

Book Reviews

Ken Mackie and Mark Burton, **Outline of Succession**, Butterworths, 1994, pp xxxv, 252, \$48 (pbk).

Until Australia gets around to developing a uniform probate law, it is doomed to be dealing with a law of succession which involves eight jurisdictions each of which, while developing from a common English base, has altered in different ways since colonization. Statutory changes have tended to be ad hoc, and while often well reasoned in their justification by law reform commissions, the different approaches have led to a set of laws whose differences can only be justified if the residents of the various States and Territories are so well organised as to make their wills and die leaving all their property in the one jurisdiction. We are used to recognising the fact that Australia is a multicultural society, but we rarely recognise the difficulties of our multi-jurisdictional status in matters other than commercial ones. The Corporations Law was enacted to deal with this problem and a uniform probate law is just as urgently required.

In Australia, succession has tended to be studied jurisdiction by jurisdiction, the student texts so far focusing on one or a few of the jurisdictions. While this is reasonable in respect of some of the case law, the developing differences between the jurisdictions in both statute and common law have made this no longer adequate for the jurisdictions not covered in the texts. Further, there is no introductory text covering all the Australian jurisdictions, so Mackie and Burton's book is a very welcome addition to the literature in the area.

Introducing the student to this messy area requires delicate handling, and on the whole Mackie and Burton have done their job well. The area requires a good understanding of property law principles, and an ability to deal with doctrines arising from common law, equity and canon law. The outcome of this is a high level of intricacy, making the appropriate balance between detail and outline difficult to judge. Mackie and Burton have judged this balance well and produced a text which is easy to read, clearly set out, concise and reasonably comprehensive. Most of the chapters have a brief section which explains the basic terminology used for the subject area.

An introductory text of this kind cannot be expected to grapple in detail with the sociological issues raised by the choices our law makes about what property and what relationships are important. However, Mackie and Burton do at least raise some of the issues relating to the choice between testamentary freedom and forced succession, and do not hesitate to criticise where the law is ineffective or unjust.

The book is divided into thirteen chapters. The introductory chapter covers the meaning and scope of the law of succession, and gives a brief account of the historical background. If I had a criticism here it

would be the relatively minor one that the history jumps from the eighteenth-century English position to the twentieth-century position in Australia without any real consideration of the reception of English law into Australian jurisdictions. The law of succession is defined as the law 'concerned with the legal consequences flowing from death on a person's property, both real and personal, whether that person leaves a will or not'. This definition is a culturally specific one, perfectly accurate for the Australian condition, but I would prefer to see succession defined as the law concerning the transmission of property from one generation to another, whether through death or not. In Australia, death is (mostly) the significant moment for succession. It is therefore strange that in general, succession texts do not focus particularly on death as a subject. This one is no exception. Death is mentioned in passing throughout, but there is little detail on the subject.¹

Chapter Two discusses the general nature of a will, and covers the characteristics distinguishing wills from other transactions, contracts relating to wills and mutual and joint wills. The difficult topic of nominations of life insurance is discussed clearly, with detailed attention to the cases, and a similar treatment is given to the other areas like *donationes mortis causa*, which often create headaches for students.

The mental elements for creating a will are covered in Chapter Three. With the granting of powers to dispense with the formalities for wills in most of the Australian jurisdictions, the mental element becomes increasingly important, and in particular, there is an increased emphasis on the proof of testamentary intention where the formalities are not met. This chapter covers these elements adequately, but in light of the dispensing powers it would have been useful, in my view, to have slightly more emphasis on the recognition of testamentary intention. However, the structure of this chapter provides a very clear explanation of how problems of proof and insanity, lucid intervals, insane delusions and so on all fit together. This chapter considers mistake as an aspect of the mental element, and therefore also considers the new rectification powers which now exist in varying forms in Queensland, New South Wales, South Australia and Tasmania.

¹ This seems a pity to me as I have found that in teaching succession, using death, the coroner and the body as a pivotal point dramatically increases students' involvement in the subject, even if such an approach is somewhat morbid. It also allows treatment of matters to do with Aboriginal inheritance and death, such as the treatment of burial sites and Aboriginal relics.

Chapter Four covers the formal requirements for making a valid will. The treatment of the subject shows the variation amongst the jurisdictions, and the problems an overemphasis on the formal requirements has frequently created. The chapter then goes on to consider the dispensing powers and the witness-beneficiary rule, incorporation of documents and privileged wills. The dispensing powers are rapidly becoming the most significant aspect of succession law in Australia. The differences between the different jurisdictions are not insignificant and need to be explored thoroughly. And because the statutes have been heavily interpreted by common law, a thorough analysis of the interpretations is required in order to predict possible outcomes of cases. While it is true that the formalities must be taught in order to reduce possible problems, it seems to me that dispensing powers are deserving of more space than they have received in this book.

Chapters Five and Six discuss 'Revocation and Alteration of Wills', and 'Republication and Revival'. Chapter Seven considers the general principles regarding the construction of wills. The structure of the latter chapter is particularly clear, and students will find that it clarifies aspects of construction that seemed obscure in other leading texts. The chapter starts with general principles, then subsidiary rules of construction, and then considers separately the admissibility of extrinsic evidence in construing a will. In my opinion, this is the only way to have students come to an understanding of the relationship between the rules of construction and the rules of evidence. The treatment of the class-closing rules is particularly good. Indeed, this chapter is a must-read for all succession students.

Chapter Eight is called 'Gifts by Will'. It covers the classification of gifts, ademption, lapse, disclaimer, forfeiture and the equitable doctrines of satisfaction and election. These doctrines are usefully illustrated by examples, as well as by exposition.

'Distribution on Intestacy' is the topic of Chapter Nine. The chapter is quite short and gives a relatively brief discussion of what can be an extremely detailed and extensive topic. In this brief treatment is included the status of children and treatment of issue generally and a discussion of the doctrine of Hotchpot, which remains in only five of the jurisdictions. It is thus a scanning of intestacy rather than a detailed treatment, but it does offer the student a clear structure with which to approach the topic. In Chapter Ten, a similar treatment is given to 'Family Provision'. However, there is a relatively detailed treatment of the property out of which an order may be made, which is very welcome, particularly in dealing with the New South Wales notional estate provisions, whose limits are presently being explored. It is good to see the link being made in this text between family provision and testamentary promises, *donationes mortis causa* and joint bank accounts. This connection is all too frequently unmentioned in

student texts, but is a vital element of practice in relation to estate planning.

Chapter 11 is called 'Personal Representatives'. It gives a brief outline of everything from appointment to removal of personal representatives. The chapter thus 'maps' the area rather than dealing in any detail with any one part of it. Chapter 12 covers obtaining grants and Chapter 13 is quite a long chapter on duties, powers and liabilities of personal representatives. This latter chapter, besides considering the duties, powers, liabilities of the personal representative, also covers the administration of assets. The structure of this chapter makes a difficult area relatively clear. It is divided into sections - the funeral, proving the will, collecting assets, liabilities of the estate (including those incurred by the deceased and those incurred in administering the estate), insolvent estates, solvent estates, distribution of estates, completion of administration, powers of the personal representative with respect to the estate, liability and rights of the personal representative. While some of these categories interact with each other, the structure allows the student to develop a grasp of the basic concepts before the interaction becomes too complex.

This book is well laid out. The tables are clear, and if we must have case tables without the complete citation, we must be grateful for the fact that the year is mentioned. The index is not particularly detailed, but is adequate for the general topic search one would expect the beginning student to use.

This is a book which I would recommend to students of succession as an introductory text, and to solicitors for a quick outline of how their jurisdiction compares with others they are dealing with. It is clearly written and care has been taken throughout it to lead the reader into the topic rather than to plunge them carelessly into it. The balance between outline and detail has been very well handled, making it extremely user-friendly. I expect that Mackie and Burton's book will remain a very useful item in the succession area for some time to come.

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