deals with the implications of death of a de facto partner on property proceedings that have been instituted. The final chapter in Part A discusses the relationship between statutory and general law rights.

In Part B, the general law remedies, the only remedies available to partners in the non-statutory jurisdictions, are discussed. There are separate chapters on contractual remedies (chapter 11), resulting trusts (chapter 12), constructive trusts (chapter 13), estoppel (chapter 14), and charges and liens (chapter 15). A separate chapter is devoted to "Other Remedies" (chapter 16) where causes of action such as ones based in restitution, claims for occupation rent, and entitlement to receive interlocutory injunctions to preserve the status quo are alluded to. Chapter 17 is entitled "Stamp Duty Exemptions for De Facto Partners" and deals with various stamp duty implications where de facto partners wish to transfer or sell property. The final chapter in Part B, "The Future" recites the problems that exist with the law in this area and suggested solutions postulated by different bodies.

In her preface, Dr Kovacs outlines the aims of the book. After referring to the variety of legal regimes that govern property distribution on relationship breakdowns, Dr Kovacs states that the book "aims to reduce this disorder somewhat". If this is a reference to examining the legal position in each jurisdiction, then the author has achieved this aim by providing a succinct, logical and accessible summary of the law. In relation to the statutory jurisdictions, there is a heavy focus on

New South Wales. This is justifiable as New South Wales is the jurisdiction which has had legislation in place for the longest period and from which most of the case law emanates. Special mention is made where the New South Wales legislation differs from other statutes. For the non-statutory jurisdictions of Queensland, Western Australia and Tasmania, there is some coverage of those causes of action which have been successful in the context of property distribution. The remedy most likely to be of assistance to a de facto partner is that of the *Baumgartner* style constructive trust. This topic appropriately receives the most detailed treatment in Part B (28 pages). While coverage of many of the other remedies is relatively brief, this is justifiable given the constraints of a book of this length.

The second stated aim of this book is “to assist legal practitioners who are required to give advice to clients and to conduct litigation in a difficult and evolving legal climate”. This work is written for the practitioners’ market and is undoubtedly of assistance in this regard. It highlights the main legal principles of importance in these kinds of disputes for all Australian jurisdictions. Practitioners are also likely to find useful the “Practice points” which often appear at the end of a discussion of the more complex areas. This text is certainly of assistance to practitioners in identifying relevant issues in providing advice to a de facto partner.

The format of this book, Part A examining the statutory remedies and Part B looking at the general law, is logical. It perhaps could have been improved, however, by chapters 17 (Stamp Duty Exemptions for De Facto Partners) and 18 (The Future) not falling within Part B. They do not have any nexus with general law remedies, the stamp duty exemptions more commonly applying in those jurisdictions where statutory remedies are available. The work could also have benefited from the inclusion of a number of topics. In all cases where a practitioner is asked to provide advice on property distribution on a relationship breakdown, that practitioner should consider the entitlement of the client (or the client’s partner) to spousal maintenance. This topic is so integrally connected with property that reference should have made at least to the relevant statutory provisions and leading cases. Secondly, any work on “De Facto Property Proceeding in Australia” should consider the entitlements of a person on the death of his or her de facto partner. While there is a 3 page chapter on “Proceedings on the Death of a Party” (chapter 9) which refers to the right of a partner to seek testators family maintenance, the author states that she does not intend to consider such rights. Moreover, the author does not refer the reader to any writings in which such matters have been considered. Probably the most significant omission, however, is the failure to consider the extent to which the Family Court is able to hear and determine matters arising under de facto relationships legislation of the States and Territories. This topic is the subject of Family Court Practice Directions and a number of authorities, and, given the extent to which orders of the Family Court frequently differ from those of the State Courts in this area, is a matter of substantial practical significance. Fourthly, while some attention is given to cohabitation and separation agreements in the statutory jurisdictions, an equivalent examination is not provided for the other jurisdictions. Despite the lack of statutory guidance, useful comments can be provided (and much has

been written) in this regard. The only reference to such agreements in Part B is chapter 11 on “Contracts”, and the focus is on the extent to which contracts already entered into can provide a remedy to a de facto partner wishing to claim an interest in property. Finally, despite the plethora of writings in the area of de facto property disputes in the form of loose-leaf services, texts and articles, it is disappointing that this work contains neither a bibliography of the more useful works in this area, nor reference to such works in relevant places in the commentary.

“De Facto Property Proceedings in Australia” is a useful book for practitioners practising in this area. It is well written and contains relevant and recent statutory and case authorities. The book provides a good overview of the applicable legal regimes on property entitlements on the breakdown of de facto relationships in all Australian jurisdictions and has a satisfactory balance between the law in the statutory and non-statutory jurisdictions. As already mentioned, the book will certainly be of assistance in identifying whether a party is likely to have or successfully be able to defend a claim in relation to property. Given the brevity of the work, however, it can only be a starting point for practitioners and those who decide that an action does lie will need to go further afield to research the legal position. On balance, Dr Kovacs has achieved her aims of providing some order in a complex area of the law and some assistance to practitioners who must give advice and conduct litigation in this “difficult and evolving legal climate”.