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Conflicting narratives in succession law — A review of recent cases

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The guiding principle in succession law in the common law tradition is the concept of 'testamentary freedom'. This principle reflects a strongly individualistic sense of property rights. A parallel principle is one of moral responsibility towards those closest to you, particularly spouse and children. This is expressed through obligations on marriage and in marriage-like partnerships and, to some extent, through Family Provision legislation. This article explores the tensions between the principles and the conflicting narratives in succession law expressing them. Understanding the ways that these narratives are played out provides a more informed basis for the consideration of law reform.

I Introduction

Family provision legislation today is in a muddle. It jumbles up its original logic and dilutes the logic of testamentary freedom. Succession law as a whole, moreover, is straining under conflicting pressures.¹

This was my conclusion in the context of a consideration of a decision of the High Court in 2003, *Barns v Barns*.² It led me to look at family provision law, at *inter vivos* transactions and their intersection with family provision legislation, and, basically, to reflect upon the wider question of the foundational ideas in contemporary succession law in Australia. What prompted me to say this? It was, as I see it,³ the pull of different forces. On the one hand, testamentary freedom is being extended through the introduction of 'dispensing powers' in all jurisdictions in Australia to overcome deficiencies in compliance with wills formalities;⁴ and by powers of rectification of wills to get closer to what the testator really wants to happen with his or her property on death. Here we are giving greater scope for the operation of the traditional notion of 'testamentary freedom'. We are giving to the individual a broader power to express his or her views through wills, or things that are near enough to be good enough, through an expansion of the operation of testamentary instruments into what was formerly an impenetrable

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1 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns*' (2003) 196 ALR 65 — Orthodoxy or Aberration?' (2005) 27(2) *Sydney L Rev* 263 at 287.

2 (2003) 214 CLR 169; 196 ALR 65.

3 This has been an interest of longstanding for me, the subject of testamentary freedom having formed the subject of my doctoral thesis.

4 For a consideration of the varying provisions, see R Atherton and P Vines, *Succession — Families, Property and Death*, 2nd ed, LexisNexis Butterworths, 2003, para 8.13ff.

domain of highly technical rules as to validity — the ‘foot or end of the will’ itself filled chapters of textbooks. And, if the testator’s intention is not wonderfully clear, there is an increasing role for powers of rectification to correct, or fathom, the testator’s real intention.⁵ All of this allows more freedom to the testator.

But then, at the same time, and in a totally different direction, we are steadily, and at times dramatically, expanding family provision legislation. We are being pushed to recognise more claimants; to grab, or claw back, more property; to override a testator’s wish to limit provision for, or exclude, particular family members in favour of others, or for other reasons — all of which represents an overriding of the individual testator’s judgment with respect to the property in his or her particular family.

My pondering upon such things has led me to conclude that there is a real clash between ‘individual’ and ‘family’ in the directions of succession law: it is expressed *philosophically* through conflicting narratives on the purpose of, for instance, family provision legislation; it is expressed *practically* through legislation which expands powers to intrude upon testamentary territory for entirely opposite reasons.

II Of wills and family provision

A ‘Bludging’ as a career move?

The litigation prompted in the estate of Lan Fong Fung is instructive. It is, in many ways, a modern tale. There were two actions; they were rolled together and both heard by Gzell J: *Ye v Fung (No 3)*; *Ye v Fung*.⁶

Frances Lan Fong Fung lived on her own. She was separated from her husband, Keith Yuk Yee Fung. She had no children. Living alone she was concerned about her security; and she was lonely.

Michael Ye came to Australia in January 1990 from China to study. He had a letter of introduction to Frances, as his aunt had been at high school with her. Frances invited him to visit her every day after he had gone to university to study (at UTS). She made dinner for them, they watched TV, chatted a bit, then he went back to where he was staying. Michael was doing it tough. When Frances learned of this she invited him to stay, saying, ‘You can move into my unit to keep me accompanied and I can provide you with free accommodation and meals’. In July he moved in.

Frances’s generosity went beyond room and board. She also contributed approximately \$22,000 towards his university fees, bought clothing and other things for him, gave him cash, paid for his travel, paid for him when they went out socially. All in all it was estimated that she made a financial contribution of around \$70,000 to him. Apparently the expectation of him was that he would look after her when she got old. She wrote to his parents in China saying she would treat him like her ‘own nephew’.

⁵ Wills Act 1968 (ACT) s 12A(1); Wills, Probate and Administration Act 1898 (NSW) s 29A; Wills Act 1936 (SA) s 25AA; Wills Act 1992 (Tas) s 47; Wills Act 1997 (Vic) s 31; Wills Act 2000 (NT) s 31; Succession Act 1981 (Qld) s 31. For a consideration of the varying provisions see Atherton and Vines, above n 4, para 10.13ff.

⁶ [2006] NSWSC 635 (unreported, 26 June 2006, BC200604717); [2006] NSWSC 243 (unreported, 7 April 2006, BC200602070).

Frances died on 21 June 2001. Michael sought a share of the estate.

As there was no will, Frances's estranged husband, Keith Yuk Kee Fung, was appointed administrator of her estate.⁷ As Frances had not divorced Keith, he was still the surviving spouse and next-of-kin under the intestate scheme in New South Wales, unless Michael could claim that he was a de facto spouse and assert higher standing than Keith.⁸

To be the de facto spouse of Frances, Michael had to establish that he was the sole partner in a de facto relationship and was not a partner in any other de facto relationship.⁹ He lost on this point. He was 37 years younger than she (not that this, by itself, necessarily ruled him out); they shared domestic duties:

She did the cooking. He did his own washing, although she washed for him occasionally, and he for her when she was sick. He did the drying and collected things after drying. She did some sewing for him. He washed the dishes. He vacuumed and put out the garbage, mopped floors and cleaned blinds. He, or he and she, went shopping. He did general cleaning of the unit such as dusting. He collected mail and parcels for the deceased and posted her outgoing correspondence. He defrosted and cleaned the refrigerator. They folded bed sheets and he sometimes cut and dyed her hair. Mr Ye carried out some maintenance of the unit. When he was sick the deceased obtained medicine and served him meals in bed. She often cut his hair.

The deceased had a property at Lindfield. When tenants left, he accompanied her to inspect the property. If the garden was unkempt, he tidied it.

Due to her age and medical condition, the deceased required Mr Ye's assistance in her day to day routine. He administered her insulin injections when requested. He assisted her when sick. Sometimes she forgot to eat and he would prepare food for her. He accompanied her to her doctors and obtained the prescribed medicines. He massaged her back every day and applied medicine to her back to treat a skin disease. He accompanied her when she went for a walk. He gave her his arm for support. She was often tired.

...

The deceased took Mr Ye with her to various social activities such as weddings of her relatives and friends. They were photographed together at the wedding of the deceased's cousin, at the wedding of her nephew, and at the wedding of one of her friends. He was often invited to visit the homes of friends of the deceased and a series of photographs of them on these occasions were in evidence. The deceased also took Mr Ye to restaurants for dinner.

There was further similar evidence. A friend described them as 'like aunt and nephew'. His documentation with the Department of Immigration ticked the unmarried box.

But was he a de facto for the purposes of the intestate scheme? There are many elements that make up the concept of a de facto relationship. In *Roy v Sturgeon*¹⁰ Powell J set out what has now become the familiar definition.¹¹

7 It was noted that contested proceedings for probate of a testamentary document under the Wills, Probate and Administration Act 1898 (NSW) s 18A were settled, but there were no details in the judgment.

8 Under the spouse versus de facto spouse provisions of the intestate scheme: Wills, Probate and Administration Act 1898 (NSW) s 61B(3A)(a).

9 Wills, Probate and Administration Act 1898 (NSW) s 32G(1).

10 (1986) 11 NSWLR 454; 11 Fam LR 271.

The Property (Relationships) Legislation Amendment Act 1999 introduced the new concept of 'domestic relationship', personal relationships based on domestic support and personal care — different from a de facto relationship, but in the broad 'morally deserving' zone. As Gzell J commented, this definition 'would not include persons sharing a flat as a matter of convenience', but 'it might well apply to the relationship between an aging aunt and her supportive nephew'.¹²

Looking at the nature of the relationship in the instant case, Gzell J concluded that they were not in a de facto relationship, but they were in a close personal relationship. As he said:

[a] de facto relationship requires more than adult persons living together. They must live together as a couple. When one thinks of persons as a couple, one thinks of two people in a romantic relationship . . . [D]e facto relationships are confined to heterosexual and homosexual romantic relationships.¹³

Where the *circumstances* have to constitute the relationship, rather than formal marriage, while it is possible for there to be a de facto relationship without sex,¹⁴ there cannot be one without romance.

As Michael was not the de facto spouse of Frances, he had no claim on her estate as next of kin on intestacy. His only recourse was a family provision claim; and he made one.

The impact of the 1999 amendments was to provide a slot for Michael to claim, on the basis of the domestic relationship, not the claimed de facto status:

It follows that Mr Ye was an eligible person in relation to the deceased in terms of para (a)(ii) of the definition in the Family Provision Act 1982, s 6(1). It refers to a person with whom the deceased person was living in a domestic relationship at the time of the deceased person's death. A domestic relationship is defined in the same provision to have the same meaning as in the Property (Relationships) Act 1984 which, in s 5(1) defines a domestic relationship to be a de facto relationship or a close personal relationship, other than a marriage or a de facto relationship, between two adult persons whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.¹⁵

Michael had essentially been a perpetual student since he arrived in Australia, apart from some time spent lobbying the government to change its policy to allow Chinese students to stay in Australia. He was a packer in a warehouse for a while, till he lost that job. He wanted to do medicine, but had not sought work in any allied field. Nursing was not for him.¹⁶ He had \$200 in a bank account and superannuation worth \$6000.

What did Michael want? He wanted to buy a home unit in the Chatswood

11 Ibid, at NSWLR 458–9. This was set out at [47] in *Ye v Fung*, above n 6. The definition was included in the Property (Relationships) Legislation Amendment Act 1999 which also extended the concept of de facto relationships to same sex couples.

12 *Ye v Fung (No 3)* [2006] NSWSC 635 (unreported, 26 June 2006, BC200604717) at [52].

13 Ibid, at [64].

14 *Marks v Minett* (unreported, NSW SC, Powell J, 12 May 1988, 4608/1985).

15 *Ye v Fung (No 3)* [2006] NSWSC 635 (unreported, 26 June 2006, BC200604717) at [9].

16 I am reminded of the expectant and hopeful possible heir in *Bleak House's Jarndyce v Jarndyce*. Richard Carstone, who tried medicine, the law and then the army, only to die in despair when the entire estate was eaten up in court costs.

area so he could visit Frances's grave frequently, which, evidently, she had asked him to do. Chatswood, after all, was only a 10–15 minute bus ride to the cemetery where she was buried. Campsie was his second choice.

As with each Family Provision case, this was one that had to be considered on its own facts. Gzell J referred¹⁷ to what Kirby P had said in *Golosky v Golosky*,¹⁸ 'that consideration of other cases must be conducted with circumspection because of the inescapable detail of the factual circumstances of each case. It is in the detail that the answer to the proper application of the Family Provision Act 1982 is to be discovered.'

In this case Gzell J considered that Frances owed a high degree of obligation to Michael, higher than that owed to her siblings,¹⁹ and concluded that he should be left something:

In my view, by leaving Mr Ye nothing, not even the forgiveness of the debt of \$22,000 that he owed her, the deceased failed to provide him with adequate provision for his proper maintenance, education and advancement in life.

...

During her life, the deceased made considerable provision for Mr Ye. In my view she should have had him in mind as an object of her testamentary bounty, and she failed to do so.²⁰

Gzell J tempered the ambitious claim of Michael somewhat, however:

There is much to be said for the submission that Mr Ye is a perennial student who has not sought to exercise his talents in an appropriate way. He is able-bodied and well qualified to earn his living.

Nor am I convinced that Mr Ye has a burning desire to practise medicine. If he did, he would, in my view, have applied for admission to medical school by this stage and, in particular, rather than undertaking a course in accountancy.²¹

He was awarded forgiveness of the debt plus enough to buy, and furnish, a modest two bedroom unit in Campsie and a small 'buffer against the prospect that he does not immediately obtain gainful employment'. (I don't think I would have been so generous. More of this later.)

B Moral duty?

In 2005 the High Court had a chance to look at 'moral duty' again, in *Vigolo v Bostin*.²² It was when the High Court restored 'moral duty' to a place in family provision, which it had sought to leave behind in *Singer v Berghouse (No 2)*,²³ when Mason CJ, Deane and McHugh JJ remarked in their joint judgment that 'references to "moral duty" or "moral obligation" may well be understood as amounting to a gloss on the statutory language'.²⁴ While there is 'baggage' in moral duty, that baggage is, in my view, important.

¹⁷ *Ye v Fung (No 3)* [2006] NSWSC 635 (unreported, 26 June 2006, BC200604717) at [35].

¹⁸ Unreported, NSWCA, 5 October 1993, BC9302134.

¹⁹ *Ye v Fung (No 3)* [2006] NSWSC 635 (unreported, 26 June 2006, BC200604717) at [36].

²⁰ *Ibid*, at [37], [39].

²¹ *Ibid*, at [44], [45].

²² (2005) 221 CLR 191; 213 ALR 692.

²³ (1994) 181 CLR 201; 123 ALR 481.

²⁴ (2005) 221 CLR 191; 213 ALR 692 at 787 in the joint judgment of Mason CJ, Deane and McHugh JJ.

Vigolo was an appeal from Western Australia. Gleeson CJ endorsed the idea that ‘moral claims and moral duty’ remained of value in interpreting the legislation. So did Callinan and Heydon JJ.²⁵ The Chief Justice put it in these terms:

In explaining the purpose of testator’s family maintenance legislation, and making the value judgments required by the legislation, courts have found considerations of moral claims and moral duty to be valuable currency. *It remains of value, and should not be discarded.* Such considerations have a proper place in the exposition of the legislative purpose, and in the understanding and application of the statutory text. They are useful as a guide to the meaning of the statute. They are not meant to be a substitute for the text. They connect the general but value-laden language of the statute to the community standards which give it practical meaning. In some respects, those standards change and develop over time. There is no reason to deny to them the description ‘moral’.²⁶

In his consideration of the implications, and weight, of such a concept, the Chief Justice singled out a passage of Fullagar J in *Coates v National Trustees Executors and Agency Co Ltd*. It bears repeating:

I do not think there is any rule of law that we must weigh every testator in the scales against a standard of testamentary impeccability. I do not think, generally speaking, that the courts, when they have referred to ‘moral duty’, have really intended to do more than suggest that the court ought to do what it is to be supposed that the testator would have done if he had known and properly appreciated all the circumstances of the case.²⁷

I agree with this. The notion of ‘moral obligation’, ‘moral duty’, ‘moral’ *anything*, was being used in the sense of what the testator ought to have done. As Cockburn CJ stated in *Banks v Goodfellow*,²⁸ the leading case on testamentary capacity, the whole notion of testamentary freedom — trusting to the testator — was premised on certain assumptions:

Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given . . . The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law . . .²⁹

As this passage makes clear, testamentary freedom was based upon moral duty: it was a power with a ‘moral responsibility’, to judge the disposition of property on death on the basis of ‘the requirements of each particular case’. I have traced elsewhere how Testator’s Family Maintenance legislation was

25 *Vigolo v Bostin* (2005) 221 CLR 191; 213 ALR 692 at [121].

26 *Ibid*, at [25] per Gleeson CJ (emphasis added).

27 (1956) 95 CLR 494 at 525.

28 (1870) 5 LR QB 549.

29 *Ibid*, at 563–5.

introduced only to correct aberrant exercises of that power,³⁰ hence to test the degree of ‘aberration’ against a standard expressed in terms of ‘moral duty’ was logical, not a ‘gloss’.³¹ Although in one sense Testator’s Family Maintenance legislation qualified the testamentary freedom of the individual, in another sense it acted as an *extension* of the exercise of testamentary power *via* the court. It was, truly, the court’s putting itself ‘in the testator’s armchair’ in the *Bosch* sense.³² As testamentary freedom was based on moral duty, it is not surprising to find an analysis of Testator’s Family Maintenance legislation in similar terms.

Gleeson CJ identified the development of the ‘correlative “moral claim”’ to the ‘moral duty’;³³ and that this was an expression ‘which is liable to being misunderstood just as its progenitor “moral duty” may mislead’.³⁴ Stripping the ideas back to their basics, Gleeson CJ was right in sensing that the claim and the duty were entirely different creatures, and that one could confuse the other. To see this in its barest of philosophical bones, we need to go back to the seventeenth century, to John Locke and the origins of contemporary thinking about property — and wills.

John Locke was the champion of an individualised concept of property in English jurisprudential thinking in the seventeenth century. For him, the power of testation served a particular function in families as ‘a part of Paternal Jurisdiction’: ‘a tye on the Obedience of his Children’; a power men had ‘to bestow their Estates on those, who please them best’.³⁵ Children expected something from the father’s estate, ‘ordinarily in certain proportions’, but it was the father’s *power*, however, ‘to bestow it with a more sparing or liberal hand according as the Behaviour of this or that child hath comported with his Will and Humour’.³⁶ Through the ‘hopes of an Estate’ the father secured their obedience to his will.³⁷

For Jeremy Bentham and John Stuart Mill, in the eighteenth and nineteenth centuries, like Locke, the power of testation was, in this way, both an aspect of individual fulfilment (to the property owner) and an instrument of social control (by the property owner). To Bentham, it was considered ‘advantageous’, ‘for the good of him who commands’.³⁸ To them both, the role of testamentary power provided an incentive to children, as it had to Locke. Bentham described it as a power to reward ‘dutiful and meritorious

30 See R Atherton, ‘New Zealand’s Testators’ Family Maintenance Act of 1900 — the Stouts, the Women’s Movement and Political Compromise’ (1990) 7 *Otago L Rev* 202.

31 R Atherton, ‘The Concept of Moral Duty in the Law of Family Provision — A Gloss or Critical Understanding?’ (1999) 5(1) *Aust Jnl of Legal History* 5.

32 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463; [1938] 2 All ER 14.

33 *Vigolo v Bostin* (2005) 221 CLR 191; 213 ALR 692 at [67].

34 *Ibid.*, at [73].

35 J Locke, *Two Treatises of Government*, 2nd ed, P Laslett, Cambridge, 1970, Ch VI, ‘Of Paternal Power’, at [72].

36 *Ibid.*

37 *Ibid.*

38 J Bentham, ‘Principles of the Civil Code’ in *The Works of Jeremy Bentham — Published under the supervision of his executor John Bowring*, Edinburgh, 1843, Pt II, Ch 5, p 337. Although Bentham expressed some concern that ‘in making the father a magistrate we must take care not to make him a tyrant’ (*ibid.*), he considered that fathers needed such a power not only for their own good, but for the good of the community in preserving social order.

conduct' and as 'an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of their families',³⁹

A power to give by will was allowed; but it was not without consequence. It was circumscribed by the 'moral responsibility' referred to by Cockburn CJ in *Banks v Goodfellow*: to provide for the maintenance, education and advancement in life of children; and to adjudicate among family members according to their virtue, or vice. Freedom, in this context, was not to exist in the abstract. It was located, philosophically, in a framework of moral responsibility, duty and obligation. But the judgment of the 'worthiness' of the individual's claim, or 'moral right', was entrusted to the testator, on the basis that his judgment was more reliable overall than the concept of fixed shares of the civilian model. It was, in essence, an endorsement of the father's power to give, or to withhold, judging those around him unworthy.

Children may have *expected* something from their father's estate, but they were only entitled, in Mill's view, to expect maintenance and education to the extent to make them independent and self-reliant, to 'enable them to start with a fair chance of achieving by their own exertions a successful life',⁴⁰ but no more. Mill also acknowledged that the calculation of this duty of provision was affected by the 'station in life' of the relevant individual:

When the children of rich parents have lived, as it is natural they should do, in habits corresponding to the scale of expenditure in which the parents indulge, it is generally the duty of the parents to make a greater provision for them, than would suffice for children otherwise brought up.⁴¹

This, however, was the extent of the 'moral claim' of a child to any provision from a parent; and conversely, the 'moral duty' of the parent to satisfy it. However, if parents wanted to leave their children more than this, Mill considered that 'the means are afforded by the liberty of bequest':

that they should have the power of showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness.⁴²

Here we see the essence of the self-reliant adult. The 'claim', if any, was a very limited one. The 'moral' lens was really just reinforcing that it was for the testator to decide the merits, or lack thereof, of those closest to him, or her. What was 'proper' was filtered through this lens. It was not 'propriety' in the abstract.

The applicant in *Vigolo* was, as described by Gleeson CJ, 'an able-bodied adult son of the testator, and a man of substantial means'.⁴³ His claim was based not on financial need but on his 'moral claim' on his father's bounty, arising out of previous business and family dealings. It failed, as the Chief Justice said, 'not because moral claims are irrelevant, but because he was unable to bring himself within the relevant provisions of the Act'. Those

³⁹ Ibid.

⁴⁰ *Principles of Political Economy*, London, 1848, Ch 2, para 3.

⁴¹ Ibid.

⁴² Ibid.

⁴³ *Vigolo v Bostin* (2005) 221 CLR 191; 213 ALR 692 at [1].

provisions are still essentially cast in terms of ‘maintenance’.

Maintenance has been stretched in the claims of children — usually by amplifying the notion of ‘advancement in life’. In *McGrath v Eves*,⁴⁴ Gzell J referred to a comment Young J had made in *Shearer v Public Trustee*,⁴⁵ namely that ‘it has never been said by any court that the community expects a mother to leave her children in a position to have a house of their own’.⁴⁶ That observation, he said, applies equally to a father. But, Gzell J concluded, ‘there is no rule to the effect that proper provision for an adult and presently able-bodied child does not extend to providing him or her with a house or money to buy one’.⁴⁷ Where the estate is large enough, an order may indeed include provision that supports the purchase of a house. *Ye v Fung* itself was an example of this. Gzell J allowed a similar award in *McGrath* in favour of the children of the testator’s first marriage. The widow received the matrimonial home by survivorship, a joint bank account and the residue of the large estate.

Other cases illustrate more of the self-reliance approach to adult children. *Re Estate of Allen; Allen v Public Trustee*,⁴⁸ a decision of Windeyer J, is a good example. There were two marriages. Both wives had died. There were five children of the first marriage; none of the second. The testator benefited four of his five children. The fifth claimed under the Family Provision Act. He sought an equal share.

The son, Anthony Allen, had little in the way of assets. He and his father had fallen out. His father had taken out an Apprehended Violence Order against him. He was obsessed with suing the NRMA and matters related to the purchase of a house that went wrong. He was not in good health. The deceased was a difficult man. The plaintiff was a difficult man.

It was, as Windeyer J admitted, ‘a difficult case’.⁴⁹ But the applicant, though concerned about his creditors, was an able-bodied man. Windeyer J’s reflection of this is summed up in the following passage:

I accept that the plaintiff is tired of litigation. I accept that he would wish to bring it to an end. There is no evidence on which I could determine that he has some reasonable chance of obtaining releases from his creditors. He has a separate action not dismissed against one of his former solicitors and might expend some of any moneys which he has obtained on that, if no other creditors did not get in first. It is also I think significant that the plaintiff is able to work and that if he could set behind him what have become the wasted years of litigation and look forward, then it is likely that he would be able to obtain work . . .⁵⁰

The son did not establish his case for provision. His needs were his own problem. He was distant from his father, so any chance of playing the ‘dutiful’ card was gone.

44 [2005] NSWSC 1006 (unreported, 10 October 2005, BC200507745).

45 Unreported, NSWSC, 23 March 1998, BC9801169.

46 [2005] NSWSC 1006 (unreported, 10 October 2005, BC200507745) at [67].

47 *Ibid.*, at [71].

48 [2005] NSWSC 76 (unreported, 22 February 2005, BC200501008).

49 *Ibid.*, at [20].

50 *Ibid.*, at [22].

*Lloyd-Williams v Mayfield*⁵¹ concerned the modest intestate estate of Leonard Stewart. His widow, Shirley, took the matrimonial home in discharge of her entitlement on intestacy.⁵² The remainder of the estate passed to Leonard's daughter, Mrs Barbara Mayfield (born in 1942), and his grandson (under the statutory trust for issue, Leonard's other daughter, Judith (born 1947), having predeceased him). They each received around \$41,000. Shirley also received some assets by survivorship — shares, securities and a bank account.

But Shirley didn't survive Leonard for long and died 14 months later. The sole beneficiary of Shirley's will was Leonard's niece, Suzy Lloyd-Williams, the daughter of his sister Muriel Lloyd-Williams. The value of Shirley's estate was valued at over \$5 million. The bulk of this was property from Leonard that did not form part of his estate: it was, if anything, only accessible as 'notional estate'. Barbara made a claim for provision out of the jointly owned assets which passed by survivorship to her late stepmother.

Barbara and her husband were farmers. Their property was valued at over \$3 million. But it was tied up — it was a pattern not to be 'disrupted'.⁵³ Bryson JA used the expression 'fairy gold' to describe the debits and credits in the accounts of the farming business — 'as they would disappear at a touch and are not truly accessible'.⁵⁴ At first instance, White J had ordered provision for Barbara of \$850,000 — to enable her to purchase retirement accommodation for her and her husband; a fund to provide a secure income independent of the farming business; and an amount for 'contingencies'.

It was a somewhat unusual fact situation. As Bryson JA commented, the facts had features 'which are rarely encountered . . . together'.⁵⁵ The value of the notional estate was very large; the beneficiary under the will was extremely well provided for; the claimant herself was not 'needy' in any real sense. Hence 'the concept of advancement in life can take consideration well beyond needs'.⁵⁶ The appeal was dismissed.

These cases are a snapshot of contemporary judicial approaches. What we see is tension. It is a tension that has been there for hundreds of years. It reflects what we see as the right place for ideas of property in families.

Let's ask some questions of ourselves. What is it, exactly, that we owe our husbands and wives because of our commitment expressed in marriage? Does marriage (and its modern equivalents) express *partnership* or *dependence*? Why should adults be able to seek orders that they can buy houses, send their kids to private schools, preserve themselves against eventualities of one kind or another?

These are the questions we need to consider in the arena of Family Provision. If we are not producing the right answers, then we need to refocus, reconfigure the legislation. In the 1970s there was a great opportunity for reforming family provision. It was an opportunity lost. It had its reasons. The reformers did what they could to change the existing law. But it was limited.

51 (2005) 63 NSWLR 1.

52 Under s 61D of the Wills, Probate and Administration Act 1898 (NSW).

53 *Lloyd-Williams v Mayfield* (2005) 63 NSWLR 1 at [12].

54 *Ibid.*, at [14].

55 *Ibid.*, at [31].

56 *Ibid.*, at [32].

The changes were conceived within the concept of ‘lawyer’s law’.⁵⁷

C Eligibility — how far do we go?

The claim by the applicant in *Ye v Fung* posed the question of limits to the definition of eligibility. Was he ‘family’, or wasn’t he? Was Michael Ye ‘deserving’, or not? Why should he claim a share of the estate at all?

In a paper presented in 2005 Lindsay Ellison SC was troubled by some of the categories of eligibility.⁵⁸ He said that he saw ‘a lot of circumstances where stepchildren should be entitled to make a claim but do not come within the categories of “eligible person”’, contrasting that of grandchildren whom he considered should be ‘removed’ from category ‘d’ and included, if at all, in the general category of dependent members of the household.

From his experience in practice something nagged at him about what was going on in the family provision context. Some weren’t getting it who should; some were getting it who shouldn’t. While family provision legislation began as a modest intrusion upon testamentary freedom, it has been subject to great pressure for expansion, both through the interpretation of the legislation, particularly in relation to adult children, and through specific legislative amendment. The fact of expansion of operation is not in itself problematic, provided that there is (ideally) a consistent logic for doing so. What has troubled me is the lack of such logic and, indeed, the often conflicting logics of aspects of family provision legislation. To take one example, consider the categories of eligible applicant, which have been extended significantly in all jurisdictions.

In 1994 I wrote a major ‘Expert Report’ for the Victorian Law Reform Advisory Council, at the time they were considering reforming the legislation in that State. In my report I traversed a range of possibilities for amending the legislation, predicated upon the differing roles that could be seen as appropriate for it and argued for a consistency of approach.⁵⁹ I identified some of the things that could provide the focus for an approach: dependency, relationship (status), moral obligation.⁶⁰ What I posed was connecting the underlying logic of the perceived role for family provision legislation and any proposed changes to it. Only then, I argued, could a template be generated for justifying future amendments. For example, if moral obligation were seen as the core principle, then a wider role for family provision could be crafted. If the idea of maintaining dependants or relieving needs was identified as the relevant function, however, then a narrower role for the legislation could be found.

The Victorian legislature eventually opted for moral obligation as the

57 M Tilbury, ‘A History of Law Reform in Australia’ in B Opeskin and D Weisbrot (Eds), *The Promise of Law Reform*, Federation Press, Sydney, 2005, pp 10–11.

58 ‘Changes in Family Provision Law’, presented at the National Heart Foundation of Australia (NSW Division), Annual Solicitors Working Lunch, 4 August 2005.

59 When there were proposals for law reform being considered with respect to family provision. It was presented in 1994 and later published in a series of ‘Expert Reports’ by the Council as *Expert Report 1: Family Provision*, Melbourne 1997. See, generally, Ch 2 and the summary of recommendations in Ch 6. The Expert Report was provided to the New Zealand Law Commission when undertaking its work in relation to the New Zealand Act.

60 *Ibid*, para 2.241. See also the summary recommendations in Ch 6.

guiding principle: it rejected a list-based approach and went for the one-category approach: 'those for whom the deceased had responsibility to make provision'. The recommendations of the National Committee for Uniform Succession Laws in Australia included this concept in addition to a limited list, including spouse and non-adult children.⁶¹ Lists are easier, but limited. Ellison recognised this from the context of his experience, particularly with reference to stepchildren. Categories based on circumstances are the most flexible, but the most likely to attract the ire of the late Hutley J, which he expressed in the preface to the third edition of his co-authored *Cases and Materials on Succession*, published after the passage of the Family Provision Act:

The most radical complications [in the law of succession by the extension of claims against the estate] have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, 'The Family Provision Act 1982'. The Act might have been more properly entitled 'The Act to Promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982'.⁶²

III Notional estate

From the moment the first family provision legislation was introduced in New South Wales in 1916, the Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW) (TFM Act), a hot issue was avoidance. Provision under the TFM Act could only be made out of 'the estate' of the deceased — property owned beneficially by the relevant person as at the date of his or her death. The issue for those working with the legislation, and, eventually, the legislature, was the extent to which a testator could, or should, be permitted to avoid the operation of the legislation by dispositions of property: either outright or through a range of transactions, some of which were 'will-like', many of which involved trusts and others which involved some kind of contractual obligation undertaken. The answers to these questions involved questions of interpretation and questions of public policy. The notional estate provisions included in the Family Provision Act pushed the solution into the legislation — and out of the interpretation zone — by including a mechanism to claw-back certain property so that the court could subject it to an order under the Act. Under these provisions the court may designate property as notional estate where it is subject to a range of 'prescribed transactions'.⁶³

The notional estate provisions have now had well over a decade to be tested. There aren't many cases under them — partly because they are so

61 Family Provision Bill 2004 ss 6–7, in the model family provision legislation included as App 2 to National Committee for Uniform Succession Laws, *Family Provision — Supplementary Report to the Standing Committee of Attorneys-General*, Queensland Law Reform Commission, Report No 59, July 2004.

62 F C Hutley, R A Woodman and O Wood, *Cases and Materials on Succession*, 3rd ed by O Wood and N Hutley, Lawbook Co, Sydney, 1984, p v.

63 Family Provision Act 1982 (NSW) ss 22–29. In formulating these provisions a variety of comparative examples of 'claw-back' provisions were considered, such as those in the Inheritance (Provision for Family and Dependents) Act 1975 (UK), the 'augmented estate' provisions of the Uniform Probate Code (US), the 'forced share' provisions in some US jurisdictions, which may be elected against the will, as well as the provisions in relation

complicated (having been based on the old Death Duty provisions which were designed to serve a different object altogether)⁶⁴ — but they have allowed an extension of the jurisdiction into the *inter vivos* arena, whether involving avoidance or not. New South Wales is still the only jurisdiction in Australia to include such wide-ranging provisions.⁶⁵

A recent consideration was in *Birch v O'Connor*.⁶⁶ The question that attracted the Court of Appeal's attention was a simple one: whether the District Court had jurisdiction in relation to notional estate. The court held that the District Court does have power to make orders designating property as notional estate, provided the overall jurisdictional limit of \$250,000 is not exceeded.

A contract to leave property by will is the most problematic example of an *inter vivos* transaction that intersects with inheritance issues in general. In Family Provision terms, should the obligation under the contract be treated in the same way as any other obligation binding the estate, so that the property is not part of the estate, or should the obligation to make a will be subject to family provision orders like other property in the estate? This has been 'the subject of considerable controversy',⁶⁷ and was an issue, which, as Gleeson CJ commented, 'divided judicial opinion from the earliest days of such legislation'.⁶⁸ In *Dillon v Public Trustee of New Zealand*,⁶⁹ the Privy Council classified the obligation in the second way, subject to a family provision order; in *Schaefer v Schuhmann*,⁷⁰ the Privy Council classified it in the first, in the *inter vivos* zone. While *Dillon* was, in many respects, regarded as an aberration, the latter restored orthodoxy.

Schaefer was part of the bag of issues that propelled the work of the New South Wales Law Reform Commission in the 1970s leading to the Family Provision Act 1982 and, in particular, the provisions in that Act concerning 'notional estate'.

One type of transaction caught by the notional estate provisions is a contract that provides for a disposition out of the deceased's estate. The key issue in such situations is the question of consideration. Where the transaction involves a contract and 'valuable consideration, although not full valuable consideration, in money or money's worth' is given, the transaction is

to matrimonial assets in the Family Law Act 1975 (Cth): Law Reform Commission New South Wales, *Working Paper on the Testator's Family Maintenance and Guardianship of Infants Act, 1916, 1974*, paras 11.10–11.16.

64 See my comment on this in R Atherton, 'Notional Estate and the Family Provision Act 1982: consideration of a prerequisite' (1987) 25 *Law Society Jnl* 37.

65 Queensland was the only other Australian jurisdiction that specifically included *inter vivos* transactions, and then only *donationes mortis causa*, which are included as property for family provision purposes in Succession Act 1981 (Qld) s 41(12). However the proposed uniform model bill includes notional estate provisions based on those in New South Wales: National Committee for Uniform Succession Laws, *Family Provision*, Supplementary Report to the Standing Committee of Attorneys-General, Queensland Law Reform Commission, Report No 58, July 2004, Family Provision Bill 2004.

66 (2005) 62 NSWLR 316.

67 R D Oughton and E L G Tyler (Eds), *Tyler's Family Provision*, 3rd ed, Butterworths, 1997, p 313.

68 *Barns v Barns* (2003) 214 CLR 169; 196 ALR 65 at [18] per Gleeson CJ.

69 [1941] AC 294; [1941] 2 All ER 284.

70 [1972] AC 572; [1972] 1 All ER 621.

'deemed to be entered into and to take effect at the time the contract is entered into'.⁷¹ So, if a contract is considered as being of 'full valuable consideration' then the relevant date is the date of the contract. Where this occurred more than three years before the death of the relevant person then the property affected by the contract is not subject to an order under the Act. If the transaction fell within this period, then additional questions must be considered, such as intention to limit provision for eligible applicants.⁷²

What about the jurisdictions without notional estate provisions? In the absence of such provisions, the issues that could arise were whether there was any room in the doctrine stated in *Schaefer* to intrude upon or overturn a contract that had an effect on the estate of a deceased person in the family provision context. A further issue was whether *Schaefer* did, in fact, get it right. As to the first issue, in a passage in the speech of Lord Cross in *Schaefer*,⁷³ there are dicta that leave open the possibility of interfering with a contract where, for example, it was made not as a bona fide exercise 'in the normal course of affairs', but rather 'with a view to excluding the jurisdiction of the court'. His Lordship however made it clear that he considered such matters the province of 'legislation deliberately framed' rather than straining the construction of the legislation. So he recognised the problem, but deferred it to the legislature, rather than the courts.

In *Barns v Barns*⁷⁴ the High Court of Australia returned to the approach in *Dillon*. The High Court decided that it did not need legislative amendment to interfere with a contract to make a will in a particular way through the vehicle of family provision legislation. It held that it could do so as a matter of construction of the legislation. The decision considered the South Australian legislation in which there were no provisions such as those in New South Wales. In deciding that the property the subject of a contract to leave property by will (in this case expressed in a mutual wills agreement) was subject to family provision legislation, it upset the decision in *Schaefer*.

While *Barns v Barns* demonstrated that the tension contained in the legislation continues, and creates what I described as 'a new orthodoxy' in terms of the definition of 'estate' for jurisdictions outside New South Wales,⁷⁵ with significant ramifications for possibly many well-laid estate plans since *Schaefer v Schuhmann*, it was a timely reminder of the need to push ahead for reform of family provision legislation — and on an agreed national basis as urged by the Standing Committee of Attorneys-General and put into effect through the Uniform Succession Project.⁷⁶ But given the shift in the

⁷¹ Family Provision Act 1982 (NSW) s 22(6).

⁷² Family Provision Act 1982 (NSW) s 23(b).

⁷³ *Schaefer* [1972] AC 572 at 592; [1972] 1 All ER 621.

⁷⁴ (2003) 214 CLR 169; 196 ALR 65.

⁷⁵ Croucher, above n 1.

⁷⁶ The Family Provision reports to date include: New South Wales Law Reform Commission, Issues Paper 11 and Queensland Law Reform Commission, Working Paper 47, *Uniform Succession Laws — Family Provision*, February 1996; National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys-General on Family Provision*, Queensland Law Reform Commission Miscellaneous Paper 28, December 1997; National Committee for Uniform Succession Laws, *Family Provision — Supplementary Report to the Standing Committee of Attorneys-General*, Queensland Law Reform Commission, Report No 59, July 2004.

interpretation domain effected by the decision itself, it now requires a revision of the property provisions of the Bill prepared as part of that project. To date this project has led to recommendations for following the concept of an expanded reach of the legislation with respect to property as included in the NSW provisions. But, in *Barns v Barns*, the ground rules for the interpretation of ‘estate’ in the legislation (apart from New South Wales) has changed.

In *Barns* there was much discussion about the ‘purpose’ of family provision legislation. It was the use of the ‘purposive’ interpretation of family provision legislation that prompted me to write my article in the *Sydney Law Review* published in 2005.⁷⁷ It was about *Barns*; but much more.

IV Of ‘almost’ wills and probate

A Extending testamentary freedom

Dispensing powers have transformed probate litigation. The principles are pretty well mapped out now. The putative testator must ‘intend the document to constitute their will’. This is more than having testamentary intentions in general. It is more than knowing what you want in a will, and that a particular document (eg, instructions) is a record of it. It is wanting *the very document* to constitute a will. This has been the stumbling block in much litigation. Many cases have brought up documents in which it was very clear that what was written there represented plans for testamentary disposition, but did not pass the statutory threshold. Why? Because without that extra level of certainty, that the person ‘intended the document to constitute their will’, the general intentions could remain precisely there, part of an ongoing *draft* of plans. People can be remarkably fickle in their will-making; and wills, after all, are the one last great act of control over one’s children, the right to be respected and honoured in one’s dotage through the power that testamentary freedom gives us. This sounds harsh, but it is the reality of the lives of many seniors.

Such feelings are alive and living and well in contemporary probate practice, as it was at the time people like Locke, Bentham and Mill wrote. The children usually don’t see it that way — hence family provision practice. From their side of the family equation there is a gut sense of ‘entitlement’, an almost dynastic assertion of right.

Back to dispensing powers. Section 18A of the Wills, Probate and Administration Act 1898 provides:

(1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute the person’s will, an amendment of the person’s will or the revocation of the person’s will.

(2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.

⁷⁷ Croucher, above n 1.

As Probate Judge and later on the Court of Appeal, Powell J was a key figure in shaping the jurisprudence of this section. In *Hatsatouris v Hatsatouris*,⁷⁸ Powell JA (with whom Priestley and Stein JJA agreed) summarised the key elements of the provision:

. . . the questions arising on applications raising a question as to the applicability of s 18A are essentially questions of fact, the particular questions of fact to be answered being:

- (a) was there a document,
- (b) did that document purport to embody the testamentary intentions of the relevant Deceased?
- (c) did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her, or his, part operate as her, or his, Will?

The following are recent examples of successes and failures that demonstrate the provision in operation.

B Intending the document to constitute a will

In *MacKenzie v Osburn*,⁷⁹ a decision of Gzell J, Carolyn McKenzie, the de facto widow of the deceased, Henry Dean, propounded an informal document as his will. It appointed her executrix, contained a devise of a house to her and a residuary bequest in favour of Henry's half brother, William Hamilton Osburn, and William's sons, William John and Alex William Osburn. The deceased died on 9 December 2003.

Just before he died, Henry Dean asked Carolyn's son, Stuart, to check his house. (A neighbour had told Henry that a side door of the house was open.) When Stuart went there he found an empty envelope on the table with a business card of a solicitor attached. On the back of the envelope was written: 'Thursday 1 March 2001. Will.' It was empty. The top left drawer of a chest of drawers in the back room was open. There he found, inter alia, the document that was to become the subject of the s 18A claim. It was dated 17 December 2001. There was also a trunk that contained the deceased's books. It was open, with some of the books on the floor.

The will dated 1 March 2001 appointed Carolyn and William H Osburn executors and divided the whole estate equally between Carolyn, William and his sons. The informal document varied this by giving Carolyn the house.

Carolyn's sons, Stuart and David, gave evidence about the deceased's saying to them on many occasions that he had left the house to their mother. Some of this was pinpointed to late 2002. He said that he had made a will to that effect. Carolyn also said that the deceased had told her he was leaving her the house and that she had seen him writing a will on a number of occasions. David said that the deceased had told him that if he needed to find the will it would be in the top drawer of the cupboard in the back room. The Osburns also had recollections of what the deceased said to them: that he was leaving

78 [2001] NSWCA 408 (unreported, 30 November 2001, BC200107669).

79 [2005] NSWSC 657 (unreported, 6 July 2005, BC200504786).

everything ‘to Mr Osburn’s boys’. He showed William H Osburn and his wife a document that was in the trunk in the back room.

Both Carolyn and the deceased had mental illnesses. They did not always live in complete harmony. In October 2001 Henry turned up at the Osburns saying he didn’t want to have anything to do with Carolyn anymore. But by December they were back living together again.

The evidence was in conflict, as it often is, largely about who had the strongest claim on the deceased (ie, reasons for supporting an intended benefaction in their direction).

The informal document was the classic ‘do it yourself’ will. It was made from a will kit that included examples of gifts and instructions how to make a will and stated:

This is the last Will and Testament of me, . . . Henry Lloyd Deann . . . (name) of . . . 498 Pacific Highway Mt Colah . . . (address) in the State of . . . NSW 2079

1. I revoke all Wills and other documents of testamentary intent previously made by me; this is my last Will and Testament.

2. I appoint . . . Caroline Anne Meldrum (Mackenzie) . . . (name) of Unit 31 No 8 Wylde St Potts point . . . to be Executor or Executrix and Trustee of this my Will as to be recognised as the sole owner of the property.

3. I give . . . known as 498 Pacific Mt Colah 2079 and that all cash balances to be equally divided

Willy John Osburn

Alex Hamilton Osburn all of the same address.

William Hamilton Osburn known as 14 Forster St

Dated this day Friday 17th Dec 2001

H Dean.

It was unwitnessed. There were irregularities in it. The deceased misspelled his own name (as ‘Deann’), and Carolyn’s (as ‘Caroline’). He confused addresses.

Capacity was an issue. There was evidence called upon it, but it wasn’t pursued. Gzell J summed up the point of the irregularities in this way: ‘. . . these irregularities, while perhaps relevant to the question of mental clarity, do not, in my view, go to the question whether the deceased intended the document to constitute his will.’⁸⁰

What were the relevant facts in deciding whether the document made it over the s 18A line? For one, the document was placed in a special place, in the top drawer of the chest of drawers. Gzell J compared the situation with that in *Masters* where the informal document had been entrusted to a close friend shortly before death.⁸¹ The case was not as strong as *Masters*, but it had other context — the evidence of Carolyn’s sons for instance (who, after all, did not benefit from the informal document, although their mother did). The document presented itself in a particular way: it was in the form of a will. It was much more than a note of things *to go into a will*. It had certainty to it. It was also signed. It also purported to act with things on his death. As Gzell J concluded, it had ‘all the hallmarks of a will, save for the lack of attestation’. He admitted it as the will of the deceased.

⁸⁰ Ibid, at [42].

⁸¹ See my discussion of draft wills in R Atherton, ‘Dispensing with Wills Formality in Australia: The Problem of the Draft Will in the Tranquil Revolution’ (1994) 2 *APLJ* 68.

A document rejected under s 18A is seen in *Estate of Kiepas; Twemlow v Kepas*,⁸² a decision of Campbell J. Walcaw Kiepas died on 17 May 2003. He was born in Poland and had been in Australia for 53 years. He died without wife and children.

Walter, as he was known, made a will on 8 May 1992. It appointed his friend Frank (Branko Lapajne) as executor and a list of legacies, many to charitable organisations. It also included his brother and sister, with whom he had not been in contact, and was uncertain of their address.

Two months before his death he wanted to see Mr Twemlow, a solicitor. After some difficulty he managed to contact his mobile telephone while he was in South Africa. When he got off the phone he said to a helper, Ms Drysdale, that he would contact Twemlow on his return. But he also got a piece of paper and dictated the following to Ms Drysdale:

I appoint as my executors M F Twemlow, Solicitors.

One quarter of the residue of my estate after all debts (and bequests) have been paid, to Royal Blind Society. One quarter to Guide Dogs Association.

Ten thousand dollars to Mary Immaculate Church, Waverley. Ten thousand dollars to St Vincent de Paul, Waverley.

Two thousand to Barry Kimmorley, Accountant. Twenty thousand dollars to Branko Lapajne of Burwood.

All furniture, clothes and personal items to St Vincent de Paul Society. Two thousand dollars to Jean Drysdale of Paddington.

I direct that I be cremated and my ashes be located at Waverley Cemetery.

After it was finished, Ms Drysdale read it out to Walter. He said to her that he was not leaving anything to his brother as he didn't know whether he was alive or not, and he didn't want Frank as his executor because of his age and state of health. Walter didn't sign the document, nor did he mention it again to Ms Drysdale.

When Twemlow returned to Australia he contacted Walter, but Walter said he was busy and would 'get back to' Twemlow. He didn't.

The informal document was found after Walter died, with other documents at his home. How did it fare under s 18A? It clearly said something about his testamentary intentions. It included many of the usual provisions one might find in a will. It was also read over to him.

But Campbell J was not satisfied that it met the other requirements of s 18A: 'I am not persuaded that the Deceased intended that the informal document should, on the day it was written out, without more on his part, operate either as a Will, or as a codicil to his Will.'⁸³ Walter had not done anything to indicate that he wanted the document to be his will 'then and there'.⁸⁴ It wasn't dated, nor was it signed. Just because he left the informal document with other papers of a more formal kind didn't say anything of itself. It was, said Campbell J, 'equivocal'.⁸⁵ Walter's own actions in telling Twemlow that he would 'get back to' him only reinforced this. He did not, for example, indicate that there was no further need to see him (namely, because he had

82 [2004] NSWSC 452 (unreported, 2 June 2004, BC200403291).

83 Ibid, at [26].

84 Ibid, at [27].

85 Ibid, at [28].

already made another will himself — the informal document).

The signalling of intention that the document is intended ‘without more’, ‘then and there’, to be a will is the critical element in dispensing power cases. The case of *In Estate of Frederick Cecil Lumb; McMillan v Lumb*⁸⁶ demonstrates the kinds of things that will send this signal.

Frederick Lumb died on 10 July 2003. He was 84 and a widower, his wife having died in December 2000. He had three children. After Frederick’s wife died he decided to make a new will. He gave instructions to his solicitor, Mr Kelly, in December.

Kelly drafted a will and faxed a copy to Frederick. He didn’t do anything with it for a while, indicating to Kelly that he wanted to ‘sort out’ some of the property which was in the course of being sold.

In December 2002 Frederick was to go into hospital for surgery. He said to one of his daughters that he needed ‘to finalise’ his will before he went into hospital the following day. He made some alterations on the faxed copy of the will he’d received two years before. He also ticked and initialled each paragraph and signed at the foot. He also took out a separate piece of paper and wrote a note to Kelly:

Jim Kelley
Owen Hodge
16th December 2002

Dear Jim — I would like My Estate To Be Distributed as I have Described in My will of 16th December 2002, Which Reflects Mabel’s and my wishes.

F C Lumb
16th DECEMBER 2002

He then handed the will and the letter to his daughter and said, amongst other things, ‘This Will represents [your mother’s and my] wishes’.⁸⁷ She made copies for him and kept the originals herself, on his instruction. The next day Frederick spoke in terms of ‘finalising’ his will the night before.

The estate was a large one — about \$9 million. Windeyer J weighed up the factors before and against admission of the document under s 18A. Those favouring admission were that Frederick was going into hospital the next day and he was worried about it; he referred to the document as ‘his will’; he told Jim (the Executor added in the informal document) that he’d been included as an executor; and he gave the document to his daughter to keep and didn’t send it back to his solicitor to be amended.⁸⁸ Factors against were that Frederick knew how to make a formal will as he already had one; and one paragraph of the will was of no effect — this left the fate of shares undecided.

On balance Windeyer J held in favour of admission.

⁸⁶ [2005] NSWSC 371 (unreported, 22 April 2005, BC200502546).

⁸⁷ *Ibid*, at [12].

⁸⁸ *Ibid*, at [17].

C Of lists and gifts

An example from South Australia is a good one to test the dispensing provisions in that state in *In the Estate of Kathleen Torr*.⁸⁹ Mrs Kathleen Torr, a widow, died without children on 18 April 2003. She owned and lived in a house in North Adelaide.

Mrs Torr had made a formally valid will, but it left her options open, so to speak, as follows:

I DIRECT THAT MY DEAR AND LOYAL FRIEND MARGARET CARMEN BYRNES . . . shall deal with all of my clothing, jewellery and other articles of personal or domestic use or adornment in the terms of a letter signed and provided by me to her for such purposes.

As part of the formal will any such letter would have to withstand the test of being an ‘incorporated document’: it must exist at the time of the making of the will, it must be referred to as presently existing and it must be clearly identified.⁹⁰ The nuances of this doctrine did not need to be explored in the case as Mrs Torr did not provide any letter to her friend Margaret, nor was one found in her personal effects. But she did leave other documents.

Mrs Torr left a two-page handwritten document and a number of envelopes and photographs. The document itself was dated 23 October 2002. It was very orderly, it was all in her own handwriting and she signed each page. It had two columns, with the first describing an item of personal property, the second the name of a person and sometimes other information. There were 17 items in the list. Besanko J gave an example:

Photo of ‘Mercowie’ (hanging opposite clock) For Annabelle Harry (Tom’s goddaughter)

For 11 of the items Mrs Torr had also included photographs and placed them in an envelope, each time writing on the envelope the intended recipient’s name, sometimes adding additional comment. But she also went beyond the written list. She got creative. There were six additional envelopes with photographs and notes. Besanko J included an example. One envelope included nine photographs of items of dining room furniture — cabinets, a table, chairs and a tapestry. There were no notes on the photos themselves, only a note on the envelope in they were included:

Photos of dining room furniture for Annabelle Harry

Lest there be any doubt as to Mrs Torr’s intentions, Besanko J commented that ‘I do not think that it can be sensibly argued that the deceased’s intention was to leave the photograph to the person named as distinct from the item shown in the photograph’. (His Honour probably had his tongue firmly in his cheek, or he demonstrated an astute understanding of his testatrix!)

The fate of the lists depended on the probate application: that the list, envelopes and photographs be admitted to probate as a codicil to the will of Mrs Torr.

Mrs Byrnes was indeed a dear and loyal friend, and had been close to

⁸⁹ (2005) 91 SASR 17.

⁹⁰ *Allen v Maddock* (1858) 11 Moo PCC 427.

Mrs Torr for at least 50 years. Mrs Torr had told her that she wanted her to ensure that her wishes with respect to specific items would be honoured. She told her about the photographs and the instructions. She told her where she would find them — in her late husband's desk. She told her that the things were special and she wanted them to go to those she had chosen. Mrs Byrnes saw the list etc and she said that she knew that is what her friend wanted. But she never received the letter that Mrs Torr referred to in the will. She just did it 'her way'; and it made a problem for her lawyers.

Mr Peacock was one of the lawyers. He told Mrs Torr when he prepared her will that she should complete the bequests in writing and give them to Mrs Byrnes. In other words, do what she said she would do. Mrs Torr responded in a not unexpected way: she said she was organising it and not to push her. She also told him that she kept her documents in her late husband's desk.

When Mrs Torr died Mr Peacock went to the desk. It was locked. The key was found. There was the list, and the photographs, envelopes, sealed and unsealed, stacked neatly one behind the other, as well as some other things, in a green cash tin, also locked. (The key to this had also been found.) One of the envelopes contained nine smaller envelopes each containing one photograph. There were other photographs of her tapestries, without any writing at all on the photo or accompanying list.

So, now to probate. Should the list, envelopes, photos, etc be admitted as part of the will? First, were the photos 'writing' in the relevant sense? We have seen examples of things like the audio tape, in *Treacey v Edwards*,⁹¹ and the plasterboard wall, in *Estate of Slavinskyji*,⁹² considered to be 'documents'. But was a photograph a 'writing'? In New South Wales this would not have been an issue, as 'document' is defined in a way that makes it clear that a photograph is a 'document': Interpretation Act 1987 s 21. It was this definition that led to the admission of the audio tape in *Treacey* by Austin J.

Besanko J looked at the original meaning of 'document' — the Latin word 'documentum', the broad view of 'document' in the dispensing power (such as in *Slavinskyji*), dictionary definitions of the word, and while concluding that it was more usual to understand a document as meaning writing on something, it did not need to be restricted to that. Given the remedial intent of the dispensing power, he held, in the circumstances, that 'a document includes information recorded on a piece of paper and that it follows that the photographs in this case are documents'.⁹³

Having got over this hurdle, Besanko J then needed to consider whether the list, envelopes and photographs expressed the testamentary intentions of the deceased and intended them to constitute her will. Did she intend the documents to be operative at her death to dispose of the property in the manner described in them?⁹⁴ He held that they did.

Besanko J noted Mrs Torr's comment that she was 'organising it' and that he shouldn't 'push' her — in other cases this may have been considered as

91 (2000) 49 NSWLR 739.

92 (1988) 53 SASR 221.

93 *Ibid*, at [32].

94 *In the Estate of Kathleen Torr* (2005) 91 SASR 17 at [34].

evidence of vacillation, indecision, and not of fixed intention, particularly where she was well aware what a formal will required. But Mr Peacock had told her to complete her list and give them to Mrs Brynes; Mrs Torr told Mrs Brynes that she wanted her to fulfil her wishes, about the photographs and where she would find them. The documents were all found in a locked tin in a locked desk. There was nothing transient about them. They were also signed — the list, the envelopes. And so Besanko J admitted them to probate.

V Conclusion

The dispensing power cases and the family provision cases show the tensions that are evident in succession law today. They are not getting better. Family provision is, in my view, right out of hand. It is on a slippery slope where adults are concerned. I would clearly distinguish the position of partners/spouses from that of children. Marriages, or marriage-like relationships, are based on different logic than simply being a child (or analogous relationship) of someone. A good look at family provision legislation in its real context is needed — namely, what role does, and should, property play in families. Unless we seriously look at such questions then we will continue to tinker with the legislation, a bit this way, a bit that, and end up writing a blueprint for bludging.

There is room for looking after those who need it who might otherwise ‘become a burden on the state’ — Mill himself supported this.⁹⁵ But self-reliance is a laudable principle. It is often lost sight of in family provision cases. While the principles may be those of ‘past times and do not express the values of the present age’, according to Bryson JA in *Lloyd-Williams v Mayfield*,⁹⁶ they still have a place in the overall philosophical rationale of property and the decision-making that is allowed to those who ‘own’ it.

⁹⁵ Ibid, Bk V, Ch 9 s 1.

⁹⁶ (2005) 63 NSWLR 1 at [29].