

**CURRENT DEVELOPMENTS IN FAMILY PROVISION  
LITIGATION AND INFORMAL WILLS**

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*A seminar presented by Counsel of Gordon & Jackson's List*

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# AN OVERVIEW OF THE LAW RELATING TO INFORMAL WILLS

## Introduction

With the commencement of the operation of section 9 of the Wills Act 1997 solicitors have had to adjust to a new and uncertain reality in the wills and probate jurisdiction.

Where previously a solicitor could readily advise a client with confidence regarding what did or did not constitute a will and whether a particular document would be admitted to probate, he or she must now turn their mind to section 9 before offering advice.

The hand written and unsigned scrawl on note paper found in the client's drawer with the copy of his will may now be proved as an informal will or revocation of a prior will, where once it could be safely ignored.

The anxious but healthy client who wants a will done "on the spot" and who could once be confidently told that they would need to return the following day to sign the will when the will would be prepared and witnesses arranged, may now be asking to sign your will instruction notes as a "stop-gap" will.

In this new and uncertain environment all solicitors who practise in the jurisdiction need to have an understanding of the operation of section 9 and the way the Courts have applied the section and its equivalent in other states.

## 1. The Legislation

Section 9 of the Wills Act 1997 came into operation on 20 July 1998 and in its scope and purpose is similar to legislative provisions existing in other states of Australia.

Section 9 provides the Court with the power to dispense with the formal requirements for the making of wills and the altering of wills as set out in Section 7 and 15 of the Act respectively and to admit an informal document to probate if it is satisfied that the testator had intended the document to be his or her will or an alteration to a prior will.

It also provides the Court with the power to refuse to admit to probate a will which the testator has attempted to revoke in writing that does not comply with the formal signing requirements contained in section 12 (e) of the Act.

The relevant part of the section states as follows:

*" (1) The Supreme Court may admit to probate as the will of a deceased person-*

*(a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or*

*(b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act-*

*if the Court is satisfied that that person intended the document to be his or her will.*

*(2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the court is satisfied that the testator intended to revoke the will by that writing.”*

Section 9(5) of the Act gives the Registrar Of Probates the dispensing powers of the Court where the estate of the deceased does not exceed \$50,000 in value or where the estate exceeds \$50,000 in value and all persons who would be effected by the admission to probate of the informal testamentary document consent to the Registrar exercising the powers of the Court. It is interesting to note that according to figures kept by the Probate office there have been approximately 250 applications pursuant to section 9 since the section came into operation and 95% of these applications have been dealt with by the Registrar.

The section applies to a document whether or not it was executed within Victoria (s 9 (4) ) provided that the testator died on or after the commencement of the section (s 52 (4)).

In the case of *Re Mc Comb [1999] 3 VR 485* Warren J settled any concern arising from the fact that the wording of the section did not specifically include reference to a grant of Letters Of Administration with the will annexed, by finding that the dispensing powers of the Court contained in section 9 also applied where the informal document did not appoint an executor either explicitly or by the tenor of the document itself.

## **2. The Procedure For A Grant Of An Informal Document**

An application for a Grant of Probate or Letters Of Administration with the will annexed of an informal document will need to be made in the usual way to the Registrar of Probates but in addition the application will need to be supported by an affidavit by the applicant and any other persons who are able to depose to the testamentary intention of the testator. Order 2.08 (4) of the Administration and Probate Rules 1994, requires the supporting affidavit(s) to, “*state the acts, facts, matters and circumstances relied upon to satisfy the Court,*” that the informal document being propounded is the intended will or the alteration to the will of the testator and should be the subject of a Grant of Probate or Letters Of Administration with the will annexed.

It should be noted that section 9 (3) specifically permits the Court to have regard to:

- “(a) any evidence relating to the manner in which the document was executed; and
- (b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.”

If the value of the estate exceeds \$50,000 and the consent of the persons effected by the application cannot be obtained the application will eventually be brought before a Judge in the Practice Court in either of two ways.

If a caveat has been lodged against the application on the grounds that the document being propounded was not executed in conformity with the Act and was not intended by the deceased as his will, the caveat procedure will be activated so that after the caveator has lodged his or her grounds of objection, Order 8.07 of the Administration and Probate Rules 1994 will require the application to be brought before a Judge in the Practice Court for directions. The application for directions from the Judge will be by summons issued by the caveator or if the caveator fails to issue the summons within 7 days from lodging his or her grounds of objection, the summons may be issued by the applicant.

At the directions hearing the caveator will be made a defendant to the proceeding and orders will be made requiring notice to be given to any persons that may be effected by the application such as beneficiaries under the prior will or if there is no prior will, any beneficiaries who would be entitled in an intestacy. As well, orders will be made setting down a time table for the conduct of the proceeding which will include directions for filing and service of affidavits, discovery, the joinder of defendants, the listing of the matter for trial and other procedural matters.

If the application for a grant is not blocked by a caveat, the Registrar will by requisition ask the applicant to file a notice to produce requiring him to transfer the probate file to a Judge in the Practice Court on a date to be determined by the Registrar. On that date the Judge will make directions ordering notice be given to persons affected by the application and setting down a further date when he or she will either make further procedural directions as described above, where the application is contested, or he or she may decide the application where no interested person applies to be joined as a defendant.

### **3. The Case Law**

The relatively recent introduction of section 9 means that there are very few Victorian cases dealing with the interpretation of the section. However as the section is similar (but not identical) to legislation existing in most other states, guidance on the interpretation of the section can be sought from the considerable case law that has developed in the other states.

In the Victorian cases of *In the will of Mark Edwin Tretheway* [2002] VSC 83 and *Equity Trustees v. Levin* [2004] VSC 203 the Court adopted the criteria first stated by Powell J, in *Public Trustee v Commins* (1992) NSWSC unreported) and endorsed by the New South Wales Court Of Appeal in *the Estate Of Masters, Plummer* (1994) 33 NSWLR 446, in applying Section 9.

In dealing with the equivalent New South Wales legislation, Powell J stated that the requirements for admitting an informal document to probate or for granting Letters Of Administration with the will annexed were as follows:

1. there must be a document;
2. the document must record intentions which are testamentary intentions; and
3. the document must have been intended by the deceased to be his will.

The review of the case law that follows will focus on an examination of Powell's J criteria in assessing informal documents for admission to probate. The principles to be gleaned from the case law under each heading will be relevant to informal wills and alterations as well as informal written revocations.

#### **A. The Requirement Of A Document**

(i) As we have noted section 9 (1) of the act empowers the Court to admit to probate, "a document".

Section 9 (6) of the Act defines, "document" by reference to the definition of that word in the Interpretation of Legislation Act 1984. In section 38, document is defined as:

*"anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them" and,*

*"any disk, tape, soundtrack or other device in which sounds are embodied and also any film, negative or tape or other device in which visual images are embodied"*

The effect of this definition is to allow the Court to consider for admission to probate any material that contains writing, images or sound. The definition has no application to an informal written revocation which is not referred to as a "document" in the section. The definition only applies to informal wills and informal alterations to prior wills.

In *Treacey v. Edwards* (2000) NSWLR 739, a valid will that incorporated by reference an audio tape in which bequests were recorded was admitted to probate.

In *Kathleen Torr [2005] SASC 49*, photographs of household chattels contained in envelopes in which the deceased had hand written a general description of the photographs within the envelope and the name of the person to whom the photographed items were to be given, were admitted to probate along with a handwritten and signed list of bequests as a codicil to a will executed by the deceased in conformity with the formal requirements of the South Australian equivalent of Section 7 of the Act.

In the Victorian case of, *In the will of Mark Edwin Tretheway [2002] VSC 83* Beach J admitted to probate a printed copy of the contents of the deceased's computer file contained on a hard drive unit at his home.

In all of these cases the Court was convinced by the affidavit evidence in support of the application that the relevant document expressed the testamentary intentions of the deceased.

(ii) Regardless of its form the document must come into existence before the deceased's death. In the Western Australian case of, *Henwood v. Public Trustee (1993) 9 WAR 22*, a document prepared by a solicitor after the deceased's death based on instructions provided to the solicitor before the deceased's death, was not accepted by the court as a document to which the equivalent to Section 9 could have application.

(iii) The requirement that there must be a document in existence at the time of the deceased's death does not prevent the Court from admitting to probate a, "lost informal will". In the famous but unreported case of *Whiteley v. Clune (no 2); Estate Of Brett Whiteley [1993] NSWSC*, the Court granted probate of a handwritten note prepared and signed by the deceased but which was unwitnessed. The court was satisfied by the evidence before it of the existence of the document, that it contained the testamentary intentions of the deceased and that the presumption of revocation was so slight as "not to exist". In finding that the presumption of revocation was non-existent, the Judge relied on evidence that the deceased's studio in which the will was last seen was accessed by other persons following the making of the will and that there was no evidence pointing to the deceased's probable destruction of the will.

In New South Wales the Courts have applied a test first adopted by Campbell J in the case of *Cahill v. Rhodes [2002] NSWSC 561*. (see *Payten v. Perpetual Trustee Company [2005] NSWSC 345*) This test requires the Court before making a grant of a "lost informal will" to be satisfied of the following:

1. The informal will existed;
2. it expressly or by implication revoked all previous wills to the extent that they are inconsistent with the provisions of the informal will;
3. the presumption of revocation has been rebutted;
4. the contents of the will can be ascertained from the evidence provided to the Court; and

5. the deceased intended the document to be his will.

There is no reason why the same or a similar test would not be applied in Victoria to determine applications involving a “lost informal will”.

### **B. The Deceased Must Intend The Document To Be A Will**

The simple proposition that needs to be stated under this heading is that the informal document must be testamentary in its effect and not use precatory language or purport to deal with property during the deceased’s lifetime. As stated by Whelan J in the case of *Equity Trustees Limited v. Levin & Others* [2004] VSC 203,

*“The document must be intended to be the legally operative act which disposes of the deceased’s property upon their death. It cannot be a document intended as a personal memorandum or a note of intended instructions, it cannot be a draft or a “trial run”.”*

Thus, in the New South Wales case of *Romano v. Romano* [2004] NSWCA 37, the Court Of Appeal held that a letter signed by the deceased and two witnesses which provided instructions to a son regarding the administration of his estate in the event that he became incapacitated and which stated that the son should protect the estate from taxation when it passes “to him and his heirs” was intended to operate during the deceased’s lifetime and was not intended to have any testamentary effect on his property or rights.

### **C. The Testator Must Intend the Testamentary Document To Have Effect As His/Her Will**

(i). The person seeking to propound the informal will has the onus of proving that it constitutes the deceased’s will and this onus must be satisfied on the balance of probabilities (see *Re Jennifer Gay Strickland (Deceased)* (*supra*) paragraph 10 and *Belcastro v. Belcastro* [2004] WASC 111 paragraph 9).

(ii). The enquiry regarding whether or not the deceased intended the informal document to be a will commences at the time of the creation of the document. (see *Re Jennifer Gay Strickland Deceased; Ex Parte Varian* [2004] WASC 261 paragraph 9 and the cases cited therein.)

(iii). Where there is an interval of time between the creation of the informal document and the death of the deceased the Courts will look for evidence of words or conduct by the deceased with which the deceased could be said to have adopted the informal document without more, as his or her will.

Thus in *Re Estate Of Frederick Raymond Reeve Perriman (Deceased)* [2003] WASC 191, the Court decided that it could not be satisfied that a will prepared by a solicitor on the

instructions given by the deceased but which was not sighted by the deceased before he died two days later and where there was no evidence that he by words or conduct had adopted the document as his will, was intended by him to be his will. The Judge came to this decision whilst conceding that the deceased would have probably signed the will prepared by the solicitor had he lived to make his appointment with the solicitor to sign the will.

Whereas, in *Re Ogle (Deceased) ; Ex Parte The Public Trustee [2004] WASC 277*, will instructions which were read over to the deceased and signed by him and two witnesses were accepted by the court as the testamentary intentions of the deceased, notwithstanding that the deceased died shortly afterwards and before sighting the completed will. The signing of the will instructions by the deceased and affidavit evidence that the deceased believed that by signing his will instructions he had made a will, convinced the Court that the deceased had adopted the will instructions as his will.

Another interesting example where the Courts have been prepared to find that the deceased had adopted an informal will can be found in the case of *In the Estate Of Vauk (deceased) 1986 41 SASR 242*, where it was held that a suicide note found with the deceased which referred to a draft will that was prepared by an officer of the Public Trustee from the instructions of the deceased but which had not been sighted by the deceased manifested a sufficient intention that the draft document had been adopted by the deceased as his will.

(iv). There have been a number of cases that have been brought before the courts involving suicide notes which were contemporaneous with the suicide of the deceased. In these cases the Court's enquiry will usually be restricted to whether the words used by the deceased in the document were intended to have effect as his or her will and if so whether the deceased had the testamentary capacity to make the informal will. There will of course rarely be an opportunity for the Court to examine evidence of the deceased's words or conduct following the making of the suicide note to determine whether the deceased had adopted the note as his or her will.

In *Ryan v. Kazakos [2001] NSWSC 140* the Court held that a suicide note found with the deceased in which the deceased had stated:

*"To Michelle Ryan I leave my 50% share in the business – The Penthouse. Further I leave her my villa- No 7 at Pacific Mirage. This is to be made unencumbered prior to her receiving full title."*

was intended by the deceased as his will and took effect as a codicil to the deceased's prior will which had already been admitted to probate. The court reached this decision after finding that the deceased had testamentary capacity at the time of making the suicide note. (See also *Estate Of Donald Lee Hudson (deceased) [2002] WASC 146* – where one part of the note was held not to make a testamentary disposition of the

deceased's assets mentioned in the note and the other part was held to have revoked a prior will thus causing an intestacy - and *Butler v. Thompson [1997] NSWSC* )

(v). Where there has been an interval of time between the informal document and the death of the deceased and there is evidence that the deceased was aware of the legal formalities required for the signing of a will, the absence of evidence that the deceased adopted the informal document as his or her will is usually fatal to an application. In such circumstances the Courts have tended to reach the conclusion that the deceased intended the signing formalities to be followed and completed before his or her will could have effect.

In *Kedzier v. Postle [2002] NSWSC 875* a signed note which would have had effect as a codicil to the deceased's prior will was not admitted to probate because there was evidence that the deceased had signed the note believing that it needed to be signed by two witnesses to be legally valid.

In *The Estate Of Kevin John Hines [1999] WASC 111*- Probate of a "will kit will" was not granted because the applicant who was the de-facto partner of the deceased admitted in her affidavit that the will prepared by the deceased but not signed by him was considered by the deceased not to be finished and requiring formal execution.

The above two cases can be contrasted with the case of *MacKenzie v. Osburn [2005] NSWSC 657* where a signed but unwitnessed, "will form" was admitted to probate even though the Judge found on the evidence that the deceased, "was aware of what a will was", and had previously executed a formal will prepared by his solicitor. Despite there being no evidence that the deceased had adopted the document as his will, the Judge in this case found that the deceased had intended the informal will to be his will because of the fact that the deceased had gone to the trouble of acquiring a "will kit". This case may be distinguished from the earlier two cases referred to above in that unlike *Kedzier's* or *Hines's* case, in *Osburn's* case there was no evidence given that the deceased knew or believed that the will needed to be formally executed for it be valid.

(vi). However where the deceased adopts an informal will in circumstances where he is aware of the formal signing requirements, the deceased's knowledge will not preclude the Court finding the requisite testamentary intention.

In *Rakich & Others v. Stanicich & Others [2004] WASC 212* the deceased had telephoned his solicitor four months after a draft had been sent to him and had asked what needed to be done to finalise the will. The solicitor had told him that he needed to insert the middle name of the executor on the draft and return the draft to him for engrossment. The deceased inserted the middle name of the executor, signed each page of the draft but did not return the draft to his solicitor before dying three months later. The Judge held that the telephone conversation with the solicitor evinced the deceased's intention that the draft take effect as his will as he had not raised any objections or concerns about the draft during the conversation and that therefore the draft will with the additions made by the deceased should be admitted to probate.

In *Hatsatouris v. Hatsatouris* [2001] NSWSC 147 the testator who was in a hospital signed a codicil in the presence of the solicitor and another witness, but before the witnesses could sign their names on the codicil, the hospital matron entered the room and demanded that the codicil not be signed further. As a result of her intervention the codicil was not signed by the witnesses. Despite evidence of the testator's knowledge of the formalities relating to the signing of wills and his subsequent doubts about the legal effect of the unwitnessed codicil the Court held that the deceased had at the time of signing the codicil intended it to be his will and that he had done everything in his power to give it effect.

**(vii).** Where there is positive evidence that the deceased had no knowledge of the formal signing requirements of the Act coupled with evidence that the deceased had adopted the document as his will, the Courts are likely to find that the deceased had intended the informal document to take effect as his or her will.

In *Stanley v. Mechler* [2004] NSWSC 58 a will was sent to the deceased and was signed by him in the belief that the two witnesses to his will could be arranged by his solicitor.

In *Re Ogle* (*supra*) the deceased believed that the notes made by an Officer of the Public Trustee from will instructions given to the officer by his wife and which were confirmed and signed by him and witnessed by his wife and the officer after the officer had read the deceased's instructions to him, was in fact his will.

**(viii).** Notes made by a solicitor or some other person from instructions provided by the deceased will not be admitted to probate unless the notes have been adopted by the deceased as his or her will. (See *In the Estate Of Kiepas Deceased* [2004] NSWSC 452 and *Macey v. Finch; Estate Of Donald Munro* [2002] NSWSC 933 *c/f Re Ogle* (*supra*))

This raises the question of whether solicitors should as a matter of course obtain a signed acknowledgement from their client to the effect that the instructions given to the solicitor are accurately reflected in his or her notes and that the solicitor's notes are intended to have effect as the client's will in the event that the client dies before the formal will is completed and signed.

Certainly, where the instructions are clear and unambiguous and the client is unlikely to reconsider his instructions, it would seem prudent to offer the client the choice of adopting his solicitor's instruction notes as his will until such time as the formal will is signed.

**(ix).** However what is the situation where the "stop gap" informal will is not replaced by a formal will?

It would seem that provided the informal will was intended to have effect as the deceased's will, the fact that the document was made in contemplation of a formal will

being prepared and signed, will not invalidate the informal will if subsequently a formal will is not completed. (See statement of Priestley JA in *Estate Of Masters deceased (supra)* at p 469.)

However, probate will not be granted of the informal will where it is expressed to have a limited duration and the deceased fails to make a formal will where he or she had an opportunity to do so before death.

In *Permanent Trustee Co Ltd v. Milton; Estate Of Brooks (1996) 39 NSWLR 330* the testatrix had made a will which she sought to amend by two linked letters sent to her solicitor whilst overseas. In one letter she provided instructions to her solicitor that two persons be removed as beneficiaries from her will and she stated that she considered the letter as a codicil to her will and added that, "When I will be home again, I will visit you to make it proper." In another letter which referred to her earlier letter she added a beneficiary to her will. On her death almost 30 years after the letters were sent, the deceased had not made a further formal will even though the evidence before the Court disclosed that the deceased had changed her mind about the removal of at least one of the beneficiaries. The Judge held that the letters were intended to have testamentary effect as a stopgap in the event that she died before seeing her solicitor on her return ; and that although the testatrix's change of mind did not invalidate the testamentary effect of the letters, the fact that the testatrix had stated that the letters were of an interim nature and would be reviewed with the solicitor on her return from overseas meant that her failure to do so upon her return raised the inference that she did not formally make the changes referred to in her letters because she did not want to. Therefore the Judge decided that the two letters did not represent the deceased's testamentary intention at the time of her death and could not be admitted to probate with her original formal will.

(x). In the above case Hodgson J had stated that once an informal will comes into existence it takes effect like a formal will and cannot be revoked except in the same way that a formal will can be revoked. Evidence of a change of mind will not make the informal will invalid. (see also *Hatsatouris v. Hatsatouris (Supra)* and *Leslie v. McDowell [2000] NSWSC 727*). What is relevant is the deceased's intention at the time the informal will comes into existence and a mere change of mind unsupported by the creation of a testamentary document whether formal or informal, will not revoke or alter the informal will.

### **Conclusion**

With the introduction of section 9 of the Act the ancient practice of sacrificing the testator's testamentary intentions on the altar of legal certainty is now a thing of the past. This of course is a very good thing for beneficiaries of informal wills who would otherwise be denied their entitlements, but section 9 poses a number of dilemmas for solicitors accustomed to the old certainty and consistency that was provided before its introduction.

Solicitors must now carefully consider the circumstances when it may be appropriate to offer clients the option of signing their instruction notes with an acknowledgement to the effect that the notes made are consistent with the instructions given to the solicitor, that they accurately represent their will until such time as their formal will is executed, and that all prior wills are revoked. Clearly, the signing of instruction notes will not be appropriate where the instructions are incomplete or uncertain. But where the instructions are unambiguous and complete it would seem a prudent practice to offer the client the option of having the instruction notes signed and preferably witnessed, especially where there will be a significant delay before the formal will can be executed.

The client will need to be advised that the will instructions once formally signed will take effect as his or her will and can only be revoked in the normal way a will is revoked. He or she will also need to be advised that any subsequent changes in the instructions given will only have effect if they are included in a new formal will or in the form of further instruction notes that are signed and which revoke the prior will.

Solicitors should also take special care when advising executors of a formal will in possession of a document that may constitute a later informal will, an alteration to a will or an informal written revocation.

The uncertainty inherent in determining the deceased's intention as we have seen in many of the cases discussed in this paper requires executors to adopt a cautious approach and dictates that they propound any document (as defined by the section) which on its face appears to have been intended by its author to have testamentary effect or any writing which purports to revoke a prior will.

Where an informal will does not explicitly revoke the prior will and does not appoint another executor, both documents should be propounded. If the Registrar or the Court decides to admit to probate both documents it may be necessary for the Executor to make an application to the Court pursuant to rule 54.02 to have the inconsistencies construed by the Court.

The difficult question of whether the deceased intended the informal document to be his or her will is one that is best left to the Registrar or the Court. It can only properly be answered after all available evidence of the deceased's intention has been assessed. The executor will not always have knowledge of all of the evidence and in many cases the evidence will be contradictory and difficult to interpret. The process of proving the informal testamentary document whether overseen by the Registrar or a Judge will elicit and test the available evidence of the deceased's testamentary intention; and it is only after this process has been completed that the question of the deceased's testamentary intention can be decided.

Finally, a solicitor advising a client seeking to propound an informal will, an informal alteration to a will, or an informal written revocation needs to be aware of the case law relating to the issue of the deceased's testamentary intention in order to properly advise the client of the type of evidence that will need to be gathered and presented in order to

successfully convince the Registrar or the Court that the deceased intended the informal document to have testamentary effect. As has been seen in many of the cases requiring the Court to decide whether the deceased intended the document to take effect as his or her will, the facts brought before the Court will be critical in assisting the Registrar or the Court to decide the application. A solicitor's failure to properly advise the client on the evidence necessary to prove that the deceased intended the informal document to operate as his or her will, as an alteration to a previous will, or as an informal written revocation may on the one hand result in important evidence being overlooked or disregarded and on the other hand it may result in an application being brought that is doomed to failure from the outset.

In either case the solicitor will have exposed themselves to the risk of an action against them in negligence.

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**6. Wills by minors who are married**

Despite section 5—

- (a) a minor may make a will in contemplation of marriage, and may alter or revoke such a will, but the will is of no effect if the marriage contemplated does not take place;
- (b) a minor who is married may make, alter or revoke a will;
- (c) a minor who has been married may revoke the whole or any part of a will made while the person was married or in contemplation of that marriage.

**Division 2—Executing a will**

**7. How should a will be executed?**

- (1) A will is not valid unless—
  - (a) it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and
  - (b) the signature is made with the testator's intention of executing a will, whether or not the signature appears at the foot of the will; and
  - (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
  - (d) at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.
- (2) A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.

- (3) Where a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
- (4) Where a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.

**8. *Must witnesses know that they are signing a will?***

A will which is executed in accordance with this Act is validly executed even if a witness to the will did not know that it was a will.

**Division 3—Dispensing with requirements for execution**

**9. *When may the Court dispense with requirements for execution or revocation?***

- (1) The Supreme Court may admit to probate as the will of a deceased person—
  - (a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or
  - (b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act—

if the Court is satisfied that that person intended the document to be his or her will.

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- (2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.
- (3) In making a decision under sub-section (1) or (2) the Court may have regard to—
- (a) any evidence relating to the manner in which the document was executed; and
  - (b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.
- (4) This section applies to a document whether it came into existence within or outside the State.
- (5) The Registrar may exercise the powers of the Court under this section—
- (a) where the Court has authorised the Registrar to exercise the Court's powers under this section; and
  - (b) where—
    - (i) all persons who would be affected by a decision under this section so consent; or
    - (ii) if consent is not given, the value of the estate does not exceed the limit set for the purposes of this section by the Court.
- (6) In this section "**document**" has the same meaning as in the **Interpretation of Legislation Act 1984**.
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**Division 4—Witnessing a will**

**10. What persons cannot act as witnesses to wills?**

A person who is unable to see and attest that a testator has signed a document, may not act as a witness to a will.

**11. Can an interested witness benefit from a disposition under a will?**

A person who witnesses a will or his or her spouse, at the time the will is witnessed, is not disqualified from taking a benefit under the will.

**Division 5—Alteration, revocation and revival of wills**

**12.<sup>9</sup> When and how can a will be revoked?**

S. 12(1)  
repealed by  
No. 43/1998  
s. 52(1).

\* \* \* \* \*

(2) Subject to—

S. 12(2)(a)  
repealed by  
No. 43/1998  
s. 52(2)(a).

\* \* \* \* \*

- (b) sections 13 and 14; and
- (c) any order made by the Court under this Act authorising the revocation of a will; and
- (d) any order made by the Court under this Act dispensing with the formal requirements for revoking a will—

the whole or any part of a will may not be revoked except—

(da) by a later will; or

S. 12(2)(da)  
inserted by  
No. 43/1998  
s. 52(2)(b).

- (e) by some writing, declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
- (f) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it; or
- (g) by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied, from the state of the will, that the testator intended to revoke it.

**13. What is the effect of marriage on a will?**

(1) A will is revoked by the marriage of the testator.

(2) Despite sub-section (1)—

- (a) a disposition to the person to whom the testator is married at the time of his or her death; or
- (b) an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death; or
- (c) a power to exercise, by will, a power of appointment, when, if the testator did not exercise the power, the property so appointed would not pass to the executor or administrator or the State Trustees under

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(3) A will in which there is a disposition, appointment or grant to which sub-section (1) applies takes effect as if the spouse had predeceased the testator.

(4) In this section—

**"divorce"** means the ending of a marriage by—

- (a) a decree of dissolution of the marriage becoming absolute under the Family Law Act 1975 of the Commonwealth; or
- (b) the granting of a decree of nullity in respect of the marriage by the Family Court of Australia; or
- (c) the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, if that dissolution or annulment is recognised in Australia under the Family Law Act 1975 of the Commonwealth;

**"divorced spouse"** means the spouse of the testator by the marriage which was the subject of the divorce;

**"spouse"** includes a party to a purported or void marriage.

**15. Can a will be altered?**

- (1) An alteration to a will after it has been executed is not effective unless the alteration is executed in the manner in which the will is required to be executed under this Act.

- 
- (2) Sub-section (1) does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.
  - (3) If a will is altered, it is sufficient compliance with the requirements for execution, if the signature of the testator and of the witnesses to the alteration are made—
    - (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
    - (b) as authentication of a memorandum referring to the alteration and written on the will.

**16. *Can a revoked will be revived?***

- (1) A will or part of a will which has been revoked is revived by re-execution or by execution of a codicil which shows an intention to revive the will or part.
- (2) A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (3) Sub-section (2) does not apply if a contrary intention appears in the document which revives the will.
- (4) A will which has been revoked and later revived, either wholly or partly, is to be taken to have been executed on the date on which the will is revived.

**Division 6—Wills to which foreign laws apply**

**17. *General rule as to validity of a will executed in a foreign place***

- (1) A will is to be taken to be properly executed if its execution conforms to the internal law in force in the place—
-

**CURRENT DEVELOPMENTS IN FAMILY PROVISION LITIGATION**

Richard Boaden

*Introduction*

*The moral duty question*

*Widows' claims*

*Grandchildren's claims*

*Claims by adult sons*

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*Discovery in relation to the financial position of the defendants*

*Interest on awards*

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*Claim against the estate of a sibling*

*Claim failing where success would have deprived beneficiary of a home*

*Successful claim by "niece in law" - deceased in loco parentis*

*Claim by foster child where relationship equivalent to parent child relationship*

*Assessing quantum*

**Introduction**

1. Under s. 91 of the *Administration and Probate Act* the court has power to order that financial provision be made out of the estate of a deceased person for the "proper maintenance and support" of a person "for whom he or she had responsibility to make provision".
2. In *Singer v Berghouse* (1994) 181 CLR 201 at p. 209 the High Court referred to the traditional two stage process in which such claims are considered:
  - (1) First, the court must decide whether the applicant has been left without adequate provision for his or her proper maintenance and support. If, but only if, the deceased has failed in his or her duty or responsibility to make such provision, does the court have power, in the exercise of its discretion, to make an order making provision for the applicant out of the estate.
  - (2) If there was such a responsibility and it was not adequately discharged by the terms of the will, then the court must decide what financial provision should be made for the applicant.
3. In *Schmidt v Watkins*, [2002] VSC 273, Harper J held that since 1998, when the legislation was expanded and the class of persons able to make application to the court ceased to be confined to spouses and children, the former two-stage process now has a third stage where the claim is not brought by a surviving spouse or a child. In those cases, and the present is one, the court must decide -

- (3) Whether or not the claimant was person for whom the deceased had responsibility to make adequate provision for his or her proper maintenance and support.
4. There are thus always two, and sometimes three, questions in a Part IV case -
- (1) whether the deceased owed any "responsibility" to make provision out of his or her estate for the maintenance and support of the applicant; and if so,
  - (2) whether the deceased failed to discharge that responsibility, so that the applicant has been left without adequate provision for his or her proper maintenance and support; and if so,
  - (3) what financial provision should be made for the applicant by the court intervening, in order to thereby discharge the responsibility which the deceased neglected and failed to discharge;
5. In answering all of these three questions the criteria specified in s. 91(4) of the *Administration and Probate Act* are to be taken into consideration. Those specified criteria are
- (a) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;
  - (b) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;
  - (c) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;
  - (d) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;
  - (e) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;
  - (f) the age of the applicant;
  - (g) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;
  - (h) any benefits previously given by the deceased person to any applicant or to any beneficiary;
  - (i) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;
  - (j) the liability of any other person to maintain the applicant;
  - (k) the character and conduct of the applicant or any other person;
  - (p) any other matter the Court considers relevant.
6. In Part IV cases there are usually five considerations which are more important than the others, these being -
- (a) the **nature and quality of the relationship** which existed between the testator or testatrix and the claimant;
  - (b) the **nature of the relationship** which existed between the testator or testatrix and the preferred beneficiary or beneficiaries under the will,
  - (c) the **financial needs** of the claimant;
  - (d) the **competing financial needs** of the preferred beneficiaries; and
  - (e) the court's recognition that in our society we do enjoy **freedom of testamentary disposition**, so that a will can be altered only where the

testator or testatrix has failed to make adequate provision for the maintenance of someone in respect of whom he or she did have a moral obligation to make financial assistance available.

7. The recent decisions include these:
- Downing v Downing*, [2003] VSC 28, Osborn J
  - Macewan Shaw v Shaw*, [2003] VSC 318, Dodds-Streeton J
  - de Angelis v de Angelis*, [2003] VSC 432, Dodds-Streeton J
  - McKenzie v Topp*, [2004] VSC 90, Nettle J
  - Coombes v Ward*, [2004] VSCA 51, Winneke P, Chernov JA, Bongiorno AJA
  - Harris v Bennett*, [2004] VSC 171, Redlich J
  - Sanderson v Bradley*, [2004] VSC 23, Balmford J
  - Szlazko v Travini*, Young CJ in Eq, [2004] NSWSC 610
  - James v Day*, Cummins J, [2004] VSC 290
  - Blair v Blair*, [2004] VSCA 149, Chernov and Nettle JJA, Hansen AJA
  - Petrucci v Fields*, [2004] VSC 425, Mandie J
  - Curtain v Curtain*, [2005] NSWSC 35, Palmer J
  - Vigolo v Bostin*, [2005] HCA 11, Gleeson CJ, Callinan, Heydon, Gummow, Hayne JJ
  - Moore v Moore*, [2005] VSC 95, Mandie J
  - Lee v Hearn*, [2005] VSCA 127, Callaway, Batt and Buchanan, JJA
  - Keets v Marks*, [2005] VSC 172, Balmford J
  - Re will of Sitch*, [2005] VSC 308 & 383, Gillard J
  - Markovska v Kocevaska*, [2005] VSC 319, Byrne J
  - Iwasivka v State Trustees Ltd*, [2005] VSC 323, Hansen J
  - Herszlikowicz v Czarny*, [2005] VSC 354, Hargrave J
  - Sellers v Hyde*, [2005] VSC 382, Mandie J

### **The "moral duty" question**

8. A brief history of the differences between the Victorian courts and the New South Wales courts and the High Court, is as follows.
- (a) In *re Allen (Deceased)*, [1922] NZLR 218, at 220 Salmond J said  
"The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances. If it is manifest that the testator has, whether consciously or inadvertently, failed to perform this duty, it is the right and duty of the Court to perform it for him by making such alterations in his testamentary dispositions as may be adequate, but no more than adequate, for that purpose".
  - (b) In *Hughes v National Trustees*, (1979), 143 CLR 134, and *Goodman v Windeyer*, (1980), 144 CLR 490, Murphy J said that a claimant is not to be put to proof of a "moral claim".
  - (c) In *Singer v Berghouse*, Mason CJ, Deane and McHugh JJ, referred to Murphy J's comments and said of the statement by Salmond J  
"For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to 'moral duty' or 'moral obligation' may well be understood as amounting to a gloss on the statutory language".

- (d) In *Collicoat v McMillan*, [1999] 3 VR 803, Ormiston J said at p 816  
Since this kind of legislation was introduced the Courts have considered on many occasions what is meant by "proper" and what it is intended to connote in the context of a jurisdiction intended to remedy inappropriate distributions of property by will or upon intestacy. Fortunately there has been remarkable consistency over the years, largely because the test of propriety has always been treated as flexible and adaptable to current but accepted standards of testamentary obligation: see, eg, *Goodman's Case* at 502. In addition, but requiring a somewhat different inquiry, legislation of this kind has consistently contained provisions that the Court may take into account the character or conduct of an applicant if it has been such as would disentitle that applicant to provision from the estate (see s. 96) [*note* disentitling conduct no longer appears in Part IV as amended in 1997], but that is a matter which the defendant must establish. Nevertheless, although provisions such as s. 96 have been interpreted relatively narrowly, they are again but a reflection of the fact that a principal determinant of proper maintenance or support is what the testator in all conscience should have felt bound to provide, and it has never been suggested that the plaintiff's behaviour has been the essential determinant for the purpose of s. 91. In fact, except in cases which come within s. 96, it is primarily to the testator's moral obligations that the Court has been required to look, rather than the virtues and vices of those who seek provision.
- Unfortunately Murphy, J in *Hughes' Case*, in his brief judgement at 157-160, appears to have concluded that the critical test is confined to adequacy and seems not to have included propriety in a consideration of the testator's dispositions. After reciting the test in the language of the statute his Honour proceeded (at 158) to say that many cases, such as *Bosch's Case*, "suggest that an applicant must show a moral claim as well" but that "this gloss on the act is unwarranted and inconsistent" with the legislative scheme. He continued by saying that if the distribution of the estate "does not make adequate provision" for persons entitled to claim then such persons have a claim unless disentitled, but he fails to make reference to the qualification connoted by the expression "proper maintenance and support".
- (e) In *Permanent Trustee Co. Ltd. v Fraser*, (1995) 36 NSWLR 24, Kirby P at p29 said that "I do not consider that it would be safe for this court, or other courts in this state, to disregard the obiter dicta in *Singer v Berghouse* concerning "moral duty".
- (f) In *Grey v Harrison*, [1997] 2 VR 359, Callaway JA discussed the decision in *Singer v Berghouse* and concluded  
We should therefore understand their Honours' observation as no more than an indication that earlier authorities might be overruled or explained on some future occasion. . . . It is one of the freedoms that shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit. Rights and freedoms must of course be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity, as it were, to interfere with a testator's dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator's bounty and give it to someone else. In conferring a discretion in the wide terms found in s. 91, the legislature intended it to be exercised in a principled way. A breach of moral duty is the justification for curial intervention and simultaneously limits its legitimate extent. So much may be derived from the concept of "proper" maintenance and support but also, and more fundamentally, from those considerations.

- (g) In *Coombes v Ward* [2002] VSC 61, McDonald J said at [62]  
 Having regard to the speech of the Attorney-General on the Second Reading of the Bill to amend s. 91 of the *Administration and Probate Act* and her reference specifically to the amendment which would enable a "wider category of persons" to make such applications such as the present to include those who have a "moral claim on the deceased's estate", I am of the view that when assessing whether the deceased had "responsibility" to make provision for the proper maintenance and support for the plaintiff out of her estate the question to be addressed, is whether in all the circumstances as a wise and just testator, did the deceased have a moral duty to make provision by her will for the proper maintenance and support of the plaintiff out of her estate?
- (h) In *Lee v Hearn* [2002] VSC 208 Warren J said at [59]  
 In my view, the new statutory provisions enshrined in s.91 of the *Administration and Probate Act* whilst expanding the class of eligible persons effectively constituted a codification of the approach taken at common law to testator's family maintenance claims. In my view, the proper approach to the new legislation remains unchanged from that described by Ormiston J in *Collicot v McMillan* [1999] 3 VR 803, namely, of searching out the touchstone of what a wise and just testator would have thought was the moral duty. Furthermore, there is nothing in the amendments or the extrinsic materials to indicate that the parliament intended to constrain the freedom of the testator unless the testator breached a moral duty owed to the applicant.
- (i) In *Schmidt v Watkins* [2002] VSC 273, Harper J said  
 [7] At the same time, the court must during both stages use the same point of reference: "what a wise and just testator would have thought his or her moral duty".  
 [9] . . . While, therefore, all citizens have a moral duty to make adequate provision out of their estate for such of their surviving spouse or children who would otherwise be left without proper maintenance and support, that moral duty is not necessarily restricted to those family members. Others (including those who were not related) may fall within its reach. Until the passage of the *Wills Act 1997*, Victorians in such a position could not look for assistance to the legislative provisions dealing with testator's family maintenance. On the other hand, one's moral duty is by definition a limited duty. Accordingly, the remedy was not a wholesale enlargement of the field of prospective claimants. Nor was it left to the courts in the exercise of an unprincipled discretion to decide whether a particular claimant was or was not a person for whom the deceased had the requisite responsibility. Rather, the remedy was the inclusion into the class of those claimants of persons who, although not numbered among the deceased's immediate family, nevertheless had "a moral claim to the deceased's estate".

9. In *Coombes v Ward* the plaintiff was the natural son of the deceased. He never knew his father. He was born in 1929 and, at the time of his application, he was 72. He had been adopted out by his mother, then unmarried, when he was 4. He was brought up by his adoptive parents. His mother married and the Defendant was the only child of her marriage. The Estate consisted of the family home in Bentleigh valued at \$370,000, and the daughter was the sole beneficiary under the will. For nearly 20 years before her mother's death, she had lived with and cared for her mother. She had expended much of her income in improving the house in Bentleigh where they had lived together.

10. At first instance McDonald J held that there was no responsibility on the part of the natural mother to make provision for the Plaintiff, saying "I am of the view that when assessing whether the deceased had 'responsibility' to make provision for the proper maintenance and support for the plaintiff out of her estate, the question to be addressed, is whether in all the circumstances as a wise and just testator, did the deceased have a moral duty to make provision by her will for the proper maintenance and support of the plaintiff out of her estate."

11. On the appeal it was argued that this was the wrong approach, substituting a test of moral duty for the test laid down in s. 91. The appeal failed.

(a) Winneke P

[7] There is nothing in his Honour's judgment which, in my opinion, provides a basis for this submission. Certainly there is nothing in the closely reasoned judgment which can possibly support the submission (which was, in essence, the thrust of the appellant's argument) that his Honour had effectively jettisoned the provisions of the Act in favour of an alternative line of inquiry into the testator's moral duty. His consideration of the evidence with reference to the provisions of s.91(4) necessarily produced an outcome in conformity with the legislative design to benefit those applicants in respect of whom the testator had a "moral" responsibility to provide out of the estate. His Honour's approach appears to be that adopted by other trial Division judges in this State. In my view the trial judges are correct.

None the less, I think Chernov, JA is correct to doubt whether, in the light of the exhaustive list of criteria to which the Court is now required to have regard in determining the threshold question, it is either necessary or helpful to refer to the deceased's moral duty.

(b) Chernov JA

[12] First I consider that, on a plain reading of s. 91(1), "responsibility", as used in that provision, connotes essentially a moral responsibility. If there was a legal obligation to make provision for the applicant out of the estate by reason of, say, a contract that had been entered into by the deceased, the enforcement of it would be the subject of separate proceedings. It is plain that subsection (1) is not speaking of such a right but rather, of a responsibility that has a moral basis.

Secondly, what this court said in *Grey v Harrison* about the utility and correctness of characterising the obligation of the deceased to make adequate provision for the proper support and maintenance of the claimant under the former s 91 of the Act generally applies as much to the new provision as it did to the former s 91, ... and I see nothing wrong in principle in continuing to do so provided, in the context of determining the threshold question, it is made clear that the reference to the moral duty of the deceased is confined to it being a compendious description of the criteria set out in s 91(4)(e) – (p).

Having said that, however, I doubt whether, in light of the exhaustive list of statutory criteria to which the court must now have regard when determining the threshold question, it is necessary, or helpful, for a primary judge to refer to the deceased's moral duty in respect of the disposition of the estate. Such a factor obviously cannot be a substitute for the criteria prescribed by the legislation and a reference to it might only serve to give unnecessary encouragement to the fertile mind that is desperate to find any basis on which to appeal the decision.

12. In *Blair v Blair* Nettle JA said

41 The court is bound in answering each of those questions to have regard to the matters mentioned in ss. 91(4)(e) to (o) and, pursuant to s. 91(4)(p), to any other matter considered to be relevant. Self evidently, such matters are of themselves incapable of providing an answer to either question. To

reason from the matters mentioned in ss. 91(e) to (p) to a conclusion that a testator had a responsibility to make provision for a claimant, or that the testator failed to make adequate provision for the claimant, necessitates the application of a test or standard to the matters to be considered. That test remains one of whether and if so what provision a wise and just testator would have thought it his moral duty to make in the interests of the claimant: *Collicot v McMillan* [1999] 3 VR 803 at p. 815, per Ormiston, JA .

13. In *Lee v Hearn* [2005] VSCA 127, Callaway JA described Nettle J's statement (in the previous paragraph) as an important observation, and continued at [5]  
It is important to focus on the words of the legislation. The question to be determined, in the words of the statute, is whether or not the deceased had *responsibility* to make provision for the applicant. That must mean a legal or moral responsibility, in the sense in which "moral" has been explained in the authorities, for what other kind of responsibility is there?

Batt JA said at [53] that the word "responsibility" has strong connotations of moral duty, for, if there were a legal responsibility, resort to the Act would be unnecessary and no other description of responsibility suggests itself. Buchanan JA said at [57] that he also agrees with Callaway, JA's observations as to the continued relevance of the concept of a moral duty informing the determination of the question whether a responsibility exists to make provision for a claimant.

### **Vigolo v Bostin**

14. *Vigolo v Bostin* provides definitive guidance about the place of "moral duty" in Part IV claims, hopefully bringing closure to the debate and differences which erupted between the High Court and the Victorian Supreme Court.
15. The facts were that the appellant, an able-bodied adult son of the testator, and a man of substantial means, based his application, not upon financial need, but upon what was said to be a moral claim upon the testator's bounty, arising out of previous business and family dealings. His case failed, not because moral claims are irrelevant, but because he was unable to bring himself within the relevant provisions of the Act. The estate was worth \$1.9M and the will divided it equally amongst the testator's four children, but excluding the plaintiff, for whom no provision at all was made.
16. The plaintiff had worked with his father on his farm for some 15 years but the plaintiff then went his own way and, with his wife, bought a shop and later a farm and they prospered. The father resented this and it led to a break up of the business relationship between the son and the father, and there was a division of assets between them. By the time of the trial the plaintiff and his wife owned assets worth in excess of \$2M. By contrast, his four siblings had net assets of between \$70,000 in one case, and (with their siblings) between \$202,000 and \$271,000.
17. In *Vigolo* the judges made these comments:
  - (a) Gleeson CJ  
[25] 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".

(b) Callinan and Heydon JJ

[113] We would not be reluctant, at least in some cases, to use the expressions "moral duty" and "moral obligation", and to apply the concepts underlying them, which include the idea of "moral claims". It seems to us that there are several material indications in the Act that moral considerations may be relevant. But before we refer to those indications we should make it clear that a moral claim cannot be a claim founded upon considerations not contemplated by the Act. Nor can it be a claim based simply upon the fact of a preference shown by a testator in his will for another or others, although there may be cases in which disparities in dispositions may be relevant.

[121] For many years therefore several justices of this Court have found it convenient and generally useful to resort to the concepts of a moral duty and a moral claim in deciding both whether, and how much provision should be made to a claimant under the Act. In our respectful opinion they have not been wrong to do so. These are not concepts alien to, or in any way outside, the language of s 6 of the Act.

(c) Gummow and Hayne JJ

[73] "Moral duty" may often have been used as a convenient shorthand expression intended to do no more than invite attention to the questions presented by the relevant legislation. Its use, however, has led to reference being made to the "moral claims" of those who seek further provision and that is an expression which is liable to being misunderstood just as its progenitor "moral duty" may mislead. It is therefore better to forgo any convenience that these shorthand expressions may offer in favour of adherence to the relevant statutory language. In *Permanent Trustee Co Ltd v Fraser*, Kirby P and Sheller JA correctly indicated that what was said in the joint judgment in *Singer* should henceforth provide an appropriate guide to the construction and operation of the family provision legislation.

18. The extract from Gleeson CJ's judgment seems to sum up the matter and hopefully to be the last word on this topic.

**Widows' claims**

**Downing v Downing**

19. In *Downing v Downing* Osborn J dealt with a widow's claim. It had been a second marriage for each; the duration of marriage was 30 years, during which time husband supported the wife and they had lived a comfortable lifestyle. The husband left an estate worth \$2.7M comprising the family home worth \$1.3M, an investment property worth \$750,000, and a debt owed by the Family Trust of \$670,000. The wife had some independent means at the time of the marriage, and at the date of the trial she had her own investments of \$109,000 and a loan account of \$198,000 with the Family Trust.

20. The will gave the widow a life interest in family home and contents, determinable upon remarriage; and income from residuary estate and from Family Trust. The remainder was given to husband's son of his first marriage.
21. Osborn J applied the following dicta -
- (a) *Re Allen*, [1922] NZLR 218, Salmond J 222  
"It may probably be said with truth that the proper maintenance which a testator owes to his widow in cases where there are no competing moral claims of other dependents is such maintenance as will enable her, taken in conjunction with her own means, to live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime, or would have been so accustomed to if her husband had then done his duty to her."
  - (b) *White v Barron*, (1981), 44 CLR 431, Mason J 444  
"With Wilson J and the majority in the Court of Appeal, I would reject the view expressed by Kitto J in *Worlidge v Doddridge* that in most cases 'the maintenance order for a widow should be confined to continuance of widowhood.' Community attitudes have so altered that it is now generally accepted that a widow should be maintained for life, rather than during widowhood."
  - (c) *Luciano v Rosenblum*, (1985) 2 NSWLR 65, Powell J  
"It seems to me, that as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies."
  - (d) *King v White*, [1992] 2 VR 417, Hedigan J 423 and 427  
"Whilst it is true that there have been a number of judicial statements that supported disinclination to award property or capital sums to older widows, such a proposition is necessarily circumscribed by the particular circumstances in each case: *White v Barron*. The awarding of assets, or some capital provision, may, even in the case of an elderly widow, be the just method of providing proper maintenance and support."  
"I have formed the opinion that the provision of ownership in fee simple of the home is necessary to give the plaintiff that degree of protection which will provide an adequate bulwark against inflation, future vicissitudes and uncertainties. Moreover, since the plaintiff will have to maintain the house, I think it appropriate that some provision from residue to enable her to do so that that should be made. In addition, I believe that a small amount of capital from residue should be provided to the plaintiff to recoup her for past expenditure on the house, to enable some immediate expenditure to be made and to add modestly to her small cash reserve to cover other needs not fully explored."
  - (e) *Caldwell v Ang*, Young J, NSW, 22 March 1991  
"The view that I have taken in many of these cases (is) that with respect to a spouse in his or her sixties or seventies or later, a life estate is not likely to be adequate provision because of the changing circumstances of the spouse as old age advances. In addition to such problems, there are usually other unavoidable problems connected with who should bear expenses of a capital nature of the estate whilst the surviving spouse is enjoying its fruits."

22. Osborn J said at [18] that, having regard to the length of the plaintiff's marriage to the deceased and the other circumstances, case, the limitation of the life interest by reference to the alternative of remarriage was inappropriate and did not reflect current community attitudes. He held that the provision in the will was inadequate because
- (a) of the limitations terminating that provision in the event of remarriage; (and the estate did not oppose the deletion of those provisions);
  - (b) giving the wife the income from the Family Trust was ineffective since the trust was a discretionary trust, and there was no assurance either that it would continue to generate income, or that the discretion would be exercised to appoint it to the widow; and
  - (c) the widow needed a larger nest egg of her own.
23. The award made was
- (a) confirmed the widow's life interest in the family home, but deleted the provision for termination on remarriage; and
  - (b) gave her the investment property absolutely.

### **Curtain v Curtain**

24. *Curtain v Curtain* was a claim by a widow aged 86 after a 25 year marriage. She had bank savings of \$38,500 and income from age pension which was sufficient to meet her recurrent cost of living. The estate comprised a house worth \$475,000 and cash \$31,000; with a net value after costs \$440,000, (sale of the house was unavoidable). The will gave the estate in equal shares to the widow and the deceased's two adopted children, who were aged 47 and 53.
25. It was conceded that the gift of one-third of the estate was insufficient provision. The plaintiff claimed the entire estate: the defendants said that \$200,000 would be sufficient to provide for her accommodation for the rest of her life.
26. Palmer J held that the widow should have \$400,000 - in effect the net value of the estate - held on trust to provide her with such accommodation as she chose, with the balance to be invested to provide an income to her for her life in order to cover future contingencies. In remainder the capital would pass in accordance with the dispositions in the will.

### **Szlazko v Travini**

25. In *Szlazko v Travini* the claim was made by a 66 year old de facto widow. The deceased had been 11 years older. They had been engaged in 1959 but did not marry. The deceased married twice, and outlived both wives. The Plaintiff also married. They met again in 1996 and soon after the plaintiff moved into the deceased's home and lived with him until he died. The estate consisted of a house in Bankstown worth \$400,000, \$65,000 in shares, and \$135,000 in cash.
26. The will gave the widow a right of residence in the home, on condition that she pay the maintenance and upkeep, and not remarry or enter into a relationship with another man, together with \$50,000. The residue, including the remainder interest

in the home, was given to the deceased's two sisters who lived in Croatia. Young CJ in Eq said that a life estate for a widow is in general inadequate.

34 In *Moore v Moore* Court of Appeal 16 May 1984, Hutley JA, at p 2, made it clear that a mere right of residence will usually be an unsatisfactory method of providing for a spouse's accommodation to fulfil the normal presupposition. This is because a spouse may be compelled by sickness, age, urgent supervening necessity or otherwise, with good reason to leave the residence. The spouse will then be left without the kind of protection which is normally expected will be provided by a testator who is both wise and just. Kirby P, Cripps JA agreeing, *Golosky v Golosky* 5 October 1993 repeated those words with approval. In *Court v Hunt* 19 September 1987 I said "In many cases these days a life estate will not be sufficient because it does not cover the situation of the plaintiff moving from her own home to retirement village to nursing home to hospital." As far as I am aware, no Judge has ever departed from those remarks.

27. Young J held that the life estate was not sufficient provision, even with the \$50,000 legacy. Proper provision was that she receive the property at Bankstown outright, the \$50,000 which will cover the cost of putting the house into proper condition and \$30,000 for a car.

### **Moore v Moore**

28. In *Moore v Moore* a 64 year old widow claimed against the estate of her husband. It had been a second marriage for each, the marriage lasting 20 years. The plaintiff had an old car and about \$18,000 and was in receipt of a pension. Will left \$5000 to each of five grandchildren and the car to the plaintiff. The residue was given to plaintiff and to the deceased's three children in equal shares. The husband's children were aged 34 to 42. Each of the four had received distribution of \$11,000 and the remaining asset was the family home at Echuca worth \$350,000.

29. Mandie J described the plaintiff's entitlements under the will as  
... manifestly inadequate to provide a suitable residence for the plaintiff, in her circumstances, let alone to provide for her future contingencies. A wise and just testator would have considered it his prime responsibility and moral duty to make a substantially greater provision for his widow.

30. On behalf of the estate it was conceded that the will made inadequate provision for the plaintiff, and it was submitted she should have a life interest in the remaining  $\frac{3}{4}$  of the home. Mandie J said

[44] In my opinion it would not be adequate or proper provision for the plaintiff merely to grant her further provision by way of a life interest in the whole of the residue of the estate. I agree with the submissions made on her behalf that such a provision would not be sufficiently flexible and would unduly restrict her independence, having regard to her age and future needs.

[45] I consider that further provision should be made for the plaintiff by way of an absolute entitlement to three-quarters of the residue of the estate, together with a life interest in the remaining one-quarter, ... The result of such a provision, after costs, would be that the plaintiff would have available to her approximately \$225,000 for the purchase of a suitable residence. On the evidence, that would be sufficient to obtain a suitable residence, even if not at the top of the price range.

[46] To the extent that the plaintiff might choose to purchase a suitable residence of lower cost (and the evidence shows that there are a number available at lesser prices), she would have an amount available to set aside for future contingencies. In addition, and in any event, she will have the income available from a quarter of the residue to which she will be entitled for her life.

**Grandchildren's claims**  
**Macewan Shaw v Shaw**

31. In *Macewan Shaw v Shaw* application was made on behalf of infant grandchildren against the estate of their grandfather. The grandparents had provided gifts to their grandchildren and their parents, including a year's rent for a house and the application fees for the grandchildren's entry to Wesley College. On behalf of the plaintiffs it was argued that the grandfather was the effective breadwinner, and that he had assumed a father's role in the family, because the plaintiff's own parents generated only modest earnings.
32. The gross estate was worth \$2M, and was left in its entirety to the deceased's widow, the grandmother of the plaintiffs.
33. Dodds Streeton J applied the following dicta
- (a) *Leahey v Trescowthick*, [1999] VSC 402; Warren J  
The deceased and before him his wife was certainly very generous grandparents to most of their grandchildren. However the grandparents had no direct parental or grandparental duty to provide for any of their grandchildren, (including each of the plaintiffs). The fact that the deceased and his wife during their lifetime made generous gifts towards some of the grandchildren, including the plaintiffs and, in particular made generous contributions towards the education of some of the grandchildren cannot in my view be construed or characterised as an obligation or responsibility on the part of the deceased to any of the plaintiffs.
- (b) *Sherlock v Guest* [1999] VSC 431; Beach J  
There is no moral obligation upon a grandfather to make provision for the maintenance and support of his grandchildren simply by virtue of the existence of such a relationship. Such a moral obligation will rest upon the parents of a grandchild but not the grandparents. However, such a moral obligation can be created in a particular case by reason, for example, of the care and affection given by a grandchild to his or her grandparent.
34. Dodds-Streeton J held that there was no responsibility upon the grandfather to provide in his will for these grandchildren. She made these observations in [213] - [217]
- The amended legislation, while expanding the class of eligible applicants, confers only a limited jurisdiction to interfere with freedom of testation. It does not license the court to effect a redistribution of an estate because it would satisfy notions of familial generosity, or because the claimant has few resources and the defendant taking benefits under the will is relatively well off.
- Rather, it remains necessary to establish a need for provision and maintenance in the applicant in order to enliven the jurisdiction. If the need is not established, the court has no jurisdiction to make an order, no matter how large the testator's estate. Nevertheless, the size of the estate is not irrelevant to determining need, which is not an absolute concept.
- Further, it is necessary to establish a breach of duty or moral obligation on the part of the testator, which constitutes a departure from the standards which a wise and just testator would have applied. There must be an abuse of the freedom of testation.

Prevailing community standards, which may alter according to changing social and economic conditions, are the criteria against which the duty and moral obligation, and any departure from them, must be measured.

According to prevailing community standards and applicable law, as consistently recognised by this Court, the obligation to maintain and provide for infants ordinarily rests upon their parents, rather than on grandparents.

35. Dodds-Streeton J concluded at [223]

Where children are in the primary care of their own parents, who are capable of fulfilling their basic needs, prevailing community standards will not, in the absence of some special factor or unusual circumstances, impose on a grandparent a responsibility to provide.

**Petrucci v Fields**

36. In *Petrucci v Fields* a widow claimed against the estate of her deceased husband's father, and for her children as well. The will gave the entire estate to the testator's four surviving children and made no provision for the widow and three children of his deceased son. The plaintiff was 58 and her three children were aged from 24 to 33. Mandie J was prepared to make a modest award for the daughter in law and the grandchildren. He said -

[61] In my opinion, the deceased had a responsibility to make provision for the proper maintenance and support of the first plaintiff and, as he made no provision at all, he failed to do so. A wise and just testator, in the circumstances existing at the date of death of the deceased, would have made some provision for his widowed daughter-in-law. ... In particular I would stress their long relationship (which broke down due to no particular fault of hers) and the significant contribution which the first plaintiff made to the welfare of the deceased and his late wife. Further, the first plaintiff has demonstrated need, especially for additional income. To my mind, in the light of prevailing community standards, it would be a callous rather than a wise and just testator who would totally ignore the needs of his son's widow, given the size of his estate and the competing claims upon it. It is likely that [the son] would have had a legitimate claim to provision. It is one thing to say that that [the son's] claim ceased with his death. It is another to say that his death should cut off his widow from all consideration of her need, especially when she supported her husband in his filial duties and made a significant contribution to the welfare of the deceased in her own right. A wise and just testator would also have regard to the detriment caused to the first plaintiff by the early death of her husband.

37. In relation to the grandchildren, at [62] the judge described the grandchildren as follows: "They were adults, they had never been dependent on the deceased, they were all in employment and two of them had spouses who were themselves in employment. Their relationship with the deceased was at best unremarkable." He continued:

[64] [Referring to *MacEwan Shaw*] The above statements by Dodds-Streeton J must be read in the context of the case and the particular claim then before the Court. It seems to me that grandchildren can neither be "ruled in" nor "ruled out" until all the facts are examined. It is important to distinguish between the general

obligation of parents to provide for and support their children and the potential responsibility, in the statutory sense, of a testator, who is a grandparent, to make provision out of his estate for the proper maintenance and support of grandchildren. The obligation of living parents to provide for their children does not necessarily negate, in an appropriate case, the moral responsibility of a grandparent to make provision for the maintenance and support of those grandchildren out of his estate.

[66] I consider that a wise and just testator would not have been bound to make any provision for the *immediate* needs of the grandchildren. However, I think that a wise and just testator would, looking at the family line constituted by the first plaintiff and her adult children, and considering the loss of their husband and father, conclude that he had a responsibility in the particular circumstances to make some provision for the grandchildren's future needs.

38. Orders were made providing \$60,000 (free of interest) to be set aside to be held on trust to pay the income to the son's widow for life, and on her death to be paid to their children in equal shares.

**Claims by adult sons**  
**Blair v Blair**

39. *Blair v Blair* was a claim by an adult son. Chernov JA said

[20] In my view, his Honour did not err in **rejecting** the submission that, merely because he was an adult son of the testator, the respondent was required, as a pre-requisite to obtaining further provision out of the estate, to establish some special need or special claim on the estate. It is plain enough that s.91(4) - particularly paragraphs (e), (f) and (h) - requires the court, in considering the jurisdictional issues, to take into account what could be described as the applicant's moral claims on the estate and his or her financial needs, but they do not elevate them to a "special" status and do not require these matters to be established as a *pre-requisite* to a successful application. As McDonald, J. pointed out in *Allan v. Allan*, [2001] VSC 242 at [67]. The provisions of s.91(4) draw no distinction between the applicant who is a son or daughter of the testator, and there is nothing in its paragraphs that suggests that an adult son must establish a special need or special claim before the court can exercise its discretion in his favour. On the contrary, it seems to me that, by stipulating the matters to which the court *must* have regard in determining the jurisdictional questions, the legislature has made it apparent that the court should not approach these matters with the pre-disposition contended for by the appellant.

[22] Thus, although it may be very difficult for an adult son, who is in an independently sound financial position, to establish the jurisdictional requirements, it does not necessarily mean that he must show that he has some special need or claim before he can succeed on those issues. As Gibbs, J. said, and as Ormiston, J. inferred, in the above cases, whether the claimant has discharged the burden of establishing the two jurisdictional requirements will depend on all the circumstances of the case.

**de Angelis v de Angelis**

- 40 *de Angelis v de Angelis* was a claim by an adult son against father's estate. The testator had two sons. The plaintiff was the elder son, age 46, permanently incapacitated from employment and dependent on disability pension. His only

asset was a claim to the proceeds of sale of former home of himself and his divorced wife. He had debts of \$24,000. His brother was aged 42, employed as lending manager with a bank, and owned property of his own. He had no dependants.

41. The estate consisted of two residential units worth \$165,000 and \$100,000; together with money and investments \$190,000. By the will the less valuable unit was given to Plaintiff for life (but determinable upon his failure to maintain the unit and pay outgoings) and in remainder to Plaintiff's infant children. The more valuable unit and residuary estate was left to the defendant, the younger brother of Plaintiff. Reasons given in will for the lesser provision to the plaintiff were that the plaintiff had squandered what he had been given, and had caused his father much pain and anguish.
42. Section 94(c) permits the court to accept any evidence of the deceased's reasons for not making proper provision for the applicant. It was held that this cannot render a will which fails to make proper provision immune from challenge, and nor does it compel the court to attribute any particular weight to that evidence or to accept a statement of reasons as establishing the truth of what is asserted.
43. The judge did not accept that there was a risk of the plaintiff dissipating the value of any award made to him, but (obiter), and following dicta of Ormiston J in *Collicot v McMillan*, she recognized that if provision ordered for a plaintiff would invariably go to the applicant's creditors and provide no personal benefit, or would be dissipated by the applicant for other purposes, then these are valid grounds for declining to make any award.
44. In this case the plaintiff was given absolute ownership of the more valuable unit plus \$30,000. This would enable him to discharge his debts, have somewhere to live, and continue to receive the disability pension to provide him with an income.

### **Herszlikowicz v Czarny**

46. In *Herszlikowicz v Czarny* the claim was by an adult son aged 59. The son had qualified as a doctor and had for a time enjoyed a high income and ownership of valuable properties and investments. He became addicted to pethidine and was on a number of occasions suspended from medical practice. He defrauded Medicare and spent some time in prison. He began gambling and lost all of his assets. His marriage came to an end. His prospects of returning to medical practice were remote. He had a number of health problems. He had liabilities of about \$170,000.
47. His surviving parent, his father, left an estate which consisted of two units in Malvern worth \$300,000 and \$330,000, one unit in Surfers Paradise worth \$330,000, and personal property of \$326,000. By the will the plaintiff was left a unit in Malvern, and the balance of the estate was given to the plaintiff's sister and her children. In addition during his life the deceased had transferred approximately \$1M in cash and property to his daughter.

48. There was evidence that whilst the father was proud of his son's achievements in becoming a doctor, he was also distressed and ashamed at his later behaviour. In relation to misbehaviour on the part of children, Hargrave J cited *Kleinig v Neal* (No. 2), [1981] 2 NSWLR 532, where Holland, J (when considering factors a court must take into account) said at 540 -1

"... another circumstance is that the parent was responsible for bringing the child into the world and having done so assumed a duty to be concerned for the child's welfare. A wise parent will recognise that perfect harmony between parent and child is in the nature of things not to be looked for and that, coming to adulthood, a child will want to make his own life just as the parent had done before him. Differences of outlook between different generations is not exceptional, it is the general rule, so some friction between parent and child or disappointment in a parent's hopes and expectations concerning his child will be accepted by the wise parent as almost inevitable. If it occurs, the parent who is just as well as wise will not allow such disharmony or disappointment to blind him to the needs of his child for maintenance, education or advancement in life. The duty of a parent towards his child to provide for those needs on his death, if he can, continues in spite of such disharmony or disappointment and the statute obliges the court to consider whether it has been performed."

49. Hargrave J also referred to the statement by Nettle J in *McKenzie v Topp*, at [45], speaking of disharmony in ordinary family relationships

"That is what happens in families, often. Parents and children misbehave towards each other, and the older they get the more they seem to do it. But absent extraordinary circumstances, it does not mean that the parents love the children any less or that their duties and responsibilities towards the children are in any way diminished, and usually it does not mean that the children are any less deserving of the parents' love and support."

50. Hargrave J concluded

[156] In my view, any shame or disappointment which the deceased may have felt in respect of his son and his conduct was not in all the circumstances as they existed at the time of death, sufficient justification for a wise and just testator to provide such a small bequest to his son

[157] Notwithstanding the plaintiffs failings and misdeeds, the moral responsibility of the deceased, given that the need of the plaintiff was far greater than that of his sister Sally, and given that the size of the estate was sufficient to *both* satisfy the deceased's moral duty to his son and his understandable desire to prefer his daughter in his will, such as to require the making of far greater provision for his son. Furthermore, given the plaintiff's profligacy, a wise and just testator would no doubt have provided such greater provision for his son in the form of a trust which was structured in a way to, in effect, protect his son from himself.

51. Provision was made for the son by giving him, in addition to the flat which was left to him by the will, \$425,000. After paying his accrued liabilities of \$175,000 this would leave a balance of \$250,000 available to be used to supplement his pension and provide capital to meet contingencies.

### **Stepchildren's claims**

52. There are all sorts of stepchildren relationships, ranging from those where the child comes into the home of the natural parent and step-parent as an infant, to those where the parent marries when the child is already an adult so that the new spouse never occupies a position analogous in any way to that of parent to the stepchild.

### **McKenzie v Topp**

53. *McKenzie v Topp* was a case where there had been a long and close relationship between the stepchild and the deceased. The plaintiff's natural mother had died when he was six and his father had remarried when he was ten. The stepmother had no children of her own, and she treated her stepson as being in a position very similar to her own son, although she also maintained close ties with and interest in her own blood relatives, her sister and her nephews and nieces.
54. After leaving home, marrying, and having children, the stepson's life disintegrated when his marriage failed, he lost his business, and his ability to work. On a disability pension, he came back to live with her stepmother in her home. At the date of the trial he was 66 and had no assets and his sole income was from the pension. His stepmother left an estate consisting effectively of just the family home which was then worth between \$650,000 and \$700,000.
55. The residuary estate was worth about \$550,000 after allowing for pecuniary legacies of \$25,000 and the costs of the litigation. By the will the whole of the residue was left to a nephew of the stepmother. The pecuniary legacies included \$12,500 for the stepson's own children, but the will made no provision for the stepson himself.
56. A significant element of the claim was that the assets in the stepmother's estate could in a sense be traced as having been derived from what she inherited from the plaintiff's father. Nettle J dealt with this as follows.

[56] I turn therefore to the significance of the plaintiff's father's estate. Counsel for the plaintiff submitted that because the plaintiff's father left all of his estate to the deceased there arose a moral obligation or responsibility upon the deceased to continue the arrangements set in place in her latter years whereby the plaintiff was provided with accommodation. The argument was that where a man who has children from an earlier marriage leaves to his second wife the entirety of his estate, and thereby deprives the children of his first marriage of the provision which they might otherwise have expected, it falls to the second wife as a matter of moral responsibility to make adequate testamentary provision for those children. More specifically, it was said, because it is often the case that a husband cannot know with certainty the extent of the support that his widow will require, and in those circumstances it may be that anything less than the entire estate would be inadequate provision for the widow's proper maintenance and support, the children of the first marriage must forgo the provision which they might otherwise have received in order that their stepmother receive adequate provision. But if then later when the stepmother dies there is sufficient in her estate to make good some or all of the provision of which the stepchildren were earlier deprived, it is her responsibility to make it good.

[57] The proposition is novel. It is only recently that the legislation was amended to allow stepchildren to make claims under Part IV, and so far nothing of this kind has been considered in any of the cases. ...

[58] Be that as it may, however, it appears to me that the proposition should be accepted, up to a point. For just as community attitudes are the touchstone of adequate provision, so too are they the criterion of responsibility to provide. Other things being equal, right thinking members of society are likely to accept that the needs of the widow of a second marriage should rank in priority ahead of the claims of the children of a

first marriage; although of course it is always a question of fact. But equally, upon the death of the widow, and as it were in the event of a surplus, most would surely say that the children of the first marriage should rank for their fair share. For once the widow is gone, and therefore no longer in need of provision, her needs no longer warrant that the children rank behind her or thus her chosen successors.

[59] Of course that is to speak in terms of broad generality and upon the assumption not only of an estate of sufficient value to provide for the children of the first marriage but also of a need for their provision. Furthermore, although the question for present purposes is confined to the first or jurisdictional aspect of the inquiry - of whether children of the first marriage may be regarded as persons for whom the widow of the second marriage has a responsibility to provide - the size of the estate and the circumstances of the children may be critical to the answer. But the need to look forward to the second stage of the inquiry in order to complete the first is endemic to most of the considerations listed in s. 91(4). It is the consequence of defining the class of eligible plaintiffs in terms of persons for whom a testator or testatrix has a responsibility to provide. The first stage of the inquiry is now informed as much by the answer to be given to the second stage as the second stage will be informed by the answer that is given to the first. But there are still two stages.

57. The judge awarded the stepson a lump sum of \$275,000, which was intended to be sufficient to enable the Plaintiff to buy a modest home of his own.
58. This theme, recognizing a derivative claim based on the origin of the assets in the estate, has been applied in two later cases.

### **James v Day**

59. In *James v Day* the plaintiffs' father was born in 1919 and his children, the plaintiffs, were born in 1935 and 1938. His first wife died in 1952 and he married his second wife in 1954. He died in 1992 and his second wife died in 2003. His children brought proceedings against her estate seeking provision for their maintenance and support. The evidence showed that after their father died his son maintained a cordial but desultory relationship with his stepmother, whilst his daughter's relationship with her tailed off completely. In 1998 the stepmother wrote to her deceased's husband's daughter telling her that they had nothing in common and that the daughter should cease correspondence with her and cease sending her Christmas cards. There was no further direct contact between the stepmother and the daughter for the remaining five years of the stepmother's life.
60. When the plaintiff's father married his second wife he owned a home: the evidence did not show whether it was subject to mortgage or not. The second wife did not own any real property, although upon her mother's during the marriage she inherited a half share in her mother's home. The plaintiffs' father and his second wife sold the first home and in succession bought two further homes, each of which they owned jointly. Thus when the plaintiffs' father died, ownership of the home that he and his second wife shared passed by survivorship to his widow.
61. The net value of the estate at trial was about \$300,000. The second-wife's will made no provision for her stepchildren, and she gave her estate to her nephews and nieces. The plaintiffs were able to demonstrate financial need, and the nephews and nieces were not. Based on these facts, which essentially came

down to a loose sort of tracing exercise in relation to property, Cummins J awarded half of the estate to the plaintiffs by way of provision for their maintenance and support. He held:

- [35] ... The question of her responsibility to make provision, in the circumstances of this case, must be approached holistically and historically. When so approached, it is apparent that the genesis of her estate was the father of the plaintiffs. Rightly, he provided for his wife by joint ownership of the major asset, the house, which passed to her by survivorship. ... The question of the deceased's responsibility to make provision for her step-children necessarily in this case bears an historical aspect.
- [36] In my view, by reason of the derivation of the deceased's financial position, she did have a responsibility to make provision for the proper maintenance and support of each of the plaintiffs. She did not make any provision.
- [38] The proper provision for the maintenance and support of each of the plaintiffs and for which the deceased had responsibility to make, is one quarter of the estate: that is, one quarter for the first plaintiff and one quarter for the second plaintiff. That leaves one half of the estate to be shared equally between the three named beneficiaries.

### **Keets v Marks**

62. *Keets v Marks* was a claim by a son against estate of his stepfather. Plaintiff's father died when the plaintiff was 25, and some years later his mother married the deceased, this being his second marriage. She and he purchased a unit in Beaumaris for \$185,000 which they purchased jointly (and it appears that she contributed half the cost). Two years later the mother died and left her residuary estate, \$60,000, to her husband (with a gift over to the plaintiff). The husband acquired full ownership of the residential unit by survivorship, so that the plaintiff inherited nothing from his mother. Seven years later the husband died, and the plaintiff then brought this claim.
63. The deceased had no children of his own. His will left his estate to three nephews and nieces of his first wife, and to a friend. It was not suggested that any of these beneficiaries had any valid claim upon the estate. The value of the gross estate was \$600,000. The plaintiff was aged 56, married, and in secure employment. Balmford J commented that the plaintiff's mother had "recognised a primary moral obligation to her husband, and after him to her son"; and
- [30] ... consistently with the decisions in *McKenzie v Topp* and *James v Day*, [the plaintiff's mother] had had a responsibility to make provision for the plaintiff, and that that responsibility transferred itself, as it were, to her husband on the receipt by him of her money. On that basis I find that the plaintiff was a person for whom Paul had a responsibility to make provision in terms of section 91(a) of the Act.
- [32] ... the measure of the amount of the provision to be made for the plaintiff out of the deceased's estate must be related to the extent of the plaintiff's mother's contribution to that estate.
63. It was held that the appropriate provision was \$150,000 being the \$60,000 which the deceased had inherited from the plaintiff's mother's estate, and \$90,000, being the approximate value at the time of acquisition of the half share in the Beaumaris unit.

**Discovery in relation to the financial position of the defendants**  
**Harris v Bennett**

64. Section 94(1)(h) requires the court to consider the financial resources (including earning capacity) and the financial needs of any beneficiary of the estate. In *Harris v Bennett*, a claim by a grandchild against a grandfather's estate, discovery was sought concerning the financial position of one of the executors who was also a daughter of the deceased and a substantial beneficiary under his will. Evidence was provided that to confirm that the defendant did not intend to make any claim based on "competing need" in order to reduce the quantum of whatever provision the court might decide was appropriate to be made for the Plaintiff, and Redlich held that because the Court would not be required to have regard to her financial resources or needs the legislation imposed no obligation upon the Court to require the she disclose matters relating to her personal circumstances.

**Interest on awards**  
**Blair v Blair**

65. Under Rule 78.05 interest is payable on a legacy at the rate of 8% per annum from the end of the executor's year. Under s. 97(4) of the *Administration and Probate Act* an order making provision for a plaintiff takes effect as if the order had been made by the deceased by executing a codicil to his will immediately before his death.
66. The trial judge in *Blair* ordered that the plaintiff be paid a legacy of \$200,000, whereas the will had given him a pecuniary legacy of \$150,000. Nothing was said in the judgment about interest. The Court of Appeal held that the combination of Rule 78 and s. 97(4) of the Act meant that the plaintiff was entitled to be paid interest on the new enlarged legacy as from the end of the executor's year. (It was only because of this that the plaintiff succeeded in beating the offer of compromise, which had offered him an extra \$50,000.)

**Calderbank Offers**  
**Re Will of Sitch**

67. In *Re will of Sitch*, a claim was made by surviving partner in a de facto marriage against the estate of deceased husband. Will gave the estate to the deceased's two children. The size of the estate was modest, and the plaintiff was awarded \$50,000 together with the estate's interest in a panel van which was co-owned. This meant that the plaintiff failed to beat a *Calderbank* offer, and it was ordered that she should have her costs from the estate only up to the date of the offer, and that she should pay the estate costs as between solicitor and client from the time when she had chosen not to accept the offer.

**Claim against estate of a sibling**  
**Sanderson v Bradley**

68. In *Sanderson v Bradley* an 81 year old sister claimed against the estate of her deceased brother. The brother's will had left a residential property to his sister, and the residue to his wife, but the property had been sold and the gift failed by ademption. leaving nothing to pass to the sister under the will. The wife predeceased and the Melbourne University took the entire estate under a gift over. The deceased owed no obligation or responsibility towards the university.
69. The plaintiff and her husband had been full time workers for the Jehovah's Witnesses. They received free accommodation, and would do so for the rest of their lives. They were dependent on pensions for their income. The plaintiff and her brother had had a "normal sibling relationship, less close than many such". It was held that the deceased had no responsibility to make provision for the plaintiff and the claim was dismissed.

**Claim failing where success would have deprived beneficiary of a home**  
**Markovska v Kocevska**

70. In *Markovska v Kocevska* the deceased was survived by his three adult daughters. The will in effect gave \$25,000 to each of two daughters, and the family home at Northcote to the third. This was worth \$335,000 at the date of trial. One daughter was well established with a home and a job and did not make any claim. The other daughter did. She was 53, divorced, earning a modest income from a secure job, and looking after two adult sons both on invalid pensions. She owned her home which was subject to a mortgage of \$32,000. She had two cars and was able to travel. The judge concluded that to the extent that she had a mortgage this "reflected her own priorities".
71. The daughter to whom the home was left had lived with her parents, and later her father, looking after them in the family home. She had not worked for some years and although she had recently completed a course in caring for the aged she had not found employment. Her employment prospects did not seem bright.
72. The judge concluded that given the competing needs of the preferred beneficiary, and the testator's evident wish to provide her with a home, as he had already for some years, he was unable conclude that the testator had had a moral responsibility to make any provision for the plaintiff. Further, since the will did give her a pecuniary legacy of \$25,000, which could not be dismissed as trivial given the size of the estate, he could not find that the testator had made insufficient provision, even if he had had a responsibility to make testamentary provision for her.

**Successful claim by "niece in law" - deceased in loco parentis**  
**Iwasivka v State Trustees Ltd**

73. In *Iwasivka v State Trustees Ltd* the plaintiff was the daughter of the deceased's husband's half brother. Her parents had divorced when she was about nine years old, and the plaintiff had not seen her mother since she and her father came to

Australia, where the deceased and her husband were living, three years after the divorce. The plaintiff had no contact with her mother after she came to Australia, and the deceased took on the role of mother. The plaintiff lived with her under her care from the age of twelve to around sixteen. The mother-daughter relationship continued during the plaintiff's adulthood, with the plaintiff making various contributions to the deceased's welfare over the years,

74. By the time that the deceased died (leaving an estate worth approximately \$1,200,000) the plaintiff was forty-seven years old, on a disability pension, in poor health, unlikely to ever work again, and bereft of assets (her parents had by then died and had had very little in the way of estate). The claim succeeded because the Court found that the relationship between the deceased and the plaintiff was of the nature of that between mother and daughter.
75. The deceased had died intestate, had had no known contact with European relatives, and, as at the date of trial, no next of kin entitled under the intestacy had been located. The judge was prepared to proceed in the absence of the next of kin on the basis that they had had nothing to do with the deceased over the course of her life in Australia, and there would therefore not be any strong competing interests to be put forward on their behalf. At trial provision was made for the plaintiff by providing her with a legacy of \$700,000, intended to provide her with an amount to enable her to purchase her own accommodation and leave her with a fund as a measure of security for future expenses and contingencies.

**Claim by foster child where relationship equivalent to parent child relationship**  
**Sellers v Hyde**

77. In *Sellers v Hyde* application was made by an adult foster daughter aged 73. She was brought up as the sole daughter of the deceased and only discovered that she was not her daughter when she was aged in her 50's. The plaintiff was separated from her husband but still living in the former matrimonial home, worth \$340,000. She needed \$170,000 to buy out her husband's interest in the house. She suffered considerable health problems and also needed to spend substantial sums to equip the house so that she could continue to live there. Alternatively she would need to move to supported accommodation. Due to her health she had a reduced life expectancy of up to ten years.
78. The deceased was 90 when she made her will. She had fallen out with her daughter and her grandchildren for no good reason. Her daughter's health prevented her from driving or travelling by public transport, but the deceased resented what she perceived as her daughter's neglect of her. The deceased lived alone in her home in St Kilda, where she took in lodgers largely for the sake of company. The will gave the entire estate to the defendant who was a nurse, 36 years of age at the date of the trial, who had lived in the home since 1995. The defendant was married to a pilot and they had a young baby.
79. The estate consisted of the home in St Kilda which was the principal asset. It was worth \$1.15M and there was an additional \$100,000 in cash. After costs the net value of the estate was about \$1.1M. The plaintiff was awarded \$750,000 for reasons which the judge summarized as follows:

[43] I particularly take into account ... the plaintiffs assets, her likely life expectancy, her requirements for home expenditure and care, her likely home care expenses, the possibility that she might have to move to a nursing home within two or three years and her needs generally. I take into account that there are of course a number of future contingencies which might affect the plaintiff, some of which would reduce her need for provision and others which might increase that need. I consider that provision for the plaintiff should not err on the side of parsimony. I am satisfied that her needs are substantial and that one real contingency is that she may live longer than is expected. In all the circumstances, and doing the best I can, I have decided that provision should be made for the plaintiff in the sum of \$750,000.

### **Assessing quantum**

80. In *Grey v. Harrison*, [1997] 2 VR 359 Callaway JA said at p. 366

There is no single provision of which it may be said that that is the provision that a wise and just testator would have made. There is instead a range of appropriate provisions, in much the same way as there is a range of awards for pain and suffering or a range of available sentences. Minds may legitimately differ as to the provision that should be made. Furthermore, it is not at all clear that reasons for an appropriate provision need be fully articulated. To borrow again from the analogy of sentencing, what is required is an instinctive synthesis that takes into account all the relevant factors and gives them due weight."