The Right of Independent Adult Children to Receive Testamentary Provision: A Statutory Interpretation and Philosophical Analysis of the New Zealand Position.

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Abstract

Should independent adult children be entitled to a share of their parent's estate and on what basis? This thesis seeks to answer that question in the New Zealand context by analysing the judicial approach to claims by such children from a statutory interpretation perspective and then by exploring the philosophical arguments in support of such provision.

Since 1900 New Zealand has had legislation allowing certain classes of people, including adult children, to make a claim against an estate, without any qualifying restrictions. Claims can be made if the testator has failed to make "*adequate provision for their proper maintenance and support*." The judiciary has not confined the jurisdiction to adult children in dire financial straits or even financial need in the broadest sense. All other circumstances permitting, the Act is also used to make provision for a disinherited child on the basis they deserve recognition as part of the deceased's family. This has been achieved through the application of "support" to include emotional support.

The consensus of commentators is that the judiciary is applying the Act incorrectly on the basis that its original target was destitute adult children and those physically unable to maintain themselves. They criticise the broad economic application of "maintenance and support" and its emotional application. None of the criticisms, however, are located in a theory of statutory interpretation. Is the approach wrong from such a perspective? This thesis answers the question by assessing the judicial approach according to the interpretative theory of practical reasoning.

Practical reasoning requires a court to take into account a number of considerations - text, legislative history, purpose, and changes in the legal and social climate - to weigh each factor and then to reach a contextual justification for the best answer in the case at hand. The thesis applies the theory to the main cases. It concludes that the concepts of "maintenance and support" are economic and that while the court's broad economic approach to the Act is justified, its application to emotional support is not, the main stumbling block being that it is inconsistent with the legislation's purpose.

The thesis then steps out of the statute and asks whether there are valid arguments for testamentary recognition of adult children. Critics of the judicial approach argue not, approaching the matter from the point of testamentary freedom. But recognition of the family bond is a strong theme in the case law, not only in New Zealand but in other jurisdictions with substantially similar legislation. A comparative analysis, together with a wider focus on philosophical reasons for testamentary recognition generally, leads to a conclusion that while the New Zealand judiciary may not be justified from a statutory interpretation perspective, its application of the Act to encompass emotional "support" is not necessarily inappropriate and that the debate in New Zealand has been too narrowly focused on testator's rights. It concludes there are equally valid reasons for testamentary recognition of independent adult children but it is a debate where neither viewpoint holds the dominant position. In the event of law reform, the verdict reached will ultimately be a policy decision for Parliament to make.

Preface

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Introduction

In 1900 New Zealand passed the Testator's Family Maintenance Act 1900 ("the Act").[1] In doing so it became a pioneer in the common law world, being the first country to adopt a "*flexible restraint on testamentary freedom.*"[2] The Act gave the court discretion to make provision out of a will if the testator had failed to provide certain classes of claimant with "*adequate provision*" for their "*proper maintenance and support.*"[3] It was flexible in contrast to the other main approach to family provision on death, the fixed share.[4] Despite a name change in 1908, and several other amendments over the years, the test for provision has remained the same.[5] What has changed is the judicial approach to its application, particularly in relation to claims by independent adult children. The Act places no restrictions on the rights of children to make a claim; there is no reference to age, disability or financial need. The mapping of the Act's parameters was left to the judiciary. In the early 1900s the courts took an approach that focused on the adult child's economic need and required evidence of hardship before making an award. They then relaxed their approach as they broadened the interpretation of financial need and allowed ethical factors to inform the test as well. By 2000, the courts were applying the Act to recognise the child's need for emotional, and not just financial, support. In effect, this means that all other factors permitting, an adult child is entitled to receive provision from a parent's estate.

[1] In this Thesis reference to the Act is reference to the Testator's Family Maintenance Act 1900 and the Family Protection Act 1955. The Act's title was changed to the Family Protection Act in 1908 and has remained the same ever since. Despite several amendments since 1900, the test as to whether provision should be made has remained the same. It is now found in section 4 of the Family Protection Act 1955. The main thrust of the amendments has been to enlarge the classes of eligible claimants.

[2] This is the term used to describe New Zealand's approach in J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277.

[3] This phrase was found in s2 Testator's Family Maintenance Act 1900 and is now in s4 Family Protection Act 1955.

[4] Civil law systems have fixed rights of inheritance, derived from Roman law and the concept of legitima portio – the rightful share. It takes various forms and different names – la reserve legal in France, legitim in Scotland, Pflichtheil in Germany. For a discussion of the concept, see Chapter Six

[5] Hansard does not appear to contain any information shedding light on the name change.

This thesis examines whether the judicial approach to such claims is justified, its main focus being justification from a statutory interpretation perspective. Has the judiciary mapped the Act's boundaries in an appropriate manner? The consensus among modern commentators is that they have not and that the Act was intended to apply only to those adult children who were physically incapable of maintaining themselves or who were destitute. Yet despite disagreeing with the judicial approach none of these commentators has assessed it according to a theory of interpretation. Why is the approach wrong? This thesis fills that gap in the debate by assessing the case law according to the interpretative theory of practical reasoning.

Traditional theories of interpretation have one interpretative touchstone, be it text, intent or purpose. Practical reasoning differs from these theories in that it is prepared to look at a variety of "touchstones". It combines the strengths of the traditional theories while addressing their shortcomings with a view to reaching the best answer for the case at hand. That answer is one which looks at text, history and purpose, giving each as much weight as it can bear and which is supported by the strongest combination of evidence. Its other significant difference from the traditional theories is that it permits, and requires, the interpreter to weigh dynamic factors in the balance. By dynamic the theory's proponents mean those changes in the wider legal and social landscape which are relevant to the text's meaning. Practical reasoning therefore seeks an outcome that fits in with the current legal and social climate so that the law, where possible, can adapt to changing circumstances.

The thesis has seven chapters. The first chapter is relevant to the practical reasoning assessment as it looks at the climate that existed in New Zealand prior to the Act's passing. A key theme in this thesis is that law does not operate in a vacuum. MPs, legislative draftsmen, judges, are products of their time, conditioned by the world in which they grew up and lived, alive to the social, legal and economic concerns of the day. It is these concerns which prompt legislation to be introduced and passed and which may affect its subsequent application. To provide a context in which to explore the case law, (Chapter Two) understand the commentary it has attracted, (Chapter Three) and then to assess it, (Chapters Four and Five) it is necessary to understand what prompted the introduction of the Act and what concerns were raised during its passage. Chapter One therefore explores

the social, legal and political concerns which prompted the Act's passage, including a summary of the parliamentary debates. It shows that the economic position of women and their dependants was the thrust behind the Act, the main issue in the debates being the level of provision that should be provided; should it be confined to bare maintenance or was a more generous "station in life" approach required? As to adult children, the debates are equivocal but what is clear is that Parliament refused to pass an exclusion clause confining the jurisdiction to minor children or those unable to look after themselves as a result of a disability. This left it to the courts to map the Act's parameters in respect of this class of claimant.

Chapter Two summarises how the courts mapped those parameters in relation to independent adult children. It is purely descriptive, providing the context for the practical reasoning analysis that comes later. It tracks the evolution of the case law by focusing on the main cases and the key themes they introduced into this jurisdiction. It shows a significant swing of the pendulum from 1900 to date. As noted above, the initial approach was confined to adult children in dire financial straits or unable to support themselves due to a disability. A century later, the courts had decided that financial need was not a prerequisite to relief and that the Act could be applied to emotional support as well; an adult child now has a right to be recognised in a parent's will to show they were an important part in the deceased's life and to symbolise their place in the family.

The broadening approach has not been well received by commentators. Chapter Three traverses the literature in this area, both from New Zealand and those countries with substantially similar legislation. It shows that the general consensus is that the courts are wrong in their application of the Act. Commentators argue it is aimed at adult children in dire financial straits or physically unable to maintain themselves. The application of "support" to include emotional "support" comes in for particular criticism. However none of the commentators, while critical of the judiciary's approach, assess it from a statutory interpretation perspective. This is the first gap in the debate and it is addressed in Chapters Four and Five. Chapter Three identifies a second gap and that is the absence of any discussion setting out the arguments in favour of an adult child's entitlement to a share of the estate, issues of interpretation aside. While commentators criticise the judicial

approach, their criticisms also reflect a broader philosophical objection. For them, testamentary freedom must be the starting point and a requirement of testamentary provision for adult children is an unjustified erosion of this freedom. But are there valid arguments in support of such recognition? This question is postponed until Chapter Seven.

Chapter Four sets out my requirements for a theory of interpretation and argues that practical reasoning is the theory that best fulfills them, the key features of which have been noted above. Chapter Five then applies practical reasoning to the main cases. It is divided into two parts. The first part assesses the economic application of the Act while the second assesses the "emotional" or "ethical" application. A textual analysis is carried out at each significant shift in the case law, as is an analysis of the wider climate, changes in that climate and the Act's history, including the parliamentary debates. It weighs these factors and asks whether the approach can be justified. Overall, it concludes that the courts' economic approach to the Act, even though very broad, is justified but that its application of the Act to encompass emotional "support" is not. While such an application is not necessarily excluded by a textual and dynamic analysis, the purposive evidence provides the main stumbling block to justification; the weight of the evidence shows that the original purpose was economic in focus.

Chapter Five's conclusion raises the issue of reform. If the judges are applying the Act incorrectly reform is needed; the judiciary is unlikely to change its approach without legislative intervention. But in what way should the law be reformed? Is the judiciary's approach necessarily inappropriate, statutory interpretation issues aside, or are the critics right - ie should adult children be excluded from the jurisdiction altogether? Chapters Six and Seven explore the issue further.

Chapter Six provides a comparative analysis. It surveys the case law from jurisdictions with substantially similar legislation, namely British Columbia and the Australian States and Territories, together with the commentary coming from those jurisdictions. It asks whether these jurisdictions can provide fresh insights on the issue of justification generally and shows two things. The first is that the judiciary's approach to the legislation differs across time in all the jurisdictions and that there are also differences between the

jurisdictions themselves. It concludes that the judiciary's perception of the legislation's scope determines the direction it takes. This has relevance in terms of law reform as it shows the need for the Act to be specifically drafted to exclude adult children, if that is the desired outcome. The second finding is that while the case law pulls in one direction, the commentary pushes in another. The importance of family, and ideas of reciprocity and entitlement, are themes in the case law. This is particularly the case in British Columbia where the courts have also recognised a claim based on family status alone, all economic need aside. But as in New Zealand, the consensus of critics and law reform bodies is that adult children should be excluded from the jurisdiction. At the same time, none of the legislatures from these jurisdictions have adopted the recommendations to do so. It is unclear why. The comparative analysis therefore provides little in the way of fresh insights on the issue of justification generally and we have to look further afield still to see if recognition of the family bond is appropriate.

Chapter Seven looks at the arguments coming out of Scotland, Louisiana and America in support of adult children. Scotland has been chosen as it currently has a system of forced heirship which may be under threat. Louisiana abolished it in the 1980s. It is in the context of abolition or threatened abolition that defenders become vocal and provide us with the literature to inform the New Zealand debate. America has been chosen because it has no protections for independent adult children and, perhaps in a case of "the grass being greener", commentators there see much merit in systems that protect adult children whether by way of forced heirship or the discretionary model. The literature from these jurisdictions emphasises the positive arguments in favour of the inheritance rights of adult children. The arguments are based on symbolism, the "call of blood", reciprocity, paralleling the themes in the New Zealand case law. The Chapter concludes that the debate in New Zealand has therefore been too narrowly focused. While the "ethical" application of the Act may be unjustified from a theoretical perspective, it is not necessarily inappropriate from a philosophical one. There are valid reasons for it but neither these arguments, nor those from the defenders of testamentary freedom, have the high ground. The debate is evenly poised. The Chapter concludes that ultimately, it is a policy decision for Parliament to make.

Chapter One: The Family Protection Act: Setting the Scene

I. Overview

To provide a context in which to explore the case law (Chapter Two), understand the commentary it has attracted (Chapter Three) and then to assess it (Chapters Four and Five), it is necessary to understand what prompted the introduction of the Act and what concerns were raised during its passage. This first chapter also provides part of the context for the comparative analysis in Chapter Six which looks at, amongst other things, whether similar concerns were behind parallel legislation in other jurisdictions.

Chapter One has two main themes. The first is the role of the State in 19th century New Zealand. An overview of this provides a context in which to understand why the legislation was passed when it was but also why concerns were raised about its passage and its scope. The second theme is that of women in 19th century New Zealand. The evidence suggests the drive behind the Act was an economic one. A testator's family could find itself economically vulnerable if *he* died and left them with nothing; it was a gendered piece of legislation. The economic vulnerability of women, mainly wives and mothers, was the main concern. This vulnerability flowed from their economic and legal disabilities; it was the plight of women that placed the legislation on the agenda.

These two themes are explored before turning to the parliamentary debates leading up to the Act's passage.

II. The State in 19th Century New Zealand

Nineteenth century New Zealand was not a sympathetic place for those who fell on hard times. For most of the century the overriding policy of New Zealand governments could be summed up as liberalism.[1] With this came an emphasis on individualism and self reliance, on government not providing aid to individuals fallen on hard times, on family not state

[1] For a succinct discussion of liberalism, see G Duncan *Society and Politics in New Zealand* (Pearson, SprintPrint, Auckland, 2004) Chapter Three.

responsibility. Government used law to reinforce family obligations of support but provided little itself.[2]

Tennant argues that the philosophical objection to state aid stemmed from a concern that a system akin to Britain's Poor Laws could encourage extended dependence or pauperism.[3] Duncan makes the same point, noting that the aspiration of many settlers was to start a new society free from the social ills of industrial Britain with its poverty, unemployment and poor laws.[4] Further, too much dependence could drain people of their initiative and undermine self reliance. It was an anathema to the liberal ideal of a healthy, hardy nation which was self reliant.[5] (The reluctance has also been attributed to the fact that most settlers were able bodied and young and demand for it was therefore limited in the early colonial period).[6] Tennant puts it in a nutshell when she states the climate of the time could be summed up as a rejection of compulsory public relief, the lauding of voluntary welfare and the assertion of self-help and family responsibility for the destitute.[7] Classical liberal mentality opposed State intervention to assist those in need and any social assistance required was given reluctantly and cautiously.[8]

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[2] These themes are discussed generally in M Tennant *Fabric of Welfare; Voluntary Organisations, Government and Welfare in New Zealand, 1840-2005* (Bridget Williams Books, Wellington, 2007) hereafter "*Fabric of Welfare*". See also M Tennant *Paupers and Providers: Charitable Aid in New Zealand* (Allen & Unwin New Zealand Ltd and Historical Branch, Dept. of Internal Affairs, Wellington, 1989) hereafter *Paupers and Providers*; M Bassett *The State in New Zealand 1840-1984 Socialism Without Doctrines* (Auckland University Press, Auckland, 1998); M McClure *A Civilized Community: A History of Social Security in New Zealand 1898-1998* (Auckland University Press in association with the Historical Branch, Department of Internal Affairs, Auckland University Press, Auckland, 1998); M Belgrave "Needs and the State: Evolving Social Policy in New Zealand History" in B Daley and M Tennant (eds) *Past Judgment: Social Policy in New Zealand* (University of Otago Press, Dunedin, 2004) (hereafter "*Past Judgment*").

[3] M Tennant *Fabric of Welfare*, above n 2 at 23-28.

[4] G Duncan *Society and Politics*, above n 1 at 67.

[5] Ibid, at 69.

[6] M Tennant *Fabric of Welfare*, above n 2 at 28 citing M Bassett, above n 2 at 31-34.

[7] M Tennant "Mixed Economy or Moving Frontier? Welfare, the Voluntary Sector and Government, in Tennant and Dally (eds) *Past Judgment*, above n 2 at 41.

[8] Duncan, above n 1 at 68.

The State instituted some measures for the relief of poverty in 1846 and 1877 in the form of Destitute Persons Acts[9] but these were mechanisms for individuals to pursue relatives for help. (As noted by Tennant, Hansard suggests the ordinances were aimed primarily at wife deserters and putative fathers).[10] Desertion was widespread and, as noted by Bradbury, explained in part by the gold rushes, rudimentary communication systems, New Zealand's proximity to the sea and the general high mobility characteristic of a frontier society providing means of escape.[11] The buck stopped with family and the net was cast widely in terms of who could be pursued, such was the concern of the State to avoid financial responsibility. The 1877 Act went as far as near relatives, which included step-parents and brothers.[12]

In 1885 the Government took a step towards greater intervention in passing the Hospitals and Charitable Institutions Act.[13] The Act established a nationwide system of charitable relief, establishing hospital and charitable aid boards. It was funded from local body rates, donations and central government subsidies but it was central and local government money that made up the bulk of the funds. Its significance is that it made government and charitable institutions responsible rather than family and reflected the reality that some destitute people could not turn to families for help.[14] But even then it was a limited form of public assistance and was reluctantly implemented.[15] Family was still to be the first port of call, evidenced in the passing of the Destitute Persons Act 1894.[16] This legislation was a

[9] Destitute Persons Act 1846 (10 Vict 1846 No 9) and Destitute Persons Act 1877 (41 Vict 1877 No 44).

[10] M Tennant *Fabric of Welfare*, above n 2 at 28. Children made up the bulk of claimants in the Dunedin Magistrates Court in the 19th century: Ibid at 29.

[11] B Bradbury "From Civil Death to Separate Property" (1995) 29 NZ Journal of History 40 at 51.

[12] Section 2 Destitute persons Act 1877. See NZPD 1877 vol 24, col 576 cited in C Bayvel *Destitution, Desertion and Illegitimacy: NZ's 19th Century Maintenance legislation and its Operation in Dunedin's Magistrate Court 1890-1900* (Thesis BA (Hons) University of Otago, 1994) at 17.

[13] Hospitals and Charitable Institutions Act 1885 (49 Vict 1885 No 46).

[14] Bayvel, above n 12 at 22-24

[15] M Tennant *Fabric of Welfare* above n 2 at 29.

[16] Destitute Persons Act 1894 (58 Vict 1894 No 22).

frequent point of reference in the debates leading up to the Testator's Family Maintenance Act.[17] Given this, a short summary of its provisions follow.

III. The Destitute Persons Act 1894

The Destitute Persons Act 1894 was "*An Act relating to Destitute Persons, Illegitimate Children, and Deserted Wives and Children.*"[18] It was not, then, just about destitution but about people left economically vulnerable - women and children - when the breadwinner left.

The Act made near relatives responsible for the destitute person who was defined as a person "*unable to support himself or herself by his or her own means or labour*."[19] As with the earlier legislation the net was cast wide as to which relatives could be responsible. Near relatives included "*father, mother, grandparents, son, daughter, grandchildren, brother, sister (whole or half), adopting parents, executors and administrators.*"[20] Provision was capped at 20 shillings per week.[21]

Wives and children were in a different category. They did not have to be destitute before their husband and father had to pay maintenance. It was enough if they had been deserted or if they had to leave the family home for fear of their safety or on grounds of cruelty.[22] The Act provided a magistrate with a discretion to make an order if a wife did not have adequate means of maintenance. Maintenance was defined in section 2 of the Act to include lodging, feeding, clothing, teaching, or training.

Fathers remained responsible for sons until sixteen and daughters until eighteen, the difference no doubt reflecting the ages at which a boy could be expected to earn a living

[17] This becomes particularly relevant in Chapter Five when the court's approach to the Act is assessed according to a theory of statutory interpretation.

[18] Long Title, Destitute Persons Act 1894.

[19] Section 2 Destitute persons Act 1894.

[20] Section 2 Destitute Persons Act 1894.

[21] Section 8(2) Destitute Persons Act 1894.

[22] Sections 15-22, Destitute Persons Act 1894.

and a daughter could either get work or be married.[23] A wife's responsibility for maintaining her husband arose only if he was destitute and she, having her own separate property, was able to maintain him.[24] Here we see a gendered approach to maintenance, reflecting the overriding role of the man as breadwinner and a woman as dependent on him. Women were not cast in that light; they were wives and mothers, not breadwinners. Their obligation only arose if the husband, destitute, would otherwise become a burden on the State or the charitable aid system. This gendered approach is also seen earlier in the exclusion of "sister" from "near relatives" in the earlier 1877 Act and the different age limits for sons and daughters in their father's maintenance obligations.

What did the errant husband and father have to pay? Interestingly, given the distinction between destitute persons and wives in terms of eligibility for maintenance, the amount was capped at the same sum of 20 shillings.[25]

The State meted out punishment if people failed in their maintenance obligations. Desertion was a misdemeanour and the penalties for failing to maintain were imprisonment with hard labour or payment of penalties.[26] Bayvel notes that hard labour reflected a belief that deserting husbands had weak resolutions and that if made to work they would cease being idle and begin to contribute.[27] This reflected the attitudes of the day. Men should work and provide for their family; a good work ethic and self reliance were the important virtues.

Reflecting the social climate of the time, and the clearly defined roles for men and women, it is not surprising that some statistics from the 1890s show it was largely men charged with

[23] Section 4, Destitute Persons Act 1894.

[24] Section 6 Destitute Persons Act 1894. The legislation's extension to a wife's liability can be linked to the Married Women's Property Protection Act 1884 which allowed women to own property in their own right. With greater economic independence also came greater legal liability, the Destitute Persons Act 1894 being one example. See discussion at 13 and following below.

[25] Section 16(1) Destitute persons Act 1894.

[26] Section 33 Destitute Persons Act 1894.

[27] Bayvel, above n 12 at 83.

maintenance orders and they were mainly unskilled labourers.[28] The few women charged were unskilled too. The low figures for women reflected the reality that women had limited employment opportunities and were generally unable to support family members.

There was a strong moral undertone to the exercise of the magistrate's discretion. Women had to have a good reason to leave their husbands. Likewise, they might not get maintenance if the magistrate thought there was a reasonable ground for the husband's desertion or refusal to maintain.[29] Bayvel notes that a complainant's morality and good conduct were often questioned before maintenance was granted. If they had contravened expected marital behaviour, maintenance was denied. Drink was another reason for refusing it.[30]

IV. Charitable Aid

Bayvel's research also shows that themes of self reliance and morality are evident in the administration of charitable aid.[31] As the government was reluctant to intervene, charities stepped in when relatives were unable to support destitute relatives or when husbands failed to maintain their wives. It was the main source of relief for people fallen on hard times, generally deserted wives and children, but even aid boards would first see if a relative could be pursued before helping.[32]

The system of charitable aid was administered by charitable aid boards and help would be given to those who could prove they were destitute. Records show that women were generally provided with relief as an alternative to an absent or improvident male provider.[33] The records also reflect the prevailing attitudes of the day in relation to gender and work.

[28] Ibid at 50. (These are Dunedin statistics).

[29] Section 19 Destitute Persons Act 1894.

[30] Bayvel, above n 12 at 18.

[31] Tennant, *Fabric of Welfare* above n 2 at 25-28. See also M Tennant *Paupers and Providers* above n 2 for a general overview.

[32] Bayvel, above n 12 at 3.

[33] M Horan "The In-dependent women? Women, Work and Charitable Aid in Otago, 1895 to 1905: A Long Essay submitted in partial fulfillment for the degree of B.A. (Hons.) University of Otago, 1997) at 29.

Men were classified by work status: "*unable to work*" and "*old and past work.*"[34] Women, in contrast, were classified by relationship to a male provider: "*widow*" or "*deserted.*"[35] Widowhood, desertion and having illegitimate children were the main causes of poverty for women.[36]

The objective of aid was to protect destitute women from the vices caused by poverty.[37] A moral undertone was also evident in the attitude to those who were not seen as willing to strive for independence, the concept of the deserving poor very much at play. Aid would be stopped, or the recipient reprimanded, if they had not applied for suitable work or they would be censured if not working enough.[38] Men more than women were pushed towards independence and tested to ensure they were not "*work shy.*"[39] The attitude towards the poor was reflected, albeit in an extreme way, by the Inspector of the Hospital and Charitable Aid system who described the poor as a "*vicious class*" of "*low parasitical organisms.*"[40] For such reasons, the overriding concern was preventing pauperism from becoming established. It could lead to social disorder and vice.[41]

In summary, the family and charitable aid boards were the main source of help for those in financial trouble. The government did not have a large role to play in people's private lives. Financially it did not wish to assume the burden. Philosophically it did not wish to encourage pauperism as government assistance could be seen as a threat to individual initiative. Over the course of the 19th century several State measures were passed to help

[34] Ibid, at 30.

[35] Ibid, at 30.

[36] Ibid, at 30. She also notes, at 31, tension in the records between the theory of female dependence with the reality of women needing to become more self sufficient to avoid ongoing dependence. Aid boards expected women to get work if they were fit and if they had no brood of young children to look after. So, the theory did not always gel with the economic reality and the limited nature of funds at the aid board's disposal.

[37] Ibid, at 32.

[38] Ibid, at 31-34.

[39] Ibid, at 34.

[40] Ibid, at 38.

[41] Bayvel, above n 12 at 7.

relieve poverty as it became apparent that charities could not cope alone but with all these measures the common theme was to seek a contribution from family, where possible.[42]

Women were more economically vulnerable than men. As the next section shows, their economic vulnerability - caused largely by fewer employment opportunities and desertion - was aggravated by their legal disabilities. Women were often entirely at the mercy of their husbands when it came to money and property and therefore the means of a livelihood.

V. Women in 19th Century New Zealand

As noted above, a woman's main role in 19th century New Zealand was as a wife and mother.[43] Men were the breadwinners and this was reflected in the concept of a breadwinning wage, which was enough to support a wife and children.[44] Women's official status was that of a dependant and electoral roles, census, street directories and marriage registers all defined them as such.[45] Because of their role, women's work opportunities outside the home were limited.[46] Employment opportunities were geared towards men and education was directed towards men becoming qualified for higher paid work. The 1877 Education Act provided equal access to schooling but it was a different and gendered education.[47] Girls were encouraged to pursue their natural interests in being wives and mothers through domestic pursuits. A curriculum that contradicted their natural

[42] Ibid, at 15 citing the Neglected and Criminal Children Act 1867 (which established industrial schools, run by government, in which destitute, neglected and criminal children could be committed. Where possible, government required parents to pay for their maintenance) and The Industrial Schools Act 1882 (whereby the government sought contributions from putative fathers towards the child's maintenance).

[43] See also B Bradbury, above n 11 at 41 citing R Dalziel "The Colonial Helpmeet: Women's Role and the Vote in Nineteenth Century New Zealand" (1977)11 NZ Journal of History 2.

[44] M Horan, above n 32 at 19.

[45] Ibid, at 19.

[46] For example, the Factories Act 1891 reflected cultural perceptions of "fit work for women" and when in their lifecycle they should work. The Employment of Females Act 1875 limited the hours and days women could work, both examples cited by Horan, Ibid, at 20.

[47] 1877 Education Act. Section 84 sets out the subjects to be taught and notes that for girls these include "*sewing and needlework, and the principles of domestic economy.*"

propensities was "*disruptive to harmonious social relations*."[48] Boys were encouraged in agriculture or academic subjects to fulfill their natural role as breadwinners, family protectors and leaders.[49] Further, while education was available to all primary school children fewer girls than boys went and they were taken out earlier.[50] Too much education was seen as mentally harmful to women.[51]

The cultural mores of the time expressed a preference for women not to work unless it was a stop gap before marriage. This was reinforced by medical opinion which held that there was a physiological impediment to women doing too much work. This concern was present in submissions made to two Commissions set up 1878 and 1889 to look at the issue of sweating.[52] The sentiment is summed up in the following passage:[53]

> *The medical testimony shows that a great physiological law is violated when women and children are overworked (and this law of nature will never be repealed) and that it is physically impossible for a woman (or child) to work even in the best regulated factories the same number of hours as men without seriously injuring her constitution.*

Women's lack of earning power made them economically vulnerable. Women's property rights, or lack thereof, caused economic vulnerability too. Their classification as dependants flowed through to their legal status; they had few ways in which to control and own property. Upon marriage they lost their legal identity as a result of the principle of matrimonial unity.[54]

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[48] L Allen "Girls Then, Boys now?" in E Rata and R Sullivan (eds) *Introduction to the History of New Zealand Education* (Pearson, Auckland, 2009) at 121.

[49] Ibid, at 121.

[50] E Olssen and M Stenson *A Century of Change: New Zealand 1800-1900* (Longman Paul, Auckland, 1989) at 366.

[51] Ibid, at 377.

[52] Sweating is the practice of people working very long hours for very little wages.

[53] JBB Bradshaw "Introduction" to Major Sir John LC Richardson's *Employment of Females and Children in Factories and Workshops: A Paper"* (Dunedin, 1891) cited by Horan, above n 33 at 23.

[54] See B Bradbury, above n 11. See also R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD Thesis, University New South Wales, 1993) at 43-54 (hereafter R Atherton "Thesis"). Briggs notes that in colonial New Zealand

A. Unitary Principle

The principle of matrimonial unity had two consequences. First, on marriage the two spouses became one person for legal purposes. Second, the husband constituted the controlling mind and representative of that person.[55] As a consequence the husband had the power to manage all the family property and his wife's property. He retained title to property he brought into the marriage and also gained rights over his wife's. She no longer existed as a legal or economic being, changing from a feme sole - who could act autonomously in the courts and economically - to a feme covert - a woman under the "cover" of her husband.[56]

The unitary system drew a distinction between personal and real property. Upon marriage, a husband acquired all the chattels owned by his wife including those she acquired during marriage. If she survived him she retained title to "paraphernalia" - clothing and jewellery, (exclusive of ancient family jewels which the husband took). The husband could sell such paraphernalia whether it had been hers or given to her during marriage but he could not bequeath it in his will. If he died first, it reverted to her. The husband had absolute title to the rest of her personal property, including money. Title to realty remained with the wife but the husband had management and control of it during the marriage and received any income it generated. She could only deal with the property if she got his consent and submitted to court proceedings to ensure that her disposition was voluntary and not engineered by a dominant husband.[57]

A woman was therefore very much dependent on her husband for economic security. If the husband drank away the money, failed in business matters, went bankrupt or deserted the family, she was faced with economic hardship.[58] One woman of the time described her

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Maori women could temper the harshness of married women's coverture by avoiding entanglement with European men: M Briggs "Historical Analysis" in N Peart, M Briggs, M Henaghan (eds) *Relationship Property on Death* (Thomson, Brookers, Wellington 2004) 1 at 6.

[55] R Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Lexis Nexis) at [1.4].

[56] Hence the concept of coverture: See M Briggs "Historical Analysis" above, n 54 at 2-3. It is also discussed in Bradbury, above n 11 at 42.

[57] R Fisher (ed), above n 55 at [1.4]; Bradbury, above n 11 at 42- 43 and M Briggs, above n 54 at 2-3.

[58] See Bradbury, above n 11 at 44.

husband as a "*thoroughly unbusiness like, unenergetic man*" who spent all the money in "*profitless, and even ruinous speculations.*" She lamented that it was she who earned the money but it was he who had "*all the breadwinner's power and privileges*."[59] It is not surprising then that marriage in the 19th century has been described as a civil death for women.[60]

B. Protections

1. Marriage Settlements

Equity provided some protection for women.[61] For the wealthy, those with property to put aside, protections could be provided by the doctrine of a separate equitable estate whereby property was placed in trust for a wife and put outside her husband's control.[62] Settlements commonly included provision for pin-money to the wife and the compulsory settlement on trust of all property she acquired during the marriage. The result of such a settlement was that equity treated such money or property as the wife's separate property.[63]

2. Maintenance

At common law a wife was entitled to be maintained by her husband. The duty to support stemmed from the husband's ownership of his wife's labour and the doctrine of matrimonial unity. Commentary states that the level of such maintenance was dependent on her husband's "*degree, estate or circumstances.*"[64] Issues often arose, however, if a

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[59] Bradbury, above n 11 at 44, citing J Malone "Mary Colclough" in MacDonald (ed) *The Book of New Zealand Women* (Bridget Williams Books, Wellington, 1991**)** at 143.

[60] See Bradbury, above n 11. The title of her article refers to this and she also notes at 1 that marriage in 19th century initiated what jurists referred to as a civil death.

[61] See Fisher, above n 55 at [1.6] for a summary of equitable relief available to married women. See also Bradbury, above n 11 at 46-47 re marriage settlements.

[62] Fisher, above n 55 at [1.6]. Bradbury, above n 11 at 47 notes they were in existence citing references to them in cases, legislation, parliamentary debates and biographies. However, she also points to some evidence that they occurred in just 1 out of 50 marriages.

[63] Fisher, above n 55 at [1.6]. Pin-money was the annual allowance which an intended husband commonly settled upon his intended wife to enable her to purchase clothes, ornaments and other personal requirements during the marriage.

[64] Fisher, above n 55 at [1.5]: "*A husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink, clothes, physic, etcetera suitable to the husband's degree, estate or circumstances*": Bacon's Abridgement, cited by Lord Merrivale in *Dewe v Dewe* [1928] P 113 at 119, 120 and noted in Fisher at [1.5].

husband deserted and failed to pay maintenance. The Destitute Persons legislation from 1846 onwards provided some protection in that a wife could seek an order for maintenance but the law did not stop the husband returning and claiming everything she had earned in the meantime. Any such money or property was also available to his creditors.

3. Dower

In the early part of the 19th century a widow still had dower rights upon her husband's death.[65] As noted above, during coverture a woman was unable to acquire any property of her own. Thus, the husband's real estate was "*the only plank she can lay hold of, to prevent her sinking under her distress.*"[66]

For women, dower was a life interest in a third of her husband's real property.[67] The right attached to all land owned by the husband at any time during the marriage, whether owned at the date of death or not. As a result, a purchaser of such land could later find that the property was subject to dower. Dower rights were therefore a restriction on the dealing of property and it was this that led to its eventual abolition.[68] In 1829 a Royal Commission described it as "*an injury to proprietors and purchasers*" and recommended that power to sell real estate should be freed from the burden of dower provided this was expressed or implied in the husband's will.[69] These recommendations were implemented in the Dower Act 1833(UK) and as a result the right of dower was limited in its operation to the interest of an heir on intestacy.[70] Dower no longer took priority over the husband's will. In practical terms this was the end of dower as a husband could stipulate that he did not want

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[65] See Fisher, above n 55 at [1.5] and Briggs, above n 54 at 3-6. .

[66] Briggs, above n 54 at 4, footnote 21 citing Sir Joseph Jekyll, quoted in Cruise 1824;I 162-163.

[67] When a wife died before her husband, he got an entitlement - called tenancy by curtesy - to all his wife's property. His entitlement, however, depended on him having fathered at least one living child by the woman concerned. Her entitlement was independent of any children but she had to be of child bearing age. Dower could be forfeited for bad behaviour. See Fisher, above n 55 at [1.5], Briggs, above n 54 at 3-6.

[68] Briggs, above n 54 at 5.

[69] Real Property Commission, First Report 1829, 18 cited in Briggs, above n 54 at 5.

[70] Briggs, above n 54 at 5. For a discussion of dower and its application in New South Wales, see R Atherton "Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales (1988) 11 UNSW Law Jnl 133, 148-154 and R Atherton, Thesis, above n 51 at 110-121.

real estate transactions to be disrupted on death and because intestacy was uncommon amongst the wealthy.[71] Dower rights were abolished in New Zealand by the Real Estate Descent Act 1874.

In summary, women in 19th century New Zealand were very much dependent on their husbands. Wealthier couples could make marriage settlements in equity, and maintenance obligations may have provided some relief, but until 1860 there was little protection for those other than the wealthy. Protections came in the way of legislation which, bit by bit, chipped away at the common law disabilities noted above.[72]

C. Legislative Measures in the 19th Century

Between 1860 and 1884 New Zealand passed a number of Acts which removed some of the legal disabilities faced by married women. The Married Women's Property Protection Act 1860 was designed to protect wives deserted by their husbands. It allowed them to apply for a court order to protect their property when their husband deserted and it gave them the right to dispose of such property by will.[73] The Married Women's Property Protection Act 1870 extended the reasons for which a wife could apply to the court for an order to protect her earnings or property from her husband. It also made provision for maintenance and allowed a magistrate to order exclusive custody of children to the mother.[74]

The Divorce and Matrimonial Causes Act 1867 allowed divorce through the courts rather than Parliament. From the date of divorce a wife became a single woman - a feme sole - in relation to property she acquired or inherited from the date of the decree.[75] Under the Life

[71] Briggs, above n 51 at 5.

[72] For a general overview see Bradbury, above n 11.

[73] Married Women's Property Protection Act 1860 (24 Vict.1860 No 9).

[74] Married Women's Property Protection Act 1870 (33 and 34 Vict.1870 No 37) .The Act extended to women whose husbands drank, beat them, committed adultery or failed to provide: Section 2.

[75] The Divorce and Matrimonial Causes Act 1867 (31 Vict. 1867 No 94).

Assurance Companies Act 1873 women could take out, and have power over, their own life insurance policies.[76]

Most significant of the measures was the Married Women's Property Act 1884.[77] It created a system of separate property whereby a married woman could own property in the same manner as a single woman. It was a radical change as it meant that in relation to separate property she became a legal entity in her own right. (Nothing would have changed, however, for those women without property or income to protect). A further measure of economic protection came with the Family Homes Protection Act 1895.[78] Under this Act, modest family homes could be settled upon the settlor's family by registration in the appropriate Land Registry and thereby became protected against creditors, before and after the settlor's death.[79]

This raft of Acts provided a measure of financial protection for married women. What were the reasons for these changes? Perhaps some of it stemmed from a concern that these women would turn to the State or limited charitable resources if left economically vulnerable. There was also a concern that destitute women would turn to vice. Measures had to be taken to prevent this. The role of the women's movement was also instrumental in bringing about change.[80] But what about a woman's rights on her husband's death? Until the Testator's Family Maintenance Act 1900 a husband had complete testamentary freedom and could leave everything away from his wife and children.[81] The abolition of dower left the wife vulnerable. If she had no property of her own she was even more vulnerable.

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[76] The Life Assurances Companies Act 1873 (37 Vict. 1873 No 18).

[77] The Married Women's Property Act 1884 (48 Vict. 1884 No 10).

[78] The Family Homes Protection Act 1895 (59 Vict. 1895 No 20).

[79] Homes up to the value of 1500 pounds could be registered: Section 3, Family Homes Protection Act 1895.

[80] Bradbury, above n 11 notes, at 54, that married women's property rights were the major feminist issue of the 19th century.

[81] See R Atherton "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, The Women's Movement and Political Compromise" (1990) 7 OLR 202 at 203. Atherton notes that the freedom was only restricted by formal requirements as to the making of wills and any supervening rules of law such as the rule against perpetuities: Ibid, 203 at footnote 9.

VI. Testamentary Freedom

Testamentary freedom is the unrestricted right to dispose of property on death. It was not always a cornerstone of English law and its reign was actually quite short.[82] In the 18th and 19th centuries however - the golden age of individualism[83] - Englishmen had unbridled testamentary freedom[84] and it is this law which New Zealand inherited when it became a British colony in 1840.[85] The unrestricted right to dispose of property on death was seen as a natural incident of property ownership. It was part of a broader laissez-faire philosophy emphasising liberalism and individualism, espoused by writers such as Locke and Blackstone.[86] It is encapsulated in the following passage:[87]

> *[E]veryone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we condemn the course he has pursued. In this respect the law of England differs from that of other countries. It is thought better to risk the chance of an abuse of the power arising from such liberty than to deprive men of the right to make such a selection as their knowledge of the characters, of the past history, and future prospects of their children or other relatives may demand.*

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[82] RD Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984) at 5.

[83] See S Grattan "Of Lame Ducks, Black Sheep and Family Bonding" (2000) 51 N Ir Legal Q 198 at 202-203. For a general discussion of testamentary freedom and the philosophical context underpinning it, see R Atherton, "Thesis", above n 54 at 9-20 and 34-72 and R Atherton *Victorian Attorney-General's Law Reform Advisory Council, Expert Report 1, Family Provision* (Melbourne 1997) Chapter Two.

[84] *Schaefer v Schuhmann* [1972] AC 572 at 595 per Lord Simon of Glaisdale, describing this period as "*an interval of unbridled testamentary licence*".

[85] New Zealand was a ceded colony and as such, English law did not apply automatically. The English Laws Act 1858 affirmed the reception of English law retrospectively to 1840.

[86] See references in n 83 above for discussion of their writings.

[87] *Boughton v Knight* (1873) LR 3 P& D 64 per Sir Henry J Hannen.

There was an acknowledgement that some men could abuse the power but on the whole it was thought a better system than one which regulated property disposition on death by providing fixed shares to family members:[88]

> *[T]he instincts, affections, and common sentiments of mankind may be surely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rule of a general law.*

Testamentary freedom, however, operated in a system where it was considered natural and right to leave provision for family:[89]

> *The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed… Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers.*

Failure to act in accordance with these affections would be to "*shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law*."[90] But what could someone do if these obligations were violated? In New Zealand, until 1900, the answer was nothing.[91] It was the potential for men to abuse their testamentary freedom, and women's resulting vulnerability, which placed the issue on the legislative table. It is the women's movement that has been credited for bringing the issue

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[88] *Banks v Goodfellow* (1870) 5 LR QB 549 at 564.

[89] *Banks v Goodfellow* (1870) LR 5 QB 549,563 per Cockburn CJ. The same point has been made as follows: "*Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty, and the domestic affections, afford a surer pledge among the virtuous than positive institutions."* JJ Park *A Treatise on the Law of Dower* (1819) 3 cited in R Atherton "Expectation Without Right" above n 70 at 67 at 133.

[90] *Banks v Goodfellow*, Ibid.

[91] A person could challenge a will based on the testator's lack of testamentary capacity or undue influence but such challenges were not straightforward. See the discussion in R Atherton "Expectation Without Right", above n 70 at 136-148.

to prominence.[92] It came under the spotlight once other important women's issues had been addressed, a minor hurdle once the major hurdles had been jumped.[93]

Why it happened in New Zealand first is unclear. Some have suggested that abuses were more likely because New Zealand had "*no remnants of an antique reverence for family rights, and gave a testator freedom to leave his property as he pleased. This freedom is most likely to lead to hardship when the parties to a marriage cannot afford the expense of a marriage settlement*."[94] It has also been attributed to the new found opportunities for men to make a fortune:[95]

> *There is no doubt, in a new country especially, men who become suddenly rich… nothing to-day and everything to-morrow - are too apt to become unduly inflated with their own importance. They say to themselves, 'We have made the money, and we have a right to do what we please with it, and no-one has a right to say nay.'*

Another significant factor is the role of the women's movement and its ability to bring the issue to prominence.[96] But there also had to be a change in the political climate for such a measure to be accepted. The legislation providing women with some measure of property protection would have paved the way but that legislation only dealt with their separate property. In contrast the Testator's Family Maintenance Act allowed the court to deal with the testator's property. A political climate in which the State was reluctant to provide any

[92] The role of the women's movement is discussed in R Atherton "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, The Women's Movement and Political Compromise" (1990) 7 OLR 202.

[93] Those greater hurdles were seen as the 1884 Married Women's Property Protection Act and the gaining of the suffrage in 1893. (The Electoral Act 1893 (57 Vict. 1893, No.18) gave woman the right to vote).

[94] J Mackintosh "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 J Comp Legis & Int'l L 3d ser 13 at 13.

[95] Scotland, during the second reading of The Testator's Family Maintenance Bill. 1900 NZPD vol 113,col 617.

[96] See R Atherton "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, The Women's Movement and Political Compromise" (1990) 7 OLR 202.

measure of support to destitute people and which was premised on individualism and free will would seem a major stumbling block.[97]

What changed was a shift to a new liberalism which accepted that the State could intervene to curtail individual action. It occurred in the wake of the industrial revolution and was occasioned by the need to protect weaker members of society: "*The new liberal aim was to establish an ethical framework to prescribe and evaluate human behaviours and, where necessary, to recreate social institutions.*"[98]

The New Zealand Liberal Government of the 1890s appeared to reflect this new liberal aim; its members represented a range of opinions much wider than strict classical liberalism.[99] Its exact ideological classification is open to debate but the evidence shows that during its term there was significant government expansion in the social and economic affairs of the country.[100] As Belgrave notes, the Liberal Government of the 1890s signalled its intention to protect individuals from a free market economy and introduced a raft of measures and legislation to this end.[101] Duncan argues the Liberals were motivated by the principle of equality, of securing equal opportunity for all to get on and do well according to their own ability. The State was the necessary vehicle to achieve this. Others say that the Liberals saw the State as the embodiment of the people and there was therefore no need

[97]G Duncan, above n 1 at 67. (Chapter Three of the same text discusses the philosophy of liberalism generally). The climate is illustrated by an event just a few years earlier. In 1882, MP Sir Henry Atkinson raised the idea of a national insurance scheme against old age, sickness, widowhood and orphan hood - to be funded, in part, by Government. It was seen as a threat to individual initiative and "*greeted with laughter":* Duncan, at 69. This theme is also explored by R Atherton, Ibid.

[98] R Atherton, above n 96 at 205 citing M Freeden *The New Liberalism: An Ideology of Social Reform* (Oxford 1978) at 40. See also the discussion in R Atherton, "Thesis", above n 54 at 131-132.

[99] Duncan, above n 1 at 70.

[100] Duncan, above n 1 at 70. Bassett, above n 2 at 10-12 summarises the various views as to why New Zealand had a passion for "State activity".

[101]Belgrave, above n 2 at 28 gives the following as examples: the introduction of measures to protect infants, to regulate the adulteration of foods, to control quack healers amongst Maori and to regulate some drugs. Nurses and midwives achieved regulation and workers' compensation was introduced. A superannuation scheme for public employees was established as was a progressive and generous land settlement policy. Examples of legislation include The Old Age Pension Act 1898, The Industrial Conciliation and Arbitration Act 1894, The Factories Act 1891 and Workers' Compensation Act 1900. For further examples see H Mason "One Hundred Years of Legislative Development in New Zealand" (1941) 23 J of Comp Legis & Int'l L 3d ser, 1.

to justify intervention, regarding it as a "*distinctively New Zealand way of dealing with social problems.*"[102] Whatever the motivation or justification, there was a marked shift in approach compared to what came before.

Testamentary freedom, part of the "*extravagance of individualism,*" had to be targeted too.[103] Complete testamentary freedom was no longer tolerable in this climate: it was "*untenable with the recognition that private property is also a function of society and should not be employed to the detriment of its interests.*"[104]

VII. The Parliamentary Debates

A. Overview

To modern eyes the idea of a discretionary restraint on testamentary freedom may not seem radical. At the time it was and the idea of any inroads into it was an anathema to many. The prevailing attitude is reflected in a statement by Lord Reid in 1882 where, favouring a restrictive interpretation of an Act, he held it was "*inconceivable*" that a Parliament of that period should have put the whole of a man's capital at the discretion of a judge.[105] Accordingly, despite the shifts in the political climate, it is not surprising that it took several attempts to get the legislation passed.[106] Concerns about morality, the deserving poor, self reliance and a man's property rights were still very much to the fore, alongside

[102] M Bassett, above n 2 at 11 citing D Hamer *The New Zealand Liberals: The Years of Power 1891-1912* (Auckland, 1998) at 45.

[103] Robson describes the climate thus in JL Robson *The British Commonwealth: The Development of its Laws and Constitution* (2nd ed, Stevens & Sons, London, 1967) at 472. Perhaps it could also be suggested that the introduction of measures to assist the poor and the introduction of the Old Age Pensions Act may have made a testator more likely to leave property away from his family and so rather than being part of the same legislative package, the Act could also be seen as a response to it.

[104] J Gold, J L Robson, O Kahn-Freund, W Breslauer, "Freedom of Testation: The (Inheritance) Family Provisions Bill" (1938) Mod Law Rev, 296 at 296, commenting on equivalent legislation in Britain but equally applicable to New Zealand.

[105] Cited in S Cretney "Discretion or Whim, Freedom of Choice or Caprice?" (1986) 6 OJLS 299.

[106] The idea was first raised during a parliamentary debate in 1895 in a question to the Minister of Justice from Mr JW Kelly. He asked whether consideration could be given to a measure which would prevent a widow being left destitute and suggested a portion of one third of the estate. He was "induced" to put the question on the order paper through a case of very great hardship in Invercargill. The Minister - Reeves - said such a matter would have to be very carefully considered, impacting as it would on testamentary freedom and the suggestion was made on too short notice to take it further: 1895 NZPD vol 87, col 587.

the concerns about women's economic vulnerability. It was a matter of which concerns should be given greatest weight and whether a compromise could be reached.[107]

B. Stout's Attempts

The first attempt was Sir Robert Stout's Limitation on Power of Disposition Bill in 1896.[108] It was introduced, and seconded, on the basis that a man should not be able to leave a wife and children without means.[109] In introducing the Bill Stout pointed out that complete testamentary freedom existed only in England, the United States, Canada and other colonies whereas Scotland, and many other continental countries, had limitations on the power of disposition.[110] This suggested it was not the norm and not something that should be retained. It was an area where England and the colonies were lagging behind, out of step with what was right. Stout's Bill followed the Scottish law and proposed that if a testator had a wife and children, he had to leave a third to each. The remaining third – the dead man's part - he could do with as he pleased.[111]

While the Bill applied to a testatrix as well, the speeches emphasised the potential for men to abuse their testamentary freedom, reflecting the economic reality of the time that it was men who were the main breadwinners and who had legal ownership of the assets. Seddon echoed Stout's sentiments, describing the law as defective when it permitted a husband to will away his property from the wife "*who had assisted him building it up*" as well as leaving the wife and children without means of a livelihood and "*practically cast upon the world*" without means.[112] While acknowledging it may be an interference with testamentary freedom, his response was consistent with the new liberalism; such interference was justified as it was Parliament's role to prevent injustice.[113] Another MP

[107] The Debates can be found at NZPD 1896, vol 92; 1897, vol 97; 1898, vol 102; 1898, vol 103; 1900, vol 111; 1900, vol 113.

[108] 1896 NZPD vol 92, col 585.

[109] Stout, 1896 NZPD vol 92, col 585-586, seconded by Seddon, 1896 NZPD vol 92, col 586.

[110] Stout, Ibid.

[111] Ibid.

[112] Seddon, 1896 NZPD vol 92, col 586.

[113] Ibid.

agreed, stating that the Bill was founded on "*the soundest principles of righteousness and justice*" and a man had no right to leave his property away from family, leaving them in a state of destitution.[114] This MP also thought it appropriate that a man's obligations on death were brought into line with those while alive so that he could not "*cast his blood relations upon the charity of the country*."[115]

The first attempt failed and Stout tried again in 1897.[116] The second attempt also proposed forced shares but the dead man's part was increased to half. The same statements in support were made. Stout stated: "*It was the maintenance of the family which was surely the groundwork of our present society.*"[117] Willing everything away from the family was considered contrary to ideas of family responsibility and Stout also pointed out that the family's right to a share of the estate was already recognised by the laws of intestacy.[118] A man's first duty was to provide for his family and if he failed to do so the State must compel him.[119]

Stout gave two examples to support his position, one in which children were left penniless and another where a wife transferred property to her husband to help him out of financial difficulties and he died and left her nothing.[120] Based on his speeches in the House, Stout saw the measure as directed primarily at financial hardship, referring to cases of hardship throughout the colony and citing the example of a crippled child unable to earn a living but cut off without a shilling.[121] But there was also another apparent purpose and that was the idea of property rights for women, of women getting a fair share of the estate. He

[114] Lawry, NZPD 1896 vol 92, col 586.

[115] Lawry, Ibid at col 586. Consistency with inter vivos support obligations was also referred to by Hogg, Ibid at col 548.

[116] Limitation of the Powers of Disposition by Will Bill, 1897 NZPD vol 97, col 546.

[117] Stout, 1897 NZPD vol 98, col 550.

[118] Ibid, at 549-550. The intestacy provisions of the Administration Act left children two thirds of the estate irrespective of destitution: Section 10 Administration Act 1878 (42 Vict. 1878, No.49).

[119] Meredith, Ibid at 549, also referring to cases of hardship.

[120] Stout, 1897 NZPD vol 98, col 546.

[121] Ibid at col 546.

considered it "*entirely unfair for a man to will away the whole of his property from his family, perhaps where there were young children, and from his wife, who may have contributed as much as he to its acquirement.*"[122]

Despite the increase of the dead man's part, this Bill also failed to gain support. The idea of forced heirship was too much for the parliamentarians to take. The objections, however, were not as to the mischief to be remedied but directed at the consequences of forced heirship. Most agreed that a man should provide in some way for his wife and children and that family should be the first consideration.[123] The main criticism was that it would catch many cases where there was no destitution and money was not an issue, one member citing the possibility that the child could be middle aged and better off than its parents.[124] It may also mean a child "double dipped", receiving inter vivos provision only to receive more on death.[125]

There were also some objections unrelated to the economic position of the beneficiary. Some MPs were concerned it would be a disincentive to industry and cause sons to become idle.[126] For these objectors, the law should not interfere with a testator's disposal in accordance with his "*natural instincts*."[127] A yet more worrying possibility was that it could make a man diffident about marrying; there was a possibility he would marry a penniless woman, die twelve months later, only for her to take one third of the estate, re-marry a "*money hungry scoundrel*" and then have her second husband run off with it all and return her to her original penniless state. This could make men "*exceedingly diffident*" about marrying![128] Others voiced a concern that providing for the family in this way may

[122] Stout, 1897 NZPD vol 98, col 546.

[123] For example, Mackenzie, 1896 NZPD vol 92, col 586; Lawry, Ibid at 586; Lawry, 1897 NZPD Vol 98, col 548; Montgomery, 1897 NZPD Vol 98, col 547.

[124] McLean, 1897 NZPD vol 98, col 549. See also MacKenzie, 1896 NZPD vol 92, col 587 who agreed with the general principle but opposed a fixed share as a wife may already have ample income.

[125] Montgomery 1897 NZPD vol 98, col 547.

[126] Mackenzie 1896 NZPD vol, col 586-587.

[127] McLean, 1897 NZPD vol 97, col 549.

[128] MacKenzie 1896 NZPD vol 92, cols 586-587.

actually lead to money leaving the family. A wife may die and the money go to the second family, rather than back to the family that created it.[129] So there was a dynastic concern but not in a primary sense - ie dynastic concerns were raised not in support of the idea but as an objection to it.

The overriding point that encapsulates all the above objections was that the measure failed to take account of the individual circumstances of each family, of the economic position of the claimant and of whether or not they were deserving. The "one size fits all" approach had the potential to produce too many unjust outcomes. The concern about irresponsible or callous testators did not go away but what was needed was something that made any restrictions on testamentary freedom more palatable.

C. McNab's Bills

Robert McNab's first attempt was in 1898 and was called the Testator's Family Provision Out of Estate Bill.[130] The changed title itself addressed the concern raised in the Stout debates. It was not worded as a restriction on testamentary freedom; its focus was more positive. It was not taking anything away from a testator; instead, it was giving something to families. McNab pointed out these differences in introducing the Bill.[131] His Bill provided the court with a discretion to award children, widows and widowers provision out of the estate if they had insufficient for their maintenance and support and if the court was satisfied as to the merits of the claim.[132] But what exactly it intended to give to families is not clear from some of the speeches. Those who supported the Bill did so on the basis that it would remove the anomaly that a testator had support obligations while alive but not at his death.[133] But the reference to life time obligations, and achieving symmetry with them, could mean two things: consistency with obligations in the Destitute Persons Act 1894 or

[129] Russell NZPD 1897 vol 98, col 546.

[130] McNab, 1898 NZPD vol 102, col 418.

[131] Ibid.

[132] Ibid.

[133] For example, Hogg, 1898 NZPD vol 102, col 422-423 considered the gap between inter vivos obligations and those on death as a "*flagrant anomaly*"; Stewart, col 425; Lawry, col 420; Meredith, col 427; Kelly col 423.

consistency with maintenance obligations generally which were tied to the husband's means - the station in life approach. The debates are often unclear on exactly what the MPs had in mind.

Given the colourful language of some of the speeches the Bill, at first glance, appeared to be a measure that would satisfy the lowest common denominator, a discretionary jurisdiction in cases of destitution or hardship. There are several references to cases of destitution, notorious cases of dire distress and hardship, of wives and children being cast upon a cold hard world. Several of the speeches supported the Bill on the basis that it was wrong to leave a family destitute and at the mercy of the charitable aid boards.[134]

However, when introducing the Bill, McNab went further than the Destitute Persons Act and referred, expressly, to "comparative destitution", to the testator not leaving his family enough to live in the station in which they had lived.[135] In this, he had support from others.[136] The position of other MPs is harder to determine. Lawry, for example, appeared to support McNab's "comparative destitution" position but then went on to refer to wives and children in "dire distress".[137] Monk supported it on the basis it was often a sin to leave property away from the family but then went on to refer to families thrown on the charitable aid boards.[138] Hogg talks of destitution but then refers to a man's natural obligation to family and also the entitlement of wives who had helped build up the estate - "*The grey mare was the better horse*". He considered wives should be protected against an

[134] Meredith NZPD 1898 vol 103; col 427; Monk, col 421; Symes, col 421; Kelly, col 423; Massey, col 426 and Hutcheson, col 424 who supported it on the basis that it would save the State from the burden of maintenance and reduce the charge on charitable aid boards;

[135] McNab, 1898 NZPD vol 102, col 418.

[136] Seddon, Ibid at col 419; Sligo at col 426 and Hogg at col 423. There was also mention of a station in life approach in the Stout debates. Russell 1897 NZPD Vol 98, col 546 favoured a provision "*that compels man to bequeath to his wife and family his property so they are kept in the position of life they had been brought up in."* Mackenzie, 1896 NZPD vol 97, col 586 considered a widow should be left "*ample income"*.

[137] Lawry, 1898 NZPD, vol 102, col 419-420.

[138] Monk, Ibid, col 421.

"*unnatural disposition*" and that "*The property should be used for those in whose interests it was used while alive*."[139]

Some comments were more neutrally phrased, McLean simply noting that a good deal could be said about people who left property away from family contrary to "*human instincts*".[140] Others noted the anomaly between life and death obligations and said they would support the Bill as long as it did not mean those already comfortable could claim.[141] In his speech, Sligo noted that some MPs seemed to suggest the Bill was aimed at bare maintenance but he understood McNab's opening speech to mean that "fit" meant "proper" and therefore more than bare maintenance.[142] (At this stage, the Bill did not contain the word "proper"). In contrast, Hutcheson thought it was like other measures designed to reduce the burden on the State and the charge on the charitable aid boards; it was about food and clothing and surely there was a "*technical limitation to the words*".[143]

Some objectors agreed there would be a few extreme cases where the measure would work justice and it was laudable but wanted safeguards so "bad" children could not mount a successful claim. Again the misgivings were largely of the same type, the main argument being that the testator knew what was best and the court might not take into account the fact that a son was idle or a degenerate. It might also be in the child's interests to be left nothing as money could be "*wasted and used in a dissolute life, and…only conduce to the death or insanity of the recipient.*"[144] This concern was echoed by others.[145] There needed to be a mechanism to prevent claims by "*wasters*", those who "*couldn't keep a pound in*

[139] Hogg, Ibid, col 422-423. O'Meara also thought the wife should participate in the estate if she had assisted him building it up, Ibid, col 427.

[140] McLean, Ibid, col 422.

[141] Steward, Ibid, col 425.

[142] Sligo, Ibid, col 426.

[143] Hutcheson, Ibid, col 424.

[144] Monk 1898 NZPD vol 102, col 420-421.

[145] McLean, Ibid col 422; Crowther, Ibid, col 424, who considered that the Bill was clearly drafted by bachelors with no understanding of family life; Massey, Ibid, col 426.

their pocket for twenty four hours."[146] Other objections were that it would create work for lawyers and that costs would gobble up the estate.[147]

McNab agreed to add a disentitling clause at committee stage to allay the concerns of those who feared a "ne'er do well" could make a claim.[148] He himself displayed a more sympathetic disposition, commenting that such a son would, if he could, make a living and asked why the son was dissolute in the first place. He thought the estate should provide enough to "*keep body and soul together and for him not to be a burden on the State*."[149] But he compromised, seemingly exasperated by the end of the first debate. He also emphasised that the Bill was aimed at maintenance and support and "*nothing more*"; it was not about a fair share of the estate.[150] A person, for example, could not claim more just because they got less than other family members. Likewise, if there was adequate protection already - for example under the Family Homes Protection Act 1895 - then the Act would not apply.[151]

The Bill got to Committee stage but did not pass.[152] However, it is worth noting the changes made in Committee as they are relevant later on when assessing the judicial approach to the Act's interpretation. Clause 2 of the Testator's Family Provision out of Estate Bill (in committee) asked whether the testator had made "due" provision. Reference to "due" was deleted and replaced with "sufficient" and a clause was also added allowing the court to refuse an order if the claimant's character or conduct disentitled them. The change from "due" to "sufficient" was probably in response to a concern raised during the

[146] McKenzie, Ibid, col 422.

[147] McKenzie, Ibid, col 424-425.

[148] McNab, Ibid, col 428.

[149] Ibid, col 429.

[150] Ibid, col 428.

[151] McNab, Ibid. The Family Homes Protection Act 1895 gave a protected interest in the home up to 1500 pounds: Section 3. This was in response to a query about the point from Monk; Ibid, col 421.

[152] 1898 NZPD vol 103 (In Committee) cols 426-427.

debates that a too generous approach might be taken.[153] The disentitling clauses were also added for those who did not want undeserving claimants to succeed.

D. McNab's Second Attempt

McNab tried again in 1900.[154] This time he opened the debate by saying the measure, as with Stout's Bills, was directed at destitution and testators leaving wives at the mercy of charity. The emphasis on comparative destitution disappeared. He pointed out that a wife could get provision for maintenance and support under the Destitute Persons Act 1894 and simply wanted similar powers on death: "*[F]irst see that you do not leave any person destitute; first see that any person who is at present dependent on you for his or her support and maintenance is not left on the State for support.*"[155] In defending his Bill McNab described the champions of complete testamentary freedom as those who thought it "*absolutely within a man's powers to leave his own people destitute.*"[156] (At the same time, however, he drew support from the intestacy provisions which made "*ample provision*" for wives and children).[157]

The supporters expressed the same sentiments they had in the first debates, namely the wife had helped to build up the property and it was important to remove the anomaly between inter vivos obligations and those on death.[158] Reference to a wife and child's provision on intestacy was also cited in support of the measure.[159] Again, there is some vagueness as to whether the MPs were seeking symmetry with Destitute Persons Act obligations or a comparative destitution approach. As noted, McNab opened the debate drawing parallels

[153] Steward said he would support the Bill if the reference to "due" provision became "sufficient" provision. Ibid, at col 425-426.

[154] 1900 NZPD vol 111, col 503.

[155] 1900 NZPD vol 111, col 503-504.

[156] McNab, Ibid, col 508.

[157] Ibid, col 503.

[158] Hall, Ibid, col 505;

[159] Hanan, Ibid, col 505.

with the Destitute Persons Act but others simply noted a man's duty to provide for his wife and children.[160]

The desire to protect the State from the burden of destitute family members was also raised as a selling point, McNab stating that the question was whether a man was to be allowed to throw his family upon the State for support.[161] This passage sums it up: "*Why, Sir, should a woman…be disinherited and ejected on a cold world by the man whose duty it was to support her during her lifetime, and not leave her to become a pauper and a charge on the community.*"[162]

The objections and concerns were the same as before: scoundrel sons who squandered inter vivos provision and then come back for more, that it would be an incentive to idleness and that there were no safeguards to prevent claims by lazy wretches.[163] Such was the strength of the opposition that one MP was prepared for a "ne'er do well" son to starve rather than receive provision. This member had "*no sympathy in bolstering up people who could earn their own living but did not.*"[164]

At committee stage, there was debate about whether exclusions should be made.[165] The first suggestion was that the clause be amended to cover only infant or physically helpless children. It failed to pass. Another proposed amendment also failed and that was to limit it to children who were not in a position to earn sufficient for their maintenance and support. Another change was made at this stage and that was the insertion of "proper" and the

[160] Hanan stated a man should not leave all his property away from family and referred to the intestacy provisions but also talked of destitution: Ibid, at col 504; Russell thought it a man's first duty to provide for his wife and children: Ibid, at col 506. Fraser, at col 506, spoke of justice for wives and children with no mention of destitution. Purcell spoke of a fair share for wives, Ibid, col 506.

[161] McNab, Ibid, col 503; Meredith, Ibid, col 507.

[162] Hanan, Ibid, col 505.

[163] Russell, Ibid, col 506-507; Purcell, Ibid, col 506.

[164] Russell, Ibid col 506.

[165] 1900 NZPD vol 112, col 648.

removal of the word "sufficient".[166] The provision that went to the Legislative Council[167] for consideration talked of "*adequate provision for proper maintenance and support.*"

In the Legislative Council debates those in favour noted it removed the anomaly between inter vivos and testamentary obligations and would "*strike a blow to the mischievous power of the dead hand*."[168] It was directed at cases of men selfish enough to leave their family penniless "*for the sake of posing as philanthropists to posterity.*"[169] Sick children, unable to earn a living, were also seen as a deserving case for provision[170] and the Estate v State argument again featured in support of the Bill.[171] Some also saw it as consistent with another discretionary measure already on the books, namely the Native Land Court Act 1894.[172] It provided that where a Maori testator devised land to someone other than his successor and, in the court's opinion, that successor would not, without that land, have sufficient for his support, the Court might award the successor as much of that land as was necessary.[173]

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[166] 1900 NZPD vol 112, cols 648-649.

[167] The debates are found at 1900 NZPD vol 113.

[168] Scotland, 1900 NZPD vol 113, col 617. Consistency with inter vivos obligations was also a point of favour for Pitt, who also noted the provision received by a wife and children under the intestacy provisions: Ibid, col 613.

[169] Cadman, Ibid, col 618.

[170] Pitt, Ibid, col 615.

[171] Pitt, Ibid, col 615; McLean, col 615. The State v Estate juxtaposition is also noted and discussed by R Atherton, above n 96.

[172] Native Land Court Act 1894, s46. Fraser referred to it the debates - 1900 NZPD vol 111, col 506 as did Pitt 1900 NZPD vol 113, col 614 *"It is perfectly clear that the main principle involved in this Bill has already been applied to the Native race."*

[173] Atherton suggests this is where any similarity stops and that the main reason for section 46 was to address the problem of questionable wills. Apparently several doubtful wills had been produced to the Native Land Court as evidence of title. In the interests of protecting native lands and controlling exploitation of it through uncontrolled private dealings, the Court was given greater powers, one such power being that of overriding wills in section 46. It allowed the court to override a devise of land to overcome the "fabrication of spurious wills". AJHR, Sess. II, II, G-I, xi, cited in R Atherton, "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, The Women's Movement and Political Compromise" (1990) 7 OLR 202 at 214-215. However, the borrowing is not that surprising given that the aim of both Acts was to protect vulnerable people.

But again, there was some uncertainty as to what the Parliamentarians thought the Bill was aimed at. There is reference to destitution and people being left penniless with one stating: "*The great recommendation… is that a man cannot leave the whole of his property away from family and leave them destitute.*"[174] Others, however, took the view it was about "comparative destitution" and "station in life" drawing support from changes made to the Bill at Committee stage. Stevens noted a change since the Bill's first reading and that was the inclusion of "adequate".[175] He stated it was inserted by the Statutes Revision Committee and understood the change was made so regard should be had to the family's standard of living before the testator's death. This was to stand it in contrast to the Destitute Persons Act 1894 which allowed mere sustenance and a certain amount of clothing, "*just enough to prevent them from being taken in by the police*."[176] He noted there was nothing in the Destitute Persons Act which said a destitute person should be provided with an allowance proportionate in any degree to the testator's assets. Pitt also saw the Bill as directed at "comparative destitution", at a "station on life" approach to provision. In this, he too drew support from changes made in the Committee stage. For him, it was directed at a sum adequate for maintenance in a proper manner.[177] Others agreed, arguing that it should be more than bare maintenance, which was a mere pittance and not enough to keep a decent woman respectable, presumably referring to the level awarded under the Destitute Persons Act.[178] Some MPs thought it should expressly provide for this by reading "*adequate provision taking into account the manner of life to which the family is accustomed.*"[179] A fair share for wives was again a consideration.[180]

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[174] McLean, 1900 NZPD vol 113, col 615. Others also referred to destitution. Pitt referred to the Destitute Persons Act and "*straitened circumstances*": col 614; Twomey was amazed that, with a stroke of a pen, testators could leave family "*penniless":* col 616 and Bonar referred to destitution, col 616.

[175] Stevens, Ibid, col 616.

[176] Ibid.

[177] Pitt, Ibid, col 614.

[178] Gourley, Ibid, col 617.

[179] Bowen, Ibid, col 618.

[180] Twomey, Ibid, col 616.

There are some mixed messages, however. Those who refer to a station in life approach, or the wrongness of leaving money away from family, also refer to cases of hardship and destitution in their speeches in support of the Bill.[181] The mixed message is also seen in their references to the Destitute Persons Act and the need to save the state from the burden of maintenance but also their references to the intestacy provisions of the Administration Act and the obligations already recognised in the Native Land Court Act, neither of the latter confining relief to destitution.[182]

The main objections were that the testator knew best, spendthrift sons should not be able to make a claim and that it interfered with the duties of the head of the family to his children and wife and would force people to air dirty laundry outside the family.[183] The counter was that the court would not make an award in those circumstances.[184] It was compared favourably to the forced heirship proposals, the Bill allowing the court to look at the individual circumstances of each case.[185]

The measure passed. In its final form it read:

> 2. *Should any person die, leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as to the said Court shall seem fit shall be made out of the estate of the deceased person for such wife, husband, or children: Provided that the Court may attach such conditions to the order made as it shall think fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this section.*

[181] For example, Pitt refers to straitened circumstances, Ibid, col 614; Bowen refers to destitution, col 616 and Twomey refers to families being left penniless, yet all support the comparative destitution approach.

[182] Pitt refers to these Acts at 1900 NZPD vol 113, col 616.

[183] Whitnore, Ibid, col 614-615.

[184] Pitt responding to Whitmore's objection, Ibid, col 619

[185] Pitt, Ibid, col 615.

E. Summary of Debates

The debates surrounding all the attempts focused largely on the plight of widows and dependent children, often painting the Dickensian picture of them being thrown penniless onto a cold world. The word "destitution" is littered throughout the speeches. As one commentator put it, the extreme case was highlighted: "*The image of the villainous testator intent on consigning his hapless family to the poor house is invoked because it serves best to justify interference with a man's last will.*"[186]

No-one in the debates denied a testator had a duty to his family; the main difference in opinion was whether the court or the testator was the best judge of how to fulfill that duty. There was also an apparent disagreement as to what level of provision a testator should provide, some speaking of "comparative destitution" while others drew parallels with the Destitute Persons Act which suggested they viewed provision under the Act more narrowly.

The State or Estate argument may have persuaded some otherwise reluctant MPs to vote in favour of the measure and the insertion of the disentitling clauses, a compromise on McNab's part, also assisted its passage.[187]

VIII. Conclusion

The main concern behind the Act was the economic vulnerability of women and minor children. The evil at which it was addressed was the possibility of a testator leaving nothing to them. It was this which justified the restriction on a man's testamentary freedom. The related justification was that it would prevent the State from assuming the financial burden of maintenance. The Act can be viewed as a continuance of the approach taken by 19th century New Zealand governments - ie it was yet another legislative measure designed to enforce a family support obligation. The desire to avoid destitution and its

[186] J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277 at 294.

[187] Atherton argues that the clause represented a compromise between the welfare principle and the morality principle: "*It was… a compromise which kept the Testators Family Maintenance Act 1900 still firmly within the rationale of testamentary freedom. Behind it lay two poles of nineteenth century liberalism: a reverence for the freedom of property and the doctrine of self reliance*": R Atherton, above n 173 at 218.

consequent burden on the State is understandable in a time where there was no established welfare state, no government safety net in the form of aid entitlements, and where women and dependent children were economically vulnerable. The Act was slightly different, however, in that it allowed a court to regulate a man's private property and thus represented a significant departure from a period which has been characterised as displaying an extravagance of individualism. It was part of the new liberalism which justified state intervention to protect the individual. The Act therefore straddles the two ideologies. On the one hand, the new liberalism allowed it to pass. On the other, much of the old ideology is still present in the debates and reflected in the Act itself. Self reliance, individual initiative and the idea of the deserving poor could all be accommodated by the judicial discretion and the disentitling clauses. As Chapter Two shows, these themes continued to dominate the case law in the Act's early life.

Chapter Two: A Century of Case Law under the Family Protection Act

I. Introduction

In 1900 the Testator's Family Maintenance Act ("the Act") was finally passed.[1] Chapter One showed its passage was not an easy one. For the judiciary, the mapping of its parameters was not straightforward either and this chapter will show that in 1900 its life had just begun. Over the course of a century the seemingly simple phrase - "*adequate provision for proper maintenance and support*"[2] - had much work to do as judges applied it to many and varied situations.

The previous chapter showed that the vulnerable position of wives and dependants was the impetus behind the legislation. It is they who featured most prominently in the debates but adult children were not expressly excluded from the new jurisdiction and questions soon cropped up as adult children brought claims. Did the child have to be in dire financial straits before succeeding? Were sons to be treated differently to daughters? Were ethical as well as economic factors relevant? And, perhaps most importantly of all, could a claim be based on ethical grounds alone, irrespective of financial need? The purpose of this Chapter is to tell the story of the judges and this statute in a purely descriptive way. How did they approach these questions and what was the justification for applying the Act to independent adult children? In answering these questions the focus is on the main themes rather than minutiae.[3] (It is those themes that are then assessed according to a theory of statutory interpretation in Chapter Five).

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[1] The Act changed its name to the Family Protection Act in 1908 and kept it after subsequent amendments in 1955. It is now the Family Protection Act 1955. References to the Act in this chapter refer to both Acts.

[2] Section 2 of the Testator's Family Maintenance Act 1900 and now section 4 of the Family Protection Act 1955.

[3] Detailed case law summaries and discussion can be found in W Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis, Wellington, 2004). See also J De Groot and B Nickel *Family Provision in Australia* (2nd ed, Butterworths, Australia, 2001) and D Wright *Testator's Family Maintenance in Australia and New Zealand* (3rd ed, The Law Book Company Limited, Sydney, 1974).

Chapter One looked at the historical justification for the legislation. This Chapter shows how some of those historical influences carried over into the court's initial approach with an emphasis on destitution, self reliance and distinctions based on gender but how those early influences gradually faded. It also provides a context in which to discuss the commentary to the Act (Chapter Three), the theoretical justification for the court's approach (Chapters Four and Five), the comparison with case law in similar jurisdictions (Chapter Six) and finally, the general themes that arise in relation to the justification for testamentary recognition of adult children (Chapter Seven).

Theoretically, the statutory test can be divided into two parts. The first part– sometimes called the "jurisdictional question" - is determining whether the claimant has adequate provision for their proper maintenance and support. The courts have categorised this as a question of moral duty on the testator's part. The second is determining what is needed to repair a breach of this duty and this has been categorised as an issue of quantum. In practice, however, the distinction has been artificial and the issues are seen as opposite sides of the same coin.[4] Factors that could be taken into account in terms of the discretion have often been taken into account in determining what constitutes adequate and proper provision. The courts have adopted an overall approach to the jurisdiction and the same approach is therefore taken in this and subsequent chapters.

The Act has generated a high volume of case law and the description of it is drawn from reading those cases. The chapter adopts a largely chronological rather than theme based approach although there is overlap.

II. Case Law

A. Overview

The initial judicial approach was a narrow one. The courts trod carefully, influenced by the Act's novelty, its potential erosion of testamentary freedom and the parallels drawn with the Destitute Persons Act 1894 in the debates leading up to its passage. The Act was seen

[4] Reference to the legislation having twin tasks comes from *Goodman v Windeyer* (1980) 144 CLR 490 at 502 per Gibbs J. That the two tasks often overlap was a point made in *Goodman v Windeyer* (1980) 144 CLR 490 at 509 per Aickin J.

as creating an extension of a testator's inter vivos support obligations; widows and minor children were therefore given paramount consideration. Independent, able bodied adult children were unlikely to be successful; they were the difficult case.[5] When they did succeed it was because they were in real financial difficulty, either because their spouse and/or children were unable to support them or they were unable to support themselves because of illness or disability.

A broader approach came after the birth of the moral duty test in *Allardice v Allardice*[6] when any parallels with the Destitute Persons Act were expressly rejected. By 2000, a century after the passage of the legislation, the pendulum had swung to the other side and the Court of Appeal was prepared to state, expressly, that awards could be made on a purely emotional basis, to recognise a child's role in the family and the overall life of the deceased.[7] Juxtaposed with cases from the 1900s a reader could be forgiven for thinking the courts were dealing with different statutes. But as this chapter will show, the evolution was a gradual one and the modern approach does not seem so stark when seen in the context of what came before.

B. Case Law - 1900-1910

The early period saw the courts staying close to the eligibility criteria of the Destitute Persons Act and a person's inter vivos support obligations. Self reliance was also a dominant consideration. As seen in Chapter One the Destitute Persons Act, and charitable aid, was aimed at a bare minimum; people should work if they were able and welfare reliance was not to be encouraged. There was a fear of idleness leading to vice. Further, while the legislation did not discriminate on the basis of gender or status, the early judicial approach did. The widow held the paramount place; they were the easy case. But even with widows the courts still took a cautious approach towards their new powers and early awards reflected a narrow view of provision.

[5] *Plimmer v Plimmer* (1906) 9 GLR 10 (CA) at 21 per Edwards J and *Re Rush* (1901) 20 NZLR 249 at 253 (SC).

[6] *Allardice v Allardice* (1910) 29 NZLR 959 (CA).

[7] *Williams v Aucutt* [2000] NZLR 479 (CA).

In *Re Rush*,[8] the first reported decision under the Act, the Supreme Court saw the Act as primarily an extension of a testator's support obligations during his life, meaning it was restricted to his spouse and dependent children.[9] It also meant that provision was made in line with that under the Destitute Persons Act.[10] Edwards J saw the legal obligation under the Act as implementing the moral obligation to make provision for dependants and it was focused firmly on material needs.[11] *Re Rush* did not rule out the possibility that adult children could fall within the Act's scope but the Court thought it would require a very strong case.[12] Parallels with the Destitute Persons Act were drawn in other cases as well, both as to eligibility to bring a claim and what the level of the award should be.[13]

The requirement for consistency with inter vivos support obligations soon disappeared but the courts still required the claimant to be in desperate financial straits and for there to be a failure of others, with a stronger obligation than the testator, to help. In *Handley v Walker & Ors*,[14] the testator's adult daughter was in need of financial help. She was in poor health. Her husband – "a drinker" – was unable to support her and nor were her adult children. The testator was the next port of call. The Court made it clear that the claimant's husband had the first obligation to maintain his wife suggesting that if he had been able to provide enough to live on, the claim would have failed.[15]

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[8] *Re Rush* (1901) 20 NZLR 249 (SC).

[9] Ibid, at 253.

[10] Ibid, at 253.

[11] Consistency with inter vivos support obligations was also seen as a requirement by the Court in *Re Russell* (1907) 9 GLR 509.

[12] *Re Rush*, above n 8 at 254.

[13] *Re Wilkinson* (1904) 24 NZLR 156 and *Laird v Laird* (1903) 5 GLR 466. In *Re Philips* (1902) 4 GLR 192 the Court thought adequate meant sufficient to maintain only to the extent it was necessary. If the provision left under the will was fair, but less than the claimant had hitherto enjoyed, the Court doubted it should interfere. The level of provision was tied to lifetime maintenance obligations.

[14] *Handley v Walker & Ors* [1903] 22 NZLR 932.

[15] Ibid, at 933. The Court also considered there were some special circumstances such as the fact the will was made during a period of temporary estrangement and the fact that her ill health was attributable to the nursing help she had given both her parents.

The focus remained on an adult child's inability to maintain itself in subsequent cases. They were only successful if sick or labouring under a disability.[16] In *Munt v Findlay*,[17] for example, an adult son was successful because he had a disability which prevented him from working full time. His two brothers, "*young and vigorous*"[18] – a description often used to describe adult sons in the case law - were unsuccessful. *Re Green*[19] is a particularly good example of the court's strict approach and emphasis on self reliance. An ill adult son was successful but the Court stated that if his disease became curable, and he refused to undergo treatment, it would vary the order.

C. Act Not an Equity Vehicle

The early period also saw one of the first Court of Appeal reminders that the courts did not have carte blanche to re-write wills on the basis of perceived unfairness. In *Plimmer v Plimmer*[20] it stated that the Act was not a general equity vehicle; an adult child could not turn up to court and expect to get something just because of his relationship to the testator.

Plimmer was the first Court of Appeal decision under the Act. It concerned the power to award a lump sum to a widow but the Court made some comments of general application.[21] In particular, it stressed that testamentary freedom remained the starting point. The language used by Edwards J pointed to a narrow application of the Act. He described it as a duty *merely* to make provision for proper maintenance and support and the Court's discretion was limited to repairing that duty. It would not re-write the will for any other reason than to supply the testator's omission to make "adequate provision for proper maintenance and support."

[16] As examples see *Munt v Findlay* (1905) 25 NZLR 488; *Re Hoffman* (1909) 29 NZLR 425; *Re Cameron* (1905) 25 NZLR 907; Re *Bleasel* (1906) 25 NZLR 974 and *Re Green* (1911) 13 GLR 477.

[17] *Munt v Findlay*, Ibid.

[18] Ibid, at 492.

[19] *Re Green*, above n 16.

[20] *Plimmer v Plimmer* (1906) 9 GLR 10.

[21] The Court's comments about its lack of ability to award lump sum payments under the Act led to a statutory amendment in 1906.

The Court recognised that adult children were the difficult category of claimants, Edwards J commenting:[22]

> *No one can ascertain, and it is quite incapable of proof, what circumstances may justify a parent disinheriting a child. Habitual disrespect, an evident determination not to devote himself to useful pursuits but to live upon the proceeds of his father's labours rather than upon his own, or an idle useless life, may well justify a father leaving his son wholly unprovided for by his will and this may really be in the interests of the erring son for there are many who under the stress of necessity may become useful and fairly reputable members of society, who cannot withstand the temptations that money affords. Yet it would be quite impossible to bring such matters before the Court in a tangible shape.*

Here we see a concern - also present in Hansard - that the Act not be used as a vehicle for adult children to turn up to court, air their dirty laundry, and get an award by virtue solely of their blood connection to the testator. This would not be a good thing for family harmony:[23]

> *It is of the breath of family life that the family skeleton is kept in the family cupboard. The powers given by the Act should, therefore, I think, be exercised with extreme care and caution and it should not be sufficient for a claimant under the statute to show merely his relationship to the testator and his own immediate needs.*

Again, this passage reflects a cautious approach to the jurisdiction, suggesting something compelling would have to be shown before adult children could come within it.

The courts have consistently followed *Plimmer's* statement that the Act is not a general equity vehicle. Similar statements are still made today. It is interesting to note here that there is sometimes a difference in classification as to what the court is doing when it makes an award and what the effect of the Act is. In *Dillon v Public Trustee*,[24] for example, the

[22] *Plimmer v Plimmer* (1906) 9 GLR 10 at 21 per Edwards J.

[23] Ibid at 21.

[24] *Dillon v Public Trustee* [1941] NZLR 557.

Privy Council held that the Act does not impose a duty on a testator in any shape or form. A testator is free to act in any way they wish:[25]

> *If the testator does not make adequate provision in his will for his wife, husband or children, he does not thereby offend against any legal duty imposed by the statute; His will-making power remains unrestricted; but the statute in such a case authorizes the Court to interpose in order to carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for.*

More commonly, however, it is seen as a duty on the testator's part. In *Williams v Aucutt*,[26] for example, Blanchard J stated:[27]

> *Testators remain at liberty to do what they like with their assets and to treat their children differently or to benefit others once they have made such provisions as are necessary to discharge their moral duty to those entitled to bring claims under the Family Protection Act.*

Other differences of expression are found as to the effect of the court's order. Some judges say it is not re-writing a will, rather it is "*supplementing a bequest*"[28] or that "*a different proportion would have accorded better with the testatrix's moral duty.*"[29] But in *Welsh v Mulcock*,[30] the Court stated: "*No doubt the effect of the statute is to decree that a man's will may be no more than a tentative disposition of his property, and that the function of ultimately settling how his estate shall devolve must be exercised by the Court*."[31] But categorisation is not the important point; what is important are the constant reminders by the courts that the Act does not give them free rein. That has not changed. What has changed is that the testator's will is now likely to be an even more tentative disposition, or

[25] Ibid, at 560-561.

[26] *Williams v Aucutt* [2000] NZLR 479 (CA).

[27] Ibid, at [70].

[28] *Currin v Schepens* (1995) 14 FRNZ 1 (CA) at 7.

[29] *Re Batty (dec'd)* HC Blenheim AP 18/96, 4 March 1997 at 18.

[30] *Welsh v Mulcock* [1924] NZLR 673.

[31] Ibid, at 682 per Herdman J.

put another way, taking the *Dillon*[32] approach, the court is more likely to use the discretion conferred by the Act to make provision. This change to a broader approach starts with *Allardice v Allardice*[33] when the courts started to analyse in more detail the concepts of maintenance and support, adequate and proper.

D. A Turning Point – *Allardice v Allardice*

Allardice v Allardice[34] is heralded as a landmark case in the family protection jurisdiction. It is cited in almost every decision under the Act. On the facts it adopted a relatively narrow application of the Act but its significance lies in its coining of the phrase "moral duty" and the creation of the hypothetical wise and just testator.[35] This was the man against whom the actions of the testator would now be judged, "*the reasonable man of the law of domestic relations.*"[36] The contrast between the decision in the Supreme Court and that on appeal illustrates nicely the competing views as to the jurisdiction's reach.

The testator was one James Allardice, a farmer from the Hawkes Bay, described as having very little desire to rise above his station and as having no attainments worth mentioning.[37] He had dabbled in business dealings, many of which had turned bad. To the surprise of the Court, however, he died with a comparatively large sum of money notwithstanding that, although originally industrious, he had become a "*drinking man of loose habits.*"[38] He was married with two sons and four daughters.

In 1886 he formed an adulterous connection with the woman who became his second wife, Agnes Allardice. He kept her in a house nearby and when his wife found out he left her for Agnes in 1891. With Agnes, he had a further seven children, all minor at the date of death.

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[32] *Dillon v Public Trustee*, above n 24.

[33] *Allardice v Allardice* (1910) 29 NZLR 959, approved by Privy Council [1911] AC 730 (PC).

[34] Ibid.

[35] Edwards J refers to the test of a just but not loving testator at Ibid, 972-973. The reference to a "wise and just testator" comes from the later case of *Allen v Manchester* [1922] NZLR 218 at 220 and affirmed in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463.

[36] J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277 at 295.

[37] *Allardice v Allardice*, above n 33 at 960 per Chapman J.

[38] Ibid.

He left his estate to Agnes and the will was challenged by his then adult children from his first marriage.[39] The sons – both unmarried - got short shrift in the Supreme Court. Clearly not warming to the men of the Allardice family Chapman J commented that, like their father, they had no ambition to rise above their stations, one as a farm labourer and one as a saddler. While they had no property beyond personal effects, they were able bodied men capable of earning wages and looking after themselves.[40] Self reliance was emphasised. The daughters presented more of a difficulty. All were married to good men, capable of working, but their circumstances were described as anything but flourishing. Two were in a modest position, with the third in a precarious one.

Early in the judgment there is a glimmer of hope for the daughters. The Court is clearly sympathetic to their position but it then dismisses the claim. In doing so, Chapman J said he was taking guidance exclusively from the Act and was not able to make a just distribution or redistribution according to his own ideas of fairness, despite the fact the daughters had, in his view, been treated with "*unmerited neglect.*"[41] The determining factor for the Court was that of *dependency* on the testator, or lack thereof, at the time of his death and in this respect it followed *Re Rush*.[42] When Mr Allardice died, his daughters were outside his dominion. They were not being maintained or supported by him economically, their husbands having assumed that role. They were no different from a number of wives around the country who were supported by husbands - mechanics, small shop keepers, clerks, shop hands. The only difference was that the Allardice daughters had a father with a lot of money who had made an unjust testamentary disposition.[43]

[39] A fourth daughter did not claim as she had a wealthy husband. The Court observed that her financial position meant she could have no claim, a situation which may not necessarily bar her now, all circumstances permitting.

[40] Ibid, at 962.

[41] Ibid, at 966.

[42] *Re Rush* (1901) 20 NZLR 249.

[43] *Allardice v Allardice*, above n 33 at 963, per Chapman J.

The children appealed. The main judgments are those of Stout CJ and Edwards J, the latter becoming one of the most influential in the Act's history.[44]

In his judgment Stout CJ made four points about the Act:[45]

(1) It was more than an extension of the Destitute Persons Act;

(2) It did not give the Court authority to rewrite a will;

(3) The Court could only alter a will so far as was necessary to make adequate provision for proper maintenance and support;

(4) The Court would make greater provision for a spouse than children if the children were physically and mentally able to support themselves.

The Court held that being outside the dominion of one's parents was not a bar to bringing a successful claim. Establishing dependency made the claim more straightforward - "*A child...that has been living on a father's bounty could not be expected to begin the battle of life without means*"[46] - but not absolutely necessary:[47]

> *A child, however, who had maintained her or himself, and had perhaps accumulated means might be expected to be able to fight the battle of life without any extraneous aid. But even in such a case, if the fight was a great struggle, and some aid might help, and the means of the testator were great, the Court might, in my opinion, properly give aid.*

Still, the Act would only apply if the struggle was great, making it clear that economic necessity was still a requirement. Stout CJ held that even if the will seemed unjust from a moral point of view that was not enough to interfere with the testator's disposition: "*The*

[44] This is the same Robert Stout who introduced the forced heirship Bills. Stout went to the Bench in 1898 and served until 1926.

[45] *Allardice v Allardice*, above n 33 at 969.

[46] Ibid, at 969.

[47] Ibid, at 969-970 per Stout CJ.

first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left."[48]

The now famous passage from the judgment of Edwards J reads as follows:[49]

> *It is the duty of the Court, so far as possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not loving, husband or father owes towards his wife or towards his children, as the case may be.*

Ironically, given its subsequent role in expanding the jurisdiction, Edwards J began his judgment by downplaying the testator's statutory duty. Again, it was *merely* the duty of providing adequate maintenance and the Court was limited to making an order that would supply that omission.[50]

The daughters were successful in the Court of Appeal despite being maintained and supported by their husbands. While one was in a precarious situation, the other two were not, but the Court stated that in the future their husbands may not be able to support them in the same way. Self reliance, however, was the name of the game for the sons. What mattered was that they were physically able to work. One had a trade and the other was engaged in farm work: "*If they had any push they should, considering their age have ere done something for themselves, and to settle money on them now might destroy their energy and weaken their desire to exert themselves.*"[51]

The lack of judicial sympathy for the men of the family carried over into the Court of Appeal but there also seems to have been a general attitude at play that women should be treated more sympathetically, even if supported by husbands. Gender is the reason. Self

[48] Ibid, at 970.

[49] Ibid, at 972-973.

[50] Ibid, at 973.

[51] Ibid, at 971 per Stout CJ.

reliance was important generally but women were less capable, economically, of achieving that.

The Privy Council upheld the New Zealand Court's approach. In refusing to intervene, it held:[52]

> *These are essentially questions for the discretion of the local Courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living, and other matters, necessary to be borne in mind in adjudicating on questions of this class, and their lordships would be slow to advise any interference with the discretion founded upon such knowledge.*

Although subsequently labelled a landmark case *Allardice* did not create a change in judicial approach over night. The courts continued to act conservatively, focusing solely on the claimant's need for maintenance.[53] They also continued the focus on the claimant's ability to support itself.[54] *Allardice's* enduring significance came later once the courts saw the flexibility provided by the "moral duty" concept. Its immediate significance was in making it clear that adult children were "in" in terms of their right to make a claim despite being outside the testator's dominion. Any link with the Destitute Persons Act was now severed. By providing for contingencies, rather than a focus on immediate needs, it also paved the way for a broadened concept of maintenance and support.

E. A Relative test - *Allardice, Welsh v Mulcock, Allen v Manchester, Bosch*

Allardice is also important for emphasising the relative nature of the statutory test. It did this by fleshing out the concepts of "adequate" and "maintenance". Earlier decisions had not paid much attention to this. In *Plimmer,* Chapman J thought that the Court must

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[52] *Allardice v Allardice* [1911] AC 730 at 734 (PC).

[53] In *Plank v Plank* **(**1913) NZLR 898 the Court awarded a sum to an adult daughter who had given up work to look after her mother. It made it clear, however, that she could supplement it with employment suggesting that if she were not caring for her mother, she would received nothing. If you were able to support yourself, you were out. Another example is found in *E v E* (1915) 34 NZLR 785.

[54] In *Downing v Downing* (1932) GLR 441, the Court interfered with the will on the sole basis that owing to an operation, the claimant son was unfit for anything but light work. The same reasoning was applied in *Honeyfield v Rielly* (1934) GLR 521. A strict approach was also taken in *Powell v Public Trustee* (1933) GLR 267.

discharge the testator's duty by awarding an amount which "*fulfills the generally accepted meaning of maintenance and support.*"[55] Denniston J stated that the court's power of interference with a testamentary disposition called for "*careful definition and explanation*"[56] but there was no analysis of these terms, no definition or explanation, other than that which can be seen in the general tone of the judgments and their outcome - ie that it was maintenance based and maintenance was seen as a bare minimum, drawing parallels with the Destitute Persons Act. Early judgments did not often address the meaning of "adequate" and "proper" either but again, the results show they largely interpreted them to mean provision for the basics, the necessities in life.[57]

In *Allardice*, Cooper J held that "adequate maintenance" was an elastic concept and what would be adequate provision for the wife of an artisan or labouring man with a small estate would be inadequate for a wife of a prosperous trader or wealthy merchant or professional man. Likewise, what would be sufficient for a wife in the prime of life and robust health might be insufficient for an elderly or ill woman.[58]

In *Allardice* the Court took into account the station in life of the testator and his children, their sex, age, and health, all factors that could affect their economic well being and which also suggest a relative test. It also recognised that the nature of the test meant that "*the most careful and impartial men may differ*."[59]

Not long after, in *Welsh v Mulcock*,[60] the Court of Appeal rejected the argument that an adult daughter had no claim if she was married and had a husband who could maintain her standard of living. In doing so it confirmed and developed the relative nature of the test.

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[55] *Plimmer v Plimmer* above n 22 at 32.

[56] Ibid, at 18.

[57] In *Re Philips* (1902) 4 GLR 192 for example, the Court thought adequate meant sufficient to maintain only to the extent necessary. The level of provision was also tied to lifetime maintenance obligations.

[58] *Allardice v Allardice* (1910) 29 NZLR 959 at 974 per Cooper J.

[59] *Allardice v Allardice* (1910) 29 NZLR 959 at 973 Per Edwards J.

[60] *Welsh v Mulcock* [1924] NZLR 673.

The testator died with twelve adult children surviving him. His estate was worth over 20,000 pounds. The will distributed his household effects in equal shares to his children and the residue of 20,000 pounds was left to five of his daughters and his five sons. Two daughters missed out. One was a nun who did not make a claim. The other daughter did. She had kept home for the testator until the age of 31 but then married against his wishes. She was told that if she married Welsh she would get nothing. All the children were reasonably financially situated. Counsel for the daughter admitted she was not in immediate need and had a husband with two hands. However he noted a trend in the Supreme Court for the widening scope of the Act. The standard, he argued, was such maintenance and support as a child might reasonably expect from the circumstances of its father. The defence argued there was no need for provision as the daughter was living comfortably and had been for some years and there was a reasonable prospect of that continuing. In such a case, the argument ran, there could be no jurisdiction.

The Court of Appeal held that in deciding whether there had been "*adequate provision for proper maintenance and support*" it was entitled to factor in the reasonable probabilities as to a change of circumstances. The claimant, while comfortable at the moment, was vulnerable to changes in circumstances. The farm was heavily mortgaged and there was no other source of income. The claimant was also in bad health and was unlikely to be able to carry on the farm and live off its income if her husband died. She might also have children. It concluded that as the daughter of a man worth "X", and as a woman in *comparatively* poor circumstances and poor health, she was entitled to more substantial consideration at her father's hands than she got:[61] "*He had a duty to use his means to improve her lot in life*."[62] It awarded her a lump sum of 1,000 pounds.

In reaching this decision the Court of Appeal, like Cooper J in *Allardice,* ignored "proper" and focused on "adequate". It noted that the Privy Council in *Allardice* threw no light on the meaning of adequate provision but it had to consider nothing more than whether "*in the special circumstances in each case, a testator has acquitted himself of the obligation to*

[61] Ibid, at 684 per Herdman J.

[62] Ibid, at 687 per Salmond J.

make adequate provision for maintenance and support, giving the words their ordinary meaning."[63]

Herdman J thought it impossible to compile a complete catalogue of circumstances that fell within the section but the starting point was that it was more than an extension of the Destitute Persons Act. What was relevant would include the value of the estate, the testator's position in life, the means, age and health of his wife and children, and their ability to earn a livelihood. Whether the children were married with young children would also be relevant.[64] His Honour then commented that if adequate meant more than Destitute Persons Act provision it must mean:[65]

> *adequate having regard to the circumstances and station in life of the testator and the circumstances and station in life of the dependant. A sum that would be adequate for a child reared in humble circumstances might not be adequate for a child accustomed, because of the wealth of a parent, to live in luxury and refinement. Nevertheless in every case the question must always be, first, Has the applicant sufficient for his or her proper maintenance and support without any supplement from the testator's estate?*

The Court could not draw the line anywhere definite but knew a case that would not succeed when it saw it, reiterating that the issue was not what share of the estate a person received but whether they were in need of maintenance and support. Faced with an argument that a person could not be in need of maintenance and support if they were able to maintain themselves at their current level after the testator's death, it held that the true measure is not necessarily found in that; it was but one element to be taken into account.[66]

The Supreme Court's decision in *Allen v Manchester*[67] confirmed the relevance of the size of the estate, again endorsing the relative nature of the test. There, the bulk of the estate was left to the testator's two sons, aged 19 and 17. Substantial provision was also made for

[63] Ibid, at 682 per Herdman J.

[64] Ibid.

[65] Ibid, at 683.

[66] Ibid, at 686 per Salmond J.

[67] *Allen v Manchester* [1922] NZLR 218(SC).

his widow and minor daughter but they claimed it was inadequate given the size of the estate. Salmond J held that the provision for maintenance was not limited to provision sufficient to meet the claimant's bare necessities. That is, it was not merely a supplement to the Destitute Persons Act for continuing and enforcing legal obligations post death of supplying the necessities of existence for the wife and children dependent on him.[68] The Court went on to say that what was proper and adequate provision depended on the testator's means, the means and deserts of the claimants and the relative urgency of the various moral claims on his bounty.[69] The decision is significant for creating two categories of estate.

In the first category were small estates where claimants competed with other moral claimants. The estate could not meet all the moral claims in full and the court had to divide it according to the relative urgency of the claims. It was a case of the testator having to do the best he could in the circumstances, of carrying out an exercise in distributive justice. There is a duty but the issue is whether it can be fulfilled in whole or in part.[70]

In the second category fell estates which were large enough to meet all claims. The claimant was not complaining of an unjust division of an inadequate fund among dependants all of whom had a moral claim but of the testator's failure to make out of the abundance of his resources, sufficient provision for proper maintenance and support. In this type of case the court's function was not to distribute an insufficient fund; its task was the more difficult one of determining the absolute scope and limit of the moral duty. The Court considered that different considerations would apply depending on whether the claimant was a wife, infant, or adult child.[71]

In the case itself the testator's wife failed in her claim as she had enough to live on without pecuniary anxiety. The infant daughter was successful and an award was made to ensure maintenance of a sufficient amount to enable an education and upbringing appropriate to a

[68] Ibid, at 220.

[69] Ibid, at 220.

[70] Ibid, at 221.

[71] Ibid.

daughter of a wealthy man and proper for a young lady in possession of a fortune of 10,000 pounds. Here we see the Court pegging the level of provision to the claimant's station in life, that station having been created and maintained by the testator up until his death. Although not about adult children, the *Allen v Manchester* "divisions of estates" approach became one of general application and still holds today.

Bosch v Perpetual Trustee Co Ltd[72] continued the idea of a flexible test and is most noteworthy for giving content to "proper", the first case to do so. The case concerned an appeal to the Privy Council from the decision of a New South Wales court under similar Australian legislation.[73] In the lower Court Nicholas J had rejected an interpretation of "proper" which required further provision to be made so the child claimants could be educated at Oxford or Cambridge. He considered it a fallacy to believe a young man had not been given adequate provision for his "*proper maintenance, education or advancement in life*" unless able to attend one of the English universities. It was an "*equally fallacious*" belief that the child who would get 15,000 pounds upon reaching 25 had been left without proper provision.[74] For Nicholas J the Act was not intended to provide for this type of case at all. The claimants appealed.

Apart from the decision of Cooper J in *Allardice* none of the cases had paid much attention to the meaning of "adequate" and "proper" and their relationship to each other. The Privy Council drew the distinction holding that "proper" connoted something different from "adequate". A small sum might be sufficient for the "adequate" maintenance of a child but having regard to the child's station in life, and the fortune of his father, it might be wholly insufficient for his "proper" maintenance. So, too, a sum may be quite insufficient for the

[72] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463. While an appeal from an Australian jurisdiction, the Privy Council affirmed the approach taken in *Allen v Manchester* and *Allardice v Allardice* and it is widely cited in New Zealand case law.

[73] Section 3, Testator's Family Maintenance and Guardianship of Infants Act (NSW) 1916 required the Court to ask whether adequate provision had been made for the claimant's provision for "*proper maintenance, education or advancement in life*". (The approach in Australia is more fully discussed in Chapter Six).

[74] *Bosch v Perpetual Trustee Co Ltd*, above n 72 at 480.

"adequate" maintenance of a child and yet may be sufficient for his maintenance on a scale that is proper in all the circumstances. This point was explained in the following passage:[75]

> *A father with a very large family and a small fortune can often afford to leave each of his children only a sum insufficient for his "adequate" maintenance. Nevertheless such sum cannot be described as not providing for his "proper" maintenance, taking into consideration the circumstances of the case.*

As a result of the following statement, the judgment is also oft cited as establishing that moral and ethical considerations are relevant: "*The amount to be provided is not to be measured solely by maintenance*."[76] Rather:[77]

> *The Court must place itself in the position of the testator, and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than as a fond and foolish, husband or father.*

As with the earlier cases the circumstances included the testator's means, the means and deserts of the claimants and the relative urgency of competing moral claims.

In awarding further provision the Privy Council disagreed with the general approach adopted by the lower Court and held that it could not be said that any particular amount afforded proper maintenance in all the circumstances. Taking into account the size of the estate, that the testator himself had thought the sum insufficient and had intended to change his will, that the claimants were very young – four and seven - and that the value of the money was likely to depreciate before they became adults, it awarded the additional sum of 10,000 pounds. All this came into account via the word "proper".

Allardice and *Bosch* are the most oft cited authorities in the jurisdiction. Where *Allardice* became the precedent for "moral duty", *Bosch* became authority for the point that provision was not to be limited to mere maintenance. It set the tone for subsequent cases in permitting a degree of luxury, size of estate and other circumstances permitting.

[75] Ibid, at 475-476.

[76] Ibid.

[77] Ibid.

Colourfully, following *Bosch*, one judge has described the duty as providing not just for the bread and butter of life but for "*a little of the cheese or jam that a wise and just parent would appreciate should be provided if circumstances permit.*"[78]

But what of a broader ethical approach, one which looks to factors other than those taken into account in the above cases? The disentitling provisions provide that the court can refuse relief if the claimant has been guilty of disentitling conduct but could a claim be based solely on the claimant's good conduct or the testator's bad conduct?

F. Economic or Ethical?

Welsh v Mulcock[79] was the first case to expressly consider whether wider ethical factors could come into play. In doing so the Court focused on "adequate" rather than "proper". The Court decided it was an economic test and that there was no room for sentiment:[80]

> *Once the door is opened to admit the element of sentiment, then the Court drifts away from the principle of adequate provision and maintenance, and becomes concerned, not with the ways and means of the applicant and not with the practical duty of the testator, but with some caprice of the latter whose wife or child, apart from his estate, may be well provided for.*

Whether the claimant was dutiful, whether they made contributions to the estate, was irrelevant.[81] *Bosch* did not address the issue directly but its definition of what is "proper" opened the door for a broader test. Its reference to the deserts of the claimants and statement that provision should not be assessed according to bare maintenance were taken up in subsequent cases as authority for this. An early example is found in *Mudford v Mudford*[82] where the Court held it could take account of ethical factors considered

[78] *Blore v Lang* (1960) 104 CLR 124. This is the approach in New Zealand as well. See, for example, *Re Wright (Dec'd)* [1954] NZLR 630.

[79] *Welsh v Mulcock* [1924] NZLR 673 (CA).

[80] Ibid, at 683 per Herdman J.

[81] Ibid, at 682.

[82] *Mudford v Mudford* [1947] NZLR 837 (CA).

irrelevant in *Welsh v Mulcock*.[83] Adult daughters, supported by able bodied husbands and seemingly comfortable, were awarded something on the basis of a "*moral claim"* to provision of a moderate sum to call their own.[84] (It is differently expressed from *Allardice* where the Court saw the adult daughters as economically vulnerable if their husbands died). The Court commented that if they had received special advantages in the past, or if they had been a cause of dissatisfaction to the testator, this moral claim might be regarded as satisfied but that was not the case. In taking a broader approach, and focusing on a wider moral claim, the Court also held that the adult children's present economic needs were not the only considerations. The Court was also entitled to look at their contributions to the estate – considered irrelevant in *Welsh v Mulcock*[85] - and promises of reward.[86]

However, despite *Mudford* it was not for two decades that this broader approach took hold and the turning point came in *Re Harrison*.[87] There, the testator left everything to his second wife and nothing to the claimant daughter from his first marriage. Father and daughter met up when the former became an adult but communication was infrequent. His main contribution to her upbringing was in the form of a maintenance order. She was married to a farmer and comfortably off, although entirely dependent on him. The High Court considered that most right thinking people would condemn him for the will but that was irrelevant. The judge was "*sorely tempted*"[88] to make provision but could not do so in the absence of economic need. The Court of Appeal thought this approach too harsh and considered it unfortunate that there had crept into the cases a disposition to consider first the need and then turn to other considerations. It considered that earlier cases had placed undue emphasis on economic considerations. The needs of the claimant, said the Court,

[83] *Welsh v Mulcock*, above n 79.

[84] *Mudford v Mudford* above n 82 at 845.

[85] *Welsh v Mulcock* above n 79.

[86] *Mudford v Mudford* above n 82 at 840

[87] *Re Harrison* [1962] NZLR 6 (CA).

[88] Ibid, at 9.

cannot be considered in vacuo: "*These considerations do not admit of separate consideration; they are inter-related.*"[89]

The Court's justification for labelling the emphasis as "undue" was *Bosch*, where the Privy Council held that the amount to be awarded was not to be measured solely by maintenance. The Court in *Re Harrison* held it also had to assess the merits of the daughter's claim having regard to her circumstances at death, her relationship with the testator, the size of the estate and competing claims. The fact that some of the estate was grandfather money was also relevant, suggesting that if the testator had not earned it himself he had less right to dispose of it as he wished. Significantly, the Court held that a child might be in a reasonably strong position financially but the size of the estate could create a moral obligation to allow the claimant to participate in it.[90]

Re Young[91] affirmed *Re Harrison* on the important point that all circumstances have to be considered, including contributions to an estate or the testator, and that ethical considerations informed the test too but it then backtracked slightly.[92] In doing so it overturned the lower Court's award for a wealthy son - with no need for maintenance or support in an economic sense - whose claim was based on unpaid farm work. The Court was concerned that *Re Harrison* could be misinterpreted as applying an overly generous test and emphasised that the power to include all circumstances only arose once the need for maintenance and support had been established in a broad sense. The reference in *Harrison* to a claimant not being excluded even if comfortably financially situated could not be taken too literally.[93] It pressed the point further by reference to a passage in *Blore v Lang*[94] where the Court held: "*Good conduct and honest worth are not to be rewarded by a generous but secondhand legacy at the hands of the Court*" and, in the same decision: "*The*

[89] Ibid, at 13 per Gresson P.

[90] Ibid.

[91] *Re Young* [1965] NZLR 294 (CA).

[92] Ibid, at 288-289.

[93] Ibid, at 299.

[94] *Blore v Lang* [1960] 104 CLR 124. This is an Australian case but courts in Australia and New Zealand have drawn freely on each other's decisions. The reference to it in *Re Young* is at 299.

jurisdiction under [the Act] is to provide deserving persons according to their requirements, not to reward past services. This is sometimes overlooked…."[95] The Court in *Re Young* did not provide any guidance as to what the financial cut off position was but it appears to have been drawing a line if the claimant was wealthy.

After these cases there was somewhat of a holding pattern - even a retreat - as if the courts were unsure how far they could go in terms of adult children. A somewhat more restrictive approach was taken in *Re Swanson*[96] where the Court based its decision solely on economic grounds, *Re Downing* [97] where the Court refused to award two claimants anything as they were both capable, able bodied sons in their thirties, well established in life with no need for financial assistance and *Re Rough (Dec'd)*[98] where the claimants' reasonable financial circumstances ruled out a duty.

Another shift came in the 1980s after the Court of Appeal's decision in *Little v Angus*.[99] This and subsequent Court of Appeal cases emphasised the overriding moral duty test. This test incorporated both economic and ethical factors and was informed by current community attitudes. It led to a further broadening of approach.

G. The 1980s Onwards

Little v Angus[100] involved a claim by a daughter whose only sibling – a brother – had received everything under their father's will. Neither was in dire financial straits. Both, it seemed, were comfortable but the Court pointed to her husband's asthma and the fact she had children, both of which meant future expense and anxiety had to be reckoned with. She was awarded one third of what was considered a large estate. In reaching this decision the Court began by saying that the principles were well established but that changing social

[95] *Blore v Lang* Ibid, at 137 cited in *Re Young* at 299.

[96] *Re Swanson* [1978] 2 NZLR 469

[97] *Re Downing* [1978] 1 NZLR 385.

[98] *Re Rough (Dec'd)* [1976] 1 NZLR 604

[99] *Little v Angus* [1981] 1 NZLR 126 (CA).

[100] Ibid.

attitudes must also have their influence on the existence and extent of moral duties.[101] Reasons justifying the award, apart from the economic concerns noted, were the size of the estate and that adult daughters were now to be treated more liberally than in the past. Changing social attitudes became a common reference point in the 1970s and 1980s. In *Re Wilson,*[102] the Court of Appeal described the Act as a living piece of legislation, the application of which had to be governed by the climate of the time.[103] Similar statements can be found in *Re Z.*[104]

In *Re Leonard*, [105]changed attitudes towards women were also instrumental in the Court's decision. It provides the classic "Sons the farm, daughters the tea set" scenario. The High Court was disturbed at the "*grossly disproportionate*"[106] manner in which the estate had been distributed. It also noted the daughters had had no inter vivos financial assistance and because of this had indirectly contributed to the estate. Taking into account the size of the estate, and the grossly disproportionate sharing of it, the breach was considered manifest. The Court rejected a submission that the line had to be drawn in favour of the testator. The Court of Appeal upheld the decision, again emphasising that the Court must keep abreast of contemporary values and that social attitudes must be taken into account when considering whether there had been a breach of moral duty.[107] It considered there had been a breach and that in favouring his sons the testator was out of touch with changes in society. It also reiterated that financially comfortable claimants were not barred from claiming:[108]

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[101] Ibid, at 127.

[102] *Re Wilson* [1973] 2 NZLR 359 at 362 (CA).

[103] Ibid, at 362.

[104] *Re Z* [1979] 2 NZLR 495 (CA). This case and *Re Wilson* extended the ability of widows to obtain lump sum provisions, the Courts noting that it must move with the times and it was patronising to continue the trend to award periodic payments.

[105] *Re Leonard* [1985] 2 NZLR 88 (CA).

[106] Ibid, at 91 citing a passage from the High Court judgment.

[107] Ibid, at 91-92.

[108]Ibid, at 92.

Mere unfairness is not sufficient and it must be shown that in a broad sense the applicant has need of maintenance and support. But an applicant need not be in necessitous circumstances: the size of the estate and the existence of any other moral claims on the testator's bounty are highly relevant and due regard must be had to ethical and moral considerations, and to contemporary social attitudes as to what should be expected of a wise and just testator in the particular circumstances.

H. Summary to Date

By the 1980s economic need, in the narrow sense, was no longer required. The testator's moral duty could not be extinguished by the claimant's age or healthy financial circumstances. If the claimant was young there could be a duty to help with the vulnerable economic position most young adults find themselves in. It could mean a duty to help them become educated, to finance a mortgage, to help them raise a young family. In middle age, it could be a duty to give them a degree of financial ease, to perhaps help with potential medical costs or to allay concerns about retirement. It was now a duty not just to help the child start the battle of life but to help the adult child generally, regardless of whether it was a great struggle.[109] The size of the estate and the presence of other competing claimants became the main considerations when considering the claim. If the estate and other claims on it permitted, the claimant was generally awarded provision.

Changing attitudes towards women influenced the claims of adult daughters. Self reliance was no longer a dominant consideration and it is at this time that adult sons started being treated on a more even footing with daughters. The distinction based on gender disappeared. It is perhaps no coincidence that this change occurred at the same time as a broader ethical approach begins to emerge. The emphasis on self reliance was linked to an

[109] For some examples: *Woodcock v Beatson* HC Auckland CIV-2005-404-000547, 1 March 2006 at [22] (duty breached and taken into account was the financial vulnerability normally associated with young adults); *Jordan v Public Trustee* [2001] NZFLR 941(where the adult children's assets were tied up and they had children to raise. Neither had received significant sums from parents and neither were likely to achieve any particular measure of financial ease until middle life if they got nothing more now); *Re Torrens (Dec'd)* HC, Auckland M 897-86, 5 October 1988 (Mortgage obligations and dependants justified provision); *Re McRae (dec'd*) HC Napier CP 114/87, 11 October 1989 (claimants received provision because although in the middle of life, they were not completely established).

economic approach to the Act. Once that went, the idea of self reliance no doubt seemed redundant.[110]

After *Little v Angus* the courts were also prepared to base awards on ethical factors alone, *Re Harrison* becoming significant again for its emphasis on a global approach. Awards were made to compensate the claimant for parental neglect or to repay contributions or assistance. As to compensation for neglect see *Re Wotton,*[111] the Court noting a testator's obligation to compensate his daughter for the privations suffered during her childhood; *Re Airey*[112] where the testator failed to maintain and care for the claimants as children; *Re Foote*[113] where the award reflected that the son was substantially deprived of his father's company in late school and early university years.[114] Disparity in provision for adult children has never been the basis for a claim, the courts emphasising that they cannot re-write wills for mere unfairness.[115] Sometimes, however, a marked imbalance in provision will call into question the adequacy or otherwise of the provision made for the claimant.[116]

[110] Two adult sons were successful in *Mudford v Mudford* [1947] NZLR 837 because both were economically vulnerable, one as a result of the Depression, the other the First World War. External factors not of their own making meant they were unable to make ends meet. Helping them was not going to be a disincentive to industriousness. The estate was also large enough to meet the award. This was an early decision when the Act was still largely economic in focus, with an emphasis on self reliance for sons.

[111] *Re Wotton* **[**1982] 2 NZLR 691.

[112] *Re Airey* [1991] 1 NZLR 593.

[113] *Re Foote* (1988) 4 FRNZ 57.

[114] Further examples, among many, are found in *Re McRae (Dec'd)* above n 109, *Re Ross* HC, Auckland M 235/97, 14 April 1989; *Re McNicholas (dec'd)* HC Wellington A 234/84, 15 March 1989; *Woodcock v Beatson*, above n 109.

[115] *Re Shirley* 155/85, 6 July 1987 (CA): Emphasis laid on disparity by High Court was inappropriate; each claimant had to establish that provision was not adequate for their own maintenance and support.

[116] *Re McRae (dec'd)*, above n 109. See also *Re Stubbing* [1990] 1 NZLR 428. In *Re Kung (dec'd*) [2000] NZFLR 396 the Court held a testator was not bound to treat his children equally but in assessing a claim, it started with the premise that in normal circumstances there will be equality and a just parent will then consider whether there are circumstances justifying a departure. See also *Barker v Barker* HC Auckland CIV 2006-404-181, 8 September 2006 where provision under the will gave one son ten times more than his brothers. The Court stated that "*While disparity cannot be overemphasised, it cannot be ignored altogether."*

I. The Move Towards Belonging

The most significant development came in awards made expressly to reflect the family bond. In *Re Adams,*[117] Greig J justified the approach with the following interpretation of needs:[118]

> *[N]eeds are not in the strict sense for maintenance or monetary provision but are rather to recognise the family connection and relationship, the familial demand, and need for recognition and acknowledgement particularly when, as in this case, history had deprived these children of the support and provision which the father would have ordinarily given them.*

Another example is provided by *Re Batty (dec'd)*[119] where further provision was awarded to remedy a will which had the effect of one daughter feeling of lesser value in her mother's eyes. The Court held that proper provision, in the absence of economic need, required an increased share of the residuary estate to mark her position in her mother's life.[120] The case law had reached a stage where the courts considered it a severe thing to disinherit a child.[121] A survey carried out by academic Nicola Peart showed that out of 235 cases brought by adult children between 1985 and 1994, over 90% succeeded.[122] While some cases showed financial need others were solely about recognition of the family relationship.

J. The Law Commission Report

From the 1980s onwards the broader judicial approach started attracting criticism. In 1988 the Report of the Working Party on Matrimonial Property concluded that the then judicial

[117] *Re Adams* HC Wanganui A 34/84, 1 April 1986.

[118] Ibid at 6.

[119] *Re Batty (dec'd)* HC Blenheim AP 18/96, 4 March 1997 at 18.

[120] For another example, see *Re Lawson* [1987] 1 NZLR 486.

[121] *Re Evans* HC Wellington CP 445/89, 8 June 1994.

[122] N Peart "Awards for Children Under the Family Protection Act" [1995] BFLJ 224.

approach represented a considerable departure from earlier interpretations of moral duty and that:[123]

> *There has been a tendency to make awards solely on the basis of a blood relationship regardless of the need for maintenance and support. Similarly, adult children are awarded a share of the estate as they are perceived as having a "right" to inherit a portion of the deceased parent's property. These awards sometimes reduce bequests to surviving spouses, widows in particular, frustrate the administration of wills and deplete estates. As a result the Act, as currently interpreted, encourages speculative claims and is capable of producing windfalls for claimants who are not in need of maintenance and support even in the widest sense of those terms.*

A Law Commission report in 1997[124] also concluded that the judicial approach was too expansive and out of step with prevailing social attitudes to succession. The Law Commission concluded that awards should be based on dependence or on inability to support oneself and its draft legislation had adult children excluded from the jurisdiction.[125]

Some judges picked up on the Law Commission's criticisms describing the judicial approach since *Little v Angus* as "*estate engineering under the guise of deciding what a wise and just testator would have done.*"[126] They noted a certain paternalism to the approach which may no longer be acceptable in contemporary New Zealand society.[127] In *Carden v Malcolm,*[128] it stated the courts had been too willing to rearrange wills in favour

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[123] *Report of the Working Group on Matrimonial property and Family Protection* (Department of Justice, Wellington, 1988) at 50.

[124] The Law Commission published a discussion paper in 1996: *Succession Law: Testamentary Claims* (NZLC PP 24, 1996) followed by a Report: *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997).

[125] NZLC R 39 at [70] has the jurisdiction restricted to minors; or those under 25 and undertaking educational or vocational training; or those unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25. This is reflected in s27 of the draft legislation set out at the end of the report. The Act was amended in 2001 to extend it to de facto partners and step children of de facto partners. No changes were made in relation to adult children along the lines recommend by the Law Commission.

[126] *Re Walker* [1998] NZFLR 726 at 731.

[127] Ibid.

[128] *Carden v Malcolm* [1998] NZFLR 18 at 26.

of adult children and it was not surprising the Law Commission saw a need for a rebalancing. Others saw it as business as usual. In *Edmonson v Green*[129] the Court held that the Act must be applied as currently interpreted by the courts not as it may have been interpreted decades ago and not in accordance with the recommendations of any law reform body "*which may or may not be implemented in the future by the legislature*."[130]

In 2000 the Court of Appeal took the opportunity to comment on the above criticisms and provide some direction as to the correct judicial approach. That opportunity came in *Williams v Aucutt*.[131]

K. *Williams v Aucutt*: Emotional Support.

The claimant was the testator's wealthy adult daughter. Her claim was not based on present or possible future economic need for maintenance and support but on receiving recognition of her role in her mother's life. The estate was worth around $1,000,000. Out of this the claimant received some shares, a painting and a number of other items. Apart from some other bequests and legacies her less well off sister got the rest. The testator made it clear that the reason for the unequal treatment was not because of any lack of affection for the claimant but because of her sister's poorer financial circumstances. In summary, the will was such that the claimant received five per cent of the residuary estate while her sister received the rest. The High Court adjusted the distribution so that she received 25 per cent. Her sister appealed.

The Court of Appeal reduced the High Court award from $200,000 to $50,000 (representing around ten per cent of the residuary estate) considering it to be based on the erroneous "extent of the difference" approach.[132] In making the award the Court

[129] *Edmonson v Green* HC, Auckland, M1039/96, 13 October 1997.

[130] Ibid, at 9.

[131] *Williams v Aucutt* [2000] NZLR 479 (CA).

[132] ie the courts cannot make further provision solely on the basis of disparity of treatment between siblings: *Re Shirley*, above n 115.

differentiated, for the first time, between the concepts of maintenance and support and gave the latter term an emotional meaning. In doing so it rejected the requirement of need:[133]

> *[W]e reject the argument that the Court must expressly find a need for proper maintenance and support. The test is whether adequate provision has been made for the proper maintenance and support of the claimant.*

It held that support is an additional and wider term than maintenance: "*In using the composite expression, and requiring "proper" maintenance and support, the legislature recognises that a broader approach is required.*"[134] Delivering the majority judgment Richardson P held that support is used in its wider dictionary sense of "*sustaining, providing comfort*" continuing:[135]

> *A child's path through life is not supported simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and having been an important part in the overall life of the deceased. Just what provision will constitute proper support in this latter respect is a matter of judgment in all the circumstance of the particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a moderate amount. On the other hand, where the estate comprises the accumulation of family assets and is more than sufficient to meet other needs, provision so small as to leave a justifiable sense of exclusion from participation in the family estate might not amount to proper support for a family member.*

The majority concluded that a "recognition" legacy would have to be modest as the provision made in the will had already gone some way towards that.[136]

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[133] *Williams v Aucutt*, above n 131 at [52].

[134] Ibid.

[135] Ibid.

[136] Ibid, at [55]. There are some suggestions that an appropriate award in this type of case is one representing ten per cent of the estate. This is noted by R Sutton and N Peart "Testamentary Claims by Adult Children - the Agony of the "Wise and Just Testator" (2003) 10 OLR 385 at 410. Some judgments appear to take this approach although it has not been expressly affirmed by the Court of Appeal. See discussion in W Patterson, above n 3 at [9.7].

Blanchard J issued a separate but concurring judgment but seems to take a slightly expanded view of the support claim. The claim was not just seeking recognition of family membership but also for contributions by way of assistance to, and support of, the deceased: "*In part it seeks support from the estate for support that has been rendered, albeit without any promise of return such as would fall within the Law Reform (Testamentary Promises) Act 1949*."[137]

In relation to the duty issue, *Aucutt's* significance lies in the Court's interpretation of support to justify the incorporation of intangible concepts like "belonging" into the test. As noted above, ethical and moral considerations - including recognition of the "familial demand" - had informed the test for a long time but courts had justified this by reference to the "moral duty" test or held the claimant had established need in a broad sense and then took ethical and moral factors into account in a global approach. In *Aucutt* the Court relied on the concept of "support" to get there in a more direct manner.

The decision represents another step in the direction towards recognition of family rights. This is seen not only in its interpretation of "support" but also in the case's reference to "*family assets.*"[138] Emotional support is now seen as important as financial support "*such is the nature of the sense of belonging to a family, which the concept of support seeks to capture*."[139]

In *Re R (dec'd)* the Court put it as follows:[140]

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[137] *Williams v Aucutt* above n 131 at [69]. Under the Law Reform (Testamentary Promises) Act 1949 a person can claim against an estate for services rendered to, or work performed for, the deceased during their lifetime, in reliance on a promise that they would be rewarded for the services or work by way of testamentary provision.

[138] *Williams v Aucutt*, above n 131 at [52]. In the same paragraph it also refers to "*family possessions*." Exclusion from the "*family estate*" also justified an award in *Kinniburgh v Williams* HC Hamilton , M 193/02, 16 December 2003.

[139] *Kinniburgh v Williams,* Ibid at [36]. For another example, see *Clement v Bryant* CA 190-86, 17 May 1986 where the High Court held that a mother's expression of love for a comfortably off daughter could, after death, only be expressed in money: "*In other words a need for moral support can give rise to a duty to make testamentary disposition."* The Court of Appeal endorsed the findings of the High Court noting the award would be important symbolically. The daughter's limited enjoyment in life – she had suffered a brain haemorrhage - would be added to knowing her mother had left her something.

[140] *Re PHR (dec'd)* [2004] NZFLR 26 at [20] (HC).

> *Contribution by a family member of time, skill, compassion and support carries with it an obligation to repay, not in money's worth, but by the provision of similar support…After death, a testator may only recompense in money*.

L. The Scope of the Belonging Claim

In *Aucutt* itself the claimant had a good relationship with her mother. There was therefore a relationship to recognise but does it require a close relationship between parent and child, a cordial one, or is the mere fact of the relationship itself sufficient? In *Re Vincent,*[141] Randerson J stated that the obligation would be largely defined by the relationship which actually exists between parent and child:[142]

> *Although the relationship of parent and child is important and carries with it a moral obligation as reflected in the Family Protection Act, it is nevertheless an obligation largely defined by the relationship which actually exists between parent and child during life*.

Similar comments are found in the Court of Appeal's decision in the case of *Flathaug v Weaver*.[143] The claimant was the testator's ex-nuptial daughter. She had been brought up by her mother and her mother's husband after it was agreed that was the best course and that she should not know the facts of her birth. As an adult she found out the truth and from then on enjoyed a relationship with her natural father. She was left nothing in his will, however, and made a claim. In reaching its judgment the Court held:[144]

> *The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system and underpinned by the law. The Family Protection Act recognises that a parent's obligation to provide for both the emotional and material needs of his or her children is an ongoing one. Though founded on natural or assumed parenthood, it is, however, an obligation which is largely defined by the relationship which exists between parent and child during their joint lives*.

[141] *Re Vincent* HC Auckland CIV 2002-404-2440, 22 February 2006.

[142] Ibid, at [81(i)].

[143] *Flathaug v Weaver* [2003] NZFLR 730 (CA).

[144] Ibid, at [32].

Given the facts, it held there was no question of a moral duty arising before she learned the testator was her father. She had been brought up in a manner that was in her best interests and had enjoyed all the advantages of being reared in a stable and unified home. It considered that the testator's decision not to play a part in her life was "*an act of enlightened forbearance*" not of neglect.[145] The loyalty and affection which both had built up had to be recognised but at the same time the inquiry had to take account of the limited nature of the relationship. It lacked any element of shared family life and of common endeavour and mutual sacrifice and was seen as fundamentally different from the lifelong relationship in *Aucutt*. This, it held, was not to diminish the bond but to emphasis the duty was of a lesser order than would arise between a parent and child who had shared a lifetime relationship.[146]

While the courts emphasise the nature of the relationship they also indicate that the reason for the lack of any relationship will be relevant. If it is because of neglect on the testator's part then a duty may still arise. Blood, without any relationship at all, could also give rise to a claim.[147] As with all claims under the Act to date the courts approach each case on its own merits: "*The considerations will be fluid but underlying them must be the concepts of loyalty each to the other, empathetic bonding and if appropriate, forgiveness and reconciliation.*"[148]

Since *Aucutt*, several cases have brought claims on both basis - financial and emotional - and whether that is appropriate will depend on the facts of the case.[149] In *Flathaug v*

[145] Ibid, at [33].

[146] Ibid, at [41].

[147] A case in point is *Re the Estate of HE* FC Dunedin, FAM 2004-543, 19 July 2005 where the testator left his estate to his siblings and nothing to his only child, with whom he had had no contact at all. The Court held that a wise and just testator would have repaired the lack of relationship, and provided emotional and financial support.

[148] *Re Bryant* (dec'd) HC Napier CP 18/01, 19 June 2002 per Gendall J.

[149] In *Re Hardie* [2001] 21 FRNZ 674 the intangible component of support was fixed at $100,000 with a further $250,000 under the economic head. The term "dual components" is also used *Re Ashby* HC, Auckland, M 535/02 19/11/02; *Woodstock v Beatson*, above n 109; *Re the Estate of HE*, above n 147 and *H v C*, FC, North Shore, FAM 2005-044-1873, 11 December 2006.

Weaver[150] the Court held the claimant had established a need for maintenance in an economic sense and support in the wider sense established in *Aucutt*.[151] In *Woodcock v Beatson*[152] the Court held that: "*Each family history, of course, is uniquely different. In many histories the support obligation and the maintenance obligation may run together with the evidence demonstrating shortfalls in both*."[153]

M. *Aucutt* - A More Conservative Approach

As noted above, the Law Commission criticised awards based on blood or belonging but the Court of Appeal did not address this in *Aucutt* and made an award expressly on that basis. What it did respond to, however, was the criticism that awards under the Act had become too generous and the case is also significant for its comments on this issue; it has been viewed as signalling a more conservative approach to the jurisdiction. The Court noted a concern that some awards may be out of line with social attitudes to testamentary freedom and responded to the Law Commission's criticism by issuing a reminder that awards under the Act must be limited to what is sufficient to repair the testator's breach, no more.[154] In a separate but concurring judgment Blanchard J agreed there was some substance to the criticisms. While considering the Commission's position rather extreme he stated: "*It is to be remembered that the Court is not authorised to rewrite a will merely because it may be perceived to be unfair to a family member*."[155]

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[150] *Flathaug v Weaver*, above n 143.

[151] Ibid, at [40].

[152] *Woodcock v Beatson*, above n 109.

[153] Ibid, at [27]. See also *Auckland City Mission v Brown* [2002] 1 NZLR 650 at [35]: where the Court held it is likely to be a "*compendious inquiry into the combined elements of the composite expression. It is where it is accepted that the claimant has adequate provision from his or her own resources and the existing testamentary provision for the proper maintenance of the claimant that the inquiry will focus on the adequacy of the provision for proper support in the circumstances."* In *Re Posa* HC Hamilton CIV 2006-419-751, 6 December 2006, Harrison J noted that the distinction between the two concepts can be subtle, even elusive, and possibly artificial depending on the facts - at [22].

[154] *Williams v Aucutt*, above n 131 at 45.

[155] Ibid, at [68]. (Blanchard was a member of the Law Commission at the time).

The Court's conservative approach was confirmed in *Auckland City Mission v Brown*.[156] This case also involved a claim by an adult daughter, an only child, this time against her father's estate. The estate was worth $4,500,000. Of this, the claimant was meant to receive around $190,000 but changes to the testator's asset holdings had reduced this to $30,000 at date of death. She also received chattels, jewellery and forgiveness of half a loan for $20,000, and the interest thereon. This loan was given to provide a deposit for the claimant's first house. She had also received other inter vivos provision. The testator had set her and her husband up in a business, giving them two thirds of its shares. The remaining third were left to her in the will. The shares were of no value but the business provided the claimant and her husband with a livelihood. There had also been assistance with a property deal. (The rest of the estate, a few bequests aside, went to charity).

The claim went to Court on the agreed basis that there had been a breach. The issue was one of quantum. The reason for the supposedly inadequate provision was the testator's dislike of his son-in-law. He had a jaundiced view of his work ethic, considering him a "nine to five" guy.[157] He thought money left to his daughter would be frittered away by his son-in-law. Instead he chose to benefit his daughter indirectly by providing a $1,000,000 trust fund for her children. He saw this as providing for his daughter too as the money could be used for their education, maintenance, advancement or other benefit.

The High Court held the level of provision for the claimant was too low and she had the right to be freed from the "*shackles of economic necessity*."[158] The trust fund for her children was not enough to do this. It awarded her $1,600,000 none of which came from the provision already made to the children.

The Court of Appeal criticised the High Court's approach saying it had ignored the principle that the order had to be limited to repair the breach and that this had resulted in a

[156] *Auckland City Mission v Brown* [2002] 1 NZLR 650.

[157] A description taken from R Sutton and N Peart "The Agony of the Wise and Just Testator" above n 136 at 404.

[158] *Auckland City Mission v Brown* [2002] 1 NZLR 650 at [43].

very high award.[159] It held that a wise and just testator would have given the claimant enough to acquire a more substantial home debt free, clear her existing mortgage together with an amount to supplement the family's income and provide a reasonably substantial contingency fund. It fixed this at $1,022,000.[160]

In *Henry v Henry*[161] the Court of Appeal reiterated the need for a more conservative approach and made it clear that this applied to claims based on support in the broader sense articulated in *Aucutt* and those based on economic need.[162] It rejected the submission that the provision in *Brown* - enough for a house, payment of a debt and a contingency fund – should be seen as a benchmark or default standard.[163] It also rejected a suggestion that the courts should approach the jurisdiction as they do in judicial review cases. (This had been a suggestion by Asher J in the High Court, prompted by what he saw as a too lenient approach to the jurisdiction). [164]

N. Other Relevant Factors: Testator's Reasons, Estrangement and Disentitling Conduct

Finally, it is worth noting three additional factors that may influence the court's decision. They are the testator's reasons, any estrangement between claimant and testator and any disentitling conduct on the claimant's part. All three form part of the court's overall assessment.

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[159] Ibid at [36]-[37].

[160] Ibid, at [45]. As to the level of awards made to only children, Peart's survey suggests that an only child generally gets a higher award, the duty being linked more closely to the size of the estate. N Peart "Awards for Children Under the Family Protection Act" (1995) 1 BFLJ 224. For an analysis of the decision in terms of corrective and distributive justice principles, see R Sutton and N Peart "The Agony of the Wise and Just testator" above n 136.

[161] *Henry v Henry* [2007] NZFLR 640.

[162] Ibid, at [54-56].

[163] Ibid, at [78].

[164] Asher J's suggestion is summarised in the Court of Appeal decision at [28-29]. The reasoning ran that the concept of a discretionary failure was not dissimilar to the administrative law concept of wednesbury unreasonableness. Applying it to the Family Protection Act jurisdiction would mean that: *"Only in the event of a clear and material error or omission, or when the decision is one that no reasonable testatrix would have made, will the Court intervene."* The Court of Appeal dismissed this approach outright. To it, the analogy was inappropriate as the testator's role was not akin to that of a public official. Further, judicial review was focused on procedure whereas the Act focused on substance. Ibid, at [36-40].

The Act expressly provides that the courts can take account of the testator's reasons.[165] In some cases those reasons will support further provision while in others they will be ignored if they conflict with the court's own assessment of whether and what provision should be made.[166] Estrangement may affect the success of a claim but is more likely to be but one factor taken into account.[167] Again, in some cases the absence of a relationship will count against an award and in others it may support it. In *Croswell v Jenkins & Hall Jones* the Court stated:[168]

> *The claim of a child from whom the deceased had a long estrangement cannot be as strong as that of one with whom he has had a close relationship. On the other hand, where the estrangement is of the deceased's making, either because he has actively brought it about, or because he has not exercised his particular ability and responsibility to heal it, the need and the moral duty are compelling. What the deceased has failed to do in his lifetime to accord recognition to his own family he ought to do in his will. And if he does not, the Court ought to do it for him.*

The Act also provides that the court can refuse to make an award if the claimant has been guilty of disentitling conduct.[169] This provision has never played a large role in the jurisdiction, even in the earlier cases.[170] Courts prefer to take it into account in a global way rather than using it to bar relief outright. They also take the view that a wise and just testator should forgive or understand any wayward behaviour on the part of their children.[171] Further, what may once have been considered disentitling behaviour may not today. The overall approach is colourfully summed up as follows: "*It is the household of*

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[165] Section 11 Family Protection Act 1955.

[166] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463. The testator intended to change his will to increase provision to his infant sons. This was taken into account by the Court in awarding them further provision.

[167] See WM Patterson, above n 3 at [4.14] and [4.17].

[168] *Croswell v Jenkins & Hall-Jones* [1985] 3 NZFLR 570 at 575.

[169] Section 5(1) Family Protection Act 1955. The same provision was included in section 2 of the Testator's Family Maintenance Act 1900.

[170] See WM Patterson at [2.2] [4.17] and [5.8]. An example can be found in *Ray v Moncrieff* [1917] NZLR 234 (son a chronic alcoholic).

[171] *Re Mercer* [1977] 1 NZLR 469.

the paragon of wisdom and justice who is seldom encountered on the Clapham omnibus, a household which now includes the ner'er do well, the lame duck and even the black sheep."[172]

III. Conclusion

This Chapter shows that the fortunes of adult children have changed markedly since the first reported decision of *Re Rush*[173] in 1901. It is a story of evolution, of the jurisdiction broadening as each leading case analysed, in more detail, the parameters of the section, of each building on what went before. The early approach based on destitution and self reliance moved to a broader economic approach, to a mixed economic and ethical approach and then to a purely ethical one. The application of the "moral duty" test was pivotal in this development.[174]

It is also a story of flexibility and individualised justice, the courts eschewing hard and fast rules, each claim being assessed according to its own unique family situation and the period in which it is decided. Again, the moral duty test has been central to this development, that duty accommodating a wide variety of factors and changes in society, most notably the gradual fading of the idea of self reliance and of changing attitudes to gender. The courts have adopted the persona of the wise and just testator to inform the content of that duty. The flexibility is also seen in the level of provision. Again, there is no objective benchmark; each award will depend on the facts of the case, the size of the estate and the existence or otherwise of competing moral claimants. All these factors determine what is "adequate' and "proper".

[172] *Re Bartel Estate* (1982) 16 Man R 29 at 32, per Scollin J cited in S Grattan "Of Lame Ducks, Black Sheep and Family Bonding: One Century of the Will-Making Duties of the Commonwealth Father" (2000) 51 N Ir Legal Q 198 at 222.

[173] *Re Rush* (1901) 20 NZLR 249.

[174] Peart sees it as moving from a financial support stage, to a contribution stage to a relationship stage, the latter being recognised by the belonging claim in *Williams v Aucutt:* N Peart "Towards a Concept of Family Property in New Zealand" (1996) 10 International Journal of Law, Policy and the Family 105.

The Law Commission, commentators and some judges have been critical of the broadening approach. Those criticisms are two-fold. Some are directed at the justification for the awards and the move away from a purely economic approach. Others flow from the discretionary nature of the jurisdiction itself, which some have criticised as creating uncertainty generally. The next chapter looks in more detail at what others have had to say about the Act and the judiciary's approach to it.

Chapter Three: Literature Review

I. Purpose and Overview

Much has been written about the Family Protection Act 1955 and similar family provision legislation in other jurisdictions. This Chapter summarises the nature of that commentary over the course of a century or so as it relates both to the court's general approach and as it applies to adult children. (The two cannot, generally, be separated so while articles may not be about adult children per se, the comments have general application. The earlier commentary is more about the court's establishment of general principles. The more recent commentary is mainly targeted at independent adult children). Where relevant, the detail of the commentary is woven through other chapters; this chapter simply summarises the broad thrust with enough detail to give the overall picture.

In doing so, its purpose is to identify two gaps in the literature. The first is that none of the commentary assesses the court's approach to the legislation against a theory of interpretation; it simply agrees or disagrees with it depending on what could be called a general impression - usually based on the Act's purpose - and/or the broader philosophical views of the commentator. The second gap is that while it often identifies the tension between property and family in this area of the law, it starts from the view of property and testamentary freedom. Some reference is made to civil law jurisdictions and their system of fixed rights but there is nothing setting out the positive arguments for the rights of adult children to an inheritance. It is these two gaps which this thesis seeks to fill.

The review is not confined to the New Zealand legislation but also includes commentary on its counterparts in Australia and British Columbia, with some reference to English commentary as well. The issues arising are generally the same and the literature from one often refers to, and draws on, that in another, particularly that produced by the law reform bodies. It also concentrates on articles; textbooks, on the whole, are descriptive.[1]

[1] Texts addressing the New Zealand legislation include D Wright *Testator's Family Maintenance in Australia and New Zealand* (3rd ed, The Law Book Company Limited, Sydney, 1974); W Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis, Wellington, 2004). For British Columbia see L Amighetti *The Law of Dependants' Relief in British Columbia* (Canadian Cataloguing in Publication Data,

The literature can be divided chronologically and the chapter is structured on that basis. The initial burst of commentary can be attributed both to the Act's newness and novelty. Interested observers, usually from overseas, concentrated on describing the court's approach and its establishment of principles. Where comment is made on the judicial approach, it is generally complimentary. The modern commentary is different in that it is generally critical of the court's approach. This change followed a turn in judicial direction in the late 1960s. (A lull in the commentary from the 1950s until the later material is no doubt explained by the fact that the Act was no longer new and the principles had been established; there was nothing therefore to comment on).

While a clear difference is seen in the tone of the commentary, the literature deals with similar themes across the course of a century. Broadly, those themes are the purpose of the Act, testamentary freedom and the moral duty test. Overriding it all is the ongoing tension in succession law between family rights and those of the testator and the tone generally depends on whether the writer believes the right balance has been struck.

II. Early Commentary: 1900-1950s.

As noted, the first wave of commentary was generally from overseas commentators and largely descriptive in nature, often setting out the legislative background to the Act and then the case law and principles.[2] They were interested, not surprisingly, in how the Act

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Ontario, 1991). For Australia, see R Croucher and P Vines *Succession: Families, Property and Death* (3rd, LexisNexis, 2009) at 15.20 for adult children; R Atherton *Family Provision: Expert Report 1* (Melbourne 1997) (hereafter Atherton *Family Provision*); J De Groot & B Nickel, *Family Provision in Australia & New Zealand* (2nd ed, Butterworths, Australia, 2001); A Dickey *Family Provision after Death* (The Law Book Company Limited, Sydney, 1992). For England, see RD Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984); A Borkoswki *Textbook on Succession* (2nd ed, Oxford University Press Oxford, 2002); G Miller *The Machinery of Succession* (2nd ed, Dartmouth Publishing Company, Aldershot, England, 1996) and S Ross, Inheritance Act Claims: Law and Practice (Thomson, Sweet & Maxwell, London, 2006).

[2] For a discussion of New Zealand, Australia, Canadian and English legislation, its description, background and comparison, see J Wiren "Testators' Family Maintenance in New Zealand" (1929) 45 L Q Rev 378; WPM Kennedy "Testators' Dependants Relief Legislation" (1935) 20 Iowa L Rev 317; J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277; J Dainow "Restricted Testation in Australia Canada and New Zealand" (1938) 36 Michigan Law Review 1107; J Christie "Testator's Family Maintenance in New Zealand" (1918) 18 J Comp Legis & Int'l New Series 216; B Gray "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 233; J Mackintosh "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 J Comp Legis & Int'l L 3d ser 13; B Laskin "Dependants' Relief legislation" (1939) Can Bar Rev 181; M Brown "Dependants' Relief Acts" (1940) 18 Can Bar Rev 261-302, continued at 450. For discussion of the English legislation of 1938, see E Bodkin "Testator's Family Maintenance" (1941) 23 J

would work and how the court would approach its task and so the descriptive approach is to the fore. There was also much comment about the fact the Act had been passed at all and the significance of this, viewed against a backdrop of testamentary freedom. Early commentary was overwhelmingly in support of the Act's place on the statute book in the first place. There was a general consensus that testamentary freedom had to be restricted in the wider interests of the family and society generally.[3] At the same time, the discretionary aspects meant the right balance could be struck and it also allowed for individual rather than general justice.[4] It was viewed as a piece of "*legislative genius*."[5]

The commentary also displays a consensus as to the general thrust of the Act - that it was economic in focus and directed at financial need - but beyond that, there is some difference of opinion as to its exact scope. Some saw it as insurance for dependent family members against being left in financial need.[6] The Act's purpose of relieving the State of the financial burden also featured regularly: "*Indignation at injustice and exasperation at the burden of maintenance of a well to do being thrown upon the community led to the Act*."[7] There was another view point, however, and a prescient one, although it is in the minority. It was that the Act was tantamount to a declaration of a family interest in the property of the testator.[8]

Comp Legis & Int'l L 3d ser. 155; J Dainow "Limitations on Testamentary Freedom in England" (1940) 25 Cornell LQ 337; J Gold, J L Robson, O Kahn-Freund, W Breslauer, "Freedom of Testation: The (Inheritance) Family provisions Bill" (1938) Mod Law Rev, 296 at 303; FP Walton "Notes, Lord Astor's Bill, Lord Haldane and the Scots Law" (1929) 11 J Comp Legis & Int'l L 3d ser 269.

[3] See J Mackintosh "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 J Comp Legis & Int'l L.3d ser 13; B Gray "Dependants' Relief Legislation" above n 2; WPM Kennedy, above n 2.

[4] Robson J (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens and Sons, London, 1967) at 472.

[5] J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev277 at 282.

[6] J Dainow "Restricted Testation in Australia Canada and New Zealand" (1938) 36 Michigan Law Review 1107 and H Mason "One Hundred Years of Legislative Development in New Zealand" (1941) 23 J of Comp Legis & Int'l L 3d ser, 1.

[7] J Mackintosh , above n 3 at 13.

[8] B Gray, above n 2 at 238.

In *Allardice v Allardice*[9] the Court distanced itself from the Destitute Persons Act 1910 and the judicial approach became slightly broader. The commentary remarked on this by stating that the Act was capable of broader application given the vagueness of the words and the breadth of the discretion. It also observed there could be no hard and fast rules because each case would be different and this was the difficulty of applying abstract rules to concrete cases and the "*extreme latitude*" given by the discretion.[10] Most were also sympathetic to the court's task, considering it a difficult one, a task of "*delicacy and complexity*."[11] What constituted proper maintenance was seen as a "*vague and complex issue*."[12]

While some attributed the change in approach to the flexibility of the words, others also pointed to judicial confidence in applying them, attributed in part by statutory amendments enlarging the jurisdiction.[13] They also considered that the initial narrow approach was a result of the courts receiving their jurisdiction "*unenthusiastically*."[14] The legislation in Australia, British Columbia and New Zealand was essentially similar but differences in application were observed and attributed to the legislation's flexibility in adapting to different facts and different climates:[15]

> *[It] was perfectly natural for different interpretations to be reached from a similar statutory text. One construction may be as reasonable as the other; the variations in different places merely represent the incidental adjustments of the same principle to the environmental conditions of the respective jurisdictions.*

[9] *Allardice v Allardice* (1910) 29 NZLR 959 (CA).

[10] J Dainow, above n 6 at 1111.

[11] Robson, above, n 4 at 474.

[12] Mackintosh, above n 3 at 22.

[13] Laufer above n 2 at 284. (This is also the view of a later commentator: S Grattan "Of Lame Ducks, Black Sheep and Family Bonding" (2000) 51 N Ir Legal Q 198 at 217).

[14] Brown, above n 2 at 267.

[15] J Dainow "Restricted Testation in Australia and New Zealand", above n 2 at 1124.

A. Morality

The vagueness or generality of the words also led to discussion of the role of morality in the jurisdiction. Some saw it as inherent in the wording of the Act and that the jurisdiction was founded on the moral justice of the will.[16] When earlier cases stressed the paramount place of legal obligations, one commentator criticised this on the basis that the Act asked the court, in "*unmistakable language*", to decide moral issues.[17] Others considered reference to it was noteworthy given that the Act was not couched in ethical terms.[18] However, it was not critical of this, simply stating:[19]

> *The courts have developed attitudes or policies which effectuate their views of modern family ethics and, to some extent, their philosophy of inheritance. The decisions emphasize the minimum loyalties and decencies owed one another by the members of the family.*

B. Verdict

On the whole, the broadening approach from *Allardice* onwards was met with approval. The elasticity of the court's discretion was seen as achieving justice in new and unexpected circumstances. The courts had struck the right balance and the results were "*gratifying*."[20] Why? Consistency had been achieved despite the breadth of discretion.[21] Further, according to the commentators, the courts had not exercised their discretion inappropriately:[22]

> *The courts have responded to this broad delegation of control over private property rights with characteristic self-restraint. They have emphasized the limitations on their functions*

[16] Wiren, above n 2 at 386.

[17] Brown, above n 2 at 274.

[18] Laufer, above n 2 at 294.

[19] Laufer, above n 2 at 296.

[20] Dainow "Restricted Testation in Australia and New Zealand", above n 2 at 1117.

[21] This was the view, in 1941, of the Australian Law Journal editor. (1941) 15 Australian Law Jnl 198 cited in S Grattan, above n 12 at 217.

[22] Laufer , above n 2 at 289 See also C McLelland "Fifty Years of Equity in New South Wales: A Short Survey" (1951) 25 Australian Law Jnl, 344.

> *rather than stressed their powers. They have asserted time and again that it is not within their power to recast the testator's will or to redress inequalities or fancied injustice.*

The only critical article was the one noted above and lamenting the court's reluctance to take into account morality.[23]

Despite the broadening approach, and the positive tone of the commentary in relation to it, there is no analysis of how the courts got from destitution and dependence to the recognition of claims by non destitute adult children. There is no analysis of how the inclusion of adult children relates to the Act's purpose. Nor is there any analysis of text and how it relates to dependence and what dependence or financial need entails. Perhaps this explains why the words of the Act are used interchangeably throughout - adequate maintenance or proper support - rather than a focus on the actual words of the text.[24] There is consensus that the Act is flexible but no discussion of why and what its boundaries might be. McLelland, writing in 1951, and commenting on the broader approach, notes the courts had been assisted in taking this broader approach by the word "proper".[25] There is also a brief statement by Laufer about the nature of dependence but this is as far as it goes:[26]

> *The decisions, however, demonstrate that the seemingly simple concept of dependence is strongly tinged by prevalent notions of the status of and obligations to the particular dependent as a member not only of the family, but also of the social and economic community. It is hardly surprising that in hundreds of adjudications the courts have developed contrasting attitudes toward the various categories of dependents*.

Likewise, there is commentary on the moral duty test but no analysis of how that ties in with the text or purpose. The minority statement (noted above) that the legislation is tantamount to a declaration of interest in family property is not elaborated on either. The commentary is confined to description, explanation and conclusion based on the author's

[23] M Brown, above n 2 at 274.

[24] For example, Laufer, above n 2, talks of "adequate maintenance" while Mackintosh, above n 2 refers to "proper maintenance".

[25] McLelland, above n 22 at 344.

[26] Laufer, above n 2 at 304.

overall impression and views as to what is a just outcome. Brown, for example, refers to the court's earlier rhetoric of not re-writing wills. He then considers that this had been thrown overboard and that the courts had swung to the opposite extreme of re-writing wills for testators.[27] There is no comment as to whether this is justified or not. The obvious gap is that no-one assesses their conclusions against a theory of statutory interpretation.

Finally, there is nothing in the early literature focusing on the rights of an adult child to an inheritance. The starting point is always the power of bequest and the obligations that may come with that. This is perhaps not surprising given the discretionary framework on which they were commenting and the fact that the court's approach was still quite narrow at this stage; the idea of a claim based on belonging to a family was still decades away. At this stage, the right of a claimant was to apply, not to receive provision.

III. Modern Commentary: 1970s to Date

A. Overview

There is a noticeable lull in the commentary from the 1950s until the 1970s and the bulk of the material comes from the 1990s onwards. The catalyst for the modern commentary was the court's more liberal approach to economic need after the 1960s and then the more explicit recognition of a claim based on the family connection from the 1980s onwards. The focus of this commentary is generally on the court's approach to independent adult children. This approach is seen as distant from the Act's original purpose and as the one which has led to an unjustified erosion of testamentary freedom, if not its death knell. It discusses the same issues as the earlier commentary - the purpose of the Act, the role of morality and whether the approach achieves the right balance between individual property rights and the rights of the family. The difference, however, is that the tone is now critical.

Again, there is comment on the judicial role in interpretation but this time the consensus is that the courts have strayed too far into deciding moral issues, that they are not the right body to be deciding issues of conventional morality, the purpose of the Act has been forgotten and testamentary freedom has been eroded too much. What flows from this is a

[27] Brown, above, n 2 at 276.

lack of certainty which is also seen as a bad thing. It is the jurisdiction as it applies to adult children which is charged with creating the uncertainty. This statement sums up the general tone: "*The deceased's support obligations are ill-defined, uncertain and unpredictable. They do not reflect contemporary community values and they undermine family cohesion and efficient estate administration.*"[28]

Several articles set out the background to the legislation, and the development of the case law.[29] Most then go on to criticise the approach but some also consider whether this is a good place for the law to be generally. Whatever the exact content, all start from the premise that the Act's purpose was to provide for those in real financial need and coupled with that, to prevent destitute people becoming a burden on the State. It was this aim alone that allowed the legislation to be passed.[30] Purpose is therefore the touchstone for most of the modern analysis. Given that, commentators inevitably view the court's recent approach - the more liberal approach to financial need and recognition of the belonging claim - as

[28] N Peart "New Zealand's Succession Law: Subverting Reasonable Expectations (2008) 37 Comm. L. World Rev. 356 at 376.

[29] The most detailed discussion of the New Zealand Act's origins is R Atherton "New Zealand's Testator's Family Maintenance Act of 1990 - The Stouts, the Women's Movement and Political Compromise" (1990) 7 OLR 202. See also N Peart "The Direction of the Family Protection Act" [1994] NZ Recent L Rev 193 at 193-195; V Grainer "Is Family Protection a Question of Moral Duty?" (1994) 24 VUWLR 141 at 142-144. The background to the Australian legislation is set out in R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD Thesis, University of New South Wales, 1993) 158-203 (hereafter R Atherton "Thesis"). For British Columbia and Canada generally, see L Amighetti, *The Law of Dependants' Relief in British Columbia* (Canadian Cataloguing in Publication Data, Ontario, 1991) at 11-20. For England, see Rd Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984) at 9-21. For a description of the direction the case law has taken, see N Peart "The Direction of the Family Protection Act", Ibid; R Atherton "Thesis" Ibid at 206-246 and 342-401; S Grattan, above n 13. For an analysis of awards made under the Act, see N Peart "Awards for children under the Family Protection Act" (1995) 1 BFLJ 224. Peart also describes the case law and analyses it as part of a wider shift in New Zealand from an individual concept of property to a family one in N Peart "Towards a Concept of Family Property New Zealand" (1996) 10 International Journal of Law, Policy and the Family 105-133. N Peart "Forced heirship in New Zealand?" (1996) BFLJ 97 discusses the general direction of the case law and concludes New Zealand now has a discretionary form of forced heirship and asks whether the law should change to reflect that.

[30]Peart describes this in the three articles cited at n 29 above. See also V Grainer, above n 29 at 142-144; J Caldwell "Family Protection Claims by Adult Children: What is Going On?"(2008) 6 NZFLJ 4 at 4; J Caldwell "Editorial: Where There's a Will … Family Protection Claims and the Court of Appeal (2003) 4 BFLJ 155 at 155; D Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 OLR 603 at 604; L Amighetti, above n 1 at 168-173. It is also the view expressed by G Bale "Palm Tree Justice and Testator's Family Maintenance-The Continuing Saga of Confusion and Uncertainty in the BC Courts" (1987) 26 ETR 295 (hereafter G Bale "Palm Tree Justice"). See also the views in NZLC PP 24 "Succession Law Testamentary Claims" at [218].

contrary to the purpose of the Act and therefore an interpretation that the Act should not bear.

B. Judicial activism

As noted above, the verdict mid century was that judges were fulfilling their role properly, although there was no analysis of what that meant in terms of statutory interpretation. Writing in 1951 McLelland wrote favourably about the court's approach stating that "*no judge has ever worn the mantle [of just and wise fathers] with the abandon one would expect of a medieval Chancellor suitably modernized.*"[31] Now, the view is that the courts have stepped beyond their proper sphere and the allegation most often levelled at them is that they are guilty of judicial activism:[32]

> *Emphasising the testator's moral duty leads to a judicial free for all. Alternatively one might say, in a free adaption of the words of John Selden, that with such judicial power a testator's moral duty will vary according to the conscience of each individual judge, and as that is narrower or longer, so is the duty.*

By judicial metamorphosis, the Act has been transformed from one based on economic need to an anti inheritance vehicle.[33] This, it is stated, goes beyond the proper role of the courts in relation to the interpretation and application of statutes and the exercise of discretion. There is no discussion, however, of whether original purpose should continue to

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[31] C McLelland, "Fifty Years of Equity in New South Wales - A Short Survey" (1951) 25 Australian Law Journal 344 at 344, cited in S Grattan, above n 13 at 217.

[32] AH Oosterhoff "Succession Law in the Antipodes: Proposal for Reform in New Zealand" (1997) 16 E & TJ Journal 230 at 236. Selden said of equity "*Equity is a roguish thing. For the law we have a measure…equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot*": Pollock (ed) *Table Talk of John Selden* (1927) at 43, cited in Oosterhoff at 236, footnote 32.

[33] N Peart "Awards for Children under the Family Protection Act" (1995) 1 BFLJ 224 at 226-227: "*The philosophy has changed from testamentary freedom to family inheritance, entirely as a result of judicial activism*". S Grattan, above n 13 at 226-227 who sees it as a move from maintenance to equitable distribution as a result of "judicial metamorphosis". See also L Amighetti, above n 1 at 168-170 and also at 28 where he considers the present application of the British Columbia legislation a "*diluted and whimsical version of forced heirship.* Caldwell also sees the judges as re-writing wills solely on the basis of what they consider fair: J Caldwell "Family Protection Claims by Adult Children: What is Going On? (2008) 6 NZFLJ 4 at 4.

dominate a century later and if so, why and whether the text allows for a broader application.

The charge of judicial activism is seen in various articles, particularly when it comes to the court's assessment of community values. The prevailing view is that the court's own assessment of community values is baseless and that they have lost focus: "*Repeated practice, gradually validating and enlarging upon itself, prevents the courts from hearing what ordinary people are saying.*"[34] They have been involved in a "*major programme of legal redefinition*" resulting in unsatisfactory outcomes.[35] The approach - resulting in uncertainty - is also contrary to the rule of law in that citizens are unable to organise their affairs according to the plain words of the Act. These commentators would agree that: "*Unforeseeable interpretations of statutes and departures from precedent amount to the application of unpromulgated law. This can lead to loss of public confidence in the judicial system.*"[36] Dugdale charges the judges applying the Act with "*galloping madly off in the wrong direction.*"[37] He argues that contrary to the plain words of the Act, the courts are transforming the law and tinkering with wills on the basis of ethical rather than economic considerations "*quite undeterred by any general agreement (let alone legal rule) as to what the relevant moral and ethical considerations may be.*"[38] The upshot: The jurisdiction is out of control.

The belonging claim comes in for particular criticism. The view is that there is no normative justification for this in any of the decisions and that its result - a form of judicial

[34] R Sutton and R Bigwood "Taking Stock: Legal Method in New Zealand Today (and for the Future?)" in R Bigwood (ed) *Legal method in New Zealand* 305 at 329.

[35] Ibid, at 335.

[36] R Fisher "*New Zealand Legal Method: Influences and Consequences*" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Lexis Nexis, Wellington, 2001) 25 at 50.

[37] Dugdale, above n 30 at 604.

[38] Ibid.

forced heirship - is such a dramatic shift in the purpose of the Act that is for Parliament not the courts to make.[39]

The same criticisms are levelled at the judicial approach in British Columbia where the courts have also applied the Act in an ethical way, allowing a claim based on status alone.[40] "*Interpretation has resulted in the "undignified spectacle of the courts indulging in schizophrenia….*"[41]

Again, however, this is not assessed against any theoretical benchmark. Instead, as noted, the analysis is based on what is seen as the Act's economic purpose and the court's role when it comes to making decisions based on morality. Several commentators observe vagueness in the Act's purpose and text but this is as far as it goes. Caldwell, for example, states:[42]

> *The broad penumbra of key words such as "proper" and "support" found in s 4 of the Family Protection Act 1955 has always enabled the Courts to extend their jurisdiction beyond mere examination of the financial needs of the claimant. For instance, the statutory concept of "proper" necessitates broader examination of what is right, apt, and proportionate.*

[39] R Sutton and N Peart "Testamentary Claims by Adult Children - The Agony of the 'Wise and Just' Testator" (2003) 10 OLR 385 at 403-404. Peart also argues that the current discretionary model is an inappropriate vehicle for recognition of such a claim in N Peart "Forced Heirship In New Zealand?"(1996) 2 BFLJ 97.

[40] See G Bale "Palm Tree Justice and Testator's Family Maintenance - The Continuing Saga of Confusion and Uncertainty in the B.C. Courts" (1987) 26 ETR 295; Amighetti, above n 1 and A Oosterhoff "Succession Law in the Antipodes: Proposals for Reform in New Zealand" (1997) 16 Est & Tr J 230.

[41] L Amighetti, above n 33 at 28, borrowing from A Mellows in his analysis on case law in another branch of succession law in A Mellows *The Law of Succession* (3rd ed 1977) at 70-71.

[42] J Caldwell "Where There's a Will … Family Protection Claims and the Court of Appeal, (2003) 4 BFLJ 155 at 155. See also J Caldwell "Family Protection Claims by Adult Children, What is Going on?" (2008) 6 NZFLJ 4 at 4. One of his main criticisms is the failure of the courts to gage conventional morality correctly and an argument that the current approach is contrary to prevailing views on testamentary freedom.

At the same time, however, he criticises the broader approach, particularly the recognition of the belonging claim.[43] Again, the purpose of the Act is his reference as well as what he see as the court's incorrect incorporation of conventional morality into the jurisdiction.

Atherton also recognises divergent views in the wording itself, with an emphasis on "adequate" leading to a narrow outcome and "proper" allowing a broader one.[44] She considers the Act has an elasticity that allows it to play different roles. It could serve a maintenance or a restitutive function, these functions reflecting the broader tension between family maintenance or family provision.[45] The same possibilities are noted by other commentators.[46]

Commentators also recognise that the MPs themselves appeared to have different views about what the legislation would achieve and that the 19th century debates did not reveal a clear consensus.[47] There is an acknowledgement that the Act was worded broadly and it was for the courts to determine its scope. Different interpretations were possible:[48]

> *The Parliamentary debates clearly reveal that there was no unanimous view as regards the nature and purpose of this legislation, but it was phrased sufficiently broadly to accommodate different as well as conflicting interpretations. It was the result of political compromise and left the courts with the task of determining its scope*.

[43] Caldwell does this in both articles cited above n 42.

[44] Peart also notes the significance of "proper" in N Peart "The Direction of the Family Protection Act", above n 29 at 195.

[45] See R Atherton "Thesis", above n 29 at 407- 408 and at 420-428.

[46] See S Grattan "Of Lame Ducks, Black Sheep and Family Bonding" (2000) 51 N Ir Legal Q 198 at 204-205 and N Peart, "The Direction of the Family Protection Act" above n 29 at 196.

[47] Grainer, above n 29 notes the indeterminacy of the Act's requirement at 122-124; Peart "The Direction of Family Protection Act" above n 29 at 196 and Grattan , above n 46 at 205.

[48] N Peart, "The Direction of the Family Protection Act", above n 29 at 196.

Even the New Zealand Law Commission, who criticised the courts for their broad approach, thought that the Act's purpose was not clear and could have been better defined. It accepted that some of the uncertainty in the jurisdiction flowed from this:[49]

> *This is perhaps a consequence of the lack of clearly defined purpose lying behind the jurisdiction. If, for example, the concern of the legislation had been to protect claimants from destitution (or to protect the State from having to meet the cost of supporting them), the term could have been defined in the same way as it is for welfare eligibility.*

Yet there is still a consensus that the courts are now acting inappropriately so there is some impression that the courts are performing their interpretative role badly. The words are broad but have some limits. What those limits are is not discussed with reference to a textual analysis or any other theory of interpretation.[50] The purpose of providing financial relief to dependants is the starting point for these commentators and the benchmark against which the courts are assessed.

C. The Moral Duty

Much has been written about the moral duty test. Usually it is seen as a gloss imposed upon the statute allowing judges to hide behind rhetoric, rather than applying the words of the Act, and to re-write wills based on their own subjective assessments of what is fair, rather than based on considerations of maintenance and support.[51] It is seen as marginalising the testator's wishes and creating a duty more extensive than originally intended by the legislators.[52] It is the main culprit when it comes to the erosion of testamentary freedom, allowing the courts a breadth of discretion that was never intended.

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[49] NZLC PP 24 *Succession Law: Testamentary Claims* (Wellington, 1996) at [218].

[50] G Bale, above n 40 at 13 has some hint of it when he refers to other sections of the British Columbia legislation - eg s 13 of the Wills Variation Act - as supporting an economic approach but there is nothing beyond one sentence. Section13 empowers the court to vary or discharge certain orders where the dependant "has become possessed of or entitled to provisions for his proper maintenance and support".

[51] See J Caldwell "Family Protection Claims by Adult Children: What is Going On? (2008) 6 NZFLJ 4; G Bale, above n 40; L Amighetti, above n 1 and S Grattan, above n 46.

[52] S Grattan, above n 46 at 221.

Commentators either call for it to be rejected[53] or, if morality is to be the cornerstone of the jurisdiction, and the Act is going to recognise this, argue it should be re-framed and should not rely on the court's construction of the legislation.[54]

Atherton takes a different approach to her analysis. She has written widely on the Act and its relationship with testamentary freedom; it was the subject of her doctoral thesis.[55] She sees the Act as an extension of testamentary freedom rather than a contradiction to it. It was introduced to correct aberrant uses of that power and to test that against a standard of moral duty was logical. She sees the test as implicit in the Act and logical when viewed against the backdrop of the philosophy of testamentary freedom and individual property rights:[56]

> *[I]n placing such a 'gloss' on [the Act] it is suggested [the judges] were not confusing the basic principles of the Act, but rather plainly recognising its genesis; namely, that Family Provision legislation was developed in response to testamentary freedom, but not as a contradiction of it.*

[53] Grainer, Caldwell, Grattan, Bale, Oosterhoff and the New Zealand Law Commission all call for this in the articles mentioned above.

[54] These are the conclusions of Atherton in both her thesis, above n 29 and R Atherton *Family Provision: Expert Report* 1 (Melbourne 1997) (hereafter Atherton, *Family Provision*) at Chapter 6; N Peart "Awards for Children Under the Family Protection Act" (1995) 1 BFLJ 224 at 227.

[55] R Atherton "Thesis" above n 29. One of her main focuses is how testamentary affects women and young children. She has written about this in other articles too. See R Atherton "Expectation without Right: Testamentary freedom and the Position of Women in 19th Century New South Wales" (1988) 11 UNSW Law Journal 133. Testamentary freedom is also explored in R Croucher (previously Atherton) "*How Free is Free? Testamentary Freedom and the Battle Between 'Family' and 'Property'*" TC Beirne School of Law - Research Seminar Series 2009, February 2009 and R Croucher "Law Reform as Personalities, Politics and Pragmatics - The Family Provision Act (1982) (NSW): A Case Study" **(**2007) 11 Legal Hist 1 which touches on the debate surrounding it in the New South Wales reform process. In R Atherton, Testamentary Freedom: A Motherhood Statement" in R Atherton (ed) *Papers of the International Academy of Estate and Trust Law* (Kluwer Law International, The Hague, Netherlands, 2001) 273-281 Atherton sees the legislation as based on patriarchal assumptions - placing the judge in the role of pater familias.

[56] R Atherton "Thesis" above n 29 at 225. The same point is made in R Atherton "The Concept of Moral Duty in the Law of Family Provision - A Gloss or Critical Understanding?" (1999) 5 Australian Journal of Legal History 5 and her Expert Report, above n 54 at [2.59]-[2.61].

For her, it is also captured in the statutory text, in words such as "adequate", "proper", "as thinks fit" and the disentitling provisions. The issue for Atherton is not whether it is a gloss on the Act but whether, in future reform, it should remain the basis of the jurisdiction.[57]

In New Zealand, Grainer has also looked closely at the moral duty test. While considering it an unjustified gloss on the Act, she focuses on whether it is a good basis for the law generally and, for a variety of reasons, considers it is not.[58] Like Grainer, Sutton and Peart have also asked whether the law can capture or enforce conventional morality. They doubt whether morality can be focused in a certain and predictable way.[59] By importing it into the jurisdiction, they argue the courts are unable to achieve clarity and consistency.

D. Uncertainty

The analysis also takes certainty as an indicator of performance. The uncertainty in the jurisdiction means the courts have performed their role poorly:[60]

> *The high number of appeals confirms the level of uncertainty that exists in this jurisdiction. Uncertainty as to the scope and extent of a testator's moral duty is therefore not confined to testators and claimants and their legal advisers. Even the courts cannot get it right. What hope is there then for testators?*

The conclusion is that testators are between a rock and a hard place because of an inconsistency in the court's rhetoric. These inconsistent intentions - "we will not re-write the will but we will assess it according to moral duty" - place the testator in the rack, thus the "*agony of the wise and just testator.*"[61] Peart and Sutton also consider that the Court of

[57] This is the focus of her Export Report, above n 54.

[58] V Grainer, above n 29. At 161 she rejects the generalised concept of "moral duty" considering it inappropriate in the current social, philosophical, political and economic climate and people's understanding of family.

[59] R Sutton and N Peart, above n 39 at 387-396. See also Grattan, above n 46 at 224-225 who queries whether the community standards approach is a good one in a multi cultural pluralistic society. She also queries whether the law should enforce moral familial obligations and agrees with Grainer, above n 29 who concludes that any duty is better controlled by social pressure.

[60] N Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 Comm L World Rev 356 at 376.

[61] Sutton and Peart use the "rack" metaphor in "The Agony of the Wise and Just Testator", above n 39 at 385.

Appeal missed opportunities in both *Williams v Aucutt*[62] and *Brown v Auckland City Mission*[63] to bring some certainty and clarity into the jurisdiction by clarifying the principles on which it is based. They see the *Aucutt* decision as an expedient, a "*disaster management plan*" rather than a principled approach.[64]

Uncertainty is also seen as stemming from the general lack of reasoning in the decisions, subjective judicial value judgments and, again, the diffuse purposes the Act is now being used to achieve. It is generally blamed on the judiciary and their overstepping the mark but some also point to the void left by the legislature. One considers that the coining of the moral duty test was a "*bona fide attempt*" to fill that void.[65] The ambiguity in objectives and text meant that the Act has an elasticity which could lead to different and possibly conflicting interpretations enhanced by the juxtaposition of adequate and proper. But in the end, it is seen as the court's fault that clarity has been lost: "*Clear direction hasn't helped but at the same time proper maintenance is still far less amorphous than a fair share of the estate*."[66] While the functions were not crystal clear they are now seen as totally obscured.[67] The jurisdiction is in a "muddle".[68]

Several articles call for clarity and focus on some suggestions for achieving this and making the jurisdiction more predictable. Some say remove adult children altogether or at

[62] *Williams v Aucutt* [2000] 2 NZLR 479 (CA).

[63] *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA).

[64] Sutton and Peart, above n 39 at 410. Some also lament the Supreme Court's failure to rein in the jurisdiction in British Columbia. See R Freedman and C Berardino, "Case Note *Tataryn v Tataryn Estate* (1995) 15 Est & Tr J 6. They are critical of the *Tataryn* decision and consider the Court there should have sent a clear message that the jurisdiction was confined to an extension of inter vivos support obligations.

[65] S Grattan, above n 46 at 223.

[66] G Bale, above n 40 at 13.

[67] Grattan, above n 46 at 223.

[68] R Croucher "Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 - Orthodoxy or Aberration*" (*2005) 27 Sydney L Rev 263 at 287.

least restrict their claims to dire financial need.[69] Others suggest predictability could be achieved by requiring the same standards of certainty and clarity as are demanded in the general law of obligations and that corrective justice, rather than distributive justice, should be the guiding principle.[70] Others, as noted, suggest discarding the moral duty test.

E. Erosion of Testamentary Freedom

The concept of testamentary freedom looms large in all the literature. In the beginning it was discussed in terms of the background to the Act and the consensus, as noted, was that it was a justified restriction and achieved an appropriate balance between the rights of the testator and those of the family. The recent view is that by application of the moral duty test, the expansive approach to quantum, and recognition of the "belonging claim" the court's approach has eroded testamentary freedom beyond acceptable limits. It is now a hollow image of its former self, a myth.[71] Testamentary freedom is therefore another benchmark for analysing and appraising the court's approach. Again, it comes back to purpose and the "invasion" of testamentary freedom is seen as "*far more extensive than anything envisaged by either the framers of family protection legislation or any members of the Court who delivered the Allardice judgment.*"[72] On the same theme the courts are also criticised for their rhetoric, one describing it as disingenuous for courts to claim that testamentary freedom is the starting point in family protection claims and to assert that their task is not to rewrite the will in the interests of perceived fairness: "*Whatever the theory may be, recent decisions tend to indicate that the starting point in family protection claims is not in fact testamentary freedom, but rather*

[69] J Caldwell (2003) 4 BFLJ 155 at 156. Atherton's Expert Report recommends restricting it to maintenance, as does the New Zealand Law Commission in *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [70], and R Atherton, "Expert Report", above n 54 at Chapter 6.

[70] R Sutton and N Peart, above n 39 at 395-396.

[71] W Patterson and N Peart "Testamentary Freedom" [2006] NZLJ 46 at 49 and N Peart "The Direction of the Family Protection Act", above n 29 at 209.

[72] Grattan, above n 46 at 221.

appropriate testamentary recognition and support for family members."[73] So there is criticism of both the erosion and the reasoning.

F. The Law Commission's Report

From the 1960s onwards law reform bodies across Canada, Australia, and New Zealand looked at the issue of adult children in this jurisdiction. The tone of their most recent reports is generally critical of the judicial approach and the consensus now is that it be restricted to dependent or disabled children.[74] In criticising the court's approach the emphasis is on the original purpose of the Act, symmetry with inter vivos obligations, the moral duty gloss and a general view that adult children have no claim on their parent's estate. There is no statutory interpretation analysis but instead an analysis and conclusion based on the benchmarks discussed already. It is summed up in the Manitoba report which saw the judicial approach as transforming the Act from a "*mere limitation on testamentary freedom into an emerging principle that children are entitled to a share of their parent's capital estate*."[75] This was also the view of the New Zealand Law Commission in its 1997 report. This report features regularly in the New Zealand commentary as well, usually cited in support of the criticisms. The Commission concluded:[76]

> *The law has become unclear in its purposes. Failure by the courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker's arrangements results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the court's distribution is more commendable than the will-maker's.*

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[73] J Caldwell "Where There's a Will…Family Protection Claims and the Court of Appeal (2003) 4 BFLJ 155 at 156 Similar statements are made by N Peart in "Awards for Children Under the Family Protection Act" (1995) 1 BFLJ 224 at 224: *" In spite of what the Judges say, testamentary freedom is no longer the starting point. The testator's moral duty to the family has become the starting point."*

[74] See discussion in Chapter Six. In New Zealand, the Law Commission has recommended it be restricted to minors, or those under 25 and undertaking educational or vocational training or under 25 and unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25: see above n 69 at [70] and draft legislation included in that Report.

[75] Manitoba Law Reform Commission, *Report on the Testator's Family Maintenance Act* Report No 63 (1985) at 26.

[76] Law Commission *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) at [34].

Many suggest the courts should have listened to the Law Commission and reined in the jurisdiction both as to the level of provision and as to recognising the adult child's claim in the first place. They lament this failure and the failure of Parliament to implement the report: "*[l]egal conservatism has kept an unworkable jurisdiction alive, and the Ministry of Justice… does not now appear to be interested in doing anything about it.*"[77]

The consensus is that the Law Commission had its pulse on community opinion - having consulted lawyers and on the basis of limited feedback to its consultation paper - and that the courts should respect that.[78] The current approach is widely seen as jarring with contemporary thinking. Some suggest that there is a clear body of public opinion on which to draw. Caldwell, for example, queries why "*judges, operating in a societal context that currently promotes self-determination and individualism, should have effectively disregarded and overridden the clear public opinion in favour of testamentary freedom.*"[79] He is not alone.[80]

Peart and Sutton observe what is seen as a "haphazard" response by the courts to the Law Commission report and appear to criticise the Court in *Aucutt* for making its own assessment of community values rather than relying on the Commission's evidence. For them, this is "*an object lesson in the fragility of a system in which judges directly ascertain and assess the raw state of community opinion.*"[81]

G. Philosophical Viewpoints

The commentary also discloses a broader criticism and that is that adult children should not have an entitlement to an inheritance. Testamentary freedom should have the paramount

[77] R Sutton and R Bigwood "Taking Stock: Legal Method in New Zealand Today (and for the Future?)" in R Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 305 at 329

[78] See R Sutton and R Bigwood "Taking Stock: Legal Method in New Zealand Today (and for the Future?)" in R Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 305 at 329, J Caldwell "Family Protection Claims by Adult Children: What is Going on?" [2008] 6 NZFLJ 4 at 8, N Peart "Subverting Reasonable Expectations" above n 60 at 373-376 and Sutton and Peart, above n 39 at 389.

[79] J Caldwell "Family Protection Claims by Adult Children: What is Going on?" [2008] 6 NZFLJ 4 at 8.

[80] N Peart "Subverting Reasonable Expectations" above n 60 at 373-376.

[81] Sutton and Peart, above n 39 at 389.

place in the law of succession and while restrictions based on provision for dependants or spouses may be appropriate, no such restrictions are justified when it comes to independent adult children. This is representative of the overall view:[82]

> *The willingness of the courts to award adult financially independent children further provision from their deceased parent's estate is not justifiable in terms of the personal right to support nor does it comply with conventional property principles. It is thus in breach of the general legal principles which have regulated our society for most of this century.*

Critics of the court's approach seek a law that has symmetry with inter vivos support obligations and which encroaches as little as possible on individual autonomy.[83] One states: "*It is difficult to discern why a will-maker parent should not upon his or her death be free to dispose of property away from that child in exactly the same manner he or she would have been perfectly entitled to do, without risk of challenge, at any point prior to death.*"[84]

Much is written in this context about the philosophers Grotius, Locke, Mill and Bentham, and their views as to the powers of bequest.[85] Atherton, in particular, discusses the philosophical context for the debate in several places.[86] These views are often cited in support of testamentary freedom. As Atherton notes, the "testamentary freedom" standpoint is to the fore in all the literature.[87] While noting a clash in succession law between family and property, however, her focus is not on the rights of adult children to an

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[82] N Peart "Towards a Concept of Family Property in New Zealand" (2006) 10 Int'l Journal of Law Policy and the Family" 105 at 122.

[83] This is the view expressed in the various articles by Caldwell, Peart, Grainer, Bale, Oosterhoff. It is also the opinion of some textbook authors. See, for example, RD Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984) at 36-39.

[84] J Caldwell, above n 79 at 9.

[85] See, for example, N Peart "The Direction of the Family Protection Act" above n 29 at 210-215.

[86] R Atherton "Thesis", above n 29 at 9-20; R Atherton "How Free is Free?" above n 55 at 1-4; R Atherton "The Concept of Moral Duty in the Law of Family Provision" above n 56 at 15-24; R Atherton "Expert Report" above n 54 at Chapter Two and R Croucher "Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 - Orthodoxy or Aberration "above n 68 at 283-285.

[87] See, for example, RD Oughton, above n 83 at 31-39 who discusses adult children's rights from the starting point of testamentary freedom.

inheritance. She, like others, describes how forced heirship systems work but does not go on to discuss in any detail the reasons for having such a system other than its procedural advantages, such as certainty.[88]

Atherton also considers that the law of succession is in a muddle and is being pulled in different directions, citing the judicial approach under the family provision legislation with legislation such as the Wills Act, which strengthens the will making powers of a testator.[89] Others have made the same point.[90] This inconsistency is often seen as a reason why adult children should not have any inheritance rights.

All the recent law reform reports are against the rights of independent adult children to claim. Their reasons are consistency with other countries and certainty and symmetry with inter vivos obligations. They do not address arguments from the other point of view. In New Zealand, both the Ministerial Working Group in 1988 and the Law Commission in 1997 concluded there was no legal or moral duty to support able-bodied adult children during the deceased's lifetime and there was thus no principled basis for imposing such a duty after death.[91] This is based on a starting point of financial support, rather than a wider view as to the rights of an inheritance per se. The New Zealand Law Commission did consider various options, other than need, that could form the basis of an adult child's claim. These included adult children being capriciously disinherited or where there were no reasonable grounds of disinheritance. So, within its report, there was some suggestion that fetters on testamentary freedom were not the only consideration: "*It might be argued that all these restrictions are an undue fetter on will-makers' uncontrolled power of ownership of this part of their estate. But the mere fact of ownership does not reasonably*

[88] Atherton discusses such systems in R Atherton "Thesis", above n 29 at 410-422. See also N Peart "Forced Heirship in New Zealand?" above n 29.

[89] See R Atherton, "Orthodoxy or Aberration", above n 68 at 287.

[90] Similar comments are made in the New Zealand context in N Peart "Subverting Reasonable Expectations" above n 60 at 377; and in the British Columbia context by G Bale Annotation to *Morris v Morris* (1982) 14 ETR 35, entitled "Duty to Able-bodied Adult Children Under Testators' Family Maintenance Legislation and the Need to Adopt an Objective Approach" at 39; and by A Close in his "Reservation" in Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (1983) at 153.

[91] *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988) and NZLC, R39 (1997).

carry with it an absolute power to dispose of property on death by will."[92] But it saw problems of vagueness and uncertainty in these options. The main point, however, for the purposes of this review, is that it did not canvass the options in any detail.

The most that is said about the belonging claim is an acknowledgement that it may hurt an adult child to be disinherited but this does not mean the law should recognise it:[93]

> *[T]he relationship between the child's understandable psychological distress and the Court award of a sum of money becomes just a little bit murky. How can hurt of a psychological kind, occasioned by absence of emotional "support" from the will-maker parent, possibly be addressed and redressed by the decision of a judicial stranger to pass over a sum from the mother or father's estate? Might it not reasonably be thought that any psychological hurt and sense of exclusion occasioned by the terms of the parent's will are intrinsically irreparable harms? The one and only person who could provide the adult child with the needed love and sense of belonging, and proceed to heal the family hurt, is the family member who is dead. In contrast, then, to financial needs, needs and hurt of a purely emotional kind surely cannot be satisfactorily addressed by the judicial stranger?*

Sutton is the one commentator who comes closest to it when he explores the idea of a community property approach to succession law. Children not just partners may be part of that communality. Sutton argues that "ours" could include everyone in the family relationship: "*If we see family as a communal entity which takes its decisions together, and which shares burdens and good fortunes, then we will prefer some sort of communal property ownership.*"[94] However, he does not expand on the argument in any detail.

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[92] NZLC R39, above n 70 at [243]. The various options canvassed in relation to adult children are found at [232-268].

[93] J Caldwell "Family Protection Claims by Adult Children: What is Going On?" above n 79 at 9. Others suggest there can be no detriment without there first being a reasonable expectation of an inheritance. See RD Oughton (ed), above n 82 at 38-39. He argues that such detriment is always likely to be small given that the time of death is always uncertain, there is no guarantee a person's estate will remain constant and remarriage may destroy all prospects of inheritance. Contrast Borkowski who notes children may feel hurt because there is a reasonable expectation of inheritance but he does not go into any further detail than that: A Borkowski *Textbook on Succession* (2nd ed, Oxford University Press, Oxford, 2002) at 254-256.

[94] R Sutton, Law Commission Succession Project: Communal Property? (1995) 25 VUWLR 53 at 60.

IV. Conclusion

Like the judicial approach to the Act, the commentary tells a story of change; change from an almost congratulatory tone to one that is quite stinging in its criticism of the current judicial approach and the philosophical view that it reflects. The discretionary nature of the Act was initially praised as it allowed individualised justice. The flexibility which was initially seen as a piece of legislative genius is now seen as the Act's greatest weakness.

The change in tone came about as a result of the broadening judicial approach to the Act's scope, mainly in relation to adult children. Throughout, the performance indicators, to use a modern term, are compliance with purpose, retention of testamentary freedom as far as possible, restraint in the judicial role, and certainty. Early on the courts were seen as performing well because they met these indicators. Now, they do not. Part of the difference in tone may also be attributed to the fact that early commentary sought to describe or explain the law and its audience included the practitioner; the emphasis on criticism was not to the fore. That approach to academic writing has changed and the incentive to criticise is greater, such are the requirements of publishing in the modern academic environment. The same observation could be made of Law reform bodies; the incentive to recommend change is strong given their raison d'être is to suggest reform of the law.

The literature contains description, explanation, analysis, praise and criticism, as well as some broader discussion of what the law should be. In terms of the criticisms, it is possible to locate the writers in two camps. In the first camp are those who write often about succession law. They conceded that the courts had choices to make but consider they made bad choices. Others are writing more generally and are critical of any discretionary role for judges. They use the judicial approach to the Act as a mere illustration of their argument.[95] The main point, however, is that what is missing is all the literature is how the courts fare against a theory of statutory interpretation.[96] What role should purpose play? How do we

[95] Eg Dugdale, above n 30.

[96] Even the literature from the United States, which champions the rights of adult children and often praises the commonwealth approach, is not based on the actual text but on praise for the judiciary's adoption of the moral duty test - ie it sees the approach as justified but not for reasons of statutory interpretation. See, for example, R Chester "Should American Children be Protected Against Disinheritance" (1997) 32 Real Prop

determine it? Should it dominate? What about text? How far do words such as "proper", "adequate" "maintenance" and "support" allow a court to go? Should their meaning be set in stone as at 1900 or can statutes evolve? A theory of interpretation addresses the questions which are at the very heart of the debate. The next chapter sets out such a theory and in applying it, we can assess the court's approach from a theoretical perspective.

Finally, while this thesis is about the justification for awards made to adult children under the Act it is also about justification generally. The literature reflects not only a view as to the role of the courts in interpretation but also a wider philosophical view, one which values individual property rights over that of the family. The picture would be more complete, and any future debate more fully informed, if the case for adult children was also put forward, not just by negating arguments in support of testamentary freedom. The case law from New Zealand - and as we will see, also from Australia and British Columbia - reflects the "family" view point but the literature does not. Chapter Seven fills that gap.

Prob & Tr J 405. Chester applauds the Supreme Court's decision in *Tataryn v Tataryn* [1994] 2 SCR 807 - discussed in Chapter 6 and which allowed a claim on a purely ethical basis - but makes no mention of approaches to statutory interpretation. Praise without theoretical analysis is also found in A Dayan "The Kids Aren't Alright" (2009) 17 Cardozo J Int'l & Comp L 375 at 391-400.

Chapter Four: A Theory of Interpretation

I. Introduction

Family protection legislation has been on New Zealand's statute book for over a century now. Despite some changes over that time the key wording, for the purposes of this thesis, has remained the same. The court's approach to the Act has not. Chapter Two shows an evolution from a narrow economic focus to a broader one based on moral duty, encompassing economic and ethical factors and in some cases, ethical factors alone. The commentary to the Act has also changed from descriptive and/or congratulatory to critical in tone. The essence of the criticism is that the Act was intended to address economic need, in its narrowest sense, that being the original legislative intent. Statutory interpretation, then, is at the heart of the Act's story but to date, there has been no theoretical analysis on point. The purpose of this Chapter is to provide a theoretical framework in which to assess the judicial approach to the Act. The theory will be applied in the next chapter.

As a general statement New Zealand has not engaged in a theoretical debate about the best way to approach the interpretative task. The only thing approaching a "how to" theory is the purposive approach directed by the Interpretation Act 1999. This requires the courts to interpret in a way consistent with purpose and directs that legislation must be applied to circumstances as they arise.[1] There are also canons of construction to help with the meaning of the text and there is an externally imposed restraint on the judiciary in the form of parliamentary supremacy. It is also the norm for courts to draw on external aids such as Hansard, history and the current legal and social climate but nothing fills out the gaps and addresses what courts should do in difficult cases.[2] From time to time there have been articles advocating or lamenting a certain approach as part of a wider discussion about the nature of the judicial role or judicial method. Some advocate literalism and an abandoning

[1] Section 5(1) of that Act provides that an Act's meaning must be ascertained in light of its text and purpose. Section 6 provides that an enactment applies to circumstances as they arise.

[2] For a descriptive account of the New Zealand approach, see J Burrows and R Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009).

of the purposive approach while others see more room for a creative role in interpretation.[3] But apart from this, there has not been any sustained reflection on the nature of the interpretative task. There is no discussion, for example, of whether a purposive approach is the correct one and why, whether it has pitfalls and what to do when those crop up. Should dynamic considerations be taken into account or is meaning fixed at the date of enactment?

To have no articulated theory assumes that words apply themselves and that there are no difficult cases but this is not the reality. Given the theoretical vacuum, the purpose of this Chapter is to set out a theory of interpretation against which to assess the courts' approach. The issues have been discussed extensively in the United States, (where its Constitution provides a touchstone for the debate) and I draw largely on that literature in this chapter.[4]

The Chapter starts by discussing the importance of a theory generally, what such a theory should reflect and then sets out a theory that I suggest best fits those requirements.

II. What Is a Theory and Why Is It Important?

A theory seeks to establish a normative standard for statutory interpretation. It is important for what it says about the judicial role in interpretation and about our view of law's purpose.[5] Must judges interpret a text according to original meaning or should they adopt a dynamic approach and adapt statutes to modern circumstances? What factors should they

[3] Some examples are found in the following articles: D Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 OLR 603; J Smillie "Certainty and Civil Obligation" (2000) 9 OLR 63; J Smillie "Who Wants Juristocracy?" (2006) 11 OLR 183; E Thomas "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9 OLR 459; A Galbraith "A Return to Principle and Judicial Reasoning and an Acclamation of Judicial Autonomy [1993] NZLJ 320; A Galbraith "A Polite Response to Mr Justice Thomas "(1993) 23 VUWLR 125. There are also several essays about the nature of the interpretative task and judicial method in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Lexis Nexis, Wellington, 2001) and R Bigwood (ed) *The Statute: Making and Meaning* (Lexis Nexis, Wellington, 2004).

[4] Some of the literature may be "United States" specific due to its different legislative structure and its written Constitution but much of it is of general application. The debate in the United States largely arises in the context of how to apply the Constitution in today's world. Simply speaking, factions can be divided into the "original intent" camp and those advocating a more dynamic approach. The literature is vast and wide ranging and cannot hope to be summarised in this chapter. For some introductory reading to the American approach to interpretation and its various theories, see W Popkin *Statutes in Court: The History and Theory of Statutory Interpretation* (Duke University Press, Durham 1999).

[5] Popkin states that theories of interpretation have less to do with a statute's meaning and more to do with the proponent's view of the judicial role in interpretation. Ibid, at 248.

take into account and how should they weigh them? Do we care about how the judges got to the result or are we happy to leave them to it? These are all questions which are addressed by theory and accordingly, even if it makes no difference to the outcome in some cases, it still matters for what it says about these issues: rhetoric matters for its own sake.[6] We therefore need to ask what we want from a theory, what picture of our legal and constitutional structures do we want to paint? Ultimately, this comes down to a subjective judgment. People with different values will have different views and at this level of debate there can be no agreement. The requirements I seek from a theory are set out below.

III. What a Theory Should Do

Our constitutional framework is centered on parliamentary supremacy. As the supreme lawmaking body, Parliament's laws must be followed. In interpreting a statute the text must therefore be given paramount consideration.[7] Related to this are rule of law considerations; people need to be confident that what is on the statute books will be applied. Certainty in this regard is important.

Interpretation should be fully informed and take into account all relevant information. By relevant, I mean those external aids to interpretation which may shed light on meaning, such as Hansard, other similar statutes on the books, the wider legal and social landscape. Fully informed decision making is better than "*groping in the dark*."[8]

Interpretation should take account of any changed circumstances since the legislation was passed. Law serves a social purpose and it is regressive to be bound by original meaning when society has changed significantly since the time of enactment. An updating approach should be applied where text can accommodate it, all other factors permitting. (Such a

[6] Compare D Farber "Do Theories of Interpretation Matter ? A Case Study" (2000) 94 Nw U L Rev 1409 at 1434. Farber analyses various cases from competing theoretical perspectives and queries whether the outcomes are much different in practice. He then notes that even if not, we may care about the language used by the judges at a deeper level for what it says about our picture of government.

[7] Parliamentary supremacy is my starting point and I do not intend to question whether that should be the case or not. Others argue, however, that the text should be a starting point only. See G Calabresi *A Common Law for the Age of Statutes* (Harvard University Press, 1982) where a central tenet is that courts should be able to override obsolete statutes.

[8] *Davis v Johnston* [1978] All ER 841 at 851, per Denning J.

factor would be the need for certainty in the law which is often achieved through gradual, rather than sudden change).

A theory should reflect what a statute is designed to do and the reality of the legislative process. A statute is designed to pass.[9] The introducer of the Bill may start out with an end in mind but knows there may be changes along the way, that there may be disagreements and that compromise may be inevitable if the Bill is to get through. For this, and other reasons, precision may be impossible to achieve and it may be a case of the best that can be done in the circumstances, the aim being to get it passed and then see what happens. Where there is uncertainty about what should be covered and what should be left out the best solution may be to express words vaguely, "*with a generality for future unfolding*."[10] Justice Frankfurter, in a well known article on statutory interpretation, perhaps best summed up a statute thus:[11]

> *It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.*

Further, a drafter does not have a crystal ball; he cannot anticipate all the factual scenarios that may cross the court's door or the changes that may occur in society over time. If it is going to have any sort of lifespan, an Act needs to be flexible. Generality of language therefore provides the required flexibility, although sometimes at the expense of certainty. The use of broad, general terms also means succinctness and brevity but again, certainty may have to be sacrificed. Problems may have to be ironed out by the judiciary, the "*finishers, refiners and polishers*."[12] If further problems arise legislative amendments can always be made. The overriding aim is to get it passed, to "*Suck it and see*!" A theory needs to acknowledge that this overriding aim may mean an Act's parameters have to be mapped by

[9] See the discussion in G Engle "Bills are Made to Pass as Razors are Designed to Sell: Practical Constraints in the Preparation of Legislation" Statute Law Rev (1983) 4 (2) 7-23.

[10] F Frankfurter "Some Reflections on the Reading of Statutes" (1947) 47 Columbia Law Review 257 at 258.

[11] Ibid.

[12] *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 at 638 per Donaldson J, cited in J Burrows and R Carter *Statute Law in New Zealand*, above n 2 at 327.

the courts and that the generality allows, and may require, an updating interpretation to meet modern and/or unforeseen circumstances.

A theory should also reflect the judicial role in interpretation. Judges are not automatons, able to separate themselves completely from their life experiences and world view. It is therefore important to avoid the fiction that they can and that interpretation is a mechanical exercise. Any perceived dangers associated with this can be alleviated by requiring judges to articulate their reasons. Transparency in decision making requires judges to identify the factors on which they are relying and why. In turn, this leads to greater judicial accountability.

Finally, a theory has to work in practice. It is pointless if it cannot adapt to the day to day reality of the judicial task. A theory should therefore be grounded in the reality of every day law and New Zealand's present interpretative culture.

IV. The Theory - Practical Reasoning.

I will argue that practical reasoning is the best theoretical approach to statutory interpretation as it meets the above requirements. It is this theory that I will apply in the next chapter to assess the court's approach to the Family Protection Act 1955.

Practical reasoning is best understood by contrasting it with the three traditional theories of interpretation, namely textualism, intentionalism and purposivism.[13] These theories are described as foundationalist, by which it is meant they have one interpretative touchstone or foundation - be it text, intent or purpose.[14] They hold that there is only one legitimate basis for reaching an interpretation and it controls regardless.

The theories' main pillars are legislative supremacy and judicial restraint. Judicial restraint, in particular, looms large and stems from what has been labelled "counter-majoritarian

[13] These theories are summarised and analysed in W Eskridge Jnr and P Frickey "Statutory Interpretation as Practical Reasoning" (1990) 42 Stan L Rev 321 at 325-345. (hereafter Eskridge and Frickey "Practical Reasoning"). An account is also given in R Sullivan "Statutory Interpretation in the Supreme Court of Canada" (1999) 30 Ottawa L Rev 175 at 181-184.

[14] Eskridge and Frickey describe them as foundationalist. Ibid, at 364.

anxiety"[15] - ie unelected judges becoming too creative in the interpretative task and usurping legislative power. This anxiety is said to be alleviated when text, intent or purpose provide a clear boundary for judges engaged in the interpretative task. Another feature of the traditional approaches is that they are all originalist (or archaeological[16]) in that they seek to adopt the meaning, purpose or intent of the enacting legislature. Meaning is therefore set in stone at the date of enactment: "*The implicit claim is that a legislature interpreting the statute at the time of enactment would render the same interpretation as a judge interpreting the statute fifty years later.*"[17]

Practical reasoning is also based on parliamentary supremacy - the text is the main controlling factor - but it does not insist on one interpretative touchstone. Indeed, it rejects such a narrow approach and holds that the best decision is one which takes into account not only text, intent and purpose but also dynamic or "evolutive" factors.[18] By "evolutive" its proponents mean that the court should interpret the Act against the current climate, updating it where necessary to meet contemporary situations, perhaps unanticipated by the original legislators.

Eskridge and Frickey are the main proponents of practical reasoning in the United States.[19] They explain their theory by using a tool called the funnel of abstraction. This funnel

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[15] Eskridge and Frickey above n 13 at 378-383. Eskridge also discusses the counter-majoritarian anxiety in W Eskridge Jnr "Dynamic Statutory Interpretation" (1987) 135 U Pa L Rev 1479 at 1523-1530.

[16] This is the term used in T Aleinikoff "Updating Statutory Interpretation" (1988) 87 Mich L Rev 20 at 21. It is also a term used in C Curtis "*A Better Theory of Interpretation" (*1950) 3 Vand Law Rev 407 at 415. Both advocate an updating approach to interpretation.

[17] W Eskridge Jnr "Dynamic Statutory Interpretation", above n 15 at 1480.

[18] The term "evolutive" is used in W Eskridge Jnr "Dynamic Statutory Interpretation", above n 15 at 1483. It refers to the "*the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time*". Eskridge and Frickey also use the term throughout their article "Practical Reasoning" above n 13.

[19] The main article is Eskridge and Frickey "Practical Reasoning", above n 13. See also W Eskridge Jnr "Dynamic Statutory Interpretation", above n 15 and W Eskridge Jnr "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609. In Canada Ruth Sullivan is the chief proponent of a similar approach, which she calls pragmatism. See Sullivan, above n 13. Sullivan endorses a theory which requires a focus not only on text but on the entire range of interpretative aids. In particular, while the importance of the text and legislative intention are acknowledged, she emphasises the judge's role in interpretation, rejecting the view that interpretation is a mechanical task and that judicial values do not come into it. Pragmatism seeks a

proposes a hierarchy of interpretative tools starting with text - the most concrete inquiry - to evolutive considerations such as current values and societal conditions. In between are legislative history, intent and purpose.[20] The approach requires judges to go up and down the funnel, reasoning and weighing and seeking contextual justification for the best legal answer among the potential alternatives.[21] The theory is based on the idea that our decision making is informed by a "web of beliefs". For statutory interpretation this means that we should look at a number of considerations and a variety of arguments rather than adopting a single focus. It is called practical reasoning because it accepts there is no universally right answer, just the best answer for the case at hand.[22] The traditional theories are overarching; they insist on the same touchstone being used in all cases regardless of the evidence of intent, purpose or text in the given case.

I now turn to the three main interpretative touchstones and elaborate on the argument that while text, purpose and intent are all relevant, they do not solve all interpretative problems and are therefore inadequate by themselves to determine the outcome. Practical reasoning's approach to interpretation is then set out in more detail.

V. The Three Traditional Theories

A. Textualism

Textualism can be equated with plain meaning.[23] It places emphasis on the words alone and relies on dictionary definitions, grammar, and the canons of construction to determine meaning. For textualists, the text is the only reliable indicator of intention: "*We do not*

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methodology whereby judges justify their decisions through analysis, argument and appeal to legal norms. Transparency is a key requirement of this approach.

[20] Eskridge and Frickey "Practical Reasoning", above n 13 at 353-354.

[21] Ibid, at 322, footnote 3.

[22] The theory draws on Aristotle's concept of phronesis, and its emphasis on the "*concrete situatedness of the interpretative enterprise"*. Practical reasoning (phronesis) posits that we can know the right answer in a specific set of circumstances even though we have no general theory to explain why it is right. See Eskridge and Frickey "Practical Reasoning", above n 13 at 323.

[23] It is sometimes called plain meaning, sometimes literal and sometimes ordinary meaning. For the purposes of this chapter it makes little difference. I use the term to refer to the view that the words of the Act alone can determine meaning.

inquire what the legislature meant, we only inquire what the statute means."[24] If the meaning is plain on its face, it should govern. Parliamentary supremacy is the central tenet of this theory (as with all traditional theories). If the law leads to strange or unfair results, or is out of touch with social conditions, it must be addressed by the legislature and not the courts.[25]

Textualists also argue that their theory best upholds the rule of law. Citizens must be able to rely on the apparent meaning of the text so they are clear about their rights and obligations. Textualism therefore provides stability, predictability and accessibility. It is also attractive in that it allows judges to base decisions on something concrete without worrying about other, perhaps less tangible, considerations. It appeals to those who say that attributing purposes to the legislature is nothing more than judicial law making.[26] This theory sees the judicial role as merely mechanical, as applying an objectively determined meaning to the text. There is no room for extrinsic material to play a part; if it happens to support the plain meaning, it is superfluous. If it casts doubt, it is inadmissible.[27]

Textualism's appeal is clear but its main flaw is that it cannot solve all cases. In some cases plain meaning may be obvious but when it is not, what should judges do? By insisting that plain meaning leads to the outcome in such cases, a fiction is created and judicial responsibility for the outcome is muted. There is no transparency because the factors that actually determined the outcome are not acknowledged. (A finding that a

[24] OW Holmes "The Theory of Legal Interpretation" (1898-1899) 12 Harv L Rev 417 at 419.

[25] Textualism, its main tenets and advantages, is summarised in Eskridge and Frickey "Practical Reasoning", above n 13 at 340-345. One of the major proponents of this theory in the United States is Supreme Court Judge Antonin Scalia. His arguments are set out and responded to by various commentators in A Scalia *A Matter of Interpretation, Federal Courts and the Law* (Princeton University Press,1997). Sullivan also summarises and analyses the theory in R Sullivan "Statutory Interpretation in the Supreme Court of Canada" (1999) 30 Ottawa L Rev 175 at 181-183 and 187-215 and there is a useful analysis in Popkin, above n 4 at 157-188.

[26] Others argue that it is the best of the theories on the basis that the courts do not have the institutional capability to interpret in any other way. See A Vermeule *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006).

[27] R Sullivan "Statutory Interpretation in the Supreme Court of Canada" (1999) 30 Ottawa L Rev 175 at 182.

meaning is plain may also be an interpretative decision in itself, as may a finding that the term is ambiguous, a point unacknowledged by textualism).

Canadian academic Ruth Sullivan argues it is difficult to resist the suspicion that, without being aware of it, courts take account of as much context as is needed to support a preferred interpretation, declare that to be plain meaning, and dismiss all other contextual factors as irrelevant. If this is the case, plain meaning is not dictating the outcome. Rather the outcome is dictating plain meaning: "*This is objectionable not because they have a preferred outcome but because the real determinants of the preference are hidden and the proffered explanation is unpersuasive*."[28]

Difficulties also arise because plain meaning may not help us in hard cases. There may not be a plain meaning or if there is, it may be different to different people. This, some argue, is a result of the indeterminacy of language. Even if we do not agree that all language is indeterminate, some terms will be capable of different meanings and even where there is agreement on core meaning there may be disagreement at the edges, the area coined the penumbra of doubt.[29]

Both Eskridge and Sullivan see the main flaw of textualism as ignoring the indeterminacy of language but they approach it from different angles - one is a philosophical objection and the other, linguistic. Eskridge draws on the philosophical insights of hermeneutics whereas Sullivan draws on psycholinguistic studies. Both, however, take the view that interpretation is not an objective, mechanical and archaeological exercise of discovering a meaning that is put there by the enacting legislature, existing independently of interpretation.

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[28] Ibid, at 200.

[29] The term "penumbra of doubt" comes from H Hart *The Concept of Law* (Clarendon Press, Oxford, 1961). Hart viewed language as open textured which means that words have a core meaning over which there is generally little argument. At the outer edges is the penumbra and it is unclear whether the words cover the situation or thing in issue. Hart viewed open textured words as an advantage as they allowed statutes to be applied to situations unforeseen, or unable to be foreseen, by legislators. For detailed discussion and analysis of Hart, see B Bix *Law, Language, and Legal Determinacy* (Clarendon Press, Oxford, 1993) at 7-28. The term "penumbra" is often used in texts on statutory interpretation. For example, see F Bennion *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, New York, 2001) at 119 and J Burrows and R Carter *Statute Law in New Zealand*, above n 2 at 166.

In summary, hermeneutics suggests a text lacks meaning until it is interpreted.[30] The metaphor used is that of a fusion of horizons.[31] Put simply, this view holds that the horizon of the historical text is different from that of any later interpreter. As a result, the interpreter can never share the historical horizon. Hermeneutics posits that interpretation is a dynamic process which means that every interpreter is conditioned by their own climate: "*Every age has to understand a transmitted text in its own way*."[32] It is therefore not a mechanical exercise to determine the answer put in the statute by the enacting legislature. Because the interpretative horizon changes over time, interpretation must not "*chase the phantom of an historical object*."[33]

Sullivan also dismisses textualism as the controlling theory for interpretation based on the indeterminacy of language. She relies on psycholinguistic studies to inform her views and argues that there may be no such thing as plain meaning and, even if there is, it may not be the same to everyone. She argues that judges cannot interpret mechanically because they cannot escape bringing their own experience or contexts to bear on the task. Textualism allows no room for this. (Whether or not one philosophically agrees with a subjective element coming into play, it is the reality. Textualism does not deal with this reality and therefore lacks transparency in those cases where there may not be a plain meaning).

Two metaphors are employed to illustrate the point - conduits and blueprints. Textualism relies on the conduit theory of language whereby "*linguistic expressions - words, sentences, books etc are compared to vessels or conduits into which thoughts, ideas, meaning are poured, and from which they can be extracted, exactly as they were sent, accomplishing a*

[30] Eskridge and Frickey "Practical Reasoning", above n 13 at 346. Practical Reasoning discusses hermeneutics at various points in the article and draws widely on one of its leading proponents, H Gadamer. The text to which they most often refer is H Gadamer *Truth and Method* (2nd ed, G. Barden &J. Cumming trans. 1975**)**. See also the discussion in W Eskridge Jnr "Gadamer/Statutory Interpretation", above n 19.

[31] Eskridge and Frickey "Practical Reasoning", above n 13 at 346.

[32] Ibid, at 345 citing H Gadamer *Truth and Method* at 263.

[33] Eskridge and Frickey "Practical reasoning", above n 13 at 346, citing H Gadamer *Truth and Method* at 264-65.

transfer of possession."[34] Linguists on the other hand see language as a blueprint "…*from which much may be inferred, but with no assurance of correctness.*"[35] Sullivan argues the metaphor is appropriate to statutory interpretation as it emphasises "*the ambiguous and indeterminate nature of language that comprises text and the extensive work that readers must do to infer intended meaning*."[36]

When textualists assume that plain meaning is the same for all, and therefore equivalent to the meaning of Parliament, they are relying on the conduit metaphor but the blueprint metaphor suggests no reading of a text is context free. Readers cannot escape bringing their background, experiences, knowledge of the world, values, culture, to the text. They may also bring to it expectations - ie they see what they want to see. There are no "null contexts" and therefore, as with Eskridge's argument, we can never assume reciprocity of perspective. Judges are not immune from this. They, too, bring context to their task. Judges cannot wipe out the beliefs, values and expectations they bring to the reading:[37]

> *They cannot erase their knowledge of law or of the subject of legislation. They cannot cast aside legal culture…They cannot unexperience their experiences, unread the books they have read, unwatch the television they have seen. All of this necessarily informs judicial notions of what is true, normal, reasonable, plausible, desirable and fair - notions that are essential in construing meaning.*

I would add that we do not want judges to unlive the lives they have led for it is these lives that have given them the experience, training and wisdom for which, presumably, we have appointed them.

Given that we cannot escape from context, what does this mean for statutory interpretation? If it is inevitable, it must be acknowledged so there is transparency in decision making which in turn leads to greater accountability.

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[34] G Green *Pragmatics and Natural Language Understanding* (2nd ed, Lawrence Erlbaum Ass, New Jersey, 1996) at 10, cited by Sullivan, above n 27 at 204.

[35] Green, Ibid, at 11.

[36] Sullivan, above n 27 at 204.

[37] Sullivan, above n 27 at 208.

That language is indeterminate can be overstated, however. In some cases meaning will be clear. If it was indeterminate all the time, we could not function. Every day we proceed on the basis that we are capable of communicating our intentions to others. This communication is possible because we share a common language and common discriminatory capacities to determine what meaning is appropriate in a given context.[38] There may be some cases where usage is so strange that attempts at a single interpretation are impossible but that is not the norm.[39] We do have a common language and words may often remain the same for years and decades and even centuries. As one New Zealand commentator points out, judges are not "*high priests with access to arcane knowledge. They're not interpreting chicken entrails. They're interpreting words that have a large measure of accepted meaning.*"[40]

The view of language as indeterminate is often drawn from literary criticism and its parallels and relevance to law may not always hold. To take one difference as an example, the judicial role is to decide on meaning whereas literary academics have an incentive to find new meaning.[41] Nevertheless, the point to take from it is that some words are not clear. Even if not ambiguous their parameters may be vague and their exact content may vary depending on the interpreter and the period in which the issue arises. People may disagree, for example, on what constitutes discrimination or harassment or offensive material. It is in these sorts of situations that the argument holds weight and plain meaning falls down as the single controlling factor.

The final criticism of textualism is its sometimes inconsistent application despite the fact it purports to be an overarching theory. Where rights are at stake, courts have said a narrow or generous interpretation may be required depending on what is necessary to protect those

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[38] See J Evans *Statutory Interpretation, Problems of Communication* (Oxford University Press, 1988) at 19: *"[H]uman beings could not communicate at all unless they possessed the innate ability to develop, given appropriate education and encouragement, the capacity to make discriminations in common ways."*

[39] R Kay "*Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*" (1988) 82 Nw U L Rev 226. In this article, Kay sets out and counters the main objections to an original intent approach to interpretation. Arguments refuting the indeterminacy point are set out at 242-243.

[40] B Robertson "Judges, Deconstruction and the Law" [1994] NZLJ 344 at 344.

[41] R Kay, above n 39 at 238.

rights. Likewise, in cases where commercial certainty is important more caution may be exercised. Sullivan points out that in these cases the courts are actually giving effect to common law values of private property and human rights while purporting to give primacy to the text. Since the common law values are not acknowledged, there is no opportunity to discuss and justify them and there is no transparency.[42]

B. Intentionalism

Legislative intent is the sole concern for intentionalists. The court is the faithful agent of the legislature; its aim is to discover the framer's original intent and meaning is therefore cast in stone upon enactment. As with textualists, the words of the Act are the starting point but they are prepared to look further and draw on external sources.[43] They argue that textualists inappropriately ignore context and that plain meaning relies on it.

Why bother looking at original intentions? Its main strength is its "*democratic pedigree*".[44] If we can discover original meaning, it serves democratic values by enforcing the law as the legislature understood it. It also serves to limit judicial discretion and power. The most authoritative historical evidence is the legislative history of the statute because it is a contemporary record made by the enacting legislators.[45] Sometimes it may provide an example or suggest an application that is right on point with an interpretative problem. Crystal clear evidence will be rare though. Where there is no evidence of intent it is intentionalism only if we accept it is presumed intent, under which judicial values and choices are deemed to be intended by the legislature.[46] Where there is imputed intent, the real reasons for the decision are hidden and there is no transparency. It is then difficult to critically examine the outcome. Sullivan also argues that it weakens the notion of

[42] Sullivan, above n 27 at 211-214.

[43] Sullivan says that unlike textualists, intentionalists go looking for trouble! Sullivan, above n 27 at 183.

[44] P Mitchell "Just Do it! Eskridge's Critical Pragmatic theory of Statutory Interpretation" (1996) 41 McGill L J 712 at 724.

[45] Eskridge and Frickey "Practical Reasoning", above n 13 at 356.

[46] This has been called conventional or presumed intent. See a summary at P Mitchell "Just Do it!" above n 44 at 721-723. Another proposed solution is that of imaginative reconstruction. Posner is the leading proponent of this: "*The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar*." See R Posner "Statutory Interpretation-in the Classroom and in the Courtroom" (1983) 50 U Chi L Rev 800 at 817-22.

legislative intent and deprives it of force in those cases where there is strong evidence of it - ie it is difficult to take the notion seriously if in fact it is judges who are creating it in some cases.[47]

It is here that intentionalism falls down as a controlling theory.[48] Practical reasoning accounts for this. If there is strong evidence of intent, then practical reasoning takes it into account and weighs it along with everything else. Where there is not, we need to avoid the fiction. The main issue with this theory is how to go about finding legislative intent. Practical reasoning cannot avoid the argument altogether because there has to be some sort of principle to guide the weighting of it as a factor. Here are the main criticisms which need to be taken into account before we can justify using intent as a relevant tool.[49]

(1) The legislature is a multi-membered body and cannot form intent.

(2) Even if it could form intent, how do you find it?

(3) How can you recreate the assumptions of a previous legislature?

(4) How can there be intent as to every possible fact situation that comes through the court's door?

(5) Getting an Act passed is a long process and it is the end product of that process. Compromise during that process may mean that the end result has nothing to do with the intentions of the legislature (thus the majoritarian justification falls down in such a case).

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[47] Sullivan, above n 27 at 225.

[48] There are numerous articles about the validity or otherwise of using intent as an interpretative tool and on how to find that intent. It is beyond the scope of this chapter to go into this in detail. A summary of the pitfalls is found in Eskridge and Frickey "Practical Reasoning", above n 13. Oft cited articles presenting the "for and against" positions are M Radin "Statutory Interpretation" (1929-1930) 43 Harv L Rev 863(Arguing that it is impossible to determine the intent of the legislature and that even if you could, it is irrelevant to the interpretative task) with the reply and opposing point of view put forward in J Landis "A Note on Statutory interpretation" (1929-1930) Harv L Rev 886. For greater detail, see A Marmor *Law and Interpretation* (Oxford University Press, 1995) and C Mammen *Using Legislative History in American Statutory Interpretation* (Kluwer Law International 2002).

[49] These criticisms are drawn from the articles and texts noted in footnotes 42-48 above.

(6) It is too malleable and support for any interpretation can be found.[50]

(7) People's expressed intents may not be their real ones.

(8) It is regressive. If we are concerned about democracy why should we be bound by a Parliament formed, in the Family Protection Act's case, 100 years ago?

In response to the criticisms, legislative intent can be useful in two ways. One, it may produce evidence of intent if we decide how that intent is to be determined. Two, even if we cannot identify an intent as to the facts before the court we can still use it as context evidence - ie legislative history may throw light on the circumstances giving rise to the Act and the general concerns it addressed. Hansard statements can also be used as evidence of the contemporary meanings of words and of widely shared general purposes. Changes made in wording during the passage of the Bill may also assist in ascertaining meaning. If we use it in the latter, more general sense, we get around the main theoretical objections.

The first sense in which it can be used is the more difficult given some of the above objections but some responses can be made. First, we treat other groups as having intentions so it is not radical to suggest Parliament can have an intention too.[51] Acts do not pop out of thin air and utterances are not, therefore, intentionless. Although there may be some generality of language the words still come from somewhere and reflect something:[52]

> *The majority vote in the house legitimises what those responsible for framing the statute intended. The words of a statute do not appear on pages by chance: there is a guiding mind or minds behind them... It is not nonsense to ask what these minds intended the provisions of the statute to convey.*

[50] Scalia says the trick is to look over the heads of the crowd and pick out your friends. A Scalia, above n 25 at 36.

[51] J Evans "Questioning the Dogmas of Realism" in R Bigwood (ed) *Legal Method in New Zealand*, above n 3 at 295.

[52] J Burrows *Statute Law in New Zealand (*2nd ed, Butterworths, Wellington, 1999) at 108-109. See also J Evans, Ibid: "*The language in which Acts are drafted reflects deliberate and careful choices by some combination of people who speak for the legislature. Given parliamentary supremacy in our constitutional structure, these choices cannot be ignored*."

Those who vote for a measure without knowing its consequences take their chances. While some may vote for all sorts of reasons, the retort is "so what?" Members vote for a certain meaning and why they vote is irrelevant. Likewise, the inquiry is into the intent of the measure itself, not other intentions MPs may have had in voting for it. Those who vote for a measure are committed to that which they would most reasonably have concluded to be its meaning if they had made inquiry, whether they actually did so or not.[53]

We should also look for the evidence which, on balance, suggests the intent. We cannot expect certainty and nor should we. The search for certainty leads to paralysis and therefore the ignoring of potentially relevant evidence. Certainty is not a requirement in other aspects of our law - we accept decisions based on the balance of probabilities[54]- and nor do we require it in our everyday dealings. We never know with certainty what any person means when they say something but we make a decision based on the evidence at hand and we make a judgment about which of possibly several different meanings they have in mind. We ask what meaning is most consistent with that evidence. Instead of asking "What did the Legislature mean?" - which seeks certainty - we should ask "Does this case fall within the words of the Act?" The second question admits of a "yes" or "no" answer and because only one of two possible answers has to be given, there is no need for certainty. The better of two answers will usually be clear from the language used in the debates and what people thought was in issue.[55]

Given that people generally use language in the same way, we can also assume that there was agreement in relation to a core meaning and what that core meaning was directed at. There can therefore be enough identical intentions for that core meaning as the legislation was passed. (We only need a majority intention in a democracy). It may also be possible for legislators to have multiple intentions but it would be rare for them to be inconsistent, given that meaning is constructed out of shared language, culture, and knowledge.[56] Some

[53] J Evans, "Questioning the Dogmas of Realism" above n 51 at 296. See also J Evans *Statutory Interpretation, Problems of Communication* (Oxford University Press, Auckland 1988) at 286-287.

[54] In civil law proceedings, this is the standard of proof.

[55] This approach is suggested by R Kay, above n 39 at 243-245.

[56] Ibid, at 245-251.

may intend the core meaning to apply and that is that whereas others may anticipate categories to be covered that fall within the penumbra of doubt. Here we look at the evidence and see which way, on balance, it falls. Is it more likely than not that the intent was to cover those cases that fall at the edge of meaning?

In some cases it may also be possible to get close to recreating the views of the old legislature, once accounting for the fact that in any communication there can never be a complete fusion of horizons. We share the same language as the enacting legislature and they also left us clues about their intentions in the form of Hansard. We can see what they were most concerned about and whether a certain solution was acceptable or unacceptable. It is true that we can never identify with anyone completely but that holds for contemporary communication as well as historical.[57] The "recreation" exercise may be more difficult, however, where the use of language has changed significantly or society has changed in a material way.

Finally, the regressive nature of insisting on legislative intent controlling the process is addressed by practical reasoning in that it is but one factor to take into account.

The upshot is that in some cases evidence of intent can be found if we approach it as above. In other cases, evidence as to the issue before the court may be thin on the ground in which case we cannot insist that intent solves the interpretative problem and it becomes but one thread to take into account.

C. Purposivism

Purposivism has been proposed as an alternative to intentionalism. Proponents say it is faithful to the principle of legislative supremacy but without the rigidity and problems of intentionalism.[58] It achieves this by moving from the more specific concept of intent as to the very issue before the court to a broader level of purpose. It is an approach advocated by American academics, Hart and Sacks: "*[E]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea*

[57] Ibid, at 252-253.

[58] For a general summary, see Eskridge and Frickey "Practical Reasoning", above n 13 at 332-333.

of law and inadmissible."[59] The aim of the interpreter is to identify a purpose and then decide on a meaning which is most consistent with it. Hart and Sacks' approach assumes the legislature is made up of reasonable people pursuing reasonable purposes, and that "*Law is a doing of something, a purposive activity…sane people do not make provisions for the future which are purposeless*."[60]

Purpose is a useful tool when it can be determined easily enough but the theory runs aground in the same places as intentionalism. How do we discern purpose in hard cases? What if we cannot identify a clear purpose? What if there are several purposes? Further, attributing a purpose in the absence of clear evidence again creates a fiction. The real reasons for the result are masked.

As with intentionalism, Eskridge also argues that its majoritarian justification rests upon questionable assumptions about the legislative process:[61]

> *Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent the final language of the legislature may reflect hard fought compromises. Invocation of the plain purpose of legislation at the expense of the terms of the Act itself takes no account of the processes of compromise.*

It is also indeterminate because of this compromise - ie it may have to satisfy various groups and conflicting purposes.[62] However, as with intentionalism, this can be overstated given that it will be rare to find words that convey conflicting purposes; they are more likely to be overlapping.

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[59] H Hart and A Sacks *The Legal Process: Basic Problems in The Making and Application of Law* (tentative ed. 1958) 1156 cited in Eskridge and Frickey "Practical Reasoning", above n 13 at 333.

[60] Hart and Sacks, Ibid at 110-111, cited in Aleinikoff, above n 16 at 34.

[61] *Board of Governors of Fed. Reserve Sys. v Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) cited in Eskridge and Frickey "Practical Reasoning", above n 13 at 335, footnote 55.

[62] Ibid, at 335.

Like intention, evidence of purpose has its place and we may be able to make a reasonable assumption about the main purpose along the same lines. Where evidence of purpose is weak, however, practical reasoning does not insist that it be the controlling factor.

D. Conclusion as to Traditional Approaches

The three traditional approaches each have their strengths but they should not be the sole focus of the interpretative task. In some cases they may not solve the interpretative problem and it is therefore wrong for us to pretend that they can.[63] Doing so creates a fiction, mutes judicial responsibility for the result and thus does not meet the requirements of accountability and transparency.

The traditional theories also fall down in one other area and that is in their archaeological approach to interpretation, their refusal to take account of changed circumstances. Practical reasoning dictates a further touchstone and that is the consideration of dynamic considerations.[64]

VI. Dynamic considerations

While the traditional theories have been described as archaeological, the meaning fixed in stone at enactment, dynamism suggests a different metaphor, a nautical one:[65]

> *Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail…The dimensions and structure of the craft determines where it is capable of going, but the current course is set primarily by the crew on board.*

[63] See W Eskridge Jnr "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609 where Eskridge shows this by applying the traditional theories to the case *Boutilier v INS* 387 U.S. 118 (1967). He also applies a third theory, present minded interpretation, which holds that the court must interpret according to current values alone. (See T Aleinikoff "Updating Statutory Interpretation" (1988) 87 Mich L Rev 20). Eskridge argues that all fail to provide a determinate answer or to close off other avenues of inquiry, despite insisting on one interpretative touchstone. Further, he argues that none provide a method that constrains the interpreter and improves the odds that a correct interpretation will emerge. The example provides further weight to the argument that single overarching theories of interpretation are flawed.

[64] Eskridge and Frickey use the term "dynamic" in "Practical Reasoning", above n 13. It is also used by W Eskridge Jnr in "Dynamic Statutory Interpretation" (1987) 135 U Pa L Rev 1479.

[65] Aleinikoff, above n 63 at 21.

A dynamic approach sees interpretation as the case-by-case evolution of the statute to meet new problems and social circumstances.[66] Why be bound by a legislature which has "*adjourned and its members gone home to their constituents or to a long rest from lawmaking*?" Why stand in awe of a legislature that "*has folded up its papers and joined its friends at the country club or in the cemetery*?"[67]

A dynamic approach also reflects the non-mechanical nature of interpretation. Judges are not seeking the meaning put in the statute by the original legislature. As noted above, an essential insight of hermeneutics is that interpretation is a dynamic process and that the interpreter is inescapably situated historically. Accordingly: "*Every age has to understand a transmitted text in its own way*."[68] A dynamic approach also ensures that statutes serve the needs of the current society. Law can lose its legitimacy if it does not meet current social needs. As to rule of law considerations, citizens reading the Act are likely to do so in light of its current meaning.

Dynamism does not mean, however, that an Act can take on a life of its own in terms of changing its meaning completely. The text remains but its parameters may change to meet new circumstances.[69] The point is well made if we draw a distinction between original construction and the text's original sense.[70] The original construction would be the meaning given to the text the day after its enactment. It is fixed in time. If it refers to original sense the court reads the text in its current context, in light of current conditions. Unless there is clear evidence that the legislature intended it to be a "fixed meaning" statute, there seems no good reason why the modern meaning should not be applied.

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[66] Eskridge and Frickey argue that dynamic considerations are but one of several that should be weighed. Others take a different approach to dynamism. Aleinikoff, for example, argues that interpretation should be "present minded", that legislative history and intent have no relevance. See T Aleinikoff "Updating Statutory Interpretation" (1988) 87 Mich L Rev 20.

[67] C Curtis "*A Better Theory of Interpretation"* (1950) 3 Vand Law Rev 407 at 415.

[68] Eskridge and Frickey "Practical Reasoning", above n 13 at 345.

[69] Contrast with Calabresi's suggestion that judges should be able to update or ignore obsolete statutes. See G Calabresi *A Common Law For the Age of Statutes* (Harvard University Press, 1982).

[70] Sullivan makes this distinction in R Sullivan *Statutory Interpretation* (2nd ed, Irwin Law, Toronto, 2007) at 102-104.

Eskridge, the leading proponent of dynamism, acknowledges it is not always an appropriate approach. A dynamic interpretation is most appropriate when the statute is old, generally phrased, and faces significantly changed societal problems or legal contexts. It is least appropriate when the statute is recent and addresses the issue in a relatively determinate way.[71]

The objection to dynamism is that to update meaning is to usurp legislative supremacy thereby violating the separation of powers. Some have said that under dynamism the law means what it ought to mean and the "ought" is decided by the judiciary.[72] This overstates it because, as noted, the text always constrains. Dynamism does not allow judges to depart from the words of the Act.

The "anti-majoritarian" anxiety causes those in the original camp to wince at the thought of dynamic considerations being taken into account. They see it as too much power being given to judges. But on the same reasoning, is it not anti-democratic to be governed by a legislature of 100 years ago? And could it not also be argued that the enacting legislature understood the nature of legislation and, by using general language, deliberately left the "mapping out" of meaning to the courts? Further, the approach is unlikely to create instability and unpredictability when we see that the common law moves slowly, building on what went before. Why should judges suddenly act differently with statutes? It is also unlikely that there will be huge jumps in meaning because words do not change meaning that often.

A legitimate concern is how the court decides when to update and when to leave it alone. Which words stay fixed and which embark on the dynamic journey? What is it that a judge must consult to determine in what direction society has moved?: "*Community opinion garnered from chats at the country club? From talk shows, from newspapers? Here opinion*

[71] W Eskridge Jnr "Dynamic Statutory Interpretation", above n 64 at 1554-1555.

[72] See A Scalia *A Matter of Interpretation, Federal Courts and the Law* (Princeton University Press, 1997) at 22.

divides all over the show and therefore evolutionism is not a practicable constitutional philosophy."[73]

I suggest sometimes it will be a matter of commonsense and shared language - for example, whether a machine gun is a weapon, whether a car is a vehicle. These will be the easier cases. But what do we do when the case is not so straightforward, when important rights or policy considerations are in issue, for example?[74] There are some guiding principles. First, what is an interpretation that fits in with the rest of the legal landscape? Current social and legal policy will be relevant. An interpretation that coheres with other statutes and legal principles should be given serious consideration. Alternatively, empirical evidence can be sought to justify major shifts in application. Ultimately, it is a judgment call for the judiciary but the main point is that judges cannot rely on their own intuition or some broad statement that it accords with current values without something to back that up. There is also the protection in the form of legislative correction if it is considered wrong. Of course, this is not to say judges should be cavalier in the knowledge that if Parliament does not like it they will do something about it but it is a further safeguard.

VII. Practical Reasoning's Three Metaphors

Practical reasoning incorporates the three traditional theories and adds dynamic considerations as another interpretative tool. It has three main premises which are illustrated in three metaphors:[75]

(1) The web of beliefs: This metaphor reflects the complex nature of reasoning and the reality that no interpretation is context free. When we work out issues, or try to solve problems, we weigh up different considerations and consider the evidence for each before reaching a decision.

[73] Ibid, at 45.

[74] It is here that the debate rages in the United States, often in relation to constitutional rights. Such issues are discussed in W Eskridge Jnr "Dynamic Statutory Interpretation", above n 64 and see also A Scalia, above n 72.

[75] These metaphors are set out in Eskridge and Frickey "Practical Reasoning", above n 13 at 345-354.

(2) The chain and cable metaphor: This holds that our interpretative approach should take into account a variety of arguments rather than rigid adherence to one touchstone: "*Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected*."[76] Text, history and dynamic factors, when combined, may point to the best outcome in the case. Each thread standing alone may have flaws but together they may be persuasive. In many cases the threads will not run in the same direction and here, the cable metaphor suggests the result will depend on the strongest overall combination of threads. That in turn depends on what values the decision maker finds most important and the strength of the arguments invoking each value.

(3) The hermeneutical circle: The circle suggests that a true dialogue with the text requires the interpreter to reconsider their pre-understandings - which are based on their own interpretative horizon - as they consider the specific evidence in the case and then to formulate a new understanding which, in turn, is subject to reconsideration: "*[A] person trying to understand a text is prepared for it to tell him something*."[77] Eskridge elaborates thus:[78]

> *As the interpreter learns about the case (the people involved, the equities) and the statute (its language, structure, legislative history, prior interpretations), she forms tentative impressions about the best interpretation. These conclusions, though, are tested against the things she learns upon further inquiry and reflection and, indeed, call upon her to engage in further inquiry to answer questions raised by the information. This process of impression-inquiry-new impression is the to-and-fro movement in statutory interpretation.*

[76] C.S. Peirce *5 Collected Papers* (C Hartshorne & P Weiss (eds) 1960) at para 264, cited in Eskridge and Frickey "Practical Reasoning, above n 13 at 351, footnote 116. (A not foreign metaphor to New Zealand law given its use in the summing up to juries in criminal cases).

[77] H Gadamer, *Truth and Method* above n 30 at 238, cited in Practical Reasoning, above n 13 at 352.

[78] W Eskridge Jnr "Gadamer/Statutory Interpretation", above n 63 at 650.

Eskridge and Frickey put the theory into diagrammatic form to illustrate how each consideration comes into play and how it is to be weighed.[79] The diagram is that of a funnel and this is for three reasons. First, it places the considerations in a hierarchy with text at the beginning, followed by general and specific legislative history, purpose and finally, dynamic considerations. A clear and convincing textual argument will hold more weight than one where the words are vague or ambiguous. In other cases, the text's first impression meaning may become less clear if strong evidence of purpose points in another direction. The evolutionary or dynamic element is likely to take on the greatest weight when the statutory text is not clear and original legislative expectations have been overtaken by subsequent changes in society and the law. Such considerations do not have the democratic status of text and intent, hence their position in the funnel, but they are seen as relevant because a statute evolves as society changes.[80]

Second, the model suggests the degree of abstraction at each source. The sources at the bottom of the diagram - ie text - involve more focused, concrete inquiries, typically with a more limited range of arguments. As the interpreter moves up the diagram, a broader range of arguments is available, partly because the inquiry is less concrete.

Third, the model reflects the hermeneutical insight noted above. In formulating and testing their understanding of the statute the interpreter will move up and down the funnel, evaluating and comparing the different considerations represented by each source of argument.[81]

Hermeneutics sees interpretation as dynamic given that the interpreter is inescapably situated historically. Again: "*Every age has to understand a transmitted text in its own way*."[82] This is captured by a further metaphor, the "fusion of horizons". The historical text contains assumptions - an "horizon" - which is often quite different from the horizon of the later interpreter. Because the horizons are alienated from one another, the interpreter

[79] Eskridge and Frickey "Practical Reasoning", above n 13 at 353-354.

[80] Ibid.

[81] Ibid.

[82] H Gadamer *Truth and Method* above n 30 at 263, cited in "Practical Reasoning" above n 13 at 345.

can never completely recreate or understand the text's historical horizon. Yet that does not defeat interpretation if it is viewed as an effort to seek common ground between the two horizons.[83] Common ground is possible because the gap is filled with traditions and experience that inform our current horizon and link it with the previous one. One such tradition, for example, is the use of canons of construction as they express common assumptions about drafting. Both drafter and interpreter are aware of them.[84] Further:[85]

> *The historical text constrains, for the interpreter is charged with learning from the text and working from it to the current problem. Moreover, the interpreter's perspective itself is conditioned by tradition - the evolution of the historical text as it has been interpreted, the values of society, and current circumstances. While these constraints do not dictate a result, the interpreter cannot disregard the force of that which envelops and situates her in present society.*

The theory has been criticised as lacking certainty.[86] But, as argued above, the certainty claimed by the traditional theories is often a fiction and in insisting on it the real reasons for the decision are actually concealed. And even with the traditional theories judges may disagree on what is plain meaning or what evidence of purpose or intent there is. With textualism, for example, how does the interpreter choose between two plausible meanings? The theory does not provide any guidance. Even if textualists fall back on canons of interpretation their choice amongst those available is, as Eskridge argues, a way in which their own horizons are influencing the outcome.[87] Further, practical reasoning is not looking for the certainty sought by the traditional theories - ie the certainty hoped to be achieved by insisting on one overarching theory in every case. Instead, it seeks the best

[83] Eskridge and Frickey "Practical Reasoning", above n 13 at 346. Gadamer's metaphor of the "fusion of horizons" is discussed in greater detail in W Eskridge Jnr "Gadamer/Statutory Interpretation" above n 63.

[84] W Eskridge Jnr "Gadamer/Statutory Interpretation" above n 63 at 662. See also Popkin, above n 4 at 173-185.

[85] Eskridge and Frickey "Practical Reasoning" above n 13 at 382.

[86] Scalia, for example, asks how we decide which Acts stay at home and which are updated. A Scalia, above n 72 at 37-47.

[87] W Eskridge Jnr "Gadamer/Statutory Interpretation", above n 63 at 641.

answer for the case at hand and this requires looking at all relevant material and giving it only as much weight as it can bear on the facts.

Given the focus on the case at hand, however, criticisms arise that it renders meaning variable over time (relativism) and dependent upon the views of the interpreter (subjectivism).[88]

As to relativism, practical reasoning acknowledges this and sees it as an advantage. Meaning can, and in some cases should, change over time. An updated meaning may better serve the needs of society and ensures that the law is not regressive. It also reflects the reality that we are all conditioned by our present horizon and that interpretation is a dialogue between the interpreter and the text.

The safeguards from subjectivism flow from the idea of "application". Practical reasoning is based on the idea that we cannot understand concepts in the abstract but only in relation to a concrete application to a problem or issue. The idea of application counters the charge of subjectivism because the judge is dealing with the text in relation to a specific set of facts and at a specific point in time.[89] These factors constrain to some extent. Further, it is part of the idea of the rule of law that judges are not arbitrary and unpredictable. We have to assume integrity and that they play the game, that they are aware of the institutional restraints on them - their "situatedness" in a well-known tradition of laws and interpretations. All this ensures certainty as far as it is possible.[90]

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[88] Eskridge discusses and responds to the criticisms at W Eskridge "Gadamer/Statutory Interpretation", Ibid at 624-627.

[89] Ibid, at 635-636.

[90] See also Bennion who says that the idea of judicial subjectivism can be taken too far. He argues that while interpretation may not be a mechanical exercise, the decision making process is not entirely subjective or entirely dependent on the idiosyncrasies of a particular judge because weight is not assessed in a vacuum. Each judge comes to the task equipped with experience and ability and justice requires that their reasoning process be in some sense uniform - ie in how they apply their ability and experience: F Bennion, *Understanding Common Law Legislation* (Oxford University Press, 2001) at 134. See also O Fiss "Objectivity and Interpretation" (1982) 34 Stan L Rev 739. Fiss argues that objectivity does not require that interpretation be wholly determined by some source external to the judge, but only that it be constrained. It is constrained through disciplining rules which set the standards by which the correctness of an interpretation is to be judged and through the idea of an interpretative community which recognises the rules as authoritative.

The nature of the decision making process provides a further safeguard. Practical reasoning charges the interpreter with throwing themselves into the process and challenging their pre-understandings. The hermeneutical circle captures the idea that while the text's horizon can change over time, the interpreter's view point can also change during the process. The interpreter must be prepared to challenge their preconceptions and to learn from the process:[91]

> *Essential to the interpreter's conversation with the text is her effort to find a common ground that will both make sense out of the individual parts of a text and integrate them into a coherent whole. The assumption that the text has something to teach us, therefore, exercises a constraining influence on interpreters. This does not eliminate the problem of subjectivism, but does ameliorate it.*

That there is no certainty does not mean that judges are unconstrained and free to reach any interpretation they want. As noted, the text, history and tradition all constrain the judge. In the easy cases, where the text, its history, and evolution point in the same direction, interpreters from a wide range of backgrounds and values can agree on an interpretation. Even in the hardest cases Eskridge and Frickey note it is striking how much common ground interpreters can find if they genuinely throw themselves into the interpretative process.[92] Further, the requirement to articulate reasons again means that judges have to justify why they have arrived at their decision. If they cannot then bad decisions - perhaps those of the much feared "maverick judge" - are exposed. The constraining factors noted above suggest that disagreement will be as narrowed as much as it can be in any interpretative exercise while at the same time ensuring a fully informed decision. If there is disagreement, or dissent, it is not something unique to practical reasoning. The potential for disagreement is present in all cases:[93]

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[91] W Eskridge "Gadamer/Statutory Interpretation", above n 63 at 624-627.

[92] Eskridge and Frickey "Practical Reasoning ", above n 13 at 382, citing case examples to illustrate the point.

[93] N MacCormick *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) at 105-6, cited in F Bennion *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, New York, 2001) at 133.

> *Judges evaluating consequences of rival possible rulings may give different weight to different criteria of evaluation, differ as to the degree of perceived injustice, or of predicted inconvenience which will arise from adoption or rejection of a given ruling. Not surprisingly, they differ, sometimes sharply and even passionately, in relation to their final judgment of the acceptability or unacceptability of all things considered in a ruling under scrutiny. At this point we reach the bedrock of the value preferences which inform our reasoning but are not demonstrable by it. At this level there can simply be irresoluble differences of opinion between people of good will and reason.*

Practical reasoning is the better of the theories to address these differences through the requirement of transparency in reasoning and careful evaluation of all the relevant factors. The funnel of abstraction approach also gives guidance as to the order in which the relevant factors come into play.

VIII. Practical Reasoning and New Zealand

A theory needs to be workable in practice and practical reasoning fits well with New Zealand's current interpretative approach. In New Zealand, approaches to interpretation have changed over the years. In terms of a broad trend the shift in approach has been from literalism (akin to textualism) to purposivism.[94] Purpose is generally considered to be "*the end that the Act was designed to achieve*"[95] - ie the social or economic objective of the Act. In this sense, purpose does not mean the intent of various MPs. Rather, it is the broad goal of the Act. (In some cases they could, of course, overlap). If words are general, ambiguous or vague, they are to be interpreted in a way that achieves the Act's purpose. Discretions should be exercised in the same manner.

[94] For a general overview and description of the New Zealand approach, see J Burrows and R Carter *Statute law in New Zealand* (Ibid, n 2.) For a discussion of the purposive approach, see J Burrows "The Changing Approach to the Interpretation of Statutes" in D Carter and M Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) and J Burrows "The Interpretation Act 1999" in R Bigwood (ed) *Statute: Making and Meaning*, (Lexis Nexis, Wellington, 2004) at 211-225.

[95] J Burrows "The Interpretation Act 1999" Ibid at 217.

The requirement to have regard to purpose is contained in section 5(1) of the Acts Interpretation Act 1999. The section states that "*The meaning of an enactment must be ascertained from its text and in light of its purpose*."[96] It has been described thus:[97]

> *The aim in each case is to steer a middle path between preoccupation with literal meaning to a point that frustrates obvious intention, and the use of "purposive interpretation" as a rationalistion for rewriting the statute to reflect the object the Judge thinks Parliament ought to have pursued, but in the end did not*.

The purposive approach has two main features. The first is that it allows the courts to take a dynamic approach to their interpretative task. The Interpretation Act 1999 directs the courts to apply an updating approach: "*An Act is to apply to circumstances as they arise*."[98] A dynamic approach will only be permitted, however, where the words and purpose allow it.[99] The second feature is that it has led to greater use of external material. The purposive approach places the Act in its full context; it does not confine the interpretation exercise to the text or the original legislative intent. The internal context of the Act is still the starting point and canons of construction are tools to determine meaning. The internal context may also be the end point if plain meaning solves the interpretative problem but the modern, purposive approach allows the court to go further.

Context can include the internal context of the Act itself, external material such as Hansard, the social, political and economic climate in which the Act was passed, the wider legal framework, other statutes with similar purposes and so on. The courts have drawn on all such sources to provide clues as to meaning and there has been a call for the greater use of empirical evidence so that decisions are based on evidence and not intuition: "*[C]ourts must benefit, in exercising statutory discretions, from the availability of relevant empirical*

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[96] The purposive approach is not a new idea in New Zealand. Forerunners were contained in s5(j) Acts Interpretation Act 1924 and before that the Interpretation Ordinance 1851. For a long time, however, the courts failed to apply it consistently. See the criticisms to this effect by Denzil AS Ward "A Criticism of the Interpretation of Statutes in the New Zealand Courts" [1963] NZLJ 293.

[97] R Fisher "New Zealand Legal Method: Influences and Consequences" in R Bigwood(ed) *Legal Method in New Zealand*, above n 3 at 54.

[98] Section 6 Interpretation Act 1999.

[99] For examples, see J Burrows *Statute Law in New Zealand*, above n 52 at 219-233.

analysis and attitudinal surveys of social norms."[100] The bearing of context on meaning is also something that New Zealand judges have recognised.[101]

The modern approach also sees greater acknowledgement by the judiciary that decision making is not mechanical, the formalist fairytale long since debunked.[102] Judges now acknowledge their role in law making, particularly in extra-judicial addresses.[103] Likewise, they acknowledge that interpreting statutes (and applying case law precedents) depends on a particular judge's perceptions of community values and attitudes as well as on statutory directives.[104] Policy considerations also play a part.[105]

From the 1970s onwards judges repeatedly acknowledged the impact of changing social attitudes and conditions on their decisions: "*[T]hose of us who sit as appellate judges are well aware of the importance of trying to keep abreast of changing pressures within our society so as to be able to reflect current community aspirations in the value judgments we*

[100] I Richardson "Law and Economics and Why New Zealand Needs It" (2002) 8 NZBLQ 151 at 162. See also, for example, *Williams v Attorney General* [1990] 1 NZLR646, 681 (CA):"*The Court should be furnished with material so that proposed policy alternatives can be considered in an informed way rather than resting on instinctive responses supported by generalised reasons,"* cited by R Fisher in "New Zealand Legal Method: Influences and Consequences" in R Bigwood (ed), Legal Method in New Zealand, above n 3 at 59.

[101] S Glazebrook "Filling the Gaps" in R Bigwood (ed) *Statute: Making and Meaning* (Lexis Nexis, Wellington, 2004) 153 at 154-155: Language *"must be understood in context, including its linguistic and cultural context*."

[102] The fairytale description comes from an extra judicial speech of Lord Reid "The Judge as Lawmaker" (1972) 12 Journal of the Society of Public Teachers of Law 22 at 22. In New Zealand, the demise of formalism occurred several decades ago. Lord Cooke considered the turning point to be *Bowen v Paramount Builders* [1977] 1 NZLR 394 where the Court called for submissions on policy considerations. See R Cooke "The New Zealand National Legal Identity" (1987) 3 Canta LR 171.

[103] See I Richardson "The Role of an Appellate Judge" (1981) 5 OLR 1; I Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46; E Thomas "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9 OLR 459; R Cooke "The New Zealand National Legal Identity" (1987) 3 Canta LR 171.

[104] I Richardson "Judges as Lawmakers in the 1990s" (1986) 12 Mon ULR 35. See also I Richardson "The Role of An Appellate Judge (1981) 5 OLR 1.

[105] Obvious examples come in the negligence cases. Lord Cooke, for example, suggests *Bowen* was a significant case in the shift from legal formalism, above n 102.

are called on to make."[106] They have also recognised that with this development came the requirement to articulate the policy foundations for their decisions, to be transparent:[107]

> *Society demands full discussion of principles, policies, precedent and pragmatism which have led us to a particular conclusion. A failure on our part to articulate the alternatives and give reasons for our conclusions may well justify the criticism that the failure simply reflects a disguised preference for one set of values…."*

New Zealand's approach takes account of a variety of considerations; it seeks a fully informed decision and acknowledges the role context and judicial values play in interpretation. It also allows for an updating approach. In this regard it has much in common with practical reasoning. What New Zealand's approach lacks is an articulation of its underlying rationale, its limitations and a method by which the factors are weighed.[108] Practical reasoning provides this.

Finally, the theory should appeal to judges for its case by case approach rather than adherence to one overarching theory. Justice Glazebrook has noted that not many judges openly espouse theories of interpretation: "O*ne could take the high ground and say that this is because those in the practical world cannot afford the luxury of philosophies, as they are too busy deciding cases… I suspect, however, that it is rather a question of keeping one's options open.*"[109] With practical reasoning judges can reach a decision without the fear of being called inconsistent the next time. There is no need to die on the mountain of, say, textualism, if it does not solve the case at hand.

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[106] I Richardson "Judges as Lawmakers in the 1990s" (1986) 12 Mon ULR 35 at 41.

[107] Ibid, at 39. See also R Fisher, above n 97 at 72: *"If judges are seen to spell out the policy foundations for their decisions, rather than taking to unexplained formalist positions, it exposes fallacies in underlying rationales, reveals objectives that have become anachronistic, is more likely to be understood and accepted by parties and promotes public accountability and legitimacy in a questioning society."*

[108] In "Filling the Gaps", above n 101 at 169-176 Glazebrook proposes a spiral approach to interpretation, starting with text and moving out in stages to context, history and then wider context. This is similar to practical reasoning in that it looks to multiple factors and starts with the most concrete - ie text. Unlike practical reasoning however, she suggests that some of the stages may not be necessary and could just be used as a "double checking" mechanism. This differs from practical reasoning's concept of the hermeneutic circle and the "to and fro" process it requires.

[109] Ibid, at 169.

IV. Practical Reasoning - Conclusion

Practical reasoning fulfills all the requirements I sought from a theory. It does not overplay the bogeyman of the maverick judge rampaging through the statute book and re-writing the law. This fear, seen in the traditional theories, leads to an unnecessarily narrow approach to interpretation. Practical reasoning combines the strengths of the traditional theories and addresses their shortcomings. It does the latter by adding a fourth interpretative touchstone - the inclusion of dynamic considerations - and by providing a method to weigh the various factors. In doing so it provides the best opportunity for a fully reasoned and mature decision. It is not regressive and allows the law to serve the needs of the society in which it operates. Can the originalist really want to be ruled by past meaning or is it really the lesser of two evils, the other evil being the maverick judge, setting out to make policy judgments, thwarting legislative intent? When we see that there are several powerful constraints on the judiciary surely it is better, in an appropriate case, to take note of current social values and modern circumstances.

Critics of an unreflective pragmatism express a concern that judges espousing such an approach are likely to embark on their own lawmaking campaign, to expand their role and unjustifiably make policy decisions on the basis of their "*solomonic wisdom*".[110] The beauty of practical reasoning is that it is very much a reflective pragmatism which requires judicial accountability for the result. It sets parameters around the judicial role in the interpretative task. Text, history, tradition all constrain. Further, the requirement to articulate and justify all decisions means there is no room for judges to hide. To the extent possible, this approach provides safeguards against such concerns. Those safeguards are not present in the traditional theories because they deny the nature of the judicial role in interpretation.

[110] R Sutton and R Bigwood "Taking Stock: Legal Method in New Zealand Today (and for the Future?)" in R Bigwood (ed) *Legal Method in New Zealand*, above n 3 at 335, citing J Smillie "Formalism Fairness and Efficiency: Civil Adjudication in New Zealand [1996] NZ Law Review 254 at 278 where he says "*It is up to those of us who remain sceptical of judicial claims to Solomonic wisdom and moral infallibility to express our concerns, and attempt to persuade our judges to take a more modest view of their role in society, and one that is more within their limited capabilities as lawyers*."

Another criticism - lack of certainty as to when factors come into play and what weight they are to be given - is countered to a large extent by the funnel of abstraction model. As to any lingering uncertainty, such is the nature of interpretation. With practical reasoning judges will be weighing the same evidence, and will be applying the same methodology, but there may be reasonable disagreements as to what weight to place on the evidence. There have always been dissenting judgments and practical reasoning does not prevent that. What it does seek, however, is contextual justification for the best answer in the case at hand and an articulation of why. This is likely to narrow any room for disagreement. Uncertainty is also present in the traditional theories but again, is less likely to be acknowledged.

Practical reasoning also reflects the reality that legislators cannot foresee every permutation of the problem they seek to address. An Act, then, is designed for future unravelling. The fusion of horizons metaphor and the incorporation of dynamic factors address this reality and makes legislation workable, durable and receptive to current manifestations of the original problem. Finally, its attraction lies in its similarities to New Zealand's current interpretative approach.

Ultimately, whether one accepts practical reasoning or not will depend on whether one is a formalist or not; it is a value judgment and at this level there can be no persuasion. Are we prepared to have a system which denies that values come into play, that insists the interpretative task can be context free and that all decisions can be sheeted home to whatever touchstone is chosen? Or do we want fully informed decisions with the true reasons articulated and recognition of changing circumstances? I opt for the latter.

Chapter Five: Practical Reasoning and the Family Protection Act 1955

I. Overview of Chapter

The scene is now set for an analysis of the case law. The preceding chapters have set the scene for this normative analysis in the following way: Chapter One provided the general historical background relevant to the practical reasoning task, enabling us to locate the statute in a particular climate. In turn this may shed light on the motivation behind the Act. It also described the specific history by summarising the parliamentary debates leading up to its passage. It showed the concerns motivating the politicians and the compromises reached in getting the Act through. These debates may shed light on the Act's purpose and give clues as to the intent of the legislature in passing the Act.

Chapter Two told a story of the Act in a purely descriptive way, highlighting the main cases and themes. It illustrated the Act's evolution from one directed at the financial necessity of dependants to one directed at a mixture of purposes including financial necessity, restitution, compensation and, finally, belonging and the recognition of the familial bond.

As the Act evolved, the nature of the commentary changed. Chapter Three showed that in the latter part of the 20th century there was a growing chorus of criticism directed at the court's approach and this criticism largely had testamentary freedom, purpose and certainty as the touchstone of analysis. The criticisms, however, were not located in any theoretical framework of statutory interpretation. How ought the Court to approach its statutory task and why? This led to Chapter Four where I outlined the theory of practical reasoning and argued that it is the best tool to evaluate the judicial approach to the Act.

The purpose of this Chapter is to apply practical reasoning to the main cases to see whether the court's approach is justified. While the Act has generated a large and rich body of case law, I concentrate on those cases which have marked turning points in the story and which have been adopted as precedents in subsequent cases.[1] The rest of the case law would fall under one or other of the principles established by the main cases. The focus is not on the

[1] They are the same main cases described in Chapter Two.

minutiae but on the main passages of reasoning with details added where relevant to the analysis.

After the first few decades the case law does not follow a neat thematic approach. In many cases it is difficult to decipher whether the court has based its decision on an economic or ethical approach or a combination of the two. This is the result of reliance on the overriding moral duty test, particularly from the 1960s onwards. Themes may also overlap in time with some cases appearing to focus purely on economics while others of the same period adopting a more broad-brush "moral duty" approach. Overall, a theme based rather than chronological approach seems the better of the two and this is the one adopted.

The first question for the courts (the first theme) was whether adult children came within the jurisdiction at all and if so, in what circumstances. Destitution and/or dependence were the issues for consideration. Once it was accepted that adult children were within the Act's scope, debate focused more closely on what constituted "*adequate provision for proper maintenance and support*."[2] This has been viewed as an economic test and an ethical one. In terms of structure I deal with them as separate themes. In the first part of the Chapter I apply practical reasoning to the court's economic approach. The second part assesses the ethical approach.

To recap, practical reasoning rejects the traditional foundationalist approach to the interpretative task. It seeks contextual justification for the best legal answer among the alternatives and that answer will be one which relies on a multiplicity of considerations. The interpreter will look at all the evidence - text, general and specific legislative history, purpose, evolution of the Act, current policy - weighing each and reaching a result supported by the strongest overall combination of threads. The theory's main point of difference from traditional theories is that it allows a role for the "evolutive" perspective. By "evolutive" its proponents mean that the court should interpret the Act against the current climate, updating it where necessary to meet contemporary situations, perhaps unanticipated by the original legislators. History is not ignored. Instead the theory seeks, if

[2] The phrase used in section 2 Testator's Family Maintenance Act and now in section 4 Family Protection Act 1955.

possible, a fusion of horizons - ie an application which respects both history and the present.

Part One: The Economic Approach.

II. 1900-1910 - Who came within the Act?

The Testator's Family Maintenance Act ("the Act") was a novelty. Being the first of its type, and without any legislative guidance as to its application, the courts were faced with who came within it, when, and what they should receive. *R*e *Rush*,[3] the first reported decision under the Act, contains the first analysis of its scope. It provides the backdrop against which to set out the initial analysis and, later on, to juxtapose with two cases decided a century later, *Williams v Aucutt* [4] and *Brown v Auckland City Mission*.[5]

As seen in Chapter Two, *Re Rush*[6] saw the Act primarily as an extension of a testator's inter vivos support obligations and therefore suggested that dependency or destitution would be the criterion for eligibility. As a result, adult children would be at the edges of the jurisdiction:[7]

> *Adult children capable of supporting themselves may come within the statute of 1900. As to this I express no opinion. It would however, I think, require a very strong case to justify the Court in making an order under that statute in favour of such a child overriding the will of the testator*.

The case involved an application by a widow - defended by the testator's adult children from a previous marriage - and the Court took a destitution based approach to what she should be awarded, linking provision to the Destitute Persons Act 1894. The Court also

[3] *Re Rush* (1901) 20 NZLR 249 (SC).

[4] *Williams v Aucutt* [2000] 2 NZLR 479 (CA).

[5] *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA).

[6] *Re Rush* (1901) 20 NZLR 249.

[7] Ibid, at 253-254.

held that it was a duty to maintain only during the widow's lifetime; it did not extend to leaving her a fund to give to others on her death.

In reaching its decision, the Court did several things. First, it made a distinction between types of eligible claimants even though the Act itself did not. Second, it saw the Act as an extension of inter vivos obligations - as to eligibility and the level of provision - even though no mention of that was made in the Act either. Third, it saw the Act as directed at those who were dependent on the testator at date of death and suggests that the main type of dependency, the dependency that gets first claim on the estate, is economic dependency. Limits are therefore placed on the jurisdiction, those limits provided by the concept of dependency and the related concept of inter-vivos support obligations. Although the Court does not define the term dependency we can assume from the above passage that it adopted a core meaning of immediately financially dependent, or legally dependent, at the date of death, rather than some sort of ongoing dependency based on parental responsibility for offspring.[8] However, it suggested that some wider concept of dependency - perhaps based on ongoing family responsibility in certain circumstances - may be the basis of a claim but it would require a "*strong case.*"[9]

Cases following *Re Rush* continued the financial hardship focus but dismissed the requirement for dependence - in the immediate sense anyway - and the tie with inter vivos support obligations. In *Handley v Walker*,[10] an award was made to a married daughter in poor health whose husband and adult children were unable to support her. The testator was the next port of call. The Court made it clear that the claimant's husband had the first obligation to maintain his wife, suggesting that it intervened largely because those further up the "obligation chain" were unable to help. The estate was also large enough to sustain an award. In the absence of those factors, the Court doubted it would have interfered.[11]

[8] The Destitute Persons Act 1894 essentially deemed destitute adult children dependent on their parents and other relatives for the purposes of that statute so that the State would be relieved of the maintenance burden.

[9] *Re Rush*, above n 6 at 254.

[10] *Handley v Walker* (1903) 22 NZLR 932 (SC).

[11] It is also useful to note that there was no surviving spouse, the will was made during a temporary estrangement but the pair had subsequently reconciled, and the claimant's poor health had been attributed to

Re Rush and *Re Handley* set the scene for the court's initial approach to adult children and in this first decade the bulk of the case law focused on an adult child's inability to maintain itself, usually due to ill health or a disability.[12] The next section applies practical reasoning to this initial approach. The main focus is on the text and purpose as there is yet little in the way of changed horizons to "fuse". As noted in the previous chapter dynamic considerations, and therefore the need to attempt a fusion of horizons, become more relevant the older the Act is: "*A dynamic interpretation is most appropriate when the statute is old, generally phrased, and faces significantly changed societal problems or legal contexts.*"[13] We have not yet reached that stage in the analysis although the social climate in the first decade is relevant to the interpreter's context and so is discussed for that reason. Further, the fusion of horizons looks at the life of the Act, how it has evolved, and the initial analysis is crucial for this reason too; it marks the starting point of the evolution.

A. Textual Analysis

The text is the starting point. The important phrase - "*adequate provision for proper maintenance and support*" - has remained the same throughout our story.[14] It looks deceptively simple but from the start there was some doubt about what it meant and to whom it applied. The core application - the area in which there could be no real argument - is that it applied to wives of testators who were, generally, financially dependent on the testator at the date of his death. Minor children of the testator also came under this umbrella. The text clearly allows this and the "push" behind the Act came from the women's movement, concerned that wives could be left without means if their husband died and left everything away from them. As described in Chapter One, the debates surrounding all the legislative attempts largely focused on the plight of widows and dependent children. It was women who were economically vulnerable and who faced possible destitution if the male

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the nursing help she had provided both her parents. Here, although not analysed as such, we see factors that could inform what is "proper": See analysis below at 150 and following.

[12] Examples include *Munt v Findlay* (1905) 25 NZLR 488; *Re Hoffman* (1909) 29 NZLR 425; *Re Cameron* (1905*)* 25 NZLR 907; *Re Bleasel* (1906) 25 NZLR 974 and *Re Green* (1911) 13 GLR 477.

[13] W Eskridge Jnr "Dynamic Statutory Interpretation" (1987) 135 U Pa L Rev 1479 at 1554-1555.

[14] As noted in Chapter Two, the Act has been amended several times and these amendments may be relevant later on in evaluating the court's changing approach. The test, however, has remained the same.

breadwinner died and left them nothing. Men had a legal duty at common law to maintain their wives (and by extension, their minor children) and the Act reflected this. This was recognised by the Court of Appeal in *Plimmer v Plimmer*[15] where it reiterated that adult children were at the edges of the jurisdiction and that it was wives who were the obvious case:[16]

> *In the case of a widow the difficulties that surround the exercise of these powers are comparatively small. There are few persons who will not think that every testator, whatever may have been the differences between his wife and himself, ought to provide for his widow in a reasonable manner, unless she has clearly been guilty of some grave breach of the law or of conventional morality.*

But that is as far as we can take it in the abstract. Many questions remain unanswered. Children are eligible claimants. The Act makes no distinction between minor and adult children. In addition, the Act does not differentiate between classes of claimants at all and no restrictions are placed on the words. Do adult children come within the words of the Act and if so, in what circumstances? Are they at the edges of the jurisdiction? If they are "in", what level of award should they get and why?

B. Qualifying Criteria -Financial Dependence or Destitution?

A textual inquiry requires approaching the text as a reasonably intelligent reader and giving it its most commonsense reading. In doing so, we look at internal context - the placement of words in the section - and the overall scheme of the Act. Canons of construction can help. In terms of external context we look to similar provisions in other statutes to see if the words have acquired a conventional meaning that should be accepted.[17] Having done this, several interpretations may be textually justifiable and it is then that we may have to turn to other factors. (Indeed, practical reasoning requires us to continue the interpretative exercise regardless, as words which at first may appear plain could have doubt shed on them by other factors).

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[15] *Plimmer v Plimmer* (1906) 9 GLR 10 (CA).

[16] Ibid, at 21 per Edwards J.

[17] W Eskridge Jnr and P Frickey "Statutory Interpretation as Practical Reasoning" (1990) 42 Stan L Rev 321 at 355. (hereafter Eskridge and Frickey "Practical Reasoning").

Ordinary meaning is also based on the interpreter's knowledge of language: "*This includes knowledge of shared linguistic conventions and of facts, assumptions, and values that contribute to the 'common sense' of a community. It is this shared knowledge that makes 'ordinary' meaning possible….*"[18] Because each context is unique it is impossible to look up the ordinary meaning but while dictionaries are not an end point for plain meaning, they are a starting point in that they give us a range of possible meanings.[19] The context in which they are used then helps us narrow down the likely candidates. What, then, would a reasonably intelligent person, bringing common sense to the text, make of the section? Does the phrase "maintenance and support" connote economic dependence on the testator at the time of his death? Even if dependence is not a requirement, is destitution? Does maintenance connote dependence whereas perhaps support does not?

C. Dependency

I suggest a first impression meaning, and a core meaning, would require an economic link at death, some sort of dependence. When we think of maintenance and support, for example, we generally think of wives and husbands and minor children. The shared knowledge of the community could also go to such a reading then and probably now.[20] As set out in Chapter One, this was also the era of the Destitute Persons Act 1894, a frequent point of reference in the debates, and so it could also be said that the shared knowledge would have the words cover destitute family members, including adult children. We go to the dictionary to see if this supports the first impression.

The Concise Oxford Dictionary defines maintenance as: "*The process of maintaining or being maintained*" and "t*he provision of means to support life*" and "*a husband's or wife's*

[18] R Sullivan *Statutory Interpretation* (2nd ed, Irwin Law, Toronto, 2007) at 52.

[19] Ibid, at 55: "*The range of possible denotations of [a word] is indicated by the dictionary, but our judgments about what it means in these sentences, and how sure we are of its meaning, is rooted primarily in context - in what meanings are possible and plausible, given both the conventions of language and what we know of the world."*

[20] The debates and the background to the Act give some evidence as to this shared knowledge: see discussion in Chapter One. In summary, the idea of maintenance was usually associated with wives and dependent children (but there was also talk of family generally, and a proposed exclusion relating to independent adult children was voted down).

provision for a spouse after separation or divorce."[21] Maintain, in turn, is defined as "*to cause to continue; keep up, preserve (a state of affairs, an activity etc*") and "*support (life, a condition, etc) by work, nourishment, expenditure etc*"[22] Support is defined thus: "*provide with a home and the necessities of life*" and "*to give strength to; encourage*" and "*to give help or countenance to*".[23] Roget's Thesaurus gives the following as synonyms: "*To sustain*" and "*to strengthen*".[24] (Of course, other dictionaries may provide slightly different definitions but with the core sense being the same. For example, they may define support to include "*to sustain, to provide comfort*", the definition given by the Court of Appeal in *Williams v Aucutt*. The main point of citing definitions is to show that "support" can be used in an economic but also a broader "emotional" sense).

These do not give us a definite answer as to dependence. On the one hand, it may seem odd to interpret the section as imposing a duty to maintain someone on death when that duty did not exist while the testator was alive. A reasonable person may interpret it as requiring dependence - the claimant's standard of living was dependent, in whole or in part, on the testator's financial support. But on the other, the definition does not necessarily require a link at death; it is just that we usually think of maintenance and support in the context of a husband supporting his wife or vice versa - ie the link is one that comes to mind because of context. In the context of the Act, where children, including adult children, are expressly included, that context requires us to think about it differently.

Further, the definition "*to cause to continue, to keep up*" does not necessarily refer to any previous condition or state of affairs but could be to the person themselves - provision for

[21] RE Allen (ed) The Concise Oxford Dictionary (8th ed, Clarendon Press, Oxford, 1990).

[22] Ibid.

[23] Ibid. The definitions of maintenance and support also refer to physical maintenance, upkeep on a house and structural support but we know it does not mean that from the context; it would be nonsensical. Dictionary definitions from the 19th century are much the same. Webster's dictionary of 1899 defines "support" to include "*to hold up by aid or countenance; to aid; to help; to back up*" and "*to carry on; to support, sustain; to solace under affective circumstances; to furnish with the means of sustenance or livelihood; to maintain; to provide for*": Webster's International Dictionary (G&C Merriam Company, Massachusetts, 1899). Maintain is defined as "*to support; to bear the expense of; to keep up; means of sustenance; supply of necessaries and conveniences*".

[24] Roget's Thesaurus (Longmans, London, 1962).

them to keep up, to cause to continue. It may just be that with a spouse, that provision also keeps up the pre separation or pre death state of affairs but that does not mean we have to carry it over to adult children as well. If, however, the words were used in a slightly different way, and talked about the child being maintained by the testator at date of death, - as it later was for stepchildren and parents[25] - then Parliament has expressly required economic dependence. But when it is expressed in a more general way - "*adequate provision for proper maintenance and support*" - the requirement of having to have been actually maintained and supported at date of death is not, explicitly, there. The other definitions do not expressly require dependence either.

There is nothing else in the Act itself to shed light on the matter so we turn to other Acts on the statute book at the same time, directed at seemingly similar problems.

D. The Destitute Persons and Native Land Court Acts of 1894

In 1900 there were two such Acts: The Destitute Persons Act 1894 and the Native Land Court Act 1894. It is important to be careful about drawing comparisons. In some cases it may be inappropriate to look to other Acts because we are not dealing with a single, omniscient legislature. But here it is appropriate given that both Acts were raised as points of comparison in the debates leading up to the Act. The Destitute Persons Act, in particular, was a touchstone in terms of provision for wives and adult children and was important in terms of McNab selling the legislation.

The background and content of the Destitute Persons Act 1894 is set out in Chapter One. In summary, it was passed in response to failures in the charitable aid system and the government's concern that it not pick up the tab for the poor. Its purpose was clearly economic. It placed obligations on a number of family members to contribute to a destitute person's maintenance. It also placed obligations on spouses to maintain each other. A wife was to maintain her husband if he was destitute but the husband's obligations were absolute.

[25] Section 3(d) and (e) Family Protection Act 1955.

The Destitute Persons Act defined a destitute person as "*a person unable to support himself or herself by his or her own means or labour.*"[26] The Act provided that a magistrate could make an order, at his discretion, if a deserted wife did not have "*adequate means*" of maintenance.[27] Maintenance was defined in section 2 of the Act to include lodging, feeding, clothing, teaching, or training. The order was capped at 20 shillings per week.[28] The Act did not contain a separate definition of support but we can infer from the above definition of "destitute person" that it was the equivalent of maintenance and was financial in focus. The word "adequate" does not appear in the Act's definition section but does appear later on. Sections 15 and 16 set out the powers of a magistrate when a wife is deserted and left without "*adequate maintenance*." The word "proper" did not appear.

The important point for our analysis is the way the words appear in the respective Acts. In the Destitute Persons Act the words maintenance and support do not appear together. Another important difference, to be expanded upon later, is that the Destitute Persons Act places a limit on the amount of any order and this, together with a definition of maintenance, albeit not an exhaustive one, means it is expressly limited in scope. The Testator's Family Maintenance Act had no such parameters.

The Native Land Court Act 1894 was also cited in the debates, one MP considering it a precedent for a discretionary approach to provision on death.[29] It allowed the court to inquire, when a testator had left land other than to a successor, whether that successor had *sufficient* land for his *support*. If not, it could award the successor part or all of the land.[30] The term support is not defined.[31]

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[26] Section 2 Destitute Persons Act 1894.

[27] Sections 15 and 16 Destitute persons Act 1894.

[28] Sections 15 and 16 Destitute Persons Act 1894.

[29] Fraser 1900 NZPD vol 111, col 506. The Hon Col Pitt, 1900 NZPD vol 113, col 614: "*It is perfectly clear that the main principle involved in this Bill has already been applied to the Native race."*

[30] Section 46 Native Land Court Act 1894.

[31] Successor is defined in s2 to mean "*the person who, on the death of any Native, is, according to Native custom, or, if there be no native custom applicable to any particular case, then according to the law of New Zealand, entitled to the interest of such Native in any land or personal property*."

While these Acts were referred to in the debates, do they help with the inquiry as to whether dependence is a qualifying requirement under the Testator's Family Maintenance Act?

Dependence was not a requirement, in the immediate sense, under either the Destitute Persons Act or the Native Land Court Act. Perhaps, however, we can say that under the Destitute Persons Act there was a contingent dependence on a parent or relative (and vice versa in some cases) which was triggered when that child or claimant became destitute or was in need of financial support. We could therefore argue that if Parliament wanted to limit the Testator's Family Maintenance Act to dependency in the strict sense, in terms of being immediately dependent financially at date of death, it would have spelled it out. Again, it is relevant that "maintenance and support" appear together in the section whereas they do not in the other two Acts and that neither is defined in the Testator's Family Maintenance Act. This means there is an argument that they are not synonymous and that support is perhaps wider. Unlike maintenance it has less of a sense of dependence to it.

Perhaps there is also an argument that a major difference between the Destitute Persons Act and the Testator's Family Maintenance Act is that the former deals with a person's obligations while they are alive and the latter when they are dead and no longer have need of their assets. This strengthens the conclusion that support could mean something wider and that dependence is not a requirement. There is broader scope for the assets to be used for those who need them, as the testator no longer does, hence the lack of a limit on the level of provision as well. (The addition of the word "proper" in the Testator's Family Maintenance Act furthers supports this and is expanded upon at below).

At this stage of the analysis there is a strong textual argument that we should not limit it to dependency or the extension of inter vivos support obligations which, for adult children, would generally be in relation to destitution. We turn to the parliamentary debates leading up to the Act's passage to see if they shed light on the issue.

E. Hansard

The debates talk about dependants and although they do not define the term the obvious, first impression, meaning would be that of economic dependence at date of death. (McNab

talked of those "*at present dependent*" on the testator).[32] This is strengthened by talk of the testator dying and throwing his wife and children on the world penniless; this could only happen if they were economically linked to him at date of death.[33] The "State or Estate" debate lends strength to this textual argument.

Whether there is a broader meaning of dependence, not limited to immediate dependence at date of death, which arises by virtue of the parent/child relationship is unclear. The Destitute Persons Act imposed that obligation for destitute adult children suggesting a "deemed dependency" in limited circumstances but the Testator's Family Maintenance Act does not mention destitution. However, the debates talk of moving the flagrant anomaly between life and death obligations, and using the property for those in whose interests it was being used when the testator was alive. We therefore have evidence that destitute adult children, and those economically dependent on the testator, would be within the Act's scope. We bolster this by adding that if we do not want the State to bear the burden of a destitute adult child, then it makes no sense to put an age limit on it or a dependency requirement. If close kin fell on hard times, the Destitute Persons Act imposed an obligation on a wide range of relatives to provide financial help so why should it be different for adult children of a testator?

Further, a provision excluding adult children was voted down. The first suggestion was that the clause be amended to cover only infant or physically helpless children. It failed to pass. Another proposed amendment also failed and that was to limit it to children who were not in a position to earn sufficient for maintenance and support. Why? There could possibly be situations where adult children, not falling within either suggested amendment, were dependent on the testator at date of death and it could cause hardship if they were excluded – hardship to them and to the State on whom the financial burden would fall. The Legislative Council gave an example of a sick child unable to support itself.[34] Perhaps they could be physically capable of supporting themselves but still falling short because of

[32] McNab 1900 NZPD vol 111, col 504.

[33] Or, if not linked at death, then at least destitute - the argument then being that the testator should relieve the State from its burden of support or at least contribute to that support.

[34] Colonel Pitt, 1900 NZPD vol 113, col 613.

family responsibilities or unemployment or just the general battle of life. (And there could be all sorts of other situations that could not be foreseen, Parliament leaving it to the court's judgment). What we can say, with some certainty, is that Parliament turned its mind to an exclusion but wanted flexibility and left it to the courts to decide. (It could also be relevant here that under the intestacy provisions of the time, children - minor or adult - received a share of the estate so there was nothing unusual about them receiving something on a parent's death and this was also noted in the debates).[35]

Obviously dependency would make the claim easier - it is a first impression meaning and therefore the core area of certainty in terms of establishing jurisdiction - but not absolutely necessary. This was a point made by the Court in *Allardice v Allardice*:[36] "*A child...that has been living on a father's bounty could not be expected to begin the battle of life without means.*"[37] However, a child who had maintained itself and "*had perhaps accumulated means might be expected to be able to fight the battle of life without any extraneous aid. But even in such a case, if the fight was a great struggle, and some aid might help, and the means of the testator were great, the Court might, in my opinion, properly give aid.*"[38]

F. Destitution

What of destitution? As with dependence, the Testator's Family Maintenance Act does not mention destitution as a jurisdictional requirement. On one view it could be read into the Act based on the shared linguistic conventions of the era - ie people could view financial support obligations to adult children through the lens of the Destitute Persons Act. As against that, while the Testator's Family Maintenance Act may have been sold on a destitution basis it was not phrased in such an explicit way. The Destitute Persons Act is

[35] The Administration Act 1879 s10 (2*)* provided that real estate was to be divided in the same way as personal property. At this time, personal property was divided between the widow (one third) and the children (two thirds). Pitt, Ibid and Hanan at 1900 NZPD vol 111 refer to it in the debates. There appear to be no statistics relating to the frequency of will making in New Zealand in this period. There is some evidence for the early 19th century in England. According to S Anderson, 'Succession, Inheritance, and the Family' in W Cornish and others *The Oxford History of the Laws of England* (Oxford, OUP, 2010) vol xii 9-10, it was around 15 per cent.

[36] *Allardice v Allardice* (1910) 29 NZLR 959 at 969.

[37] Ibid, at 969.

[38] Ibid, at 969-970.

expressly limited to adult children who are destitute. Further, the placement of the words - "*maintenance and support*" - together with the addition of "proper" and the absence of any financial limit on provision, are significant differences. The reference to "support" and "proper" suggest something more than the bare provision required for the maintenance of a destitute person. (An award under the Destitute Persons Act for a destitute person was also capped at 20 shillings, there being no such limit under the Testator's Family Maintenance Act).

The Native Land Court Act does not refer to destitution at all. This could be seen as a neutral factor but I suggest it adds further strength to the broader textual approach - ie there was precedent for provision for non destitute adult children.

The Destitute Persons Act and the Native Land Court Act were referred to in the debates yet neither was used as a blueprint. (The latter, when referred to, was to illustrate that there was precedent for a discretionary system, rather than as to the qualifying criteria).[39] By using maintenance and support together in the Testator's Family Maintenance Act, there is a good argument that Parliament wanted effect given to both. If Parliament wished to define maintenance narrowly it could have done so and left out any reference to support. It could also have made it clear that the Act was an extension of the Destitute Persons Act and placed a cap on provision. There was also a provision in that Act which allowed an illegitimate child to claim against its putative father's estate.[40] This precedent could have been used and the Destitute Persons Act simply amended for it to apply on death for legitimate children and widows too. It could also have been expressly limited in time or age - for example as Parliament has done with the Child Support Act 1991 and the Family Proceedings Act 1980.[41]

[39] Colonel Pitt, above n 34.

[40] Section 11 Destitute persons Act 1894.

[41] Section 5, Child Support Act 1991 defines a child as someone under 19, not married and not financially independent. Liability to pay support therefore ends when those conditions are not fulfilled. Under s64(2) of the Family Proceedings Act 1980, a party shall assume responsibility for meeting their own needs in a reasonable time. At that stage, liability of the other party ends.

G. Hansard

As noted, Hansard is filled with references to destitution and removing the anomaly between inter vivos and post death financial obligations. Destitution may have been a selling point for some but there are also clear statements that it was about something more. We have the insertion of "proper", the talk of comparative destitution and station in life and the refusal to pass the exclusion for an adult child able to support itself. Hansard therefore contains evidence that there was an explicit rejection of Destitute Persons Act criteria, and this was expressly noted in the Legislative Council debates.[42]

As intended, the Act did remove an anomaly in that it created financial obligations on death but that is where the similarity ends.

H. 1900-1910 - Climate

The climate is essentially the same as that when the Act was passed. The judges' horizon is therefore shared with that of the MPs but the climate of the time is relevant to context and how the courts would have approached the text. It is therefore relevant to the practical reasoning assessment.

The cases in the first decade are applying the Act when the main concerns raised in the debates would have been fresh in the judicial mind. As set out in Chapter One, those concerns were the economic vulnerability of women and minor children, especially when their husband/father died. Complete testamentary freedom left this group vulnerable, particularly since the abolition of dower. The image of this group of claimants being thrown upon the state or charity was a strong selling point. Wives, and by extension their minor children, would justifiably have ranked first in the court's mind. Further, husbands had a common law duty to maintain their wives and this would have cemented their position as first in line. (The Destitute Persons Act strengthens this argument. Under that Act, wives did not have to be destitute to make a claim against their husbands but husbands had to be before their wives had any maintenance obligation).

[42] See Chapter One.

Other features of the climate were that the Act was passed in a liberal individualist era where self reliance was emphasised.[43] People able to support themselves should. If not, the family would step in but only for a certain amount. Even then, this was to save the State from bearing the cost of maintenance. The Court was therefore treading carefully; the idea of any inroads into testamentary freedom was new. The climate, together with the "newness" of the Act, shape the first cases and explain the distinctions made in *Re Rush*.[44] Textually, distinctions are possible and Hansard also supports such distinctions being made. Practically, distinctions may also have to be made if the estate is small and there are several beneficiaries. None of this means that adult children have to be the extreme case; it is just that it is possible they may be in some cases.

I. Assessment 1900-1910

The initial practical reasoning assessment sets the scene for the later fusion of horizons. What it also shows is that the text is applied according to the climate of the time, illustrating a central premise of practical reasoning that the meaning of a text is context specific. Judges at the time would not be seeking a fusion of horizons but rather an approach which fitted with the text, Hansard and the climate of the time. The initial judicial approach fits with the climate of the time and has some support from Hansard but it ignores the references in the text to "proper" and "support" and its lack of any reference to destitution or dependence.

The threshold requirement of destitution or dependence did not survive the first decade and nor did awards continue to be tied to the level of provision that would be ordered under the Destitute Persons Act.

III. The Second Decade and Beyond - An Expanding Approach to Economic Provision

In the first decade the bar was set high, both as to qualifying and as to provision. The next identifiable period of case law showed the courts moving away from a focus on destitution and an extension of inter vivos obligations. This happened as the courts started to explore

[43] The climate of the time is canvassed in Chapter One.

[44] *Re Rush* (1901) 20 NZLR 249.

the parameters of the Act more closely. What did maintenance and support cover and, most importantly, what was the significance of "proper"? (The early decisions did not discuss this specifically, simply assuming a Destitute Persons Act benchmark).

The main cases in this development are *Allardice v Allardice*,[45] *Welsh v Mulcock*,[46] *Allen v Manchester*[47] and *Bosch v Perpetual Trustee Co Ltd*[48] They are described in more detail in Chapter Two. Here the main thrust of the cases is analysed.

A. *Allardice* and *Welsh v Mulcock*

In *Allardice*[49] the Court distanced itself from a destitution based approach as did the Court in *Welsh v Mulcock*,[50] Salmond J in the latter case holding that adequate maintenance and support meant more than the necessities of existence: "*This may be the measure of the legal obligation…under the Destitute Persons Act, but it is not the measure of that moral obligation - the officum pietatis, as the Roman lawyers called it…and which is recognised and enforced by the Family Protection Act.*"[51] This distancing from the Destitute Persons Act is reflected in the contingency awards made to the adult daughters in *Allardice* and in this case. In the former case, the Court made the award on the basis that while being supported by their husbands, the daughters were not flourishing and their husbands may not be able to continue supporting them in this manner. In *Welsh v Mulcock* the claimant was also married, not in immediate need, and had a husband with two hands.[52] The Court held, however, that as the daughter of a man worth "X" and as a woman in *comparatively* poor circumstances, she was entitled to more substantial consideration at her father's hands than

[45] *Allardice v Allardice* (1910) 29 NZLR 959 (CA).

[46] *Welsh v Mulcock* [1924] NZLR 673 (CA).

[47] *Allen v Manchester* [1922] NZLR 218 (SC).

[48] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 (PC).

[49] *Allardice v Allardice,* above n 45.

[50] *Welsh v Mulcock,* above n 46.

[51] Ibid, at 685.

[52] Ibid, at 684, per Herdman J.

she got: "*He had a duty to use his means to improve her lot in life*."[53] In deciding whether there had been adequate provision for proper maintenance and support it held it was entitled to factor in the reasonable probabilities as to a change of circumstances.

The next two cases developed the idea of the statutory test being relative and elastic.

B. *Allen v Manchester* and *Bosch*

In *Allen v Manchester*[54] Salmond J continued the theme that the Act was about more than the bare necessities. His division of estates into small and large reflected the fact that the number of competing claimants, and the pool of money available, could inform the issue of what was adequate and proper. The Court also considered that different considerations would apply depending on whether the claimant was a wife, infant, or adult child. The Court held that what was proper and adequate provision depended on the testator's means, the means of the claimants and the relative urgency of the various moral claims on his bounty.[55]

Bosch[56] built on this distinction and is a pivotal case as it was the first to expressly reconcile both terms - "adequate" and "proper". The Privy Council held that what is "proper" depends on the facts of the case. It then drew a distinction between adequate and proper holding that "proper" connoted something different from "adequate":[57]

> *A small sum might be sufficient for the "adequate" maintenance of a child but having regard to the child's station in life, and the fortune of his father, it might be wholly insufficient for his "proper" maintenance. So, too, a sum may be quite insufficient for*

[53] Ibid, at 687, per Salmond J.

[54] *Allen v Manchester* [1922] NZLR 219.

[55] In *Allen v Manchester*, Ibid, an infant daughter was successful and an award was made to ensure maintenance of a sufficient amount to enable an education and upbringing appropriate to a daughter of a wealthy man and proper for a young lady in possession of a fortune of 10,000 pounds. The wife did not succeed as she already had enough to live without pecuniary anxiety.

[56] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463. *Bosch* is an Australian decision but the courts, at this stage, approached the legislation in largely the same way, drawing on decisions from New Zealand and vice versa. Refined distinctions between the Acts were to be avoided. *Bosch* has subsequently been cited as a leading case in New Zealand, Australia and Canada. See the comparative analysis in Chapter Six.

[57] Ibid, at 476.

> *the "adequate" maintenance of a child and yet may be sufficient for his maintenance on a scale that is proper in all the circumstances. A father with a large family and a small fortune can often only afford to leave each of his children only a sum insufficient for his "adequate" maintenance. Nevertheless, such sum cannot be described as not providing for his "proper" maintenance, taking into consideration all the circumstances of the case.*

Again, the Court held that the testator's means, the means and deserts of the claimants and the relative urgency of competing moral claims were relevant to the assessment.[58]

C. Practical Reasoning Analysis of Broadening Approach

The initial textual and historical analysis showed that the words were capable of justifying a flexible approach in terms of ranking claimants and that the words were not confined to destitution or dependence. But what of the contingency fund in *Allardice* and *Welsh v Mulcock?* And what of the size of the estate and the deserts of the claimant? How do these come into play? We need to return to the text, Hansard and the climate of the time.

D. Text

As noted, *Allardice* held the Act was more than a continuation of the Destitute Persons Act on death. The initial practical reasoning analysis showed this was justified. There was support in the text and in Hansard. But what comes within maintenance and support and where is the line drawn in a large estate where the issue of competing claimants is not present? What is the scope of the duty in that more difficult case? Here the textual assessment required by practical reasoning turns to the nature of maintenance and support and their qualifiers, "adequate" and "proper".

E. Maintenance and Support

There are no definitions in the Act itself as to what the words cover and we have seen that maintenance and support are used in a different way in the Act as opposed to the Native Land Court Act and the Destitute Persons Act. The latter also defines maintenance.

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[58] This echoes *Welsh v Mulcock* where the Court held it would have *"...regard to the circumstances and station in life of the testator and the circumstances and station in life of the dependant. A sum that would be adequate for a child reared in humble circumstances might not be adequate for a child accustomed, because of the wealth of a parent, to live in luxury and refinement":* at 683, per Herdman J.

While not defined in the Act, maintenance is a word suggesting upkeep, or day to day living expenses, the necessities of life, although these could be different depending on who is seeking maintenance. Accordingly, unlike the Destitute Persons Act, there may be greater scope for what comes within the term under the Testator's Family Maintenance. The definition in the Destitute Persons Act limited it and it was further limited by the cap on what a liable person had to pay. So it was coloured by the definition - even though it was not exhaustive - the reference to destitution, and the cap on the amount payable by a liable relative.

Without the destitution context, and without any definitions, maintenance and support are open textured words. Words that are open textured have a core meaning of clarity and a penumbra of doubt.[59] Their scope is not fixed. It is for the court to determine on a case by case basis whether something comes within the penumbra. Open textured words are therefore capable of being applied to situations and types of problems that their authors did not think about at the time of drafting or could not have foreseen:[60]

> *The meaning of a word may cover with clarity a limited sector of the world of experience, but nothing can prevent the appearance of unexpected objects, the creation of new objects, or the occurrence of unanticipated combinations of circumstances which generate doubt concerning the extent of that meaning.*

This means that "maintenance and support" could be applied narrowly or more broadly depending on the facts of the case and the period in which it is decided. Again, "support" could also be wider than "maintenance", connoting something other than the necessities of life (relative though they might be). Support's definition of "*to give help, to strengthen, to assist*" may allow provision for advancement in life, supporting a claimant's ambition to

[59] Refer to the discussion in Chapter Four at 104-108.

[60] J Cueto-Rua *Judicial Methods of Interpretation of the Law* (The Publications institute, Paul M Herbert Law Center, Louisiana 1981) at 99.

get on in life, improving their lot in life - as seen in *Welsh v Mulcock*[61] - and it could also accommodate the contingency fund in that case and *Allardice*.[62]

However, the terms have some overlap in dictionary definitions so there is an argument that they are synonymous, words in pairs, the draftsmen finding "safety in numbers."[63] It is also consistent with their use in the Destitute Persons Act where support is used in the definition of a destitute person. As against that, another drafting convention states that words are not redundant; each has to be given meaning.[64] This, together with the use of "and" - a conjunctive - may strengthen the argument that both terms are to be given effect. The judgments use the terms interchangeably but their outcomes fit better within support.

The qualifiers of adequate and proper are also crucial here, as what comes within support will be coloured by what is proper. (The provision must then be adequate to meet that).

F. The Qualifiers - Adequate and Proper

Adequate means "*sufficient, satisfactory (often with the implication of being barely so)*." It has an antonym of ample.[65] Sufficient and adequate are used in the Destitute Persons Act and Native Land Court Act. It is an elastic term, however, and what is "adequate" will be coloured by the court's finding as to "*proper maintenance and support*." It therefore takes on a different slant to the way it is used in these other Acts. Cooper J made this point in *Allardice* when he held that what would be adequate provision for the wife of an artisan or labouring man with a small estate would be inadequate for a wife of a prosperous trader or

[61] *Welsh v Mulcock* [1924] NZLR 673.

[62] *Allardice v Allardice* (1910) 29 NZLR 959.

[63] F Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, New York, 2001) at 77 addresses "words in pairs" and notes they may be a result of a reluctance to rely on a solitary word with the "*comforting feeling that the pair somehow conveys more than the sum of its parts*."

[64] J Burrows *Statute Law in New Zealand* (2nd ed, Butterworths, Wellington, 1999) 201: The courts are unwilling to treat words as surplus and assume the drafter has used words carefully and has meant every word to have significance.

[65] RE Allen (ed) The Concise Oxford Dictionary (8th ed, Clarendon Press, Oxford, 1990).

wealthy merchant or professional man. Likewise, what would be sufficient for a wife in the prime of life and robust health might be insufficient for an elderly or ill woman.[66]

Proper is defined as: "*correct; fit, suitable, right; decent; respectable*". (Its antonyms are "*improper, incorrect, substandard.*"[67]

The overriding sense of all these definitions is that of appropriate. It is an elastic term as well, as what is appropriate may vary from case to case and period to period. More significantly, maintenance and support could be "proper" in a number of senses. The first is in a quantitative sense -ie it is proper in terms of not being mean - a decent amount, not substandard, tying in with McNab's reference to "*comparative destitution.*"[68] It is appropriate in terms of the amount needed for maintenance and support, once the content of it is settled on in the case at hand. The second sense adds a slightly wider, but still "standard of living" meaning, and that is referring to the type of support that is appropriate. So it may be appropriate support in one case for a child to have an oxford education because of their upbringing or a contingency fund because they are economically vulnerable.

In yet another sense, as described in *Bosch*, it may be "proper" because there is nothing else to give. The testator has not acted inappropriately in leaving what he has; it is a cake cutting exercise and there was no more appropriate way he could have divided his resources. (The converse could also hold - ie provision may not be "proper" if the testator's means were not so limited). Finally, what is proper could turn in part on the deserts of the claimant, or the wishes or promises of the testator (as in *Bosch*).[69] It may be appropriate to award support at a certain level or of a certain type because that is what the testator wished for, or because the claimant is deserving and hard working and dutiful or because of their age and place in the race of life generally.

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[66] *Allardice v Allardice*, above n 45 at 974.

[67] RE Allen (ed) The Concise Oxford Dictionary (8th ed, Clarendon Press, Oxford, 1990).

[68] McNab 1898 NZPD vol 102, col 418. See further discussion of the Parliamentary debates at Chapter One.

[69] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 where one of the relevant factors was that the testator had expressed an intention to make further provision for his two sons.

In *Allardice*, the contingency fund arguably came within support but perhaps could also have been justified on the basis of supplementing the daughters' present modest means - ie it was maintenance at a proper level. It could also have been proper on the basis that the daughters were dutiful, economically vulnerable and the size of the estate was large enough to accommodate modest provision for them as well as the widow and her dependent children. It was "proper" in *Welsh v Mulcock* for the same reasons and in addition the fact the claimant had looked after her father for many years and was then cut out of the will because she married against his wishes. The Court also mentioned the lack of inter vivos provision and the testator's fortune which, after making provision for most of his children, he had chosen to leave to charity. All these factors can be accommodated by "proper". Again, in *Handley v Walker*,[70] although not analysed in those terms, the Court's reference to the claimant's nursing of her parents, and the fact the will was made during a temporary estrangement, could go to "proper", in addition to her economic vulnerability.[71]

What determines "proper" can be a mixture of objective and case specific factors. *Bosch* suggests family factors - the testator's wishes, the age of the claimants, their upbringing and deserts, the size of the estate. In *Allardice*, the Privy Council also held it could be tied to objective conditions - employment and living costs in a particular area, for example.[72] Proper, then, is not fixed; it is context dependent.

The court's broadening approach is supported by this textual analysis. What of Hansard?

G. Hansard

The debates suggest that the insertion of "proper" covered a number of the senses discussed above. As to the "standard of support" sense, it is true that destitution featured large in the debates and was one of the selling points. Stout had twice attempted to bring in a system of forced heirship but failed largely because of its automatic application. There was a concern

[70] *Handley v Walker& Ors* [1903] 22 NZLR 932.

[71] These factors could also overlap with the Court's discretion to make an award in the first place and as to what that award should be - "*as thinks fit*". However, as noted in Chapter Two, the Courts have not divided their task into two stages - whether adequate provision for proper maintenance and support has been made and, then, what to award. The distinction is seen as artificial in practice and makes no difference to the analysis.

[72] *Allardice v Allardice* [1911] AC 730 at 734 (PC).

that it could apply where the child was well off so there was a clear wish that the financial position of the claimant be relevant but there was no discussion of what that cut off might be.

There were also concerns in the "McNab" debates that provision could be too generous and more than needed for bare maintenance. This concern led to the insertion of the word "sufficient" in an earlier draft of the Bill.[73] This then changed to "adequate" which is largely synonymous with "sufficient". But even then, statements as to what constituted adequate maintenance are unclear. While some MPs talked of parallels with the Destitute Persons Act, others talked of maintenance and nothing more. It is unclear what they meant. It could have been maintenance in terms of the Destitute Persons Act or maintenance in terms of the common law which, as seen in Chapter One, was linked to the husband's means and would thus tie in with the Cooper J's relative definition of maintenance in *Allardice*.

The significant point, however, is the appearance of the word "proper". It seems it was McNab's insertion at the last minute. It does not feature in the debates in the lower house but is entirely consistent with his talk of "comparative destitution" or "station in life". The "station in life" approach was also endorsed by some in the Upper House who spoke of it being enough for respectable women to live on, and the money being used for those who had the benefit of it while the testator was alive.[74] This was in contrast to the Destitute Persons Act which only allowed mere sustenance and a certain amount of clothing, "*just enough to prevent them from being taken in by the police*."[75] Further, we can point to the voting down of the exclusion for adult children as distancing the Act from the Destitute Persons Act in terms not only of eligibility but also the provision contemplated.

It is true that the debates disclose conflicting statements as to the level of provision contemplated. On the one hand parallels are drawn with the Destitute Persons Act 1894 and the Family Homes Protection Act 1895 and this suggests a narrow application of the

[73] 1898 NZPD vol 103 (in committee), cols 426-427.

[74] Stevens 1900 NZPD vol 113, col 616; Pitt, col 614; Gourley, col 617; Bowen, col 618.

[75] Gourley, Ibid.

section. The Bill was apparently aimed at maintenance and support and "*nothing more.*"[76] But there was also support for maintenance at a more generous level and further, even though the focus was on destitution much of the time, the insertion of "proper" meant that the emphasis on destitution did not carry over to the final wording of the Act.

The insertion of "proper" also ties in with other concerns in the debates and is consistent with another sense of the word - that of it being appropriate from a moral point of view. Many of the objections to the legislation - including the earlier forced heirship proposals - related to the possibility that ne'er do well adult children or undeserving wives could receive provision.[77] Adult children - other than in the cases of destitution - were usually only mentioned in this context, a concern that they somehow might get an award even if idle, or undeserving or having received provision already and squandered it. Stout's "one size fits all" approach was rejected because of this too. It had the potential to produce too many unjust outcomes; there were no safeguards to prevent claims by "*lazy and reckless wretches who refused to make a living at all.*"[78] Just as the disentitling provisions made it clear that the undeserving were out, the insertion of the adjective "proper" can be seen to reinforce that the deserts of the claimants are relevant.

Hansard does not help us shed light on the content of "maintenance and support". The words were used interchangeably most of the time, even though no direct attention is paid to the point. However, some statements about station in life and comparative destitution may strengthen the textual analysis of support encompassing something more than maintenance.

The expanding approach is therefore justified on a textual analysis and the evidence found in Hansard, particularly the statements of the Bill's promoter, McNab, and those in the Upper House. While some of the MPs may have been unclear on this point, they voted through a Bill with "proper" and "support" in it and are taken to intend the effects,

[76] McNab, 1898 NZP vol 102, col 428.

[77] See discussion of the Parliamentary debates in Chapter One.

[78] Russell 1900 NZPD vol 111, col 506-507.

particularly given McNab's references to comparative destitution.[79] Is there support from the climate at the time? Again, practical reasoning seeks an outcome that takes into account text, purpose and the climate of the time.

H. Climate

The main point to date is that the words allow a broader approach even if there is no marked change in the wider climate. It appears instead to be largely a case of the courts becoming more comfortable with the statute and approaching it in different ways as they are confronted with new fact situations: "*[E]very new application of the text draws out new possibilities from it*."[80] Some points about the wider climate can be made, however.

1. Gender

Passages from the case law are highly gendered. Wives are the main focus and then daughters. Sons who are physically able get short shrift. The concern about idleness is directed at them. (Recall the judicial rebuke of the adult sons in *Allardice* even though they were in similar financial positions to their sisters). Self reliance is important for men. Sons should work and provide. They should squirrel money away for financial winters. Failure to do so meant a lack of moral fibre, a lack of initiative, of "get up and go". Sons get nothing unless they are disabled or unable to support themselves.[81] Daughters are treated differently and their need for maintenance and support appears to be interpreted more widely - the contingency fund in *Allardice*, improving the lot in life in *Welsh v Mulcock*. This reflects women's greater vulnerability to life's hazards and their dependency on men for support. As seen in Chapter One, women were economically vulnerable. Dependent on their fathers, they then become dependent on their husbands but there is an ongoing paternal responsibility, a conditional dependency, the father coming back into play if the husband is not providing sufficiently or there is a risk he may not always be in the picture. So the climate, in terms of women's economic vulnerability, explains and justifies the

[79] See Chapter Four at 110: "*Those who vote for a measure without knowing its consequences take their chances. While some may vote for all sorts of reasons, the retort is "so what?"*

[80] W Eskridge Jnr "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609 at 633.

[81] *Re Green* (1911) 13 GLR 477 is a good example. An adult son was successful because he had a disability which prevented him from working full time and had minor children to support. His two brothers, able bodied, *"young and vigorous*" were unsuccessful. However, the Court directed that if his disease became curable and he refused to undergo treatment, it would vary the order.

distinctions being made. Because of the lack of employment opportunities for married women in this period the court was not concerned that an award would cause daughters to become idle and unproductive members of society.

Women's economic vulnerability was reflected in the laws at the time - eg the Destitute Persons Act - and in the administration of charitable aid.[82] As these values were sufficiently "concrete" - ie acknowledged in law and public policy - the courts are justified in taking them into account in their application of the Act as they did in *Re Rush* and *Handley* and then *Allardice* and *Welsh v Mulcock*. Hansard also supports a distinction based on gender and not just in relation to wives but daughters as well. Adult daughters were rarely mentioned; reference, when there was a distinction made, was generally as to sons and the possibility that giving them money could lead to laziness.

2. State Welfare Provision

As to the more generous approach to provision, the move away from destitution, we could perhaps also point to the increasing role of the State in making provision for the welfare of citizens, the beginning of a less punitive or hands off approach that marked the 19th century.[83] The content and level of maintenance and support may be informed by this wider movement. While the Liberal Government was in power during the first decade of the Act's life, and started a trend of State assistance, there was a lag between that and the court interpreting the Act against this new climate. It is in the second decade and beyond that we can draw links between the new climate and the broadening application. In the second decade the Act was no longer new and was just one of several designed to make life economically easier for people.[84]

[82] Earlier legislation was also a response to this vulnerability. See Chapter One and discussion of other 19th century legislation - eg Married Women's Property Protection Act 1884.

[83] See Chapter One, footnotes 99-102 for texts discussing the new approach to government at this time.

[84] Some examples include the Old Age Pension Act in 1898, introduction of a Widow's pension in 1911, and one for miners in 1915. This was a trend that continued with the establishment of the welfare state in the 1930s.

3. Statutory Amendments

The gradually broadening approach in the second decade may also be attributable, in part, to the fact the Act was amended in 1906 to allow the court to make lump sum, periodical or other payments. This came about as a result of *Plimmer*[85] where the Court of Appeal criticised the fact it had no power to make such an award or any discretion as to the incidence of its order.[86] In *Allardice* Edwards J referred to his judgments in *Re Rush*[87] and *Re Laird*[88] - where he used the Destitute Persons Act as a benchmark - and stated he did not want to depart from those cases. However, he saw a green light for an expanded application in the fact Parliament had permitted the court to make lump sum awards. He saw this as a giving "*a more extended meaning to the court's power to remedy a testator's breach.*"[89]

There is an argument cutting against this. Prior to the amendments the court made awards for annuities or periodic payments. This suggested that Parliament had intended the Act to be focused on immediate needs associated with day to day living expenses which had been crystallised and could therefore be calculated with reasonable certainty. This would also mean, in the case of a widow, that she would not then be providing for the testator's "replacement" as well. The reason for introducing the power to award a lump sum may simply have been to allow a one off payment for immediate, crystallised need. The other changes made at the time - to vary or suspend an order if needs were no longer there - perhaps also suggest it was tightly controlled and tied to crystallised need. Further, as Bale suggests, empowering the court to make a lump sum award in addition to, or in place of, periodic awards might have been legislative recognition that if the estate was very small,

[85] *Plimmer v Plimmer* (1906) 9 GLR 10 (CA).

[86] The Act was consolidated without any further amendments in 1908 when the name of the Act was also changed to the Family Protection Act 1908. There appears to be nothing in Hansard explaining the name change. It was changed again in 1955 to the Family Protection Act 1955. Other amendments gave the court the ability to determine where incidence of further provision would fall, s33(4) and to exonerate any part of the estate from it (33(5). It was extended to intestacies by s22 Statutes Amendment Act 1939.

[87] *Re Rush* (1901) 20 NZLR 249.

[88] *Laird v Laird* (1903) 5 GLR 466.

[89] *Allardice v Allardice* (1910) 29 NZLR 959 at 972 per Edwards J.

the only feasible way to provide support would be to award the whole or a substantial part of the estate to the applicant.[90]

But as against this, there is nothing expressly ruling out the ability to make payments for contingencies and the ability to make lump sums also supports a one off payment for future needs. Such a payment could also come within support which is able to accommodate more than day to day living expenses. Further, the court only has one opportunity to make an award and has to predict the future as best it can. It cannot make a decision later on if things change for the worse. On the other hand, it can always end or vary an order if a person's circumstances later change for the better. So while the amendments do not relate, specifically, to the Act's scope in relation to adult children they are consistent with the open textured nature of the words. Further, the type of award to be made also ties in with "proper" and the court's discretion. A contingency award may be appropriate if the future is uncertain and the woman economically vulnerable. What is proper can also reflect the fact the court has to make an order that achieves certainty for estate administration. The ultimate aim was flexibility to deal with things on a case by case basis. What was "adequate" and "proper" and "maintenance" and "support" could depend on various things and the remedies had to be sufficiently flexible to allow this. Thus, on balance, the amendments are consistent with the broadening approach and lend weight to it.

What of the name change to the Family Protection Act in 1908? There is nothing in Hansard shedding light on the name change and the Act's title is not a tool of interpretation but it perhaps better reflects the broad wording of the Act, not confined to bare maintenance and dependence. It is also consistent with the introduction of lump sum awards and the suggestion this envisaged a broader approach than just maintenance by way of a periodic allowance. But other than that, I suggest it is a neutral factor.

I. Practical Reasoning Analysis to Date

In the first decade the courts took a bare maintenance approach to the jurisdiction with adult children having a significant hurdle to jump before receiving provision. Real

[90] G Bale "Palm Tree Justice and Testator's Family Maintenance - The Continuing Saga of Confusion and Uncertainty in the B.C. Courts" (1987) 26 ETR 295 at 300.

financial hardship and/or disability were requirements. From *Allardice* onwards adult children faced an easier road. By fleshing out the concept of maintenance and giving weight to both "adequate" and "proper", the courts are taking a broader and relative approach to the jurisdiction. The Act does not mention destitution or dependence and adult children were not excluded. The inclusion of "proper" distances the Act even further from a destitution focus. The courts have not yet looked at the meaning of "support" and seem to use it synonymously with maintenance but its presence in the section justifies the approach, again suggesting something more than bare maintenance.

The position reached thus far is not surprising and it is possible a textualist or purposive interpreter would have reached the same conclusion. However, changes in the wider climate lend even more support to the approach to date, something which the traditional theories would profess not to take into account. The practical reasoning analysis is therefore more persuasive as all three strands support it, the web of beliefs and the cable metaphors coming into play.

What the preceding section also shows is the significance of the word "proper" in this jurisdiction and it becomes even more significant later on. It is a fluid word giving the court the ability to update the statute, to expand it according to the case at hand and the period in which it is decided. (Recall that practical reasoning is about the right result in the case at hand and also the updating of a statute to accord with changes in the wider climate; "proper" can accommodate both). As *Bosch* illustrated provision can be "proper" in a number of ways, all of which may take on more or less significance depending on the climate in which the case is decided and the facts of the case. In some cases one factor alone may inform what is "proper" while in others there may be a number and it could be proper in all the senses listed above. Thus far, the factors are limited to the size of the estate, the testator's wishes, the age, gender and stage in life of the claimant and their deserts.

To date the approach has also been economic. While some of the factors just referred to could be called "ethical" - eg the claimant's deserts - awards are not expressly being made to reward claimants for services rendered, or to make up for past neglect or based on some

general moral duty or recognition of the family bond. From the 1960s onwards, however, this broader ethical approach gained traction and the economic and ethical approaches ran in tandem. From here on in it becomes difficult, in terms of structure, to continue a chronological approach because there were themes and approaches running in tandem, some taking a purely ethical approach, others an economic one, and yet others a seemingly mixed one. For the sake of structure and continuity of theme the next section of commentary continues to analyse the economic approach. This may appear slightly artificial given that the moral duty test became established during the life of these next cases and may have influenced the overall approach. However, in so far as the cases themselves seem to base their decisions on economic need it works and allows this theme, and the relevant dynamic factors, to be discussed without interruption. The next section takes us through to the end of the 20th century from an economic perspective.

IV. The Economic Approach from the 1930s to 2000

The textual analysis need not be repeated here. The main point is that it is a flexible test and can change from case to case and period to period. Hansard does not provide clear answers as to any cut off point either. The focus now is on dynamic considerations. They bolster the textual analysis and show that from a practical reasoning analysis, criticisms the Act was about destitution and dependence are misplaced. It also shows that what came within proper maintenance and support, and who was successful in receiving it, was influenced by changes in society. Broadly, we can say that the two world wars, the Depression, the establishment and then partial dismantling of the welfare state and changes in the roles of women, influenced the Act's application. Needless to say the 20th century saw many other changes and much could be written about each. For the purposes of this Chapter, however, it is inevitably broad brushed and focuses largely on the changes that are referred to by the courts in the cases themselves.

A. A Quick Ride Through the 20th Century - 1920s-1950s.

In the early and mid 20th century New Zealand government increasingly took responsibility for the well being of its citizens.[91] With the liberals came a raft of measures designed to

[91] See discussion in M Belgrave "Needs and the State - Evolving Social Policy in New Zealand History" in Tennant and Dally (eds) *Past Judgment: Social Policy in New Zealand* (University of Otago Press, Dunedin,

make people's lives better, New Zealand being seen as the social laboratory of the world.[92] Tennant notes that influenza and polio epidemics in 1918 helped entrench the idea of State assistance for those in need.[93] It was still limited assistance compared to what came later - the idea of the deserving poor was still present[94] - but it was starkly different to what came before. By the 1920s and 1930s New Zealand was used to government assistance in the private sphere. The establishment of the welfare state in the 1930s cemented it.

The 1938 Social Security Act was intended to give everybody cradle to grave security "*and to take away as far as possible the fear caused by the ills of life and the inexorable advances of old age*."[95] Social security was aimed at the support of young families through housing, social security and taxation policies.[96] Universal social security was introduced, freeing state provision from the stigma of charity.[97] Free primary healthcare was available. Secondary education became available to all children.[98] The goals were full employment, a house with a garden, free access to a doctor, ongoing employment and security in sickness, economic

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2004) (hereafter *Past Judgment*). See also G Duncan *Society and Politics*, (Pearson, Sprint Print, 2004); C Cheyne, M O'Brien, M Belgrave *Social Policy in Aotearoa New Zealand* (4th ed, Oxford University Press, 2008).

[92] The description is used in many texts on New Zealand history to apply to the Liberal Government's policies from 1891-1912 but its exact origins are hard to pin down. It was a slogan used to promote New Zealand during the Great Exhibition of 1906 but again, it is not attributed to anyone specifically: See J Philips "Exhibiting Ourselves: The Exhibition and National Identity" in JM Thomson (Ed.) *Farewell Colonialism*, 18-26. In K Sinclair, *A History of New Zealand* rev. edn. (Auckland: Penguin, 1985) at 187 Sinclair pins its origin to Lord Asquith at the Eighty Club in London at the turn of the century.

[93] Tennant, *The Fabric of Welfare; Voluntarily Organisations, Government and Welfare in New Zealand, 1840-2005* (Bridget Williams Books, Wellington, 2007) at 70. (Hereafter *Fabric of Welfare*).

[94] To qualify for a pension under the Old Age Pensions Act, a person had to live a sober life and be reputable. Belgrave notes that 19thc liberalism allowed for only minor intervention on behalf of individuals and focused on limited physical needs and that the restricted provision of welfare was based on narrow moral judgments: Belgrave, above n 91 at 25.

[95] B Gustafson *From the Cradle to the Grave: A Biography of Michael Joseph Savage* (Reed. Methuen, Auckland, 1986) at 226-227.

[96] Tennant *The Fabric of Welfare*, above n 93 at 126.

[97] Cheyne et al, above n 91 at 31.

[98] Ibid.

downturn and old age.[99] The welfare state promised to provide a standard of living just beyond the expectations of ordinary New Zealanders, rather than a safety net for destitution.[100] State houses, for example, had running water, inside kitchens and bathrooms and electrical fittings. Psychological needs were now also seen as important.[101] Changing the physical environment with improved housing, better health care and full employment was "*the foundation for individual and collective happiness*."[102] The focus was firmly on the family, not the individual, and it remained gendered. The idea of the male breadwinner was still to the fore and along with it the idea of a nuclear family where children attended school and married women supported the family unit as full time housewives. Family allowances were introduced and paid to mothers.[103]

The State's welfare role became more extensive following WWII and with it an acceptance that the State was the key player in the welfare arena.[104] As McClure notes, this acceptance was also conditioned by the apparent failure of voluntary welfare during the 1930s Depression. The Depression made large numbers of ordinary people vulnerable to unemployment, desertion and poverty. Fortune could be capricious and people were therefore desperate for security. Private charity and the system of charitable aid were seen as insufficient, inefficient and humiliating.[105]

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[99] Belgrave, above n 91 at 29.

[100] Ibid.

[101] Cheyne et al, above n 91 at 31.

[102] Belgrave, above n 91 at 29.

[103] Belgrave, above n 91 at 30.

[104] M Tennant "Mixed Economy or Moving Frontier? Welfare, the Voluntary Sector and Government" in Tennant and Dally (eds) *Past Judgment*, above n 91 at 48.

[105] M McClure "A Badge of Poverty or a Symbol of Citizenship? Needs, Rights and Social Security, 1935-2000" in *Past Judgment*, above n 91 at 143.

During the Depression and the Wars the government also stepped in to help farmers. It passed several pieces of legislation designed to ease their economic burden.[106] Other legislation also sought to protect the economically vulnerable.[107]

In summary, from the 1920s onwards, the State reinforced a general expectation of greater material security and this allowed for large sections of the population to share a common view of the future. By 1945 there was consensus in New Zealand about full employment, health and education, a commitment to State planning, management and regulation and the egalitarian distribution of wealth through the taxation and social welfare system.[108] By the 1950s New Zealand was seen as an affluent society underpinned by full employment and social security.[109]

B. Practical Reasoning: The Economic Approach and Evolutive Considerations

How do the above changes affect the Act? Surely the establishment of a welfare state made the need for provision on death less important and the circumstances in which it would apply considerably narrowed? Not necessarily. Maintenance and support are open textured and can expand or shrink in scope depending on the wider social climate. What is "proper" can be assessed against this external benchmark. What was considered maintenance and support in 1900 - viewed through the lens of the Destitute Persons Act - is not the same as after the establishment of the welfare state. Maintenance and support can now be interpreted more broadly, in line with State provision. The prevailing liberalism of the late 19th century - and the consequent "hands off" approach by government - is gone.

New Zealand now has a welfare state. Living standards have improved. Labour has raised the benchmark and this has flowed over into the judicial approach. The awards to the two

[106] The Mortgages Extension Act 1914 placed a moratorium on the exercise by mortgagees of their power and rights during the war. The Mortgagors Relief Act 1931 postponed the power of mortgagee sale.

[107] For example, the National Expenditure Adjustment Act 1932 reduced interest rates on mortgages and during WWII legislation prohibited people executing or enforcing a judgment.

[108] B Gustafson "NZ Since the War" in R Miller (ed) *New Zealand Government and Politics* (4th ed, Oxford University Press, Victoria, 2006) at 4. Cheyne et al, above n 91 at 44.

[109] M McClure *A Civilized Community: A History of Social Security in New Zealand 1898-1998* (Auckland University Press in association with the Historical Branch, Department of Internal Affairs, Auckland University Press, Auckland, 1998) at 7.

comfortably situated adult daughters in *Mudford*[110]could be seen as a reflection of Labour's allowance for wives and mothers, such is the expanded concept of need and the idea of comparative destitution.

The protection against life's hazards, the vicissitudes of life, central to Labour's "cradle to grave" policy, strengthens the textual analysis that the text can accommodate something more than day to day necessities, including the contingency award. Further, experience showed that people fell on hard times very quickly. The Wars and the Depression robbed people of security. Women lost husbands in the Wars. Men lost their livelihoods in the Depression. The protection against security was the express reason for an award to two daughters in *Re Barkla Dec'd*.[111] Again, the awards to the comfortably off married daughters in *Mudford* could also be explained in these terms even if not articulated as such by the Court. The protection of farms - evident in the above noted legislation and in government policy[112] - and the effects of the Depression were also taken into account in *Mudford* and an award to an adult son. In the same case, it was seen as proper to make an award to another adult son whose economic position was precarious as a result of injuries sustained in WW1. The effects of the depression were also taken into account in *Re Holmes*.[113]

In summary, as one commentator has noted, from 1900-1950 the courts and legal profession had to deal with the legal consequences of two world wars, the Depression and the social upheaval which issued in the welfare state. During much of the time the country was largely governed under masses of regulations necessarily imposed by central authority:[114]

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[110] *Mudford v Mudford* [1947] NZLR 837 (CA). The award was on the basis that they had a moral claim to something to call their own.

[111] *Re Barkla (Dec'd)* (1948) GLR 269 (SC).

[112] Labour looked to increase upward social mobility, particularly in relation to land ownership.

[113] *Re Holmes* [1936] NZLR 26.

[114] D Smith "Bench and Bar 1928-1950" in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH and AW Reed, Wellington, 1969) 90 at 137.

> *In these circumstances the courts and the legal profession strove 'to give', as Justinian defined justice, 'to every man his due'. In so doing, they were among the principal guardians of the peaceful evolution of New Zealand society during some of the most shattering years in the history of man.*

These shattering years made people vulnerable. The courts recognised this in their approach to the Act. The heightened expectations of material comfort, together with the heightened sense of insecurity, are being reflected in the approach. The text allows for the broader approach. The Act does not specify any cut off points or provide a definition of maintenance and support. The word "proper" allows the court to make provision in a flexible way. Hansard supports this through its reference to "comparative destitution" and the very fact it passed a measure with "proper" in it. Changes in the wider climate provide further strength to the broadening approach, as does the life of the Act - ie the courts are building on what has come before.

C. 1960s and 1970s

The welfare state continued to expand throughout the 1960s and 1970s and with it, the definition of need.[115] People's expectations were further heightened. Families needed not only material goods but what may previously have been seen as luxuries.[116] In 1970 a universal superannuation scheme was implemented, paid for by taxation. Tertiary education became more accessible, fees were cut, allowances increased.[117] The Domestic Purposes benefit was introduced in 1973.[118] Welfare officers were more prepared and able to provide those in need with goods that enabled them to keep living at a standard like their neighbours' and not at a basic subsistence level.[119] In 1972 the Royal Commission on

[115] Belgrave, above n 91 at 33 notes that there is now less emphasis on physical need and the dire consequences of poverty and more on the right to participate in society; this required more than attention to bare necessities of life.

[116] Ibid, at 34.

[117] Cheyne et al, above n 91 at 34.

[118] The Domestic Purposes benefit provides state support to single parents regardless of whether they are also receiving maintenance payments from the other parent. Contrast this with the Destitute Persons Act where the obligation was on the father of the child and the mother had to bring proceedings to enforce maintenance obligations. (The same was true of the position under the Domestic Proceedings Act 1964 which replaced the Destitute Persons Act).

[119] Belgrave, above n 91 at 34.

Social Policy looked at what "need" meant in an affluent era. It redefined poverty as the feeling of being an outsider unable to share the pleasures of those nearby:[120]

> *No-one is to be so poor that he cannot eat the sort of food that New Zealanders usually eat, wear the same sort of clothes, take a moderate part in those activities which the ordinary New Zealander takes part in as a matter of course. The goal is to enable any citizen to meet and mix with other New Zealanders as one of them, as a full member of the community – in brief, to belong.*

McClure notes the Commission wanted to "*nudge the poor towards the rich*."[121] Such a view contrasts with the climate in 1900. Then, the courts viewed the Act through the lens of the Destitute Persons Act. Now they might - and justifiably - view it against this idea of "middle New Zealand." It raises the economic benchmark and informs the content of maintenance and support and also "proper".

The idea of "relative deprivation" reflected in the above passage is generally associated with the work of sociologist Peter Townsend. Townsend defined poverty in terms of the society in which an individual lived. His definition of relative poverty was as follows:[122]

> *Individuals, families and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in the activities, and have the living conditions and amenities which are customary, or are at least widely encouraged and approved, in the societies in which they belong.*

In New Zealand, academic Margaret McClure has also written about this concept noting that New Zealand joined the Western World move in the 1960s to redefine poverty in a more generous way. She writes that the Royal Commission's acknowledgment of the concept of "relative poverty" viewed poverty "*no longer as a matter of destitution, but as the experience of anyone excluded from the expectations of a wealthy post-war society. The*

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[120] New Zealand Royal Commission of Inquiry into Social Security *Social Security in New Zealand: Report of the Royal Commission of Inquiry* [1972] at 62.

[121] M McClure "A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969-1979" (2003) 34 VUWLR 269 at 272.

[122] http://www.bris.ac.uk/poverty/pse/sum.

Commission advocated a sociable, egalitarian vision of a united community in which all could share a common culture and experiences."[123] McClure also observes that at this time there was a renewed appreciation of the idea that life could be precarious for people:[124]

> *From its early foundations in the Depressions of the 1880s and 1930s, social security drew from an appreciation that fate was capricious and that unexpected factors could deny a person their livelihood. Modern life encompassed new hazards, and social security therefore needed to expand to embrace new categories of need.*

A relatively recent survey conducted by the Centre for Poverty in Britain,[125] whose research focus is relative deprivation and its concomitant, social exclusion, is noteworthy for showing the sorts of things people see as necessary. It is likely that the results would be similar in other Western nations, including New Zealand. In summary it found that people's perceptions of necessities are not limited to the basic material needs of a subsistence diet, shelter, clothing and fuel. There are social customs, obligations and activities that substantial majorities of the population also identify as among the top necessities of life. These include hobbies, leisure activities, and activities with friends and families. It also shows that what once may have been considered luxuries are now considered necessities.[126] (Again, this external benchmark is only one factor that can inform what is "proper". The size of the estate and other factors may be just as, or more, significant in a particular case).

From another perspective the idea of relative deprivation could also be assessed in a family context rather than a societal one. If a claimant grew up in a wealthy family, for example, and the estate was large and other circumstances permitted, there might be a sense of relative deprivation if they are left nothing or a trifling amount for their maintenance and

[123] M McClure "A Decade of Confusion: The Differing Directions of Social Security and Accident Compensation 1969-1979" (2003) 34 VUWLR 269 at 271.

[124] Ibid, at 271-272.

[125] See http://www.bris.ac.uk/poverty/pse/sum.

[126] Ibid.

support. *Bosch*[127] can be placed in this category. It is all relative; the text allows for this, Hansard alluded to it and it is further bolstered by the changing climate.

D. The Welfare State Diminishes

New Zealand faced an economic crisis at the end of the 1970s and this hampered the State's ability to continue meeting the new level of need. A new political ideology also began to show its presence, one which considered that the State was not the best means of addressing all aspects of human need. Increases in personal taxation also decreased levels of public commitment to what were seen as increasingly expensive social services.[128] Governments now became more concerned with equality of opportunity than outcome and there was a growing acceptance that finite government expenditure had to be targeted according to need; it could no longer be universal. State intervention was now seen as too paternalistic and too authoritarian, a threat to individual freedom, harking back to the 19th century. Individual responsibility and accountability were re-emphasised : "*Consensus, conformity and collectivism became competition, diversity and individualism.*"[129]

In 1984 Labour moved to reduce state spending, social welfare being the main target.[130] A Goods and Services Tax ("GST")[131] was introduced and there was a reduction in marginal tax rates. This helped to erode the traditional philosophy of funding the welfare state through redistributive income taxation.[132] The trends continued under the 1990 National government. Benefits were slashed, the idea being to increase the rewards for moving from welfare to work. Welfare spending was now about providing a safety net, the goal being to eliminate all forms of universal provision in the long term. Tertiary education became more expensive and student loans were introduced. New Zealand embarked on a "user

[127] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463.

[128] Belgrave, above n 91 at 34.

[129] Ibid, at 34. See also Gustafson, above n 95 at 3-5: security community and consensus became insecurity division and conflict.

[130] J Kelsey *Rolling Back the State* (Bridget Williams Books Limited, Wellington, 1993) at 81. Further examples she provides are the introduction of prescription charges, the increase in state house rentals and the cutting of health subsidies.

[131] GST was introduced into New Zealand in 1986.

[132] J Kelsey *Rolling Back the State*, above n 130 at 81.

pays" system. With the erosion of the welfare state came a new tolerance of rising unemployment. The "full employment pillar" which had sustained the idealised family based society up until then slipped away.[133]

Rather than reflecting this and returning to an approach based on self reliance, of making your own way in life, the courts continued the broader approach. It made awards on the basis that the State may not make the provision it used to. As it had done after the Wars and the Depression it made awards to relieve people's economic vulnerability, this time brought about by a reduction in government services. In *Re Hilton Dec'd,*[134] the Court noted the "*contemporary wintry social economic climate for the elderly.*"[135] In *Moloughney v Public Trust*,[136] it held a wise and just testator had a moral duty to protect an elderly daughter "*against the vicissitudes of old age in a contemporary society*."[137] It was also a relevant factor in *Re Watkinson*[138] where the Court stated: "*Increasingly the State is retreating from support in the various forms that that can take and that more and more citizens are being asked to look after their own needs.*"[139] In terms of the current economic outlook it may still be relevant. In *Woodcock v Beatson*,[140] for example, the Court thought that increases in housing costs, costs of health care, and increases in relationship breakdowns may all have to be reflected in awards.

Here we see the courts reflecting the climate but in a different way. Instead of returning to a narrow approach, it factors the economically harsh environment into its awards. One

[133] Belgrave, above n 91 at 36.

[134] *Re Hilton Dec'd* [1997] NZFLR 438 (HC).

[135] Ibid, at 447.

[136] *Moloughney v Public Trust* HC Rotorua, M 62/97, 16 September 1998.

[137] Ibid, at 9.

[138] *Re Watkinson* HC, Hamilton M 173/93, 7 July 1994.

[139] Ibid, at 5.

[140] *Woodcock v Beatson,* HC, Auckland CIV 2005-405-547, 1 March 2006.

critic has suggested that the courts should reflect the current ideology of individualism and self determination.[141] What does practical reasoning make of this?

As the analysis has shown, the text is capable of a broad application. Maintenance and support by themselves allow for this and the addition of "proper" bolsters it. Hansard supports the idea of comparative destitution and providing a claimant with a decent standard of living. Those voting for the measure voted the passage of "proper" and were aware of McNab's views on point even if their speeches had drawn comparisons with the Destitute Persons Act. The speeches in the Legislative Council support the broader application. At this point in the analysis the change in government policy is the factor requiring closer inspection. If the wider climate lent weight to the broadening approach, does the opposite hold? There is an argument to that effect but the opposite one is more convincing. It is as follows: The judiciary does not have to keep in line with State provision or reflect the political ideology of the time. The Act itself was a response to, or a safeguard from, the laissez-faire climate of the 19th century and we have already seen the courts divorcing themselves from the narrow level of state provision in *Allardice*, a mere decade after the Act passing. In the harsher economic climate the courts are using it again as a protective measure, as they have done all along - as they did in *Allardice*, *Mudford*, *Welsh v Mulcock* - and in doing so, they are building on the life of the Act; it is a seamless development. (In considering evolutive factors the court must look at not only changes in the wider climate but also the way the Act has evolved).

What has remained constant is that proper provision, estate permitting, is provision that protects against life's uncertainties and the hazards of life, whatever form they may take. The advent of the welfare state came after that approach had already started and lent support to it. The courts are justified in continuing it.

IV. *Re Rush* to *Re Brown* - From Destitution to Comfort

Auckland City Mission v Brown[142] provides the final point in the economic analysis. The Court of Appeal awarded the claimant, an independent adult daughter, and the only child of

[141] J Caldwell "Family Protection Claims by Adult Children: What is Going On?" [2008] 6 NZFLJ 4 at 8.

the deceased, $1,022,000. This was enough, it said, to acquire a more substantial home debt free, clear her existing mortgage together with an amount to supplement the couple's income and provide a reasonably substantial contingency fund. Clearly this is a far cry from the destitution based approach taken in *Re Rush*.[143] Can practical reasoning bridge the gap? Practical reasoning's strength comes in approaching a statute dynamically and attempting to fuse the horizons between differently situated interpreters. It is particularly suited to a generally worded statute being applied many years after it was passed.

A. Text and Hansard

From the analysis so far the text can accommodate the *Brown* outcome and it is a strong textual argument. The text is not confined to claims based on destitution, the words are open textured and "proper" makes the test a flexible one. The text can accommodate improving the claimant's lot in life, advancing them. A home, payment of a debt, a contingency fund could all come within proper maintenance and support, particularly in a large estate such as the one in *Brown*.

Critics argue that such an approach is too uncertain and they lament the lack of predictability in the jurisdiction. But the text points against certainty and the drawing of parallels with existing objective benchmarks. "Proper" does not confine the Court to any particular benchmark. It allows an objective benchmark (as the Privy Council held in *Allardice)*[144] but also a case and family specific analysis (*Allardice*, *Bosch*, *Welsh v Mulcock*). In some cases, the courts have tied it to quantifiable need [145] and in others to a contingency fund.[146] Much also turns on the size of the estate and the lack of other

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[142] *Auckland City Mission v Brown* [2002] 2 NZLR 650 (CA).

[143] *Re Rush* (1901) 20 NZLR 249.

[144] *Allardice* approved by PC at [1911] AC 730. There, it pointed to relevant local conditions.

[145] The Court has taken a "self supporting" approach in some cases. In *Re Swanson* [1978] 2 NZLR 469 for example, the Court noted an adult son would be self supporting once he had completed his degree and provision was restricted to that time period. But it was not a factor in isolation. The estate was small, his mother was still alive and he could also expect to inherit from her. Again, the outcome is based on a mixture of objective and case specific factors - it was "proper" because of all these in combination.

[146] *Allardice v Allardice* (1910) 29 NZLR 959; *Welsh v Mulcock* [1924] NZLR 673; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463.

competing moral claimants. (*Allen v Manchester*[147] and *Bosch*[148]). It can also depend on the age and stage in life of the claimant. All this is textually justified.

There is no clear line telling the courts when a person's lot needs improving or when it stops becoming maintenance and support and starts becoming something else. An objection to Stout's forced heirship provision was that it could apply to a wealthy claimant, perhaps even wealthier than the testator. This was part of the reason the discretionary approach was accepted while Stout's Bills failed. But this does not provide the courts with a "cut off" point. In Hansard, there were references to its "*technical limitations*" by one MP but no elaboration[149] and Parliament did not define the terms as they did in the Destitute Persons Act. The references in Hansard to comparative destitution and station in life also muddy the waters for those who want to see it as purely destitution and dependence based. The fact that adult children were not excluded makes this more so. What constitutes "*proper maintenance and support*" cannot be pinned down to any concrete level given the different views expressed during the debates. What we can say with certainty is that there was agreement at the level of economic provision for a certain class of claimants. Beyond that, whatever the Members' other views as to the level of provision, the insertion of "proper" ultimately makes it a flexible test accommodating the facts of the case and the period in which it is decided.

In *Allardice*, the Court talked of the "*generally accepted meaning of the expression maintenance and support*,"[150] but what is a generally accepted meaning may depend on the period in which the case is decided, the facts of the particular case, the relationship between the testator and the claimant. In *Welsh v Mulcock* the Court said it would know the case when it saw it but ultimately it will come down to a judgment and again, the line may shift depending on the period in which the case is decided. The welfare state, the idea of "relative deprivation", and the influence this has had on people's perception of need,

[147] *Allen v Manchester* [1922] NZLR 219.

[148] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463.

[149] Hutcheson 1898 NZPD vol 102, col 424.

[150] *Plimmer v Plimmer* (1906) 9 GLR 10 at 32.

together with the way the case law has evolved, means it is likely to be drawn in a very different place today than it was in 1900. Our horizons have shifted. (The line could be drawn in a case such as *Aucutt*, hence the claimant's case being put solely on a "belonging" basis).[151]

B. The Wider Legal Framework

But what of the fact practical reasoning requires the interpreter to seek an interpretation that fits, where possible, with the wider legal framework. This is also part of our current horizon. The wider legal framework in this case could be other statutes dealing with family support obligations. One possible benchmark could therefore be found in the Family Proceedings Act 1980 where the courts look at an amount that allows the spouse time to become self supporting. Their earning capacity and likely earning capacity, their expenses, are all factored in. It is not maintenance and support forever, but for a time that allows the spouse to become self supporting. Under that Act, the court identifies the applicant's *reasonable* needs and the amount of money required to satisfy them. Second, it looks at the extent to which the applicant cannot meet them.[152] The Child Support Act 1991 also provides a formula for the liable parent's support obligations and there are cut off points in terms of quantum and the duration of the obligation.[153] There are no such Acts dealing with a parent's inter vivos financial obligations to an independent adult child. The last such Act on the books was the Destitute Persons Act which was repealed in 1968.[154] Arguably, this suggests obligations to adult children are non-existent now that the State pays for the necessities of life. It perhaps signals a policy consideration that parents are less responsible, not more, for their adult children.

Again, however, we return to the initial analysis; the Act is not focused on basic necessities, and it is not just about the extension of inter vivos support obligations.

[151] See discussion of *Williams v Aucutt* [200] NZLR 479 (CA) at Part Two below.

[152] Family Proceedings Act 1980, ss 64-65. The Act also defines maintenance and calls it "the provision of money, property and services": s2.

[153] The Child Support Act 1991 places a time limit on a parent's obligation to pay through its definition of "child" in s6 - under 19, not married and not financially independent.

[154] It was repealed by the Domestic Proceedings Act 1968.

Further, such objective benchmarks do not accommodate specific family circumstances - the relationship between the testator and the claimant, the deserts of the claimant, the size of the estate and so on. One of the main points of the Act was that it could achieve individualised justice and the insertion of "proper" bolsters this. But the idea of the hermeneutical circle requires us to keep testing our conclusions. We could say it seems odd that a more generous approach could be taken towards adult children on death than wives and minor children during the husband/father's life time? Shouldn't this be a consideration? Possibly, but there are key differences.

First, a wife and minor children still rank ahead of adult children under the Family Protection Act so their paramount place is still recognised in this jurisdiction. The court's approach is therefore not inconsistent with the wider legal framework. (Most cases do not pit mothers against adult children anyway - *Brown* being an example, although they do pit widows (the second wife) against adult children). Second, the person liable for inter vivos support is still a person who needs the money themselves. If the relationship has ended, their obligations must also end at some stage. The testator, however, is not in such a position, and the size of the estate has always been a relevant factor in determining quantum. Third, the Family Proceedings Act 1980 talks about *reasonable* needs and looks at the living standards of the parties and what expenses might be reasonable in the context of the parties. This is a term that, arguably, is more objective than "proper" and the Act itself ties it to an economic benchmark. It is also means tested as is provision under the Child Support Act 1991.[155] In the Family Protection Act, there is no such cut off and no objective economic benchmark and no guiding list of factors. So we can again draw a contrast with other Acts on the books to show how different the Family Protection Act is. Finally, there is a difference between obligations between ex spouses and those between parent and child. On divorce, the relationship ends. It therefore makes sense to stop the financial obligation at some

[155] Part II of the Child Support Act 1991 sets out the formula by which a liable parent's obligations are assessed.

point. The relationship between parent and child does not end; it is ongoing, and this is, arguably, a key difference.[156]

Others have suggested that the judicial approach under the Family Protection Act is inconsistent with another Act on the books - the Wills Act 2007.[157] The Wills Act is a recent sign that Parliament wishes to give effect to a testator's wishes by ensuring wills are given effect despite some technical errors. But this is not inconsistent with the Family Protection Act and the judicial approach to it. The will is given effect and stands, as do all wills, unless the Court has to amend it to give effect to the Family Protection Act. This was expressed as early as *Welsh v Mulcock*[158] where Herdman J stated: "*Nevertheless the testator's wishes as expressed in his will must be considered and weighed with care, and should be given effect to if they are not inconsistent with a duty which the Legislature has affirmed.*"[159]

C. The Law Commission Report and Testamentary Freedom

As seen in Chapter Two, the Law Commission was critical of the court's approach in this jurisdiction both as to the ethical basis for claims (discussed in Part Two below) and as to the level of provision being made. Is this also a factor which should have formed part of the Court's horizon in *Brown*? In *Aucutt*, the Court of Appeal considered there was some justification for the comments that levels of award were out of line with current attitudes towards testamentary freedom and emphasised that awards must be limited to repairing the breach and no more.[160] *Brown* affirmed this so called

[156] See Chapter Seven where this feature of the relationship is put forward by some as a reason for an inheritance for adult children.

[157] See commentary discussed in Chapter Three and in particular R Croucher "Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 - Orthodoxy or Aberration*"* (2005) 27 Sydney L Rev 263 at 287; N Peart "New Zealand's Succession Law: Subverting Reasonable Expectations (2008) 37 Comm. L. World Rev. 356 at 377; and in the British Columbia context by G Bale Annotation to *Morris v Morris* (1982) 14 ETR 35, entitled "Duty to Able-bodied Adult Children Under Testators' Family Maintenance Legislation and the Need to Adopt an Objective Approach" at 39; and by A Close in his "Reservation" in Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (1983) at 153.

[158] *Welsh v Mulcock* [1924] NZLR 673.

[159] Ibid, at 682.

[160] *Williams v Aucutt* [2000] NZLR 479 at [45] and [68].

conservative approach to awards. There is nothing new in this principle being recited– it goes back as far as *Allardice* - but the reminder was apparently necessary as a result of an "expansive" approach. It seems that some judges took on board these criticisms before the Court of Appeal's decisions in *Aucutt* and *Brown*.[161] What does practical reasoning make of these criticisms and should they be taken into account?

Practical reasoning accommodates relevant changes in society which are related to the words of the Act. General views about testamentary freedom and its place in the law of succession, or views of Law Commission officials generally, are not relevant. Even if the Commission had statistically robust evidence of changing attitudes to testamentary freedom, this goes to whether the Act is a good thing to have generally, rather than the Court's approach to interpretation. The Act itself represented a restriction on testamentary freedom, and was a response to the potential ills caused by a society that promoted unrestricted testamentary freedom, self determination and individualism. Its effect is that testamentary freedom remains once the claimant has the requisite level of provision.

Parliament passed an Act. The Court's job is to apply it; it should not be self conscious as a result of criticisms levelled at it by others. In *Brown*, the Court was correct in saying that the words of the Act had to be given effect and no more but as to what those words mean, it is for the courts to decide.

D. *Re Rush* to *Brown* - Conclusion

To conclude, all three strands of the analysis point to the *Brown* outcome being the best in the case at hand. There was no evidence of intent in relation to the specific facts but at the broader level of purpose it was justified. Talk of comparative destitution in the debates also tied in with the expanded concept of need apparent from the 1970s onwards and suggests the size of the estate, the claimant's upbringing, age, health, obligations and stage in life all come into play. The inclusion of "proper" strengthened this. Proper can also take into account the size of the estate, the relationship between the claimant and her father and the

[161] See the cases discussed in Chapter Two. For example, in *Carden v Malcolm* [1998] NZFLR18 the Court stated that the courts had been too willing to rearrange wills in favour of adult children and it was not surprising the Law Commission saw a need for a rebalancing.

lack of other moral claimants - ie the claimant in *Brown* was an only child, the estate was large and she was not guilty of any bad behaviour towards the deceased. Dating back as far as *Welsh v Mulcock*, the courts have held it is a testator's duty to advance a child's lot in life and that the section allows provision for this.

Any residual uncertainty as to the exact level of provision comes from the fluid nature of "proper", the fact judges may differ in their judgment as to whether the requisite provision has been made and the discretionary nature of the jurisdiction. (Recall *Allardice* and Edwards J's statement that the assessment is one over which "*the most careful and impartial men may differ.*")[162]

V. A Living Act - Gender and Disentitling Provisions

The above economic analysis above shows, quite clearly, that the Act has always been treated as living and practical reasoning can accommodate this. Other changes which it can also accommodate are those relating to gender - some of which we have already seen - and the application, or otherwise, of the disentitling provisions. It is convenient to address these now before moving on to analysing the ethical approach to the Act.

A. Gender

Throughout, gender has been an influential consideration for the courts. Gender has also been reflected in government policy. The focus, to date, has been on the family unit, with the father working and the mother heading the domestic front. A major shift in this outlook came in the 1960s onwards. Put simplistically, with the "second wave" of women's movements came calls for greater equality and pay equity.[163] Women increasingly moved into the work force. On the property front, the Matrimonial Property Acts of 1963 and 1976 began to recognise the contributions made by women to the marriage and sought to implement a fairer property sharing regime. Legislative changes were also made that benefited men. Under the Family Proceedings Act 1980, for example, spousal maintenance was placed on a gender neutral basis and men could also receive the Domestic Purposes

[162] *Allardice v Allardice* (1910) 29 NZLR 959 at 973 Per Edwards J.

[163] http://www.teara.govt.nz/en/womens-movement/6**.**

benefit.[164] When it comes to financial entitlements and obligations, legislation now applies on a gender neutral basis.[165]

This wider societal change has also left its mark on the court's approach. Men - husbands and sons - are no longer sent away as they were in *Allardice*.[166] As discussed already, distinctions can be made but are not necessary. The climate of the time will influence whether those distinctions should be made. The approach to gender is also seen in relation to widows. In *Re Wilson (Dec'd)*[167] the Court of Appeal held that the assessment of the testator's moral duty must take into account an assessment by society of a husband's duty towards his widow and that such assessments may vary from period to period. In the context of whether a widow should be awarded a lump sum, and noting the past disapproval of such an award, it held: "*The attitudes of many people today have changed from those which prevailed when this legislation was first passed in 1900.*"[168] Similar sentiments were expressed by the Court of Appeal in *Re Z (Dec'd)*.[169] Periodic payments for widows are now seen as patronising.

Gender was also pivotal in two cases involving adult daughters, *Re Leonard* [170] and *Little v Angus*.[171] In both cases the Court of Appeal emphasised the need for it to keep abreast of contemporary values and that social attitudes must be taken into account when considering whether there had been a breach of moral duty. In the former, it considered there had been a breach and that in favouring his sons, and considering his married daughters off his

[164] The Social Security Act 1964 sets out the entitlements in relation to domestic purposes benefits.

[165] This is also true under the Child Support Act 1991 - the liable parent could be either the mother or the father: s6.

[166] Sons have been successful in several cases. As an example, see *Re Swanson* [1976] 2 NZLR 27 (CA). As to widowers, see W Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, Lexis Nexis, Wellington, 2004) at [8.9].

[167] *Re Wilson (Dec'd)* [1973] 2 NZLR 359 (CA).

[168] Ibid, at 363.

[169] *Re Z (Dec'd)* [1979] CA 2 NZLR 495 (CA).

[170] *Re Leonard* [1985] 2 NZLR 88 (CA).

[171] *Little v Angus* [1981] 1 NZLR 126 (CA).

hands, the testator was out of touch with changes in social attitudes. The Court of Appeal expressed similar sentiments in *Little v Angus*.

It is not clear exactly what role gender played in either case as there was also some discussion of economic factors but the main point is that this is the sort of factor that can be accommodated under the economic approach. In *Little v Angus*, the Court stressed the point that adult daughters were now to be treated more liberally, reflecting changes in society generally about the place of women. In one respect, they always have been; their economic vulnerability ranked them ahead of adult sons. Now, the Court is adopting a liberal approach in a different way, one which reflects a different social climate. That climate says that married daughters are not just appendages of their husbands and that women should not be discriminated against on the basis of gender. (In *Re Harrison*,[172] the Court made it clear that the claimant having a husband to support her was not a disentitling factor, otherwise it meant a duty to one's daughter ended on marriage).

In terms of practical reasoning, however, the same argument arises as it did with the welfare state. Is it a case of having your cake and eating it? If women are no longer at an economic disadvantage then surely self reliance applies to them too? Arguably this aspect of the changing climate could have seen daughters excluded on the same basis as able bodied sons had been. They should make their own way in life. Everyone now has the welfare state and relationship property laws providing economic safety nets. Equality in society does not mean a presumption of equality under a will.

But this argument would only hold if we insisted the Act remained focused on destitution or immediate vulnerability. The textual analysis does not require this and the purpose of the Act was not just about making economic provision for economically vulnerable women - that may have been part of its impetus - but in terms of its final wording, its broader purpose was economic provision for eligible claimants. A person's gender and marriage status should not affect the provision left them. The claimant must be taken on their own merits. The word "proper" may require a testator not to patronise his daughters. He should

[172] *Re Harrison* [1962] NZLR 6 (CA).

not exclude his daughter just because she has a husband if she is still in need of maintenance and support, however broadly defined.

B. The Disentitling provisions

The approach to the disentitling provisions also reflects a dynamic approach. The disentitling provisions were introduced as a concession to the Act's opponents and they were firmly tied to the morality of the day. The debates are full of references to undutiful, wanton wives and reprobate, dissolute and libertine sons. The ability to exclude such people from a testator's provision was in keeping with the Victorian idea of the "deserving poor" and the emphasis on self reliance. In that era fault was central to entitlement, as it was with charitable aid and some early welfare entitlements.[173] Some early cases applied the provisions but on the whole they have not featured prominently in the decisions and in more recent times, in particular, we have seen the courts saying that "bad behaviour" should generally be forgiven.[174]

This shift is not surprising and is in keeping with changes in society and the broader legal landscape. We no longer have a fault based welfare state. Entitlements to benefits under the Accident Compensation legislation ("ACC")[175] are not based on a person's deserts and fault based divorce has long since gone.[176] The discretionary element also disappeared from some benefits in the 1970s - for example, the Domestic Purposes Benefit. McClure also notes that the eligibility of solo parents for benefits in the 1970s was the result of a more tolerant ethos from the late 1960s onwards "*in which the breakdown of marriage was seen less in terms of moral fault than in terms of a new environment.*"[177]

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[173] Refer to the discussion in Chapter One. As an example, the Old Age Pension was a discretionary payment and dependent on the applicant being of sober character and good reputation.

[174] See discussion in Chapter Two.

[175] ACC stands for Accident Compensation Corporation. In short, New Zealand has a system of accident compensation which is eligible to all who suffer an accident whether at work or not. It is administered by the Corporation. It was introduced in 1972 by the Accident Compensation Act 1972. It is not fault based. The scheme means there is no right to sue for personal injury in New Zealand. The legislation is currently called the Accident Compensation Act 2001.

[176] Fault based divorce disappeared in 1980: Family Proceedings Act 1980.

[177] McClure, above n 121 at 272. The feeling that children should not suffer because of the changing shape of families was also reflected in the Status of Children Act 1969.

VI. Part One Conclusion: Practical Reasoning and the Economic Approach

The textual analysis carried out at the beginning of the Chapter served as a basis for the rest of the 20th century as far as the economic approach is concerned. It showed that maintenance and support are open textured words and their qualifiers - adequate and proper - are relative ones. The Act could therefore be applied in a flexible manner, taking into account the facts of each case and the climate in which it was applied. The changing social climate left its mark on the Act and it has always, whether articulated or not, been treated as living. The themes of the welfare state, gender, changing approaches to morality, the impact of the Wars and the Depression, the expansion and retraction of the welfare state can all be accommodated by the words of the Act if used in an economic sense - ie when there is first established a need for economic maintenance and support.

The most difficult analysis came with the attempt to fuse the horizons between *Re Rush*[178] and *Brown*[179] but the textual and dynamic arguments for *Brown* were strong ones and there was nothing in Hansard pointing against the approach. Instead, there were conflicting statements as to the Act's target but the introducer of the Bill, McNab, talked of a broader approach than one based on destitution, this had support from other MPs, particularly in the Legislative Council, and it is reflected in the Act via the word "proper". All practical reasoning's metaphors pointed to the outcome.

Does this mean that practical reasoning justifies anything if the Act is applied in an economic way? Is there ever a situation in which adult children - disentitling provisions, competing moral claimants and size of estate considerations aside - would not succeed? Perhaps not and this answer flows from three things: the wording of the Act, the way it has evolved and the fact that family is the primary unit of our society. As to the first, the text can accommodate a wide variety of things and reflect not only family specific considerations but the expanded concept of need in society generally. The inclusion of the word "proper" expands the jurisdiction even further. The factors that inform what is

[178] *Re Rush* (1901) 20 NZLR 249.

[179] *Auckland City Mission v Brown* [2002] 2 NZLR 650.

"proper" are not weighted and the courts may take into account all or several or one in any given case. This can lead to an award of the type made in *Brown*.[180]

As to the second, the more broadly worded an Act, and the older it is, the more weight evolutive factors have and these include the life of the Act, its evolution. Given the Act's continuing broadening scope since 1900, it is difficult to conceive of a situation where the courts would return to a *Re Rush* approach.

Third, the court's horizon has always been one in which individuals own property and family is important. It is also one in which the common sentiments of mankind hold that family are the natural recipients of the individual's property upon his death. (In Hansard there were statements to the effect that leaving property away from family was contrary to human instincts).[181] Even testamentary freedom was premised on this - it was a right with an obligation. Accordingly, there would have to be some fundamental shift in this particular "horizon" before the approach to independent adult children could change. At the moment, adult children are eligible claimants, reflecting the primacy of the parent/child relationship in our society.[182]

The more important question for this analysis is whether that primacy lends itself to a purely ethical application of the Act? Can the Act be used in a restitutionary sense - to make up for past neglect - or to compensate for services rendered? Can it be used to make the claimant feel like they are part of the family? As noted at the outset, themes run in parallel and at the same time the Act's scope broadened in an economic sense, it also broadened in an ethical one. This is the focus of Part Two.

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[180] Of course, certainty is also impossible because of the discretionary element of the jurisdiction. Discretions entail a "built in looseness of outcome"; so any uncertainty flowing from this is attributable to the nature of the jurisdiction itself and this is something the analysis does not seek to assess. (The reference to a "built-in looseness of outcome**"** comes from F Bennion *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, New York, 2001) at 138.

[181] See Chapter One. *Banks v Goodfellow* also spoke in similar terms: *Banks v Goodfellow* (1870) 5 LR QB 549 at 564, discussed in Chapter One at 15-16.

[182] While the Law Commission may have thought the judicial approach was out of step with views as to testamentary freedom, there was no statistically robust survey pointing to this and nor did it not challenge the primacy of that bond.

Part Two - A Purely Ethical Approach

I. Introduction

As seen in Chapter Two, the courts have allowed ethical factors to inform the test and have expressly rejected the requirement of economic need, however broadly defined. The main case in this part of the analysis is *Williams v Aucutt.*[183] It applied the term "support" in an emotional sense rather than an economic one, the first case to do so. It drew support for this application from precedent, pointing to the moral duty test and a line of cases that adopted an ethical approach to the jurisdiction, including *Re Harrison*.[184]

The analysis is more difficult in this part of the Chapter because the judicial approach does not fit neatly into practical reasoning considerations. Practical reasoning seeks a fusion of horizons and part of what enables that "fusion", (and also restrains judges) is the life of the Act. Previous cases, which build on each other, presumably in a seamless, gradual fashion, bridge any gaps and the case under assessment is the next in a series of steps. What to do, however, when the life of the Act, its evolution in a particular direction, is not justified on practical reasoning's own evaluative criteria in that it appears to disregard the text?[185] As noted, *Aucutt* drew on precedent but what if some of those cases are not in fact authority for such an approach and what if others cannot be justified on a textual analysis? This is the situation we are confronted with here. I argue below that the general "moral duty" test - which informed part of the Court's reasoning in *Aucutt* - is not justified and therefore subsequent decisions relying on it to support an ethical approach to the jurisdiction cannot be justified either. In terms of structure it is necessary to address this first before moving on to *Aucutt*. I will then apply practical reasoning to *Aucutt* and see if the cases that preceded *Aucutt,* and which were erroneously decided under the moral duty test, could instead be justified by the *Aucutt* approach to the text - ie by applying "support" in an emotional and ethical sense rather than an economic one.

[183] *Williams v Aucutt* [2000] NZLR 479 (CA).

[184] *Re Harrison* [1962] NZLR 6 (CA).

[185] None of the examples used by Eskridge and Frickey appear to encounter this problem.

II. Moral Duty

Allardice is seen as a pivotal case for its coining of the "moral duty" test but at that stage of the Act's life it was used in a limited sense. It was a moral duty in that it was not confined to inter vivos support obligations and nor was it confined to destitution. Cases generally applied the moral duty test in this limited sense. Any suggestion the Act went further than this was firmly rejected by the Court of Appeal in *Welsh v Mulcock*.[186] It was not until the 1960s onwards that "moral duty" acquired a more expansive meaning. The pivotal case, which suggested claims could be based on a right to participate in the estate generally, is the Court of Appeal's decision in *Re Harrison*. The crucial point, in terms of the Act's evolution, is the Court's statement that a child might be in a reasonably strong position financially but the size of the estate could create a moral obligation to allow the claimant to participate in it.[187] *Re Harrison* set the tone for future cases and the emphasis in many became the moral duty - what the testator ought to have done - rather than a focus on maintenance and support. Other Court of Appeal decisions built on this, including *Little v Angus*[188] and *Re Leonard*.[189] At this stage the moral duty test appears to take the place of the text. Under its rubric awards were made to compensate the claimant for parental neglect or to repay contributions.[190] Neglect or lack of inter vivos assistance was also seen as an indirect contribution by the claimant to the estate and required to be acknowledged.[191]

A. Moral Duty and Practical Reasoning

The Act was phrased in a way that allowed some ethical factors to come into play - the disentitling provisions and the discretion are themselves recognition of that, as was the insertion of "proper". MPs were concerned that undeserving people should not be successful. The language of morality and the moral duty test is therefore not foreign in this

[186] *Welsh v Mulcock* [1924] NZLR 673 at 683, discussed in Chapter Two.

[187] *Re Harrison* [1962] NZLR 6 at 13.

[188] *Little v Angus* [1981] 1 NZLR 126 (CA).

[189] *Re Leonard [*1985] 2 NZLR 88 (CA).

[190] As to compensation for neglect see *Re Wotton* [1982] 2 NZLR 691, the Court noting a testator's wider obligation to compensate his daughter for the privations suffered during her childhood; *Re Airey* [1991] 1 NZLR 593 where the testator failed to maintain and care for the claimants as children.

[191] *Re Leonard* [1985] 2 NZLR 88 (CA).

jurisdiction. It does not cut across purpose - indeed it gives effect to concerns identified - and is not at odds with the text either, if it is limited in scope to an assessment of maintenance and support. If it becomes something broader, there are problems from a practical reasoning perspective.

The concept of moral duty, in terms of language, is general and elastic enough to take account of a wide variety of factors. It is also perfectly suited to applying dynamic considerations. The difficulty, however, from a practical reasoning perspective, is that "moral duty" is not the statutory test set out in section 4. The statutory test is whether or not the claimant has adequate provision for their proper maintenance and support. If "moral duty" is shorthand for the test, then it makes no significant difference and perhaps encapsulates the text and the considerations that can be introduced via "proper" and reflects the morality considerations brought into play via the disentitling provisions. But while conventional morality may have led to the Act, and be present in some specific parts of it, it does not automatically follow that morality generally should influence its application in any wider sense than the text allows.

Bosch[192] is often cited for the proposition that an ethical approach is justified given its statement that the Act is not confined to bare maintenance but read in the context of that decision, and its application of proper, it did not mean that economic considerations could be ignored altogether. The appropriate type of support in that case could factor in an Oxbridge education and this was "proper" in a narrow ethical sense given the size of the estate, the fact the children were young and the testator himself had wanted to change his will to make greater provision for his sons. But the decision was still anchored on economic support. So too was *Allardice*, the case that coined the moral duty test.

The life of the Act, its evolution from an economic to an ethical approach, is therefore not justified based on the moral duty analysis. All that can be offered is an explanation and that is that the courts have treated the moral duty test as if it were a principle of common law, adapting it to changing circumstances brought about from facts in individual cases. The common law evolves slowly, so that the law can change substantially but not sharply. The

[192] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 (PC).

story of the moral duty test shows just this. It caused gradual, incremental changes from *Bosch* onwards so that by the time we reach *Aucutt* the shift to an ethical claim appears easy to make.

Explanation is not justification, however, but perhaps the text can accommodate these ethical decisions if "support" is given a wider application than its financial one to date. If it could, then factors such as restitution and compensation and participation in the estate can all be accommodated via the text itself. The "support" applied for could be for support rendered by the claimant or for support which was not rendered by the testator during his or her lifetime. From a participation in the estate point of view, it could be seen as emotional support, as recognition that you belonged. Distinctions based purely on gender could also come into play here - daughters could feel excluded if they are treated far less favourably than sons, for example. In *Aucutt*, the Court of Appeal applied support in this broader, non-economic sense. It is significant because it allows us to carry out a new analysis, given its express reliance on "support" to justify the belonging claim.

III A Century On -From *Re Rush* to *Williams v Aucutt*

A. Introduction

When *Aucutt* is juxtaposed with *Re Rush*,[193] a reader could be forgiven for thinking that two different statutes were in issue. It is in such a case as this - one which is reached a century after the legislation was passed - where practical reasoning holds out the most promise in terms of explaining the shift. It recognises that a changing climate may leave its mark on the Act's interpretation and situations may arise which the drafters could not have foreseen. The longer the statute is on the books, the greater those changes may be. The key component of our inquiry here is to see if we can achieve a fusion of horizons which makes sense of the text taking on this new application. The mindset of those interpreting and applying a statute is different from those enacting it so while respecting the text, we have to see if we can bridge the gap. Are there decisive evolutive considerations which would justify this changed approach?

[193] *Re Rush* (1901) 20 NZLR 249 (SC).

Practical reasoning allows a broader approach to meaning than traditional theories of interpretation. It acknowledges that meaning can change: "*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*"[194] It therefore disputes the traditional view of interpretation that the judge's role is to uncover the text's fixed meaning, put there by the enacting legislature, in stone forever.

Importantly, in the context of an Act that many have viewed as destitution based, or at least confined to economic need, practical reasoning requires us to approach the text with an open mind. While we may have pre-understandings, we have to be prepared to challenge them.

It is useful to start the analysis with an illustration of the theory's application by its main proponent, Eskridge. This helps put the theory into concrete terms and provides us with a blueprint for *Aucutt*.

B. Eskridge and the *Boutilier* Example

Eskridge uses practical reasoning to assess an American case called *Boutilier*, decided in 1967.[195] To summarise, the case involved the application of a 1952 Immigration Act that excluded "*[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect.*" The issue was whether Mr Boutilier, a homosexual, should be refused citizenship, and his application to be naturalised rejected. The Court held he should. It relied on Congress evidence that the Act was targeted at gays and lesbians. This was on the basis of medical evidence provided by the United States Public Health Service which said that homosexuals were medically deranged and such derangement could lead to a psychopathic personality.

Eskridge starts his analysis by noting the words of the Act are indeterminate; they do not expressly refer to homosexuals. The historical evidence suggested that this group was a direct target. The originalist approach to interpretation would conclude that the same

[194] *Town v Eisner* (1918) 245 US 418, per Justice Oliver Wendell Holmes.

[195] *Boutilier v INS*, 387 U.S. 118 (1967). The case is discussed in W Eskridge Jnr "Gadamer/Statutory Interpretation" (1990) 90 Colum L Rev 609.

applies today as it interprets it according to the views of the enacting legislature. He then moves to a "present minded" interpretation, one which ignores all history and approaches the text as if it were enacted today. What could the words plausibly convey today? The present-oriented interpretivist is constrained by the statute's language but asks whether the contemporary meaning of statutory terms such as "psychopathic personality" would include homosexuals. If not, the present-oriented interpretivist would rule that the statute does not bar their entry.

But practical reasoning does not stop there. It has to fuse the historical with the current. It does not ignore what congress intended. To so do has been criticised as "mindless"[196] and allowing an outcome which could depend on the fortuity of the choice of words and what meaning they can now plausibly bear, regardless of what was intended. Parliament's choice of words may have been a matter of style, for example, not a matter of substance.[197] The argument runs that under present-oriented interpretation, legal texts represent no decision by any political authority, past or present: "*To engage in present-oriented interpretation of legal texts is, in a way, much like entrusting the fate of one's society to rule by entrails readings or something similarly 'mindless'*."[198]

Eskridge then goes back to the historical evidence but finds that the specific intention on this issue is unclear. He reasons that the Court in *Boutilier* was wrong in thinking that Congress in 1952 made an unchanging judgment about this issue, and that this judgment could not evolve over time. The enacting Congress may well have been targeting homosexuals but their "horizon" included: medical evidence that this group was medically deranged and that such derangement was equivalent to a psychopathic personality; widely held beliefs about homosexuals in the medical community, based upon unrepresentative and unscientific clinical studies and a xenophobic mood in the country as a whole. Over time, this original "horizon" changed and society learned that the medical link between homosexuality and pathology was questionable. By the time of the *Boutiller* decision in

[196] S Smith "Law Without Mind" (1989) 88 Mich L Rev 104.

[197] L Alexander "Of Two Minds About Law and Minds" (1990) 88 Mich L Rev 2444 at 2449.

[198] Ibid, at 2446.

1967, Eskridge reasons that the Court's horizon was "*substantially expanded*,"[199] as was that of the 1952 Congress, which made the choice of tying the exclusion to medical knowledge and of leaving its enforcement to medical officials.

In the 1970s the official position changed, and a large majority of experts rejected the idea that all gay men and lesbians were pathological. The horizon Eskridge shares with the text is now narrowed: "*Its horizon updated, the text therefore joins me in rejecting the broad view set forth in Boutilier.*"[200] (He also argues it is not "*countermajoritarian*," because "*there was no static judgment of Congress which has been altered.*")[201] Despite the questionable medical evidence, however, he continues to test his fusion of horizons. He notes the problem of community attitudes towards homosexuals and that a possible reason for the exclusion could have been anti gay feeling generally. The term "sexual deviation" could be a lay term and not a medical one. He observes that this lay meaning is coherent with other exclusions in the Act which exclude people because of popular disdain for them; anti-homosexual sentiment remains very strong in America today. But he concludes that it is a medical term because of textual coherence. The first seven subsections of the relevant section are couched in medical and not moral grounds for exclusion and other provisions in the section more specifically deal with the community's moral judgments.

In summary, *Boutilier* involved substantial indeterminacy in the text, support for exclusion in the legislative history, but support weakened by new medical evidence. Eskridge was able to achieve a fusion of horizons, paying respect to purpose and historical evidence as well as text and changes in society. (There was nothing problematic for Eskridge in terms of previous decisions that departed from the text but which subsequent cases have used as precedent).

[199] W Eskridge Jnr "Gadamer/Statutory Interpretation", above n 195 at 671.

[200] Ibid, at 654.

[201] Ibid, 671.

C. Application to *Aucutt*

"*[Statutory interpretation] is dynamic in the sense that each application of an historic text by a current interpreter to a factual setting brings its own surprising twists.*"[202]

In *Aucutt* the surprising twist is the emotional dimension of support. (The claim was put squarely on an emotional basis). The Court went back to the wording of section 4 and, for the first time, differentiated between the concepts of maintenance and support. It also referred to the Act's purpose in reaching its conclusions. Delivering the majority judgment Richardson P held that support is used in its wider dictionary sense of "*sustaining, providing comfort*."[203] His Honour stated:[204]

> *Support is an additional and wider term than maintenance. In using the composite expression, and requiring "proper" maintenance and support, the legislation recognises that a broader approach is required and the authorities referred to establish that moral and ethical considerations are to be taken into account in determining the scope of the duty. A child's path through life is not supported simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and having been an important part in the overall life of the deceased.*

Blanchard J, delivering a separate judgment, stated:[205]

> *We are not concerned in this appeal with a claimant's need for proper maintenance. It is conceded that there is none. The claim is for proper support in the form of recognition both of membership of the family of the deceased and of contributions by way of assistance to and support of the deceased. Such a claim is one capable of being brought under the Act. In part it seeks support from the estate in return for support which has been rendered, albeit without any promise of return such as would fall within the Law Reform (Testamentary Promises) Act 1949. The question remains, however, whether a need for proper support is made out in the particular circumstances.*

[202] Ibid, at 633.

[203] *Williams v Aucutt* [2000] NZLR 479 (CA) at [52].

[204] Ibid.

[205] Ibid, at [69].

This seems to be a slightly broader use of support in the emotional sense in that it is not just about belonging but also about being repaid for emotional support, for support rendered. As noted above support, in this wider sense, could also be used in a way that covers the restitution/neglect claims - making up for the lack of inter vivos emotional or financial support. It could also be support - in terms of recognition - for financial support rendered. For all these claims, death provides the opportunity for a final "tally up".

D. Text: Is There Indeterminacy?

There is no definition in the Act restricting the term to financial support but in context, a first impression meaning of section 4 does not immediately conjure up the idea of emotional support. If the word "support" appeared on a page by itself, it could mean emotional support but we would then ask what sort of support is being referred to. It is context which provides us with the answer. Eskridge sees the canons of construction as helping create a fusion of horizons as they express common assumptions about drafting: "*As such, they provide a potential link between the horizons of the statutory text and the statutory interpreter, since both are potentially aware of and informed by the relevant canons when they draft and interpret the statute*."[206] Here, the rule noscitur a sociis ("it is known by its associates") suggests that support is known by maintenance. (More colourfully, "*Words are not pebbles in isolated juxtaposition*").[207]

When we put it next to maintenance and the other financially hedged provisions of the Act the context suggests an economic focus.[208] The fact that no court had applied it in this way before, even when saying financial need was not a requirement, reflects this. Instead, cases such as *Re Harrison* used the "moral duty" test to incorporate such factors into the jurisdiction. Other economic and family orientated Acts do not use the words in an

[206] W Eskridge Jnr "Gadamer/Statutory Interpretation", above n 195 at 662.

[207] Learned Hand in *NLRB v Federbush Co. Inc.* 121 F.2d 954, 957 (2d Cir. 1941).

[208] Section 6 of the Family Protection Act 1955 allows the court to place money in a class fund and for that money to be applied towards the maintenance of the claimants, or their education or advancement or benefit. Section 12 provides that the court can vary an order as to periodic payments or a class fund if the person subsequently has provision for their proper maintenance or support.

economic sense either.[209] (And nor did they in 1900). It may also seem artificial, in context, to think of financial provision for emotional support, even though on death that is the only way it can be recognised.

This tentative conclusion is strengthened by the whole Act rule, this canon suggesting that a single word or clause must be read in the context of the entire statute. Again, the sections appear to be economic in focus[210] although there is reference to moral duty in section 3(2) in relation to grandchildren. Does this shed light on the new application of support? This could be taken as confirmation of a moral duty test generally which could reinforce a conclusion of emotional support. But as against that, it is a moral duty to provide maintenance and support; it does not take us any further in terms of what support encompasses. A moral duty to provide economic support appears to be the obvious contender in the context of the Act as a whole, with attention to some ethical factors coming through "proper" - ie the deserts of the claimant, the size of the estate, the testator's wishes. Used in this sense, the reference to moral duty is consistent with the economic focus discussed in Part One.

Further, moral duty is not referred to in section 4. Clearly, when amending the Act to include grandchildren, Parliament took the expression from the case law but it is impossible to know whether it saw it as shorthand for the statutory test or a directive for a broader, non financial approach. Further, when it amended the Act to include grandchildren or in later amendments - as late as 2001 - it could have included the phrase in section 4. It did not. What do we make of this? Is it legislative endorsement? If a phrase has been interpreted one way, and the Act is subsequently amended or consolidated and the same wording appears, the conventional wisdom is that this is not legislative endorsement of the

[209] For example, the Social Security Act 1964 describes a woman as "inadequately maintained" if she has lost the regular *support* of her husband: s27B(e). A woman alone is someone who has lost the *support* of her husband: s27(c). The purpose of the invalid's benefit is to provide income *support* to people who have, because of a disability, restricted capacity to support themselves: s39F. In the Family Proceedings Act 1980 maintenance is used in a financial sense but it also talks about the spouse's ability to become "self *supporting* during marriage": section 63(2) (a). In calculating maintenance, one of the relevant factors is whether the spouse or de facto by whom maintenance is payable is *supporting* any other person: s 65 (2) (c). The term is also used in a financial sense in the Child Support Act 1991. Under the Destitute Persons Act 1894, a destitute person was defined as someone unable to *support* themselves: section 2.

[210] Sections 6 and 12 Family Protection Act 1955: see n 207.

approach.[211] As against that, the Court in *McGregor*[212] considered that when Parliament uses the term in a subsequent Act, it is embracing the philosophical system that has built up around it. Again, that could be true in that Parliament is referring to moral duty in the sense discussed in *Allardice* but not the broader sense subsequently adopted in *Re Harriso*n.[213] On balance, I suggest it is not strong evidence of an emotional aspect to support. It would mean inferring a broader purpose when, at this stage, there is no strong evidence to do so.[214]

E. Maintenance and Support - Different or Synonymous?

The initial textual analysis concluded that support can be interpreted more widely than maintenance, so the argument that they are different concepts is plausible. Statutory changes made since 1900 seem to strengthen this. The wording of section 4 has remained the same in terms of referring to "maintenance and support" but there are now other sections which do not. One provision which suggests support may be wider is that relating to step-children and parents. They can only seek provision if they were being maintained, wholly or in part, by the testator at date of death.[215] No mention is made of support. Another section - s12 - relates to the court's ability to vary orders and talks of whether the claimant has sufficient for their maintenance *or* support. But there is still nothing here that suggests a wider emotional sense. In fact, section 12 in particular suggests a financial focus. The court is unlikely to vary an award for emotional support. And why would there be a distinction in terms of emotional support not being a category for parents and step children. They could just as equally be in a position to seek support in the wider sense.

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[211] J Burrows *Statute Law in New Zealand* (2nd ed, Butterworths, Wellington, 1999) at 216.

[212] *Re McGregor* [1961] NZLR 1077 at 1102 per Turner J (CA).

[213] Note, also, that *Re McGregor* was decided before the case law began to reflect a general moral duty test and was also in the context of a different issue - that of foresight on the part of the testator, not as to the scope of proper maintenance and support.

[214] Purpose is discussed below. The same reasoning would apply to amendments in 2001 when Parliament altered the Act to enlarge the class of eligible claimants yet it did nothing to respond to the Law Commission's criticisms that awards should not be based on "blood".

[215] Section 3(1) (d) and (e) Family Protection Act 1955.

But this does not absolutely rule out an emotional component. The Court's definition - "to sustain, to provide comfort" - can clearly cover economic and emotional factors. Further, we could say that it is coloured by "proper" and its meaning of "appropriate". What is appropriate could colour the meaning of support. In this case, Christine Aucutt argued that emotional support was appropriate. In terms of overall textual coherence, it seems an unlikely application. It is not as indeterminate as it was in *Boutilier* but we cannot rule it out at this stage.

F. Meaning and Evolutive Considerations

Meaning is not fixed at the time of enactment; it can expand as human experiences expands. The text travels from parliament in 1900 to us in 2000 via the judge and the judge is presently situated. We have to ask what has changed in the 100 years since the Act was passed that could justify this broader application. Has there been a shift in values which would make us think of the section differently now or does the first impression meaning remain?

Unlike the *Boutilier* example, it is difficult to find a direct link between decisive "evolutive" evidence and text but there are some arguably relevant connections that can be made. In terms of other statutes on the books, support is used in an economic sense in the Family Proceedings Act 1980 and the Child Support Act 1991. As against that the Property (Relationships) Act 1976 recognises support - material or otherwise - as a contribution to the relationship.[216] There is no presumption that one is greater than the other.[217]

In other areas of the law there is also recognition that harm or support can be emotional. The Domestic Violence Act, for example, defines violence to include psychological violence.[218] Mental distress and emotional anxiety are recognised in the Weather Tight Homes Resolution Services Act.[219] The Sentencing Act takes account of emotional harm to a victim when making orders and the Education Act provides for reviews as to a school's

[216] Property (Relationships) Act 1976, s18 (h).

[217] Ibid, s18(2).

[218] s3(2) Domestic Violence Act 1995.

[219] Sections 8 and 50, Weather Tight Homes Resolution Services Act 2006.

physical and emotional environment. The Care of Children Act recognises a child's intellectual, emotional, physical, social, cultural and other personal development as being important. The Victims' Rights Act again recognises the emotional harm suffered by victims of crime.[220]

It is difficult to think of the 1900 legislature worrying too much about psychological harm or emotional support. The emphasis on self-reliance, for example, and the harsh attitudes towards the poor seen in the administration of charitable aid, suggest otherwise. But that does not mean it cannot come within it if society changes in a relevant way - the recognition of psychological harm in other legislation, for example. Further, given it is recognised in "non family" legislation, then it seems even more plausible that it should be recognised in an Act such as the Family Protection Act. Against that, however, those other statutes - including the "family" ones - expressly define harm or support in a non economic sense. This perhaps suggests that it is not an immediately obvious meaning and needs to be spelled out. Still, we cannot rule it out.

Further, as noted above, from the 1960s onwards, emotional, psychological and cultural needs became just as important as physical needs in terms of government social policy and the provision of welfare. It was at this time that the cases started to adopt the "belonging" test, although not phrased in that way. The right to participate in an estate may have some connection with this. Here, we could refer again to the idea of relative deprivation and the survey showing what people viewed as necessities.[221] Although not a direct link, it is relevant to note that respondents considered it a necessity to have money to participate in social activities which involved *reciprocation* in relation to family and friends and care of,

[220] Sentencing Act 2002 - reparation orders can be made for emotional harm: s32; Education Act 1989 - reviews look for a safe physical and emotional environment; Care of Children Act 2004 recognises that guardians contribute to the child's intellectual, emotional, physical, social, cultural, and other personal development: s16(1)(b); Victims' Rights Act 2002 - s4(a)(ii) defines an offence as an act that causes a person physical or emotional harm and s17 states that victim impact statements should address the emotional harm suffered by a victim.

[221] http://www.bris.ac.uk/poverty/pse/sum. Discussed at p165 above.

or service for, others.[222] This idea of reciprocation and care of, or support for, family is consistent with Blanchard J's definition of support in *Aucutt*. [223]

The idea of belonging to a society could also be applied to the sense of belonging to a family, something more important in a society which has been described as moving from consensus to conflict.[224] The family could be seen as a stable reference in an otherwise divided society, and the protection of the family - through economic and emotional support - could be seen as being fundamental to society's well being. (This echoes Stout when he said that "*It was the maintenance of the family which was surely the groundwork of our present society*."[225] Protection of the family and recognition that it is important to society's well being is seen in government policy - for example, the Establishment of the Families' Commission and the Working for Families allowances.[226] While all this is in relation to minor children, the overriding reason - recognition of the importance of family - could be applied to adult children as well. Increasing divorce rates and second marriages could also play a role. An adult child may require more recognition that they belong when their surviving parent has remarried. The 1988 Royal Commission on Social Policy also noted the importance of family for nurturance, social learning, belonging and identification and that love and support are critical throughout life not just infancy. It noted that family is different from friendship; obligations, responsibilities and commitments differ and that it is the glue that holds society together.[227]

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[222] http://www.bris.ac.uk/poverty/pse/sum.

[223] *Williams v Aucutt* [2000] NZLR 479 at [69].

[224] See above at p 166.

[225] 1897 NZPD Vol 98 col 550.

[226] As stated on its website, the Commission, a Crown agency, "*provides a voice for New Zealand families and whānau. We speak out for all families to promote a better understanding of family issues and needs among government agencies and the wider community*": http://www.nzfamilies.org.nz. Working for families is a financial a package designed to help make it easier to work and raise a family. Financial help is provided by the government by way of allowances and tax credits: http://www.workingforfamilies.govt.nz/.

[227] Report of Royal Commission on Social Policy, Volume IV, *Social Perspectives* (1988). Chapter entitled "Family" at 595-618.

While all this may seem intangible, judges are products of their environment and interpret according to their own present horizon. These changes, while not directly related to the text, form part of that horizon. In terms of first impressions, a reasonably intelligent reader may still consider the text economic in focus. Stripped of all knowledge about the background to the Act - but read in current context - it could still be the first impression meaning. But what has changed is that it is now more likely than in 1900 or even 1950 that a reader would consider an emotional aspect to it; it is not implausible.

G. The Life of the Act

Precedent is relevant as it is part of the interpreter's present-day horizon. Today's interpreter cannot think about section 4 of the Act without thinking about cases such as *Allardice*, *Bosch*, *Harrison*, *Re Adams* and so on. Precedent is also relevant to practical reasoning in that it is one of the constraints on the judiciary. Taking into account tradition and the Act's evolution to date is a safeguard to subjective interpretations.[228] The Court in *Aucutt* drew support from precedent in terms of the ethical approach in these cases. However, as noted above, while *Allardice* and *Bosch* refer to some ethical factors they were still applied to an economic test. Accordingly, they cannot be used to support a broader application, one divorced from economic considerations. The later cases which applied a general moral duty test are not justified on a practical reasoning analysis either. That is, it is difficult to see how they can inform an analysis which respects text when such an approach ignores the text, substituting it for moral duty. All that can be said about this consideration is that it is not a tool which helps in this particular practical reasoning assessment. Other evolutive considerations, such as statutory amendments, may help, however.

Statutory amendments which have had the effect of broadening the jurisdiction - mainly through extending the class of eligible claimants - show that Parliament wants the Act to keep pace with changes in society. Perhaps this could be pointed to as a "green light" for an expanded concept of support as well, to keep pace with the changes noted above - ie recognition of emotional harm and support in the law generally. As against that, why has Parliament not amended section 4 at the same time to expressly extend the Act to claims of

[228] See discussion in Chapter Four.

this type? We could say it is happy with the approach and has chosen to ignore the Law Commission's criticisms[229] or that it has been too busy to focus on it. At best, this is a neutral point but on balance, given the importance of purpose in the practical reasoning analysis, it is difficult to make such a leap without strong evidence of it.

H. The Law Commission Report and Critics

The way the judicial approach has evolved has been subject to a great deal of criticism, one such criticism being the "blood" award.[230] In *Aucutt* itself the Court did not take on board the criticisms as to the basis for such a claim but did refer to the report in relation to its criticisms of quantum. However, is it relevant to the outcome in *Aucutt*, even if the Court did not take it on board on this point? Again, such criticisms can hold little weight in and of themselves and the courts should not be self conscious just because of outside criticisms. The Law Commission is not an elected body, representing the wishes of the community. It is for Parliament to make the law and for the courts to apply it. How should they apply it? By seeking contextual justification for the best answer among alternatives. The Law Commission provided nothing in the way of relevant evidence to form part of that context.[231]

Some justification for the approach so far is found in the text. It is not strong evidence but when added to evidence of dynamic considerations, it may point the court in the "ethical direction." We now have to see if purpose is a further strand supporting this position.

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[229] As noted in Chapter Three, the Law Commission was critical of awards based on purely ethical factors, in particular the "blood" claims.

[230] See *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988).

[231] Sutton and Bigwood concede it was anecdotal evidence at best: R Sutton and R Bigwood, "Taking Stock: Legal Method in New Zealand Today (and for the Future?)" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Lexis Nexis, Wellington, 2001) 305 at 328. It was also evidence as to testamentary freedom generally and whether the jurisdiction as it relates to adult children should remain. This is more about whether the jurisdiction is a good thing generally rather than the court's approach to statutory interpretation.

I. Hansard and Purpose:

"*[A] commitment to the text requires the interpreter to listen in good faith to what the history has to teach*."[232]

Is there concrete evidence, as in *Boutilier*, of Parliament's legislative "target"? In *Aucutt*, the Court referred to Parliament's purpose - without more - to justify the broader application of support. We have concrete evidence that Parliament wished to target testators who left their wives and dependent children without financial means, or their adult children destitute. That is clear enough. The analysis also supports a broader purpose in terms of the level of support and as to what "proper" can accommodate. But is there evidence of a non-economic purpose?

Stout promoted his Bills largely on an economic basis, as did McNab.[233] Both drew parallels with the Destitute Persons Act and symmetry with inter vivos obligations. During the debates, reference was also made to the financially focused Native Land Court Act and the Family Homes Protection Act. We also have evidence that Parliament was against any form of forced heirship, one of the reasons being that it could apply to children who had no need for economic support and who may in fact be wealthier than the testator. It could also mean a child "double dipped", receiving inter vivos provision only to receive more on death. Both Stout's forced heirship attempts failed, even with the lower threshold in the second attempt. McNab's first attempts failed too, even though they were discretionary in nature. Financial concerns were again at play requiring McNab to reassure members that his Bill was nothing more than an extension of inter vivos financial support obligations and it was limited to "*maintenance and support*" and nothing more.[234] At one stage he stated that if a person received adequate provision under the Family Home Protection Act, then they would not succeed.[235] Again, this reference to a financially focused Act is evidence that his purpose was economic.

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[232] Eskridge "Gadamer/Statutory Interpretation" above, n 195 at 665.

[233] See the discussion of the Parliamentary debates in Chapter One.

[234] McNab 1898 NZPD vol 102, col 428.

[235] Ibid.

Any argument that it was supported for reasons concerning the ethics of keeping money in the family - support for a dynastic element - is hard to pin down. Generally, any such comments are ambiguous or when read in the context of an MP's speech as a whole, are pinned to economic concerns. In introducing his Bills Stout stated that all he wanted was recognition of the principle that a person could not leave all their property away from family and that it was entirely unfair to leave nothing to family. He considered that willing everything away from family was contrary to ideas of family responsibility and rights of individual property holders.[236] Others made similar comments; family should be the first consideration.[237] It was "*a sin to leave property away from family*"[238] and leaving property away from deserving spouses and family generally was "*unnatural*".[239] But when looked at in the context of the speeches overall, most of these MPs were still focusing on economic considerations and referring to destitution or cases of hardship or comparative destitution. Other comments are more ambiguous. One such comment was that a man has "*no right to leave everything away from family*."[240] Does that mean because it would leave them penniless or that a dynastic concern is at play? The other "dynastic" comment was made in the context of a concern that a wife could take under the Act, remarry and then die and leave family money to another man.[241] This evidence, even if of a dynastic concern, is in relation to an objection to the Bill rather than a reason for it.

If passing a statute that would cover financial provision was a struggle, does this make it even less likely that a concern animating the legislation was the emotional support of family members, their right to participate in the estate? The answer would appear to be yes. But practical reasoning requires us to keep going and challenge this tentative conclusion. Perhaps it is not as straightforward as first appears. It would be misleading to say the

[236] Stout 1897 NZPD vol 98, cols 549-550.

[237] For example, Mackenzie, 1896 NZPD vol 92, col 586; Lawry, Ibid at 586; Lawry, 1897 NZPD Vol 98, col 548; Montgomery, 1897 NZPD Vol 98, col 547. Montgomery

[238] Monk 1898 NZPD vol 102, col 421.

[239] For example, Hogg 1898 NZPD vol 102, col 422-423; McLean, 1898 NZPD vol 102, col 422

[240] MacKenzie1896 NZPD vol 92, col 587.

[241] Ibid and see also Russell, 1896 NZPD vol 92, col 546 who thought money should stay in the family that created it.

debates are crystal clear. While the promoters of the Bills pointed to economic provision and drew links with the Destitute Persons Act and other financially focused Acts, they also muddy the waters by talking about "comparative destitution" and "station in life". The insertion of "proper" at the last minute also makes us question McNab's purpose. Clearly he was focused on something more than bare maintenance. But this is still economic in approach.

There are comments about a fair share for wives, however, - because of their status as wives and also the contributions they may have made to the estate - and this suggests a wider than economic purpose. It also fits in with the idea of support for support rendered. The same could arguably apply to adult children who had rendered similar support, whether economic or not, and whether directly or not - ie the idea that they contributed indirectly as a result of the testator's financial neglect of them as children. Added to this is a strong sense in the debates that many MPs' overriding concern was not economic in nature but was about the potential for non-deserving claimants to receive provision. As noted, the disentitling provisions - and perhaps "proper" - were inserted to allay these concerns. Can we turn this around and say that MPs were talking more about inheritance and disinheritance than economic need and as long as they were deserving, claimants would participate in the estate?

The common sentiments and affections of mankind generally meant leaving property to family.[242] An MP made this point considering it against human instincts to leave property away from family.[243] Such testators were "*evilly disposed*".[244] MPs may have been happy with that position as long as there was room for disinheritance when justified. We could argue that the reasons for rejecting forced heirship were along these lines - ie not just about the claimant's lack of economic need but also about the ability to disinherit the ne'er do wells. In this sense, support could well encompass that sense of inclusion, of the right to participate in the estate if you were deserving. The selling point could have been that it was

[242] *Banks v Goodfellow* (1870) 5 LR QB 549 discussed in the context of testamentary freedom in Chapter One.

[243] McLean 1898 NZPD vol 102, col 422. See also Hogg, col 422-423.

[244] Smith 1900 NZPD vol 113, col 617.

not forced heirship as long as there was a discretion - ie the objection was not to the general right to participate in the estate - the position under force heirship schemes - but only as to its automatic application.

Further, the family is an important "unit" of society, both then and now. In the debates, Stout himself said that maintenance of the family was the "*groundwork of our present society*."[245] A century later, in *Flathaug v Weaver*,[246] the Court pointed to the primacy of the bond between parent and child. Such a description is unlikely to be disputed. The Act itself is recognition that wives and children - regardless of age - have some sort of special claim on the estate, and the reason is that primacy. The fact that it was about something more than bare subsistence - the level under the Destitute Persons Act - was again because it was to do with family. The jurisdiction is also confined to those in parent child relationships - the extension to parents and grandchildren is still within this direct line. It is not extended, as in the Destitute Persons Act, to brothers and sisters, for example. So the primary unit is marked out as special. We could also point to the intestacy provisions of the Administration Act which provide that children - including adult children - get a share of the estate even when there is a surviving spouse or partner.[247] This was also the case in 1900. (The Family Protection Act applies on intestacy so could alter the distribution under the Administration Act but it is still a starting point as to the normal method of distribution).

Accordingly, there are some arguments supporting the *Aucutt* decision but it is still hard to attribute them to a concrete purpose. Acts do not pop out of thin air. As Chapter One showed, the economic vulnerability of women and the influence of the women's movement were the reasons why the legislation was placed on Parliament's agenda. While the debates show the MPs were concerned with a number of issues we look for the evidence which, on balance, suggests the purpose. MPs had a variety of views on the Act. Some were destitution focused, some arguably inheritance focused, some focused on the extension of

[245] Stout 1897 NZPD vol 98, col 550.

[246] *Flathaug v Weaver* [2003] NZFLR 730 (CA).

[247] Section 77 Administration Act 1969 - personal chattels plus a prescribed amount go to the surviving partner, with the remainder divided one third and two thirds between the partner and children.

inter vivos obligations and nothing more. Some presumably voted on the basis they wanted to take the financial burden off the State, and some had specific cases of hardship in mind. Most were also concerned that it be discretionary and that the undeserving would not succeed. Clearly there was a divergence in terms of concrete intentions but at a broad level of purpose, the one area of certainty was the provision of financial support for those in need of maintenance and support, however broadly defined. While we cannot be certain of purpose, we do not look for certainty. Rather, we ask which of two answers appears better. Given the language of the debates and the historical climate of the time, the economic focus is the better of the two. If it was about a fair share generally, then the Act could have talked of proper provision. While testators may have left money to deserving family members as a matter of course, not confined in any way to maintenance and support, the Act places "maintenance and support" limitations on it. By using the terms maintenance and support in an economic sense, and drawing parallels with other economic Acts, the economic purpose appears the better answer.

Some of the MPs may have been quite happy with children getting a share of the estate as long as they were deserving but this is not the test under practical reasoning. This would divorce the Act from legislative purpose and fall under the rubric of "mindless" interpretation, the Court in *Aucutt* being able to reach the outcome as to emotional support through a fortuitous choice of words. Support may have been a deliberate choice of word in the sense that some wanted it to be wider in economic scope than just bare maintenance but there is nothing supporting an even broader application. Hansard does not even disclose it as a lesser purpose which could become more dominant over time, changed circumstances bringing it to the fore. While inheritance statements were floating around, they were not made in a vacuum - they were made in the context of a measure put before them aimed at financial provision - and often the person making such statements went on to talk about destitution or cases of hardship or saving the state from the burden of maintenance. A selling point was also to prevent people looking to the State for help when the testator should have provided. A person not receiving emotional support from a testator would not then look to the State for it.

In his *Boutilier* analysis, Eskridge looked "*beneath and beyond the reliable legislative history to retrieve the background assumptions and norms underlying the statutes.*"[248] He saw that some of them no longer held true once tested against the current circumstances - ie the medical evidence suggesting that homosexuals always presented a threat to society. Can we say the same here? We could say that norms such as self reliance, individualism, women's role in society have all changed and that as a result the Act is obsolete. But as Part One showed, the Act is capable of changing in the opposite direction and the courts had contextual justification for taking it in that direction. Text, purpose and dynamic considerations suggested that approach was the best out of the alternatives. There is nothing in terms of an emotional "norm", however, that we can say has now been tested and the concerns the MPs had no longer hold true. It is not that type of case. In *Boutilier*, the word "homosexual" was never used so the language was even more indeterminate but most importantly, Eskridge's conclusion did not thwart the Act's purpose - ie to make sure unstable people did not gain permanent residence in the United States. This is where *Aucutt* falls down on a practical reasoning analysis.

IV. Part Two Conclusion

The textual argument for an emotional application of support was not strong but it gained some strength from dynamic considerations. Those dynamic considerations, however, were not directly on point; they were certainly not decisive. They did not relate, as in the *Boutilier* example, to the exact issue before the Court. When lack of purpose evidence was added to the equation, the strongest overall combination of threads led to an economic application only.

V. Practical Reasoning - Chapter Conclusion

The main focus of this thesis has been to critically assess the judicial approach to the Family Protection Act. The preceding chapters have all led to this analysis. What has it shown?

[248] W Eskridge Jnr "Gadamer/Statutory Interpretation" above n 195 at 665.

The story of the Family Protection Act is a story of change. The general nature of the wording made it inevitable there could be no hard and fast rules as to the specific circumstances that qualified for relief. Each case depended on its own facts and the period in which it was decided. It is a living Act, accommodating changes in the wider climate in respect of gender, societal expectations of material needs and in the less punitive attitudes to disentitling conduct. The following passage nicely encapsulates what the theory of practical reasoning reflects and what this Chapter's analysis shows:[249]

> *Legal experience is human experience, and every human experience is unique in the sense that it occurs at a certain place and time and involves certain persons having particular names, ages and family status… Natural language words are elastic. Their meaning expands or contracts, their cores of clarity change according to the way in which people use them as a result of their varied social experience… Legislators and judges can formulate a precise definition of a word in the sense that such a definition is precise at the time of its formulation [but cannot control] the impact which subsequent unexpected events or objects may have [upon the] scope.*

In terms of the Act, neither the legislators nor the judges formulated a precise definition in 1900 so there was even more scope for movements in application. The fluid nature of "proper" made it more so. This has justified the Court's economic approach to the statute but the Act's "elasticity" could not extend to the broader ethical approach adopted in *Aucutt*.

To conclude, practical reasoning is based on three metaphors; the web of beliefs, the chain and cable and the hermeneutical circle. The web of beliefs assumes that no interpretation is context free and that in reaching a decision, we weigh up different considerations. The chain and cable metaphor reflects the requirement that the best answer is one which has the strongest overall combination of threads. Each thread standing alone may have flaws but together, they may be persuasive. The hermeneutical circle suggests the interpreter must reconsider their pre-understandings - which are based on their own interpretative horizon -

[249] J Cueto-Rua *Judicial Methods of Interpretation of the Law* (The Publications institute, Paul M Herbert Law Center, Louisiana 1981) at 100.

"*[A] person trying to understand a text is prepared for it to tell him something*."[250] This Chapter showed that the shift in the economic approach - from *Re Rush* to *Brown* - is justified. The context in which the courts applied the Act in terms of the specific facts and the climate meant that outcomes varied according to each claim but even so, text, purpose and dynamic considerations, where relevant, suggested the court's approach was the best one. Generally, all threads pointed in the same direction. At various points, in keeping with the concept of the hermeneutical circle, the analysis questioned its conclusions and asked whether the court was guilty of having its cake and eating it, of using the climate to suits it own ends, even if using it inconsistently. It concluded that was not the case and "proper", and the "life of the Act" were significant factors in this conclusion.

The critics have used purpose (seen as destitution based), certainty and testamentary freedom as touchstones. The above analysis argues that a destitution approach was not required, uncertainty was inevitable given that "proper maintenance and support" could change according to each case and period and, more generally, certainty is not possible in a discretionary jurisdiction. Finally, current attitudes as to testamentary freedom are an issue for a wider philosophical debate rather than something that should dictate the court's approach to the Act.

The above three metaphors were then applied to *Aucutt*. Given the Act's evolution and the establishment of the moral duty test, it was not a surprising decision. When viewed in light of the Act's life as a whole, it was certainly not a case of the Court of Appeal playing Humpty Dumpty with "support" or of the courts galloping madly off in the wrong direction.[251] In fact, as practical reasoning dictates, the courts looked to the life of the Act and built on precedent to support the broader ethical approach. But unlike the examples

[250] H Gadamer *Truth and Method* at 238, cited in W Eskridge Jnr and P Frickey *"Statutory Interpretation as Practical Reasoning"* (1990) 42 Stan L Rev 321 at 352.

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[251] "'*When I use a word*,' Humpty Dumpty said in rather a scornful tone, '*it means just what I choose it to mean – neither more nor less.*' '*The question is*,' said Alice, '*whether you can make words mean so many different things.*' '*The question is*,' said Humpty Dumpty, '*which is to be master – that's all.*'" Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass and What She Found There* (Roger Lancelyn Green ed., Oxford University Press, 1998) (1871) 191-192.

used by practical reasoning proponents, the precedent relied upon could not be supported by text or Hansard. This aside, other evolutive considerations may well have lent support to the ethical approach if purposive arguments were stronger but they were not and thus the cable metaphor led to an economic application only.

The judiciary is unlikely to change its approach as this would represent a sharp departure from a position which has been reached through gradual evolution of the case law over more than a century. But the above conclusion means that the legislation needs to be amended because it cannot be justified, even according to one of the most liberal theories of interpretation. (This is so even if Parliament were comfortable with the current approach, a point on which there is no evidence, however). The conclusion presents an opportunity for a fresh debate on the issue of reform. The arguments in New Zealand are well traversed and there are no fresh insights to be gained here. It is therefore instructive to look overseas to jurisdictions with similar legislation and also to those where there are no statutory protections for independent adult children. This is the subject of Chapters Six and Seven.

Chapter Six: Family Provision on Death: A Comparative Analysis

I. Overview

New Zealand's approach to family provision was described as a piece of "*legislative genius*."[1] Within 40 years, perhaps emboldened by New Zealand's example, the Australian States and Territories, several provinces in Canada, and England, Wales and Northern Ireland had also adopted the discretionary model. As one commentator put it:[2]

> *Not only did New Zealand successfully overcome the conservative tradition of property rights, but the propriety and results of the measure have been admired to the extent of considerable borrowing and imitation by the states and provinces of Australia and Canada. There can remain no question about the permanent significance of the change in the New Zealand law; it has even been recommended as a desirable model for reform in the law of England.*

This Chapter places New Zealand's approach to adult children in a broader context by looking at how adult children have fared in Australia, British Columbia and England. Australia and British Columbia have been chosen because of the similarities in legislative origins, the eligibility of children to apply as of right and the jurisdictional basis for the court's intervention. Its purpose is to see whether judicial perceptions as to the scope of the legislation are the same in these jurisdictions or whether they differ. If the latter, is this because of slight differences in legislative wording, the judicial perception of the legislation's scope or both? (The answers to this may contribute to the debate about reform in this area, as it relates to adult children). England's experience is then considered as it provides a different point of contrast, its jurisdictional formula being confined to reasonable maintenance.

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[1] J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277 at 282.

[2] J Dainow "Restricted Testation in Australia, Canada and New Zealand" **(**1938) 36 Mich Law Rev 1107. For a discussion of Canadian legislation generally, see B Laskin "Dependants' Relief legislation" (1939) 17 Can Bar Rev 181 and WPM Kennedy "Testator's Dependants Legislation" (1934) 20 Iowa L Rev 317.

The analysis also examines whether New Zealand is out of step with the above countries and provinces in adopting the belonging claim. If it is, this does not decide any issue of justification. Indeed, New Zealand was out of sync with the rest of the world when it enacted the Testator's Family Maintenance Act. But if after almost a century of similar legislation, other jurisdictions have looked at the issue of adult children again and suggested and/or implemented changes, we have to examine the reasons for that. Again, then, the comparative analysis may provide insights that can more fully inform any debate in New Zealand about the place of adult children in this jurisdiction generally.

Before embarking on the comparative analysis a brief note should be made about why Canada's other provinces, in particular Ontario, have been excluded from the analysis. Quebec, Canada's largest province, operates under a system of civil law and has not enacted what could be termed "family provision" legislation. It has been excluded on this basis. The other provinces have been excluded because they do not allow independent adult children to apply as of right.[3] Ontario first passed legislation modelled on New Zealand's in 1929 but limited it to dependants. Dependants were defined as a wife or husband, a child under 16 or a child over that age who was ill or infirm and therefore unable to earn a livelihood. It retains such limitations in its current legislation.[4]

II. British Columbia and Australia:

A. Legislative Provisions

Adult children can apply as of right in British Columbia and all the Australian States and

[3] For a summary of the position in other Canadian provinces see L Amighetti *The Law of Dependants' Relief in British Columbia* (Thomson Professional Publishing, Ontario, 1991) at16-20.

[4] See L Amighetti, Ibid and G Bale "Limitations on Testamentary Disposition in Canada" (1964) 42 Can Bar Rev 367. Initially confined to future maintenance, the current Ontario legislation now talks of proper support: s. 58(1). Succession Law Reform Act, R.S.O. 1980, c. 488. For discussion of Ontario, see AH Oosterhoff *Oosterhoff on Wills and Succession* (5th ed, Carswell, Ontario, 2001); A.H. Oosterhoff "Some Aspects of Support of Dependants" (1982) 12 ETR 197; AH Oosterhoff "The Effect of Death on Familial Obligations" (1981**)** 23 RFL-ART 272; R Hull "A Turn in the Road of Dependants' Relief Claims in Ontario" (2005) 13 ETR-CAN-ART 24; S Tator and F Kirsh "Case Note: Cummings v Cummings (2004) 235DLR (4th)" [2004] 23 Est Tr and Pensions J, 189-195.

Territories.[5] In British Columbia, the court's jurisdiction is based on the formula "*adequate provision for proper maintenance and support.*"[6] In Australia, the formulation differs across the states and territories. The legislation of Queensland, Tasmania and Victoria refers to "*proper maintenance and support.*"[7] South Australia, the Northern Territory, the Australian Capital Territory ("ACT") and New South Wales use the term "*proper maintenance, education and advancement in life,*"[8] while Western Australian legislation has the term "*proper maintenance, support, education or advancement in life.*"[9]

Once jurisdiction is established the court's power to make an award is discretionary. There are some differences in how that discretion is expressed. As in New Zealand, the words "*thinks fit*" appear in the ACT, Northern Territory, Queensland and South Australia statutes.[10] In Tasmania there is reference to "proper" and "fit" in the discretionary part of the test.[11] The New South Wales legislation refers to such provision the court thinks *ought* to be made having regard to all the facts of the case.[12] In Victoria the court *may* order provision for "*proper maintenance and support*", followed by a list of relevant factors to

[5] Family Provision Act 1969 (ACT) s 7(1)(c); Family Provision Act (NT) s 7(1)(c); Succession Act 1981 (Qld) s 40; Inheritance (Family Provision) Act 1972 (SA) s 6(c); Testator's Family Maintenance Act 1912 (Tas) s 3A; Inheritance (Family and Dependants' Provision) Act 1972 (WA) s 7(1)(c); Succession Act 2006 (NSW) s57(1)(c). In Victoria, the applicant must first show that the deceased had a responsibility to make provision for that person Administration and Probate Act 1958 (Vic) s 91(4)(a). Decisions hold this includes an adult child and the courts see the legislation as a continuation rather than a departure from existing principles: *Blair v Blair* [2002] VSC 95 and De *Angelis v De Angelis* [2003] VSC 432; [2004] VSCA 51.

[6] Section 3 Testator's Family Maintenance Act 1920 and now section 2 Wills Variation Act 1979.

[7] Succession Act 1981 (Qld) s 41(1); Testator's Family Maintenance Act 1912 (Tas) s 7(1)(b); Administration and Probate Act 1958 (Vic), s 91(1)

[8] Family Provision Act 1969 (ACT) s 8(2); Succession Act 2006 (NSW) s59(1) (c); Family Provision Act 1979 (NT) s 8(1); Inheritance (Family Provision) Act 1972 (SA) s 7(1) (b).

[9] Inheritance (Family and Dependants' Provision) Act 1972 (WA), s 6(1).

[10] ACT s8(1); Qsld s41(1); NT s8(1); SA s7(1).

[11] Tas s3(1).

[12] NSW s9(2).

which it must have regard.[13] In British Columbia it is such provision as the court thinks "*fit, just and equitable*."[14]

B. Similarity in Origins

A brief outline of the background to the legislation shows that its genesis was remarkably similar to that in New Zealand.[15] Testamentary freedom could be abused and mainly to the detriment of women and young children. As primarily a women's issue, it was the women's movement which agitated for legislative protection in both countries.[16] (Again, in both Australia and British Columbia, legislation was passed after women received the vote).[17]

The need for protection arose from similar conditions to those that prevailed in New Zealand. Testamentary freedom, in the absence of other protective mechanisms, could lead to hardship. The law in these Dominions had "*no remnants of an antique reverence for family rights, and gave a testator freedom to leave his property as he pleased. This freedom is most likely to lead to hardship when the parties to a marriage cannot afford the expense of a marriage settlement.*"[18]

[13] Vic s91.

[14] Wills Variation Act RSBC 1979 c435, s2(1).

[15] For a detailed outline of the background to the New South Wales legislation see R Atherton "Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales" [1988] UNSW Law Jnl 7 and R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD Thesis, University of NSW, 1993), hereafter R Atherton, "Thesis". For British Columbia in particular, and some comment on Canada generally, see L Amighetti *The Law of Dependants' Relief in British Columbia* (Thomson Professional Publishing, Ontario, 1991) at 1-20.

[16] See R Atherton, "Thesis" above n 15 at Chapter Five and Amighetti, above n 15 at 11-16.

[17] South Australia in 1894, Western Australia in 1899, New South Wales in 1902 and Victoria in 1908. Australian women (except Aboriginals) were enfranchised for the new Commonwealth Parliament in 1901: "Australian Suffragettes" www.abc.net.au/ola/citizen/women/women-home-vote.htm. In British Columbia women received the vote in 1916: L Amighetti, above n 15 at 12.

[18] J Mackintosh "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 J Comp Legis & Int'l L 3d ser 13.

In introducing the Bill for what became the Testator's Family Maintenance Act 1916, the New South Wales Attorney-General said:[19]

> *It is remarkable that in Australia, where the rights of women have developed so rapidly in the matter of property, we have wiped out whatever right a woman has in the estate of her husband. The dower which existed here for many years exists no longer. It was abolished in the year 1890, and to-day a man may leave the whole of his property, both real and personal, to any stranger to whom he chooses to leave it. The wife may have been with him a partner for forty or fifty years. She may have assisted him in acquiring whatever wealth he possesses; yet he, dying, may will the property away and leave her dependent on the kindness of friends or the charity of the State. During his lifetime he cannot do that, for it is incumbent on him to maintain his wife. The object of the bill is to secure that after her husband's death the right of the wife to get sufficient from his estate to maintain her shall continue, and the right of his children shall be equally preserved.*

In Canada generally, similar concerns were noted.[20] In British Columbia, the parliamentary records of the legislative debates are thin but the available evidence points to the focus being on women and their dependent children. Introductory comments to the Bill referred to it as a link in the government's chain of social welfare legislation: "*It would provide very necessary assistance to dependant wives and children who were not properly provided for.*"[21] It would go towards the "*amelioration of social conditions within the province.*"[22] This social legislation was in marked contrast to:[23]

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[19] New South Wales, Legislative Assembly, Parliamentary Debates , 3 August 1916 at 578, cited in *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191at [9] per Gleeson J. For a more detailed discussion of the background to the New South Wales legislation and the women's movement, see R Atherton, "Thesis" above n 15 at Chapter Five.

[20] See L Amighetti, above n 15 at 18, giving Ontario as an example and citing from The Globe 29 March 1928. The newspaper saw the legislation as overcoming the effects of the inadequacies of dower given the changing nature of wealth -ie a move away from real estate to personal property. In Alberta it was seen as "*especially applicable in a growing country and provided that where a wife had helped her husband in building up a business he should not have the opportunity of depriving her of her share*": Edmonton Daily Bulletin, 26 November 1910.

[21] BC legislative Clippings Book, 7th February 1920, cited in L Amighetti, above n 15 at 15.

[22] Journals of the Legislative Assembly of the Province of BC cited in L Amighetti, above n 15 at 12.

[23] BC Legislative Clipping Book, 7th February 1920, cited in L Amighetti, above n 15 at 14.

> *cold material laws already in abundance on the statute books…In the speaker's opinion the people as a whole were less concerned about the doings of the farmers' party, the soldiers' party, the labor party, or even the womans' [sic] party than they were about the party that would range itself on the side of human considerations.*

Taking into account social or human considerations represented a contrast to the climate of individualism that prevailed in the 19th century. The legislation was seen as a "*definite departure from this view*"[24] and as reflecting a "*most significant readjustment between the individual's property right of free disposition and the interests of his family in particular and of society in general.*" [25]

The legislative responses were enacted at various times but generally during, or soon after, the Great War and the Great Depression. The same events that may have contributed to the broadening of approach in New Zealand case law were probably the impetus for legislative action in these jurisdictions. Amighetti notes that the legislation in British Columbia was passed shortly after WWI, in a time of active social reform. He suggests it was also motivated in part by concerns for society's stability:[26]

> *The social and economic impact of World War 1, the loss of human life during the same war, the subsequent influenza epidemic, working-class militancy, the triumph of the Bolsheviks in Russia, and the fear by reformers and politicians of a proletariat revolution combined to influence society's conception of social justice and a need for guarantees for predictability and stability.*

As with New Zealand, testamentary freedom was the backdrop to the debates about family provision legislation. The tone of opposition to any such legislation is familiar as the following passage illustrates:[27]

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[24] B Gray "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 233 at 239.

[25] WPM Kennedy "Testators' Dependants Legislation" (1934) 20 Iowa L. Rev 317 at 325.

[26] L Amighetti, above n 15 at 12.

[27] F Jordan "Testamentary Disposition Limitations" (1907-1908) 5 Commonwealth Law Review 97 at 104, cited in Law Reform Commission New South Wales 1974, *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act*, 1916 at [3.6].

> *[I]t is undoubtedly arguable that certain possibilities of evil consequence are inseparable from even this modified form of limitation. Children emboldened by the confidence that some share is assured to them in the absence of flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testator's power to dispose of his own earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly unworthy member of his family except at the risk of exposing a grave family scandal which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better judge than the court can possibly be. Complicated questions of fact may arise regarding previous advancements to the claimant. An opportunity is given for speculative and blackmailing actions on behalf of persons who have been properly excluded.*

But again, it was the potential for testamentary abuse and the effects this would have for widows and their dependants that outweighed such sentiments. In British Columbia, a newspaper commenting on the legislation remarked: "*Incidentally, the new legislation is another blow at individual freedom of action, although in this particular instance that may not make it the mark of criticism*."[28]

C. Early Approach

The original legislation was aimed primarily at the protection of women.[29] As in New Zealand, this left its mark on the case law. While the legislation did not discriminate on the basis of gender or status, the judicial approach did. The widow held the paramount place, the legislation seen as extending her husband's inter vivos obligations beyond his death; they were the easy case. But the courts still took a cautious approach towards their new powers and early awards reflected a narrow view of provision. To preserve testamentary freedom as far as possible awards were confined to maintenance.[30] In *Brighten v Smith*[31] it

[28] The Colonist, 16 April 1920 at 4, cited in L Amighetti, above n 15 at 15.

[29] In some places it was restricted to widows and young children: In Alberta (The Married Women's Relief Act, SA 1910 (2nd Session) and in Victoria (The Widows and Young Children's Maintenance Act 1906).

[30] *Re Livingston* (1922) 31 BCR 468(SC) - Annuity to widow after inquiry as to needs, cited in L Amighetti, above n 15 at 30.

[31] *Brighten v Smith* (1926), 37 B.C.R. 518, cited in L Amighetti, above n 15 at 31.

was seen as sufficient provision to keep the widow being a burden on the state. Likewise in Australia. In *Re Jacob Morris (Deceased)*,[32] for example, the Court said "*The Act is directed to making provision for the maintenance of members of a family who are found to be in need of such maintenance when the family tie has been broken by death.*"[33]

The courts, echoing concerns seen in New Zealand,[34] stated: [35]

> *[W]e are dealing with a matter which is something wholly unknown to our former law, and the whole object of the new statute is to defeat the wishes of the testator. This novel circumstance must be considered by the Court, in relation to the object which is sought to be maintained.*

D. Adult Children

While adult children were not expressly excluded from the new jurisdiction, familiar questions arose. Did the child have to be in dire financial straits before succeeding? Were sons to be treated differently to daughters? Were ethical as well as economic factors relevant? And, perhaps most importantly of all, could a claim be based on ethical grounds alone, irrespective of need? These are the themes identified in the New Zealand story and are the themes discussed below. The focus is on broad trends, not the minutiae of the case law.[36]

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[32] *In re Jacob Morris (Deceased)* (1943) 43 SR (NSW) 352 at 357.

[33] Ibid, at 357, per Jordan CJ.

[34] Eg *Plimmer v Plimmer* (1906) 9 GLR 10 at 18 where the Court said the powers called for "*careful definition and explanation.*"

[35] *Brighten v Smith* (1926) 37 BCR 518 (CA) per Martin JA at 520 cited in L Amighetti, above n 15 at 31.

[36] Detailed discussion of the case law is found in several texts and articles. For British Columbia, see L Amighetti, *The Law of Dependants' Relief in British Columbia*, (Thomson Professional Publishing, Ontario, 1991) and G Bale, "Limitations on Testamentary Disposition in Canada" (1964) 42 Can Bar Rev 367. For Australia, see R Croucher and P Vines *Succession: Families, Property and Death* (3rd ed, LexisNexis, 2009) at [15.20] for adult children; R Atherton *Family Provision: Expert Report* 1 (Melbourne 1997) (hereafter Atherton, *Family Provision*); De Groot & Nickel *Family Provision in Australia & New Zealand* (2nd ed, Butterworths, Australia, 2001); Anthony Dickey *Family Provision After Death* (The Law Book Company Limited, Sydney, 1992); D Wright *Testator's Family Maintenance in Australia and New Zealand* (3rd ed, The Law Book Company Limited, Sydney, 1974).

In the absence of local jurisprudence the courts drew on *Allardice*[37] and *Bosch;*[38] the wise and just testator therefore took up residence in Australia and British Columbia too. Moral duty and the emphasis on a flexible and relative approach became the overriding tests. Alongside this came the mantra, also from *Allardice*, that courts were not to re-write the will. Yet these were the broadest of guidelines and the courts still had to map the parameters of their respective jurisdictions. The cautious approach meant that initially, adult children were at the edges of the jurisdiction as the courts viewed it as maintenance based.[39] But as in New Zealand this changed and the overall theme became one of relative need, of moral duty and of economic and ethical considerations being viewed "in globo". Given the similar jurisdictional formula, and the use of *Allardice* and *Bosch*, this is not surprising.

Uniformity of approach has also been encouraged in both jurisdictions. In *Coates v National Trustees Executors and Agency Co Ltd*[40] Dixon CJ stated: "*The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided.*"[41] In the same case Fullagar J stated: "*The searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach.*"[42]

Similar sentiments have been expressed in relation to the Canadian legislation.[43]

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[37] *Allardice v Allardice* (1910) 29 NZLR 959.

[38] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463. *Bosch* was an appeal from New South Wales in which the Privy Council approved the approach taken in New Zealand in *Allardice* v *Allardice* (1910) 29 NZLR 959 and *Allen v Manchester* [1922] NZLR 218.

[39] For example, see *Re Sinnott* [1948] VLR 279 at 280 where the Court stated that the claims of adult children presented more difficulty than those of widow or infant children.

[40] *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494 (HCA).

[41] Ibid, at 507.

[42] Ibid, at 517.

[43] See cases cited in G Bale "Limitations on Testamentary Disposition in Canada" (1964) 42 Can Bar Rev 367 at 379.

E. Maintenance and Support

In New Zealand the courts appeared to treat maintenance and support as synonymous until the Court of Appeal's decision in *Aucutt* when support was distinguished from maintenance and given an emotional rather than financial application. In British Columbia the concepts have been treated synonymously.[44] In Australia there are suggestions they are synonymous:[45]

> *"Maintenance" may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. "Support" similarly may imply provision beyond bare need. The use of the two terms serves to amplify the powers conferred upon the court.*

But there are also comments to the effect that support can be seen as encompassing more, including provision for "advancement in life":[46]

> *The word 'support' has been taken to comprehend any kind of provision, other than maintenance, which a testator is under a moral duty to make for a member of a prescribed class of applicants…The natural meaning of the word 'support' is at least as wide as 'advancement in life' but, even if it were not, the combined expression 'maintenance and support' has been given so consistently wide an interpretation by the High Court that apparent distinctions between criteria should be seen as insignificant*.

As a general rule nothing much has turned on the difference, the courts using the words interchangeably and approaching the test as an overall one, introducing flexibility through "adequate" and "proper" and the moral duty test.

F. Adequate and Proper

As in New Zealand flexibility has been introduced by the terms "adequate" and "proper" and the adoption of *Allardice* and *Bosch*.[47] Judicial expressions of this relative test are

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[44] L Amighetti, above n 15 at 28 citing *Barker v Westminster Trust Co* [1941] 4 DLR 514 at 524 (BCCA).

[45] *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191 per Callinan & Heydon JJ at [115].

[46] *Anderson v Teboneras,* [1990] VR 527 at 537 (SC) per Ormiston J cited by R Atherton, *Family Provision*, above n 36 at [4.4].

[47] *Bosch* was an appeal from New South Wales. See above, n 38.

found in several decisions of the High Court of Australia. In *Goodman v. Windeyer* the Court held:[48]

> *The words "adequate" and "proper" are always relative. There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards*.

More recently, in discussing "proper", the High Court of Australia stated:[49]

> *It implies something beyond mere dollars and cents…The use of the word "proper" means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the "station in life" of the parties and the expectations to which that has given rise, in other words reciprocal claims and duties based upon how the parties lived and might reasonably expect to have lived in the future.*

Likewise with adequacy:[50]

> *Adequacy or otherwise will depend upon all of the relevant circumstances…The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors.*

The same approach is seen in British Columbia. In *Price* v *Lypchuk Estate*[51] the Court stated:[52]

> *There is abundant authority for the proposition that the size of the estate may influence the decision about whether "adequate" provision has been made for "proper" maintenance of a wife or child of the testator. That decision is not to be made only in relation to the needs of the applicant. It may well be affected by the size of the estate and by the number and character of the claims on the testator's bounty*.

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[48] *Goodman v Windeyer* (1980) 144 CLR 490 at 502, per Gibbs J.

[49] *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191 per Callinan & Heydon JJ at [114].

[50] Ibid at [122].

[51] *Price v Lypchuk Estate* 37 DLR (4th) 6 (BCCA) sub nom *Price v Knutson*.

[52] Ibid, at 14.

As in New Zealand, community standards are also called in aid to inform the statutory test and there are numerous statements to that effect.[53]

G. Financial Approach to Maintenance and Support

Again, as in New Zealand, the broad trend in both British Columbia and Australia has been a relative approach to financial need, taking the cue from *Bosch*. In Australia the oft cited passage in this respect is from *Blore v Lang*:[54]

> *In such a case as this, where the applicant is a married woman with a healthy husband in satisfactory employment who supports her in reasonable comfort, her need is not for the bread and butter of life but for a little of the cheese or jam that a wise and just parent would appreciate should be provided if circumstances permit. The kind of provision that we think the deceased ought to have made for the applicant is a gift of a sum of money that she could invest to give her a couple of hundred pounds a year of her own, together with the additional security of a little capital.*

This means that comfortably situated adult children have been awarded provision, size of estate permitting. Contingencies are also taken into account.[55]

The trend towards a broader approach could also be explained, in part, by legislative amendments. As in New Zealand the main thrust of the amendments has been to widen the class of eligible claimants to conform to changes in society.[56] These changes do not touch directly on adult children but may have had some influence on the gradually broadening approach.[57] One commentator considered that such amendments:[58]

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[53] *Walker v McDermott* [1931] SCR 94 at 96 per Duff J; *Tataryn v Tataryn Estate* [1994] 2 SCR 807; Price *v. Lypchuk Estate*, above n 50 at 13. For Australia, see *Vigolo v Bostin*, above n 48 at [19]-[20] per Gleeson J.

[54] *Blore v Lang* [1960] HCA 73; (1960) 104 CLR 124 at 135.

[55] *Liberman v Morr*is (1944) 69 CLR 69 at 91-92 (HCA) per Williams J. See also the summary by L Amighetti, above n 15 at 115-117 for British Columbia. For Australia, see the texts cited at n 36 above.

[56] Step children, illegitimate children, de factos are now included in the relevant legislation. In Victoria, status as a qualifying criteria has been replaced with a more general, circumstances based test: Did the testator have a responsibility towards the claimant? - s91 Administration and Probate Act 1958 (Vic).

[57] In *Allardice v Allardice* (1910) 29 NZLR 959 Edwards J drew support for the broader approach from legislative amendments.

[58] J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277 at 284.

> *tended to broaden the scope of the statutes, to discard limitations both substantive and procedural by which anxious legislatures had originally sought to contain both the scope of the statutes and, especially, the sweep of the judicial discretion. This process seems certain to continue.*

The same commentator noted a "*steady growth of both judicial control and coverage*", reflecting wide acceptance of the Act as "*just and workable.*"[59]

H. Gender

The legislation was gendered and while not reflected in the legislative provisions themselves, it played a role in the court's approach. Widows ranked first, followed by infant children, and unmarried daughters. Married daughters came next. Like the judicially rebuked sons in *Allardice*, adult sons struggled to receive provision. As in New Zealand this reflected contemporary views about self reliance and a woman's more vulnerable economic position. The distinction based on gender was again, not surprisingly, the most pronounced when the legislation had a predominantly economic focus. In British Columbia, in 1948, the Court in *Re La Fleur* summarised the position thus:[60]

> *A widow occupies the most favoured position, while relief is not given so readily to a widower. Infant children usually receive some measure of relief, directly or indirectly, by increased allowances to a parent. Adult daughters, married or single, receive relief more often than it is refused to them…But the position of adult sons, who are not physically or mentally disabled, is different.*

Again, as in New Zealand, this attitude no longer holds in British Columbia. Adult sons are treated the same as adult daughters. In *Re Parks*[61] the Court held that the "*robust view of the claims of the sons*" was no longer appropriate.[62]

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[59] Ibid, at 312.

[60] *Re La Fleur* [1948]1 WWR 801 (Man KB) per Williams, CJKB, cited in L Amighetti, above n 15 at 104.

[61] *Re Parks* (1968) 64 WWR 586 (BCSC).

[62] *Re Parks* (1968) 64 WWR 586 (BCSC) at 595, per Wilson C.J.S.C. cited in L Amighetti, above n 15 at 105.

In Australia that position has taken longer to reach in some states. A distinction appears to have arisen after the case of *Re Sinnott.*[63] Decided in 1948, the same year as *Re La Fleur*, the Court held that no special principle applies to adult sons but then went on to say that the approach of the court must be different. The starting point was that if able to maintain and support himself, an adult son must show some special need or claim before the court would intervene:[64]

> *In the case of an adult son, who has received an education and is well able to earn his living, the father's moral obligation can probably in most cases be regarded as discharged, and a wise and just testator may well feel himself at liberty… 'to do what he likes with his own'.*

Following *Re Sinnott* some cases adopted the "no special principle" approach while others took the view that adult sons had to jump an additional hurdle to succeed.[65] Atherton suggests that any gender discrimination may be more apparent than real, it instead reflecting a balancing act by the court and that the son has missed out not on the basis of gender but because of priorities generally. In large estates, they are more likely to succeed, for example.[66] What constitutes a special claim has also been interpreted broadly, again making the distinction less real. It takes account of the usual factors relevant to any claim - youth, financial difficulty, contingencies, dependants to support, contributions and so on.[67] Still, as recently as the 1990s, there have been some express statements that adult sons are a different case.[68] In New South Wales the courts have held that the distinction no longer holds. Several cases from the 1980s made the point. In *Hunter v Hunter* the Court stated:[69]

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[63] *Re Sinnott* [1948] VLR 279 (SC).

[64] Ibid, at 281.

[65] See cases and discussion in R Atherton, *Family Provision* above n 36 at [2.94] - [2.106] and R Atherton and P Vines, above n 36 at [15.20].

[66] De Groot and Nickel, above n 36 at [3.37].

[67] De Groot and Nickel, above n 36 at [3.35].

[68] *Anderson v Teboneras* [1990] VR 527 at 528, per Ormiston J (SC).

[69] *Hunter v Hunter* (1987) 8 NSWLR 573 at 579 per Kirby J (CA).

> *There is no warrant for it in the Act. It limits, in an unnecessary and artificial way, the consideration of all the circumstances of the case. It frustrates the object of the statute. It diverts attention from the focus which the Act requires upon the proved needs of the applicant and comparison of those needs with the provision made by the will*.

In *Gorton v Parks,*[70] the Court considered that the emphasis on self reliance was no longer relevant and that it was an expression of "*romantic egalitarianism.*"[71]

Victoria held on to the distinction until relatively recently.[72] It was not until 1997 that the courts held gender was not relevant and only because of legislative amendments. Victoria legislation now lists a number of factors the courts must take into account and gender is not one of them.[73] The courts have taken this as a cue to ignore it as a relevant consideration.[74] Western Australia also took longer to reach this position but recent cases indicate it is following the same approach.[75]

The move towards treating daughters equally with sons is the flipside of the coin. Initially seen as more vulnerable than men, they are now on an even footing. In *Re Sinnott,*[76] working, unmarried daughters were given greater status than sons:[77]

> *Unless she is equipped for a profession or a skilled occupation, late middle age and old age are perhaps more likely to find her in a situation in which a little capital or even a very small assured income would make a world of difference to her comfort and happiness.*

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[70] *Gorton v Parks* (1989) 17 NSWLR 1 (SC).

[71] *Gorton v Parks* (1989) 17 NSWLR 1 at 7 per Bryson J.

[72] *Anderson v Teboneras* [1990] VR 527 at 538-539 per Ormiston J (SC).

[73] Section 91(4) Administration and Probate Act 1958 (Vic).

[74] *Blair v Blair* [2002] VSC 95; *De Angelis v De Angelis* [2003] VSC 432; [2004] VSCA 51.
Allan v Allan [2001] VSC 242.

[75] *Curran v Duncan* [2006] WASC 9.

[76] *Re Sinnott* [1948] VLR 279.

[77] Ibid, at 281 per Fullagar J.

These attitudes reflected the role of women at the time, their greater economic vulnerability. In *Hunter v Hunter*,[78] Kirby J stated:[79]

> *The former law about adult sons should be seen now as replaced by a law appropriate to the society of today where adult sons, daughters and other persons enjoy quite different relationships with those who become testators.*

I. Conduct and Relationship with Deceased

The conduct of the applicant, whether good or bad, is relevant to claims in both Australia and British Columbia regardless of whether it is expressly stated in the legislation.[80] It does not appear in the wording of the British Columbia legislation but has been taken into account in the overall discretion and as part of assessing the moral duty:[81]

> *The significance of conduct is a matter of discretion, merely one factor among many which must be balanced by a court in order to make an award which accurately represents contemporary community standards as to what is fair, just and equitable.*

As with New Zealand disentitling conduct is generally seen as reducing a claim rather than extinguishing it.[82] Overall, it can be said that the courts take a lenient approach to disentitling conduct as summed up in the following passage:[83]

> *I do not think that the Legislature intended that provision under the Act should be given rather to those that are efficient and successful rather than to those who are not. A just*

[78] *Hunter v Hunter* (1987) 8 NSWLR 573.

[79] Ibid at 579 and a point also made by Kirby J in *Samsley v Barnes* [1990] NSWCA 161. Other case examples can be found in R Atherton, *Family Provision*, above n 36 at [2.105] and De Groot and Nickel, above n 36.

[80] Family Provision Act 1969 (ACT) s 8(3)(a); Succession Act 2006 s60(2)(m); Administration and Probate Act 1958 (Vic) s 91(4). In some jurisdictions a court is empowered to refuse to make an order on that ground, see Family Provision Act (NT) s 8(3);Succession Act (Qld) s 41(2)(c); Inheritance (Family Provision) Act 1972 (SA) s 7(3); Testator's Family Maintenance Act 1912 (Tas) s 8(1); Inheritance (Family and Dependants' Provision) Act 1972 (WA) s6(3).

[81] Law Reform Commission of British Columbia *Report on Statutory Succession Rights* (1983) at 52 -53.

[82] De Groot and Nickel, above n at 36 [2.31]-[2.41].

[83] *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* 143 CLR 134 at 139 (HCA) per Gibbs J.

father's moral duty is to assist the lame ducks amongst his offspring, provided they not be morally or otherwise undeserving.

A similar approach is seen in relation to the quality of the relationship between the deceased and applicant. In Victoria and New South Wales the relationship with the deceased - its nature and duration - are listed in the legislation as relevant factors[84] but this is simply legislative expression of an existing approach across Australia generally. As a general rule, the decisions suggest the quality of the relationship will affect the level of provision rather than barring a claim outright particularly if the lack of communication is due to the parent's failure to acknowledge the child and maintain contact. But, as always, it is a case by case approach.[85]

J. Moral Duty

The courts in both jurisdictions have drawn on *Allardice* and therefore the moral duty test is the touchstone for judicial decisions and an umbrella concept for any number of considerations to come into play. It explains, in part, the broad approach to need and the wide range of factors the courts have taken into account in applying the legislation. It has also been the vehicle through which courts have updated their approach to keep abreast of changes in society. In *Gorton v Parks*[86] the Court, referring to the moral duty, stated:[87]

This part of the judicial function must be exercised contemporaneously … [j]udges share with all members of the community access to the current moral beliefs of the community of which this legislation makes them the spokesmen.

Similar judicial statements can be found in British Columbia:[88]

The judicious father…seeking to discharge both his marital and his parental duty, must be considered as doing so in accordance with a contemporary view of marital and

[84] Section 60(2)(a) Succession Act 2006 NSW; s91 (4)(e) Administration and probate Act 1958 (Vic).

[85] Succinctly summarised in C Sappideen "Families and Intergenerational Transfers: Changing the Old Order?" (2008) 31 UNSW Law Jnl 738 at 761 and L Amighetti, above n 15 at131-133.

[86] *Gorton v Parks* (1989) 17 NSWLR 1.

[87] Ibid, at 11.

[88] *Price v Lypchuk Estate* above n 51 at 13. See also *Tataryn v Tataryn* [1994] 2 SCR 807 at 819.

> *parental obligations, and in accordance with a contemporary view of testamentary independence*.

Familiar examples of the factors that come into play via "proper", "adequate" and "moral duty" generally are those already noted - ie age, financial status, relationship with the deceased, conduct of the claimant. Other factors include contributions to the welfare of the deceased, economic contributions, help in building up the estate, all those factors seen in the New Zealand story. In New South Wales and Victoria these are now listed in the legislation itself.[89]

The courts have seen the language of the respective statutes as imbued with morality:[90]

> *Two of the key words are "proper" and "fit". Fitness and propriety are value-laden concepts. Those values must have a source external to the decision-maker…The justification for conferring upon a court a discretionary power to intervene, and to make an order modifying the legal effect of the will, was explained in terms of familial obligation, not unnaturally or inappropriately described as moral.*

Similar statements are found in British Columbia: "*In my opinion, the very structure of the Act makes it clear that the legislative scheme contemplates that the concept of moral duty is an essential element in the working of the Act*."[91]

There is a difference, however, in how the courts view the place of the test. It has come under attack in Australia. In *Coates v National Trustees Executors and Agency Co Ltd* [92] Fullagar J stated:[93]

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[89] Section 91(4)(k) Administration and Probate Act 1951 (Vic); Section 60(2)(h) Succession Act 2006 (NSW).

[90] *Vigolo v Bostin* [2005] HCA 11; 221 CLR 191 per Gleeson J at [6].

[91] Ibid, at [11]. Atherton discusses the theme of "moral duty" and its connection with the wording of the Act in R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD Thesis, University of New South Wales, 1993) at 224-225 and in R Atherton, "The Concept of Moral Duty in the Law of Family Provision - A Gloss or Critical Understanding?" (1999) 5 Australian Journal of Legal History 5.

[92] *Coates v National Trustees Executors and Agency Co Ltd*, above n 40.

[93] Ibid, at 523.

> *The notion of 'moral duty' is found not in the statute but in a gloss upon the statute. It may be a helpful gloss in many cases, but, when a critical question of meaning arises, the question must be answered by reference to the text and not by reference to the gloss.*

His Honour then warned against turning "*...a guide into a tyrant, a commonly convenient factual test into a rule of law*."[94] Recent decisions of the High Court have also suggested it is an unhelpful gloss, diverting attention from the statutory test.[95] Most recently, in *Vigolo v Bostin*[96] two judges of the High Court stated it could mislead: "*It is therefore better to forgo any convenience that these shorthand expressions may offer in favour of adherence to the relevant statutory language.*"[97] The majority saw it as useful but that "a *moral claim cannot be a claim founded upon considerations not contemplated by the Act.*"[98] There has been no such equivocation in British Columbia where it is "*thoroughly embedded*" in the case law.[99]

The above discussion shows how similar the judicial approach has been. The Acts do not discriminate on the basis of gender but the courts have. The Acts do not say that the widow and dependent children hold the paramount place but the courts have. Again, disentitling conduct and the nature of the relationship with the deceased are relevant to the court's intervention whether listed as relevant factors in the legislation or not. But there is also a significant divergence in approach. What may seem a slight difference in terms of the perception of the moral duty test is actually a pointer to this greater divergence. In Australia the scope of the moral duty is confined to economic maintenance and support, however broadly defined. In British Columbia it extends to an obligation to leave a child a share of the estate, all circumstances permitting.

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[94] Ibid, at 522-523.

[95] In *Singer v Berghouse (No 2)* [1994] 181 CLR 201 at 209 the High Court suggested the concept was a gloss on the statute and doubted whether it helped elucidate the statutory provision, the implication being that it should be avoided (Mason CJ, Deane and McHugh JJ). The other two members of the court did not discuss the point.

[96] *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191.

[97] Ibid, per Gummow and Hayne JJ at [73]

[98] Ibid at [113].

[99] *Price v Lypchuk Estate*, above n 51 at 11.

K. The Judicial Paths Diverge

The British Columbia courts discarded the requirement of financial need early on in their jurisdiction. As a result, many of the factors discussed above have been directed as much towards an ethical claim as a financial one. It may well be that the approach to gender in British Columbia reflects this. If economic need is not the basis for a claim then logically, any emphasis on self reliance and the ability to self support no longer has relevance.

A hint of the difference between the two jurisdictions can be seen in two cases discussing *Bosch*.[100] In 1957, in the Australian case of *Worladge v Doddrige*,[101] the Court affirmed *Bosch* but saw its reference to ethical factors as ethical in an economic sense only. The Court held that a judgment as to maintenance which is "proper" for a particular applicant in the circumstances of the case is necessarily a judgment as to what maintenance the applicant ought to have in those circumstances, and not what he or she needs:[102]

> *It is only in that sense that it is correct to say that Bosch's Case [1938] AC 463 adopted an "ethical" rather than an "economic" view. The hypothesis of a just but not loving testator is resorted to, not for the purpose of determining what would have been the ideally fair manner of disposing of the testator's estate, but only for the purpose of determining what was sufficient for the maintenance and support which the circumstances make it right that the applicant should have, as distinguished from what was sufficient for the maintenance and support which the applicant may be considered to need.*

In contrast, a case from British Columbia in 1941, *Barker v Westminster Estate*,[103] saw it differently. There the Court concluded that the legislation contemplates two kinds of relief. One is maintenance and support which is a purely personal allowance, analogous to alimony but:[104]

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[100] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 (PC).

[101] *Worladge v Doddrige* [1957] HCA 45; (1957) 97 CLR 1.

[102] Ibid, at 17.

[103] *Barker v Westminster Estate* [1941] 4 DLR 514 at 527 (BCCA).

[104] Ibid, at 527.

> *Secondly, there is a form of 'proper maintenance' which is effectively a share of the estate as if it were so bequeathed in the will itself...It is a distribution of the capital or corpus of the estate…Relief of this kind arises most frequently in cases of disinheritance… It was given in the Bosch case also where the two applicants received a substantial increase in their shares of the estate.*

L. The Relevance of Ethical Factors in Australia

In all the Australian jurisdictions ethical and economic factors are to be considered "in globo" but a moral claim alone will not suffice.[105] The decisions are still anchored in financial need. There is no case law to the effect that a child has a right to an inheritance. Some cases have hinted at it but these have not been followed and there are none from the High Court of Australia. The oft cited case is *Wentworth v Wentworth*,[106]a decision of the New South Wales Supreme Court. The following passage is on point:[107]

> *The testator had so much property that it was reasonable for his children to expect that he would make provision for them, not necessarily so much that they could live on independent means and do nothing, but enough to free them of basic needs to provide for their own housing and maintenance, and enable them to pursue professions or other careers as exercises in self realisation untroubled by concerns of necessity. This is unusual for a family in Australian society, perhaps any society, but the testator had so much property under his control that expectations and moral duties could properly be formed in that way.*

This, however, has been seen as a case where need is assessed very liberally, the "cheese and jam" (and sometimes cream) approach noted in *Blore v Lang*.[108] Further, the award is still based on maintenance, just at a level that takes the responsibility for maintenance off the claimant.

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[105] See discussion at A Dickey, above n 36 at 76.

[106] *Wentworth v Wentworth* Supreme Court, NSW, 14 June 1991.

[107] Ibid, at 23-24.

[108] *Blore v Lang* (1960) 104 CLR 124 at 135 (HCA). See R Atherton, *Family Provision*, above n 36 at [2.114].

A hint that a moral claim alone could be the basis for a claim is found in *Hawkins v Prestage*[109] but it has not been followed on this point and the authors of a leading text think it is unlikely to gain acceptance: "*It is at odds with the basis upon which these applications have been considered since the genesis of the jurisdiction.*"[110] Another commentator explains it on the basis that the court took a narrow view of need, equating it to the immediate need of provision. The suggestion that the case did not require economic need, and was based on a moral claim alone, has to be read in that light.[111] The courts in Australia, then, stay close to the original economic aim of the jurisdiction.

There has been a line of cases which stress the importance of bare paternity, and therefore consanguinity, but these still anchor the decision in economic need, the nature of the relationship between the testator and claimant and whether the testator was responsible for the lack of any such relationship. This line of cases is in contrast to an earlier leading case, *The Pontifical Society for the Propagation of the Faith v Scales*[112] where the Court held that a 50 year old applicant who had no contact with his father after the age of four had not established that the deceased had breached a duty in making no provision for him. There, Dixon CJ stated:[113]

> *In truth there is the bare fact of paternity and no other mutual relation: the case depends upon that fact and basically upon nothing else except all the arguments of right and wrong that may be considered to spring from that source and affect the situation of the parties as it existed at the testator's death.*

This case is now seen as reflecting outdated attitudes. In *Gorton v Parks*[114] the testator had deserted his family shortly after the birth of the last of five children. There was very little

[109] *Hawkins v Prestage* (1989) 1 WAR 37.

[110] De Groot and Nickel, above n 36 at [2.15] and [3.32]-[3.37].

[111] A Dickey *Family Provision After Death*, above n 36 at76.

[112] *The Pontifical Society for the Propagation of the Faith v Scales* (1961) 107 CLR 9 (HCA).

[113] Ibid, at 18.

[114] *Gorton v Parks* (1989) 17 NSWLR 1.

contact and as adults two of the children had no relationship with the testator. Bryson J considered the approach adopted by Dixon CJ in *Scales'* case and did not follow it, taking into account that it was the testator who had deserted his children and had failed to acknowledge them. He stated:[115]

> *Dixon CJ did not expound the weight which he gave to the bare fact of paternity and nothing else; I regard that bare fact as of very great importance in morality. The idea that the moral obligations from paternity are diminished or do not exist if the parent withholds acknowledgement of the obligations or of the child appears to me to be an idea from a distant age. There have been large changes over long periods in the beliefs of the community about moral duty to children, and there seems in the distant past to have been some acceptance of a view that unless children were legitimate or were acknowledged by their father, he had no duty towards them.*

Again, the obligations arising from paternity were seen as significant in *Kleinig v Neal (No.2):*[116]

> *If it is a case of a parent and child, 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*.

Most recently, in *Nicholls v Hall & Ors*, [117] the New South Wales Court of Appeal awarded a son one seventh of an estate worth $1,300,000. The testator found out he had an ex nuptial son when he was 64 and the claimant son 36. They met just once but spoke over the phone 11 times over the following nine years. The testator left his estate to his three daughters in equal shares. Neither the daughters nor the son were wealthy but none were on the poverty line either. The Court of Appeal stated:[118]

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[115] *Gorton v Parks* (1989) 17 NSWLR 1 at 10.

[116] *Kleinig v Neal (No.2)* [1981] 2 NSWLR 532 at 540 (SC).

[117] *Nicholls v Hall & Ors* [2007] NSWCA 356.

[118] Ibid, at [42]-43].

> *Even if a deceased never even knew of the existence of a child, if that child had a strong case on the other factors (that is, needs, size of estate and lack of competing claims), a court could find that that child was left without adequate provision for proper maintenance.*

Here, the award was based on several factors not just paternity. The claimant had made an effort to find his father and had established some relationship with him, he and his wife were suffering from health problems, there were issues with their continued employment and the estate was sizeable enough to make provision for him and his sisters. These more recent cases are therefore more significant for reflecting a modern view as to the significance of paternity when a claimant has some economic need - or the testator is to blame for the lack of a relationship - and a moral duty arising from those factors rather than a claim based on blood alone. (In some ways they are similar to the New Zealand cases where past neglect by a parent, and the efforts of a child to establish contact, tend to be seen as creating or increasing the moral duty to the child but in Australia awards are still expressly based on economic need, even if in a broad sense).

M. British Columbia - An Equitable Basis for an Award

Earlier cases in British Columbia held that the statutory wording of "*adequate, just and equitable in the circumstances*" meant the amount needed to financially support the spouse and children of the testator. (Note that even at this early stage, when the approach still had an economic focus, the emphasis is on the discretionary aspects of the statutory test rather than the condition precedent - ie proper maintenance and support). The Court rejected the need-maintenance approach to the Act as early as 1931 in the leading case of *Walker v McDermott.*[119] Briefly, the testator left his entire estate to his second wife of 14 years. His only daughter from his first marriage, aged 23, brought a claim. A hotel was the main asset. The second wife had assisted with the down payment and assumed a large part in running the business. The daughter was married, had steady employment and was not dependent on her father. The trial judge awarded her $6,000 from an estate valued at $25,000. The Court of Appeal set aside the lower court order, only to be reversed again in the Supreme Court.

[119] *Walker v McDermott* [1931] SCR 94.

The majority in the Court of Appeal held it was not about a fair share of the estate. The daughter was not in need of maintenance and support having regard to her walk in life and all the circumstances of the case. Macdonald JA stated that the Act could not apply in such a case as otherwise few testators could regard their testamentary dispositions as final:[120]

> *It is a "Family Maintenance Act"; not an Act to destroy the free disposition of property by will… Discretion is given to apply it where the Court thinks it is just and equitable in the circumstances to exercise the powers conferred. That discretion is not judicially exercised unless the object, intent and spirit of the Act is observed. Although s3 may not be happily worded it would not be suggested that an order must be made in all cases where members of a family, adults or minors, are not left anything by a parent's will*.

The Supreme Court of Canada reversed the Court of Appeal.[121] Delivering the majority judgment Duff J stated that what constituted "proper maintenance and support" depended on a variety of circumstances and was not limited to bare necessities.[122] The size of the estate and claims of others were also relevant factors. If adequate provision had not been made, the Court then had to consider what provision would not only be adequate but also what would be just and equitable. Significantly, he then concluded:[123]

> *The testator no doubt felt himself under great obligations to his wife, and justly so. But I can see nothing in all this to lead to the conclusion that the testator, if properly alive to his responsibilities, as father no less than as husband, ought to have felt himself under an obligation to hand over all his estate to his wife and leave his only child without provision.*

This concluding statement was subsequently used to support an approach that entitles a child to a share of the estate regardless of age or need, estate and competing claimants permitting.

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[120] *McDermott v Walker* [1930] 1 DLR 945 at 959.

[121] *Walker v McDermott* [1931] SCR 94, Rinfret J dissenting on the basis that the section does not make an order mandatory. In his view "*The first inquiry therefore must be whether, at the death of the testator the petitioner lacked those means of maintenance and support which would be proper, having regard to her ordinary circumstances in life. For that purpose the court should consider how she has been maintained in the past and what were, when the testator died, the means of support available to her."* Ibid, at 99-100.

[122] Ibid, at 96.

[123] Ibid, at 98.

In the subsequent case of *Barker v Westminster Trust*,[124] the Court observed that *Walker* could not have been based on maintenance or support for the testator had not supported his daughter for five years and she was doing very well. Nor was there any room for a duty on his part to maintain her, since he had not maintained her for five years and she had bettered her position on marriage:[125]

> *The only "responsibility" left was not to disinherit her, but rather to "advance" her, viz., to give her a substantial share of his estate, consistent with the claims of his widow and the fact that the latter had contributed substantially to the building up and preservation of the estate which he left*.

The decisions of lower courts after *Walker v McDermott* followed two lines. The majority followed the principle that spouses and children were entitled to an equitable share of the estate, even in the absence of need. Moral duty therefore encompassed a right to inherit, all considerations weighed and circumstances permitting. In *Price v Lypchuk Estate*, Mr. Justice Esson summarised the position thus:[126]

> *The view which has prevailed in the cases is that the moral duty or obligation of every parent is to make some provision by will for each of his children, whatever their age and condition of life and however generous the parent may have been in preparing the children for the battle of life; but subject to some exceptions where the estate is small.*

The Court also referred to some circumstances which would give rise to this duty, including:[127]

> *a disability on the part of an adult child; an assured expectation on the part of an adult child; or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's lifetime.*

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[124] *Barker v Westminster Trust* [1941] 4 DLR 514 (BCCA).

[125] Ibid, at 525.

[126] *Price v Lypchuk Estate* above n 51 at 18**.**

[127] Ibid at 15-16.

But it is not a guaranteed share. Other claims have to be weighed in the balance as does the claimant's conduct. The right is still at the discretion of the court and a wide range of factors comes into play. Mr. Justice Lambert went on to discuss the scope of the duty, observing that a testator must be judicious but not impervious:[128]

> *But the moral duty imposed by the Act does not require a testator who has been rejected by a member of his family to ignore the rejection, nor does it require that all family members be treated equally, even when all are in need and the estate is small. If the members of the family have, for their parts, treated the testator more considerately or less considerately, or if some of them are less well suited than others for the "battle of life", or if the testator has made gifts to family members during their lifetimes, then the moral duty of the testator may be discharged or depleted.*

The *Walker* approach came in for criticism.[129] For the critics, the Act did not allow a redistribution of the capital of the estate which they viewed *Walker* as effectively permitting. The Supreme Court of Canada addressed these criticisms head on in the now leading case of *Tataryn v Tataryn Estate*.[130]

N. *Tataryn v Tataryn Estate*

Tataryn is a unanimous decision of the Supreme Court of Canada. It is significant in that it was asked to clarify the principles upon which an order under the Wills Variation Act could be made and, in doing so, affirmed the equitable basis of its jurisdiction.

Briefly, the testator and his wife were married for 43 years. They built up assets together but the estate was held in the testator's name. They had two sons, one of whom the testator did not like. He feared that if he left any of his estate to his wife in her own right she would pass it on to the unfavoured son. He therefore made a will leaving his wife a life estate in the matrimonial home and making her the beneficiary of a discretionary trust of the income

[128] *Price v Lypchuk Estate*, above n 51 at 15.

[129] See G Bale and L Amighetti, above n 36 at 48 and 56 respectively.

[130] *Tataryn v Tataryn Estate* [1994] 2 SCR 807.

from the residue of the estate, with the favoured son as trustee. After her death everything was to go to the favoured son. The disinherited son and widow made a claim under the Wills Variation Act.

In its decision the Supreme Court observed that the words "*adequate, just and equitable*" could be interpreted in either a narrow or broad fashion, the former meaning provision to keep dependants off the welfare role and the latter meaning provision tied to the lifestyle and aspirations of the dependants. A narrow reading might also limit the jurisdiction to maintenance while a broader one could extend to a fair property division.[131]

The Court preferred the broader approach and considered the general wording of the section to be a legislative attempt at conferring flexibility so orders could be "*just in the specific circumstances and in light of contemporary standards.*"[132] The broad discretion allowed a search for "*contemporary justice*" bolstered by a direction in their Interpretation Act that a statute is always speaking.[133]

In terms of the broader approach, the Court acknowledged that while the Act was intended to serve a minimum function of maintenance, there was nothing to suggest that the women's groups who lobbied for it, or the legislators who adopted it, intended that it be confined to cases of need:[134]

> *At a minimum this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modern concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916." There is no reason to suppose that the concerns of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women*

[131] Ibid, at 814.

[132] Ibid, at 814.

[133] Ibid, at 814-815 referring to Interpretation Act RSBC 1979, c. 206, s7.

[134] Ibid, at 815.

and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.

As in *Aucutt*, the Court noted that the legislation does not mention need.[135] Moreover, the Court stated, if need were the touchstone then the failure to exclude independent adult children presented a difficulty. If the British Columbia legislature had wished to confine the power of the court to cases of need and maintenance, why had it not excluded independent adult children?[136]

The Supreme Court also tackled head on the criticism directed at the broader approach, namely the lack of certainty and a charge by one prominent commentator that the court was "*regressing to the unacceptable time when Equity was interpreted by the length of the 'Chancellor's foot'...*"[137] McLachlin CJ considered this criticism value neutral as it did not support a return to the needs based approach. Rather, it implied that there should be some yardstick against which to assess whether provision was "*adequate, just and equitable*."[138] The Court's solution was to assess the phrase in light of current societal norms and that in doing so it considered much of the uncertainty disappeared.[139]

As to those norms, the Court distinguished between legal and social norms, the former - a person's inter vivos obligations - take precedence because of the desirability of symmetry between inter vivos rights and those on death: "*The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death*."[140]

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[135] *Williams v Aucutt* [2000] NZLR 479 at [52].

[136] Ibid, at 819.

[137] L Amighetti, above n 36 at 56.

[138] *Tataryn v Tataryn*, above n 130 at 820. Some cases had suggested intestacy: *Re Lewis* 49 BCR 386 (CA); some used actuarial tables: *Bates v Bates* (1981) 9 ETR 235 (BCSC). Some have pointed to symmetry with inter vivos support obligations. None have gained support. See discussion at L Amighetti, above n 36at 61-64.

[139] Ibid, at 820. It did not go on to say how to assess what those norms were.

[140] Ibid, at 822.

To be weighed next are moral obligations, found in "*society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards.*"[141] It acknowledged these were more difficult to assess and could be viewed differently by two people although the uncertainty was not as great as sometimes thought. The Court observed that most people would agree that an independent adult child was entitled to provision if the size of the estate, and the testator's other obligations, allowed for it. It falls to the court to weigh and then rank the moral claims: "*In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime.*"[142]

This approach has been applied in other Canadian jurisdictions even where the legislation is worded differently. For example, in Ontario, the Court has held it must take into account the deceased's moral obligations to avoid injustice.[143]

Predictably perhaps, the Court ended by reiterating that it would not interfere with the testator's disposition lightly. There was a range of acceptable ways in which a testator could distribute his estate and the court would only intervene if done so in a way that fell below legal and moral norms.[144] In the result the widow received the matrimonial home, a life interest in a rental property, and the entire residue of the estate after payment of an immediate gift of $10,000 to each of the two sons. Upon the widow's death the rental property was to be divided one-third to the unfavoured son and two-thirds to the favoured.

The discussion so far shows that there is a spectrum on which the case law can be plotted. At one end is case law linking provision to maintenance and economic hardship. The early case law from all three jurisdictions falls here. At the other end of the spectrum are cases which recognise the family connection, without requiring economic need. *Tataryn* and

[141] Ibid, at 821.

[142] Ibid, at 822-823.

[143] *Cummings v Cummings* (2004) 235 DLR (4th) 474 (CA). See the comment on *Cummings v Cummings* by SB Tator and FC Kirsh in (2004) 23 EP&TJ 189 and A Hull "A Turn in The Road of Dependants' Relief Claims in Ontario" 13 ETR-CAN-ART 24.

[144] *Tataryn v Tataryn,* above n 130 at 823-824.

Aucutt fall here. Australia could be seen as taking the middle road in that it allows a broad approach to need and takes ethical factors into account, although still anchoring claims in economic terms. All these outcomes flow from what is essentially the same jurisdictional formula. England is a useful point of contrast to these jurisdictions. While adopting a discretionary model the legislation confines the court's jurisdiction to "reasonable maintenance". It is instructive to see whether the absence of a reference to "support" and "proper" in equivalent legislation makes a difference.

III. England

A. Legislative Origins

Britain watched New Zealand's experience with some interest. Several articles commented on how it seemed to work well.[145] In 1928 Viscount Astor introduced the first Bill, citing the New Zealand experience.[146] Such legislation had supporters - "*It needs a stout heart to defend the existing law, under which a rich man with a wife and six children, or even a dozen, may leave his whole estate to a Dogs' home*"[147] - yet it took a decade before any legislation was passed. The struggle has been attributed to an "*indifferent government and a hostile English probate bar*".[148]

The Family Provision Act was eventually passed in 1938.[149] Again, it was the women's movement that brought the issue to the legislative table.[150] Like its counterparts in the rest

[145] See J Gold, J L Robson, O Kahn-Freund, W Breslauer (1937-1938) 1 Mod Law Rev 296 at 303; S Wiren "Testator's Family Maintenance in New Zealand" (1929) 45 LQ Rev 378; J Mackintosh "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 J Comp Legis & Int'l L 3d ser 13.

[146] HL Parl Deb, vol 71, cols 42-43 and 45, May 1928 cited in J Dainow "Limitations on Testamentary Freedom in England (1939-1940) 25 Cornell LQ 337 at 345-346.

[147] FP Walton "Notes, Lord Astor's Bill, Lord Haldane and the Scots Law" (1929) 11 J Comp Legis & Int'l L 3d ser 269 at 269.

[148] J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277 at 287.

[149] For discussion of the 1938 English Act 1938, see E Bodkin "Testator's Family Maintenance (1941) 23 J Comp Legis & Int'l 3d ser 155. For discussion of the legislative history, see RD Oughton, Tyler's Family Provision (2nd ed, Professional Books Limited, Oxford, 1984) at 9-18 and J Dainow "Limitations on Testamentary Freedom in England, above n 146 at 344-357.

[150] RD Oughton, Ibid, at 9.

of the commonwealth it was described as social legislation, a recognition that "*private property was also a function of society and should not be employed to the detriment of its interests.*"[151] To like effect:[152]

> *The Act makes the first breach in the doctrine that a testator may, through mere caprice, turn loose his dependents upon the public for support. This statute reflects a growing consciousness in the minds of English legislators that the patrimony is something of a family affair and that freedom of testation - however desirable it may be as a general principle - should not obstruct the interests of society which require that a testator should make adequate provision for his surviving family.*

It was also thought it would act as a signal to people to do the right thing and impress upon testators the duty they owed to family members.[153]

The 1938 Act imposed restrictions on the right of adult children to apply for provision. The right to apply was restricted to sons under 21, unmarried daughters or adult children who were incapable of maintaining themselves by reason of some mental or physical disability. The Act also contained restrictions on the type of relief that could be awarded. Awards were for periodic payments only unless the estate was less than 2000 pounds in which case capital payments could be made. There were also statutory restrictions on quantum. Given these restrictions Plucknett considered the Act "*extremely timid*" but at the same time: "*There can be no denial that it reverses the attitude adopted just over two centuries ago, and that once more it recognises the family as being of paramount importance in the law of succession.*"[154]

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[151] J Gold et al, above n 145 at 296.

[152] J Dainow "Limitations on Testamentary Freedom in England" above n 146 at 337.

[153] J Gold et al, above n 145 at 303-304: The Act would "*impress on the minds of testators the moral responsibility they owe to their families, and to warn them that if they fail in their duty there is an Act which can be invoked to ensure that justice is done."*

[154] T Plucknett, Concise History of the Common Law (5th ed, Butterworths, London, 1956) at 744.

Other commentators saw it as reflecting Mill's views as to what a child could expect from his parents:[155]

> *As Mill points out, the only morally justifiable claim which a child has against its parent is to education and training which will fit it for a successful life. The Inheritance Bill to some extent recognises this narrower claim, since its provisions operate not in favour of all sons, but only those who are minors or are through mental or physical incapacity unable to earn a living.*

B. Case Law

The initial approach was one of caution, the powers to be used in exceptional circumstances only.[156] Widowers rarely succeeded. Widows were usually successful but given the statutory restriction on quantum awards were modest.[157] Even unmarried daughters faced an uphill battle after WWII, reflecting a changed attitude that they could work and support themselves.[158]

The Law Commission undertook a review of succession law in the 1970s and as part of the review reconsidered the place of adult children.[159] It considered whether the legislation should extend to all children and recommended that it should. It rejected an approach that would limit the right to apply to children under 18 or "actual dependence" as it would preclude a claim being made against the estate of a parent who had unreasonably refused to support an adult during his lifetime where it would have been morally appropriate to provide such support.[160] It also saw potential hardship arising from the continuation of a restriction on the right of married women to apply. It considered that the duty to support

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[155] J Gold et al. above n 145 at 296. Mill's views are summarised by R Atherton *"Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children"* (PhD Thesis, University of New South Wales, 1993) at 17.

[156] RD Oughton, above n 149 at 18-19.

[157] Ibid, at 19.

[158] Ibid, at 166.

[159] Law Commission, Second Report on Family Property "*Family Provision on Death*" (1974) Law Com No 61.

[160] Ibid, at [75].

passed to the husband on marriage but there may be cases where a woman was a widow with young children whose husband had not provided for her. It recommended removing the restriction but thought this would not lead to any substantial increase in claims "*since a married daughter whose husband is supporting her would not be likely to make a claim or succeed in an application against the estate of her deceased parent.*"[161]

The recommendations were implemented in the Inheritance (Provision for Family and Dependants) Act 1975.[162] The Act's scope, however, is still confined to maintenance. It provides that reasonable financial provision for all applicants, other than surviving spouses, means "*such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance*."[163] (The main change was in relation to spouses whose claims were widened from "reasonable maintenance" to the wider test of "reasonable provision").

The Act lists a number of factors relevant to the inquiry.[164] These are largely financial in nature but the list also includes the deceased's "*obligations and responsibilities*" towards the claimant and ends with the catch all of "*all the circumstances of the case*."[165]

There was some initial doubt over what maintenance covered. The Court adopted a broad view in *Re Christie*[166] where provision was made for a married, able bodied son in apparently comfortable circumstances. The Judge stated: [167]

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[161] Ibid, at [78].

[162] For a discussion of the case law and principles established under this Act See RD Oughton *Tyler's Family Provision* (2nd edition, Professional Books Limited, Oxford, 1984); G Miller *The Machinery of Succession* (2nd ed, Dartmouth, Aldershot, England, 1996); A Borkowski *Textbook on Succession* (2nd ed, Oxford University Press Oxford, 2002); S Ross *Inheritance Act Claims: Law and Practice* (Thomson Sweet & Maxwell, London, 2006) G Miller, "Provision for Adult Children Under the Inheritance (Provision for Family and Dependants) Act 1975" [1995] Conv 22; and A. Borkowski "*Re Hancock (Deceased)* and *Espinosa v Bourke*: Moral obligation and Family Provision" [1999] CFLQ 305.

[163] Inheritance (Provision for Family and Dependants) Act 1975, s1(2)(b).

[164] Ibid, s3(1).

[165] Ibid, s3(1)(d) and (g).

[166] *Re Christie (dec'd)* [1979] Ch 168.

[167] Ibid, at 174.

> *In my judgment, the word "maintenance" refers to no more and no less than the applicant's way of life and well-being, his health, financial security and allied matters such as the well-being, health and financial security of his immediate family for whom he is responsible.*

This interpretation was rejected as too wide by Oliver J in *Re Coventry*[168] on the basis that Parliament, by providing a more generous standard for spouses, must have considered maintenance to be more limited than anything reasonable for the applicant's financial wellbeing.[169] There, the deceased's son was self employed and capable of maintaining himself although his circumstances left little margin for expenditure on anything other than the necessities of life. This was not enough to justify further provision and his claim failed. It was upheld on appeal where Goff LJ stated:[170]

> *What is proper maintenance must in all cases depend upon all the facts and circumstances of the particular case being considered at the time, but I think that it is clear on the one hand that one must not put too limited a meaning on it; it does not mean just enough to enable a person to get by; on the other hand, it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare.*

This more restrictive approach as to what constitutes maintenance is now the accepted one. The standard depends on the facts of the case and circumstances of the claimant but it is not confined to mere subsistence or tied to any level provided under social security legislation.[171] However, it is about living expenses rather than economic security generally. In *Re Dennis (Deceased)* Browne-Wilkinson J stated:[172]

> *[t]he word maintenance connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him. The provision that is to be made is to meet recurring expenses, being expenses of living of an income nature.*

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[168] *Re Coventry* [1980] Ch 461.

[169] *Re Coventry* [1980] Ch 472F.

[170] *Re Coventry* [1980] Ch.48C-D.

[171] RD Oughton, above n 162 at 102.

[172] *Re Dennis (Deceased)* [1981] 2All ER 140 at 145 (Chancery division).

C. A Moral Duty?

Initially, decisions under the 1975 Act suggested adult children had to show not only a need for maintenance but in addition, that the deceased owed them a moral duty, that there were some special circumstances over and above need that meant an order should be made. The oft cited case in this respect is *Re Coventry (Deceased).*[173] In the High Court Oliver J held that blood ties and need alone did not give rise to a moral obligation:[174]

> *It cannot be enough to say "here is a son of the deceased; he is in necessitous circumstances; there is property of the deceased which could be made available to assist him but which is not available if the deceased's dispositions stand; therefore those dispositions do not make reasonable provision for the applicant." There must, as it seems to me, be established some sort of moral claim by the applicant to be maintained by the deceased or at the expense of his estate beyond the mere fact of a blood relationship, some reason why it can be said that, in the circumstances, it is unreasonable that no or no greater provision was in fact made*.

Oliver J thought a special claim could exist if the son had looked after the deceased at considerable expense to himself or was actually dependent on him, still in education or incapable of earning a living.[175] His judgment was upheld on appeal[176] but in the Court of Appeal Goff LJ rejected that a moral claim was a condition precedent and stated that Oliver J had been misinterpreted on this point and that his comments about a moral duty were based on the facts of the particular case.

Nevertheless, the case was applied subsequently as authority for the principle that adult children had to show a moral obligation on the part of the deceased.[177] It was not until *Re Hancock,*[178] that the position was clarified. There, the Court of Appeal held that a moral

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[173] *Re Coventry* [1980] Ch 464.

[174] Ibid, at 475 D-E.

[175] The Applicant was 47 and had lived with his parents from the age of 33. He was in full time employment. He argued that he elected to stay at home instead of pursuing a career in the navy so he could look after his parents and by living with them he had also forgone the opportunity to buy his own home.

[176] *Re Coventry* [1980] Ch 461 at 478.

[177] See cases discussed at A Borkowski *Textbook on Succession*, above n 162 at 283-284.

[178] *Re Hancock deceased* [1998] 2 FLR 346 (CA).

obligation was not a condition precedent to an award and again, that *Re Coventry* had been misinterpreted in that respect. In *Re Hancock* the applicant was the deceased's daughter. Five of her siblings shared in the estate but she did not. At the time of her father's death she was aged 58, had no earning capacity and was in poor circumstances. By the time of the hearing she was 69. The Court held that although the applicant had failed to demonstrate the existence of any moral obligation on the part of the deceased towards her, or other special circumstances, her resources fell short of what was required for her reasonable maintenance. It awarded her periodical payments of £3,000 per year. (In New Zealand her economic circumstances alone would have established the moral duty).

Delivering the judgment, Butler-Sloss LJ pointed out that although section 3 does not contain the word "moral", the phrase "*any obligations and responsibilities*" in section 3(1)(d) was wide enough to include "*any moral obligation to the applicant owed or accepted by the deceased*." However, she went on to say that if a child was self supporting and likely to be so for the foreseeable future, then they were unlikely to succeed in the absence of some additional moral claim.[179] In Britain then the overriding principle seems to be "*Why should anybody else make provision for you if you are capable of maintaining yourself?*"[180] Ross notes that the answer to that, based on the case law, may be found when the deceased has made a promise to the applicant, the deceased has encouraged the claimant to believe he will benefit on the deceased's death and the claimant has acted to his disadvantage in reliance on that, or when the deceased had an obligation to maintain the claimant which existed at date of death.[181] (These are all things that would enhance a claim in New Zealand but are not a condition precedent to it).

Cases of parental neglect are also treated differently. Whereas in New Zealand they have formed the basis of a claim, without any causation between neglect and earning capacity, the approach in England is different. The court is required by section 3(1)(d) of the Act to

[179] Ibid, at 350**.** The principles set out in this case were recently affirmed in *Illot v Mitson* [2011] EWCA. An apparently more generous approach to an adult daughter in this case can be explained not as a departure from these exisiting principles but as a decision on the facts. The daughter was not in a good financial position, the estate was relatively large and the bulk of it had been left to charity.

[180] *Re Dennis* [1980] 2 All ER 140 at 145 per Browne-Wilkinson J.

[181] Ross, above n 162 at [6-050].

have regard to any obligations and responsibilities which the deceased had towards the applicant. In *Re Jennings*,[182] Nourse LJ said that as a general rule this referred to obligations and responsibilities which the deceased had immediately before his death.[183] In that case, the testator's neglect of the claimant (aged 50) as a young child was considered irrelevant. In the same case Henry LJ said: "*[i]t is not the purpose of the Act of 1975 to punish or redress past bad or unfeeling parental behaviour where that behaviour does not still impinge on the applicant's present financial situation.*"[184]

At every turn it seems it is more difficult for adult children to succeed in England. Another example is in relation to disentitling conduct. One author describes it as "*unthinkable*" that courts will not disregard such conduct, contrasting the position with that in Australia. He says that where claims have been rejected, the courts have "*fortified their conclusions by referring to the misconduct of the applicants.*"[185] This is not a sympathetic environment for lame ducks and black sheep.

IV. Conclusion of Comparative Case Law Analysis

A. Wording or Perception?

The Chapter's first purpose was to see how adult children fared in Australia, British Columbia and England and if there were differences, whether these could be attributed to judicial perceptions of the legislation's scope, differences in wording, or both. It concludes that it is both, but that judicial perception is a significant factor.

That differences in wording can account for the difference in approach is seen most clearly in the comparison with England. When placed together, maintenance and support are often used interchangeably and convey something more than basic needs: "*The use of the two terms serves to amplify the powers conferred upon the court.*"[186] This was the general

[182] *Re Jennings* [[1994] 3 WLR 67 (CA).

[183] Ibid, at 74.

[184] Ibid, at 79.

[185] RD Oughton, above n 162 at 180.

[186] *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191 per Callinan & Heydon JJ at [115].

experience in New Zealand, Australia and British Columbia until *Aucutt* distinguished the two concepts to justify the broader "emotional" application. When they appear by themselves, they are viewed quite differently. In England, we have seen that maintenance is viewed as covering day to day living expenses and with more of an emphasis on actual economic need at the time of the application.

Another illustration of this is provided by the Ontario experience which changed its original formula from "*adequate provision for future maintenance*" to "*adequate provision for proper support.*"[187] The courts there have seen this as signalling a broader approach to claims.[188] As one commentator noted:[189]

> *It will be apparent that there is an important difference between "future maintenance" and "proper support". The former expression connotes an allowance (typically periodic) which will enable the dependant to provide the necessaries of life, whereas the latter gives wider latitude.*

The use of "reasonable" rather than "proper" in the English legislation may also account for the difference in approach and the different emphasis on morality. Perhaps it is more objective, less value laden than "proper", thus sending a signal that a narrower application is required.[190]

The other obvious example is the presence of "equitable" in the Wills Variation Act. It is that word which has anchored the decisions in British Columbia. But arguably, the approach in that jurisdiction is just as much to do with judicial perception of the Act's scope as it is to do with the appearance of "equitable" in the discretionary formula as some

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[187] Succession Law Reform Act, S.O. 1977, c. 40, now RSO, 1980.

[188] See *Re Davies and Davies* 105 DLR (3d) 537 (Surr. Ct.).

[189] A.H. Oosterhoff "Some Aspects of Support of Dependants" 12 ETR-CAN-ART 197.

[190] Note that Manitoba amended its legislation, substituting "reasonable" for "proper" for this reason.

judges saw nothing significant about that word. In *Shaw v Regina and Saskatoon Cities and Toronto General Trusts Corporation* (No. 3), the Court stated:[191]

> *Speaking generally I do not think that the differences in language used in describing `maintenance' can be said to make any difference in the construction to be placed on the various statutes.*

In *Re Lawther Estate* the Court stated:[192]

> *The words `just and equitable' appear in the British Columbia Act…as they do in the Saskatchewan Act… Duff, J .[in Walker] seems to use these words as controlling `adequate' but I do not think he intended to give the section any other interpretation than he would have given to the words of the Manitoba section which in substance are `adequate for proper maintenance and support considering all the circumstances of the case'* .

Accordingly, "*as thinks fit*", or "*in all the circumstances of the case*", or such provision as the court thinks "*ought*" to be made - the various expressions of the discretion - could all mean the same thing, particularly once coupled with the "wise and just testator" test. It is therefore arguable that it is the judicial perception of "equitable" that has created the approach in British Columbia. Other judges may have seen it differently.

Even judges across time, in the same jurisdictions, can view the legislation differently. This has been as true of British Columbia and Australia as it has been of New Zealand. The jurisdictional formula "*adequate provision for proper maintenance and support*" is capable of a narrow or broad reading. The presence of "proper" and "adequate" in all three jurisdictions has been the mechanism by which the courts have adopted the broader and relative approach to financial need as the judicial perception of the Act's scope moved away from an initial maintenance focus.

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[191] *Shaw v Regina and Saskatoon Cities and Toronto General Trusts Corporation* (No. 3) (1944) 1 WWR 433 (Sask CA) at 439 per Martin C.J.S cited in G Bale "Limitations on Testamentary Disposition in Canada" (1964) 42 Can Bar Rev 367 at 379, footnote 53.

[192] *Re Lawther Estate* [1947] 2 DLR 510, cited in G Bale, Ibid. See also *In Re Gray Estate* [1950] 2 WWR 854 and *In Re William Estate*, (1951-52) 4 WWR 114 cited in G Bale, Ibid.

Yet despite similar origins, similar jurisdictional formulae and similarities in the type of factors taken into account, differences soon became apparent. Again, this shows that legislation conferring a discretion on a court, and using open textured words, creates a situation where different people can take different views of the legislation or place emphasis on different parts of the statutes. The High Court of Australia, the New Zealand Court of Appeal and the Supreme Court of Canada have all seen the legislation differently. Neither Australia nor British Columbia has seen support as encompassing emotional support. Only the New Zealand Court of Appeal has placed a different emphasis on that word.[193] Further, the focus in Australia and New Zealand has largely been on the words "maintenance and support" - with little emphasis on the "as thinks fit" part of the section. In British Columbia the courts have focused less on the requirements of "maintenance and support" and more on the discretion given to the court to make such awards as it thinks "*equitable*". This is despite the fact that there are statements in British Columbia and Australia to the effect that the judgment and discretion aspects of the test are the flipside of each other.[194]

The difference in perception is also seen in the way the British Columbia courts have adopted the equitable claim. It was far less self conscious about taking this approach, adopting it early on, rejecting criticisms outright and, in *Tataryn*,[195] simply stating that adopting community attitudes removes uncertainty as far as possible. While *Aucutt*[196] reached the same position, it was with less "boldness" and it took longer in coming. It was not until 2000 that the Court expressly adopted an emotional aspect to "support". There are similarities, however, in that the moral duty test appears to lead to the same result as that in British Columbia in earlier decades - *Re Harrison*[197] is an example, the Court there holding that the claimant had a right to participate in the estate - but several decades passed before

[193] A search of Australian cases did not show any case following *Aucutt* on that point. Only one cited it but held it was not relevant to the issue at hand: *Lohse v Lewis & Anor* [2004] QSC 36.

[194] *Tataryn v Tataryn* [1994] 2 SCR 807. In Australia, see *Goodman v Windeyer* (1980) 144 CLR 490 at 502.

[195] Ibid.

[196] *Williams v Aucutt* [2000] NZLR 479.

[197] *Re Harrison* [1962] NZLR 6.

the interpretation of support reflected the basis of many of the earlier decisions. The Court in *Aucutt* also tried to accommodate some of the criticisms levelled at the judicial approach and acknowledged the difficulties of discerning community attitudes. There was no such equivocation in *Tataryn*.

The absence of the words "proper" and "support" have obviously contributed to the narrower approach in England but even so, there is still an argument that judicial perception of the Act's scope accounts for the less liberal treatment of adult children there. The courts have stated that "*reasonable*" introduces a value judgment: "*Once one introduces the word ought one inevitably introduces in some way or other some moral question.*"[198] Again, in *Re Coventry*, Goff LJ said that this is "*a question of fact, but it is a value judgment, or a qualitative decision.*"[199] But the courts have approached that value judgment or question of morality quite differently, as something that places an onus on the claimant, rather than a duty on the testator. Witness the cases where economic hardship in itself does not give rise to a claim. In New Zealand, British Columbia and Australia, the economic need would be synonymous with the moral claim.

It could be a case of chicken or egg - the wording creates the caution which creates the overall perception - but there is still a sense that the judicial mindset in England is quite different. Adult children fare differently in a number of areas that are not directly related to the more restricted concept of maintenance. Even those in need still have to establish that they should receive provision, disentitling conduct is treated more harshly and parental neglect is not always a bolstering factor. The difference is captured in a statement of one judge that it was "*monstrous*" to suggest that a father was under an obligation to provide for a married daughter.[200] It is difficult to conceive of any judge in New Zealand using a similar adjective, even in the early days of the jurisdiction. (Part of the explanation could also be that the 1975 Act is seen as a continuation of the 1938 legislation so the courts in England were starting from a restrictive approach generally).

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[198] *Re Fullard* [1982] Fam, 43 at 47 D-E (CA) cited in RD Oughton, above n 162 at 89.

[199] *Re Coventry* [1980] Ch. 461 at 487.

[200] *Re Homer, Rann v Jackson CA*, unreported, 6 November 1978, cited by RD Oughton, above n 162 at 163.

The British experience also shows that despite the more precise mapping of the legislation's scope, there was still an initial divergence of approach as to how broadly maintenance could be defined and uncertainty as to the role of the moral duty, again a case of judicial perceptions differing.

B. Is New Zealand Out of Sync?

The comparative analysis also shows that New Zealand is not alone in applying the Act in an ethical way, divorced from economic concerns. It is alone in seeing "support" as the mechanism for addressing this type of claim. However, there is a general tone in the British Columbia cases that emotional support, love and affection, come into play via "proper", as well as in the second stage of exercising the discretion; these are factors which inform what is equitable. In *Price v Lypchuk Estate*, for example, when discussing the concepts of adequate and proper, the Court stated:[201]

> *[w]hat is adequate and proper in relation to one set of family qualities of love, care and dependence may be inadequate or improper in relation to a different set of family qualities, even where the size of the estate and the needs of the applicants are identical. And all these considerations must be taken into account at the first stage set out in s. 2, that is, at the stage of determining whether the will makes "adequate" provision for the "proper" maintenance of the applicant, as well as at the second stage of deciding, if the answer to the first question is "no", what would be "adequate, just and equitable" in the circumstances.*

In this case, the Court refused an award to adult children who had not seen their father for 35 years because the lack of a relationship precluded the development of any "*mutual feelings of moral responsibility*." The parent/child relationship was "*drained of moral obligation. And it received no replenishment from the kind of mutual support through life's discouragements that continuous association or regular communication might have provided*."[202] This has overtones of *Aucutt* - ie a child's path through life is supported by

[201] *Price v Lypchuk Estate*, 37 DLR (4th) 6 (BCCA.) at 13-14 (sub nom *Price v Knutson*).

[202] Ibid, at 16 per Lambert J.A., with whom Taggart J.A. concurred. Esson J agreed as to the law but found for the claimant on the facts.

economic and emotional assistance, and the reference in *Lypchuk* to "*mutual support*" parallels Blanchard J's reference to "*support given for support rendered.*"[203]

New Zealand and British Columbia are also on the same page when it comes to the basis of the non-economic application. In *Tataryn* the court pointed to "*equitable*" as capable of a broad or narrow application while *Aucutt* used "*support*" but both emphasised that need was not a requirement in the Act itself, that the Act's purpose extended to such provision, and that community attitudes supported it. The evolution of the case law is also used to justify the approach in both cases.[204] The British Columbia approach may appear to go further in that it recognises a right to a share in the estate per se, rather than having to establish the right to support. The difference, however, is more apparent than real given that in both cases the nature of the relationship between the deceased and the applicant, contributions to be repaid, support for support rendered, the size of the estate and competing claims, all come into the equation but just via different words. In neither jurisdiction is the right automatic.

Nor is the New Zealand Court of Appeal out on a limb in viewing support in an emotional sense. In Ontario, (where adult children cannot apply as of right), the courts have also held that "support" in the equivalent legislation has a broad meaning.[205] Commenting on the meaning of "support" in the Ontario statute, and the fact it was a deliberate change from the previous test of "maintenance" one court, after looking at dictionary definitions, held:[206]

> *These definitions lead me to the conclusion that "support" as used in the SLRA includes not only furnishing food and sustenance and supplying the necessaries (sic) of life, but also the secondary meaning of giving physical or moral support*.

[203] *Williams v Aucutt* [2000] NZLR 479 at [69].

[204] *Tataryn* v *Tataryn* [1994] 2 SCR 807at 816-818; *Williams v Aucutt* at [35]-[40].

[205] Dependants' Relief Act RSO 1970 c126, s2(1) referred to "future maintenance". The current legislation is Succession Law Reform Act, RSO 1980, c. 488 s 65(1) which refers to "proper support".

[206] *Re Davies and Davies* 105 DLR (3d) 1980 537 (Surr. Ct.) at 542.

This broader approach to support has been followed in subsequent cases.[207] (Interestingly, in Australia, in relation to a similar test, emotional dependence has been rejected).[208]

Writing in 1939 one commentator, examining the various statutes in Canada and New Zealand, considered those of New Zealand and British Columbia as being identical in substance and policy. Contrasting them with more restrictive statutes, limited to maintenance and dependants, he stated:[209]

> *The "family maintenance" statutes on the other hand seem to present a different idea. They imply that the testator has not an unlimited right in the property accumulated in his or her ownership at the time of his or her death, but that this property must be shared with the members of the family to provide for their adequate, just and equitable maintenance after the testator's death. This is tantamount to a declaration of a family interest in the property of the testator.*

The judgments in *Aucutt* and *Tataryn* recognise the family connection and see the legislation as allowing a claim on that basis alone. Australia has not applied the legislation in this way despite it coming from the same stable but perhaps the difference in approach is not as great as it may seem. Its case law recognises the family connection in the factors it is prepared to take into account, even if not in the interpretation of "maintenance and support". Contributions to the deceased's welfare, the nature of the relationship with the deceased, blood ties and duties that flow from that, expectations of an inheritance based on station in life are all factors connected with the idea of family rather than the claimant's basic economic needs. In *Vigolo v Bostin*[210] the Court stated that the legislation is "*imbued with concepts of entitlement and disentitlement, claims and obligations, propriety and fitness, related to questions of inheritance.*"[211] In the same case, it talked of "*reciprocal*

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[207] See the discussion of this in AH Oosterhoff "Some Aspects of Support of Dependants", above n 4 at 197. Oosterhoff submits the *Davies* approach is too wide and sees the duty as encompassing *financial* support only.

[208] Atherton citing *Benney v Jones* NSW Court of Appeal, 18 June 1991 in *Family Provision*, above n 36 at [3.57].

[209] B Gray "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 233 at 238.

[210] *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191.

[211] Ibid, at [8] per Gleeson J.

claims and duties based upon how the parties lived and might reasonably expect to have lived in the future."[212] The reference to entitlement, expectations and inheritance parallels the language of the British Columbia approach. The idea of "reciprocity" also echoes the approach of Blanchard in *Aucutt*. (Ironically, the High Court in *Vigolo* saw its approach to community attitudes as similar to that in *Tataryn* but did not go on to mention the Supreme Court's affirmation of the equitable basis of its jurisdiction in that case).[213]

In summary, the case law of all three jurisdictions expresses similar views about family responsibilities and dynamics and in that respect New Zealand is not out of sync with the jurisdictions that allow adult children to apply as of right and under similar jurisdictional formula. It is this ethical, non economic basis for adult children's claims that have come under attack and in this respect, New Zealand is not alone either. Just as judges have viewed the legislation differently, both within and across the jurisdictions, so have academic commentators and law reform bodies. A brief overview of the tone of the commentary follows. This sets the scene for discussion of the various law reform reports and whether any of this has flowed through into legislative amendments. It may offer fresh insights to inform the New Zealand debate about justification generally.[214]

V. Commentary on the Interpretative Approach

As described in Chapter Three's literature review, the general content of the academic commentary in Australia and British Columbia is the same as that seen in New Zealand. Early on the tone was complimentary. Writing in 1955, Laufer commented: "*The courts have responded to this broad delegation of control over private property rights with characteristic self-restraint. They have emphasized the limitations on their functions rather than stressed their powers.*"[215]

[212] Ibid, at [114] per Callinan & Heydon JJ.

[213] Ibid, at [19] per Gleeson J.

[214] This is the focus of Chapter Seven.

[215] J Laufer above n 1 at 289.

At around the same time, mid century, an Australian lawyer also saw the courts exercising their discretion in a way that achieved justice in the individual case, but not with abandon as if the judge was a "*medieval Chancellor suitably modernized*."[216] The commentary then changed. Now commentators lament a lack of certainty, worry that the moral duty test is too nebulous and point to the multitude of purposes the legislation is used to fulfill. In British Columbia, an article written in 1964 saw the family provision legislation in Canada as a "*reasonable adjustm*ent" between the rights of the family and the rights of the testator.[217] Several decades later that same commentator was accusing the courts of distributing palm tree justice.[218]

While the shift in attitude is similar, the difference in judicial approach has influenced the extent and tone of the commentary. In Australia, for example, the criticism seems more muted, the general tone being that the purposes behind the Act are muddled and that there is lack of certainty. Suggestions to remedy that make adult children the main casualty.[219] In contrast, the "equitable" approach in British Columbia has come in for more strident criticism. Amighetti, for example, argues that the Act's purpose is clear - maintenance for dependants - and that the purpose has become nebulous as a result of poor interpretation:

[216] C McLelland "Fifty Years of Equity in New South Wales - A short Survey" (1951) 25 ALJ 344 at 345 cited in R Atherton *Family Provision*, above n 36 at [2.128].

[217] G Bale "Limitations on Testamentary Disposition in Canada" (1964) 42 Can Bar Rev 367 at 397.

[218] G Bale "Palm Tree Justice and Testator's Family Maintenance - The Continuing Saga of Confusion and Uncertainty in the B.C. Courts" (1987) 26 ETR 295 (hereafter G Bale "Palm Tree Justice"). In describing palm tree justice, Bale adopts the following definition from R.E. Megarry in a note on *Rimmer* in (1953), 69 LQ Rev 11 at 13: "*Freed from compliance with any legal rules or fixed principles, the Cadi does what seems to him to be justice on the facts of the particular case. It may be that no two Cadis would decide any one case in precisely the same way, for individual views of what is fair and just vary more than individual views of the law; yet for that reason it is rarely possible to say with certitude that the decision of any Cadi is wrong."*

[219] See, for example, R Atherton *Family Provision*, above n 36 at [2.65] where she notes a tension in the case law as to the objectives of the legislation which generates confusion and tension and suggests restricting it to maintenance in her "Recommendations" following [4.70]. As to uncertainty generally, there is also some brief comment in De Groot and Nickel, above n 36 where, referring to a comment that the case law had developed to a point where lawyers could advise clients with accuracy, it states: *"[t]his represents the triumph of hope over experience."* at [1.5].

"*Interpretation has resulted in the "undignified spectacle of the courts indulging in schizophrenia*."[220]

The finger of blame is pointed squarely at the judiciary. Describing *Walker* as an "*exceedingly unfortunate decision*"[221] Bale argues the uncertainty arises from the judiciary taking a subjective approach based on moral duty as opposed to an objective one based on maintenance and support. He criticises its failure to use an objective benchmark for assessing "equitable" - such as actuarial evidence or the rules of intestacy - and sees the following consequence:[222]

> *As a result the Wills Variation Act is like a ship adrift at sea without an accurate compass or dependable rudder. It is suggested that the B.C. Courts have not simply limited testamentary freedom to provide proper maintenance which is clearly mandated by statute but have also done so to provide a fair distribution of the estate which is not so mandated.*

Others accused the courts of judicial activism "writ large".[223] The judiciary has also had something to say. In *Price v Lypchuk Estate*, the minority judgment stated: [224]

> *The law developed in those cases is in a state of disarray such that it is all but impossible to predict with any confidence what result will flow from any given state of facts, and unduly difficult to decide what that result should be.*

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[220] L Amighetti, above n 15 at 28, borrowing from A Mellows in his analysis on case law in another branch of succession law in A Mellows *The Law of Succession* (3rd ed 1977) at 70-71.

[221] G Bale "Palm Tree Justice", above n 217 at 1.

[222] G Bale "Palm Tree Justice", above n 217 at 12. See also G Bale "Testator's Family Maintenance Legislation and Actuarial Evidence in Determining Awards", (1981) 9 ETR 235 and G Bale "Duty Owed to Able Bodied Adult Children under Testator's Family Maintenance Legislation and the Need to Adopt an Objective Approach (1983) 14 ETR 35.

[223] A Oosterhoff "Succession Law in the Antipodes: Proposals for Reform in New Zealand" (1997) 16 Est & Tr J 230 at 236. Selden said of equity "*Equity is a roguish thing. For the law we have measure…equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot*": Pollock (ed) *Table Talk of John Selden* (1927) at 43, cited in Oosterhoff at 236, footnote 32.

[224] *Price v Lypchuk Estate* 37 DLR (4th) 6 (BCCA.) at 17 (sub nom *Price v Knutson*).

Several criticisms have also been levelled at *Tataryn*. It has given "*judicial sanction*" to the uncertainty and confusion, failed to set out concrete guidelines and failed to discourage adult children from applying. [225] (These critics considered a statement that it was confined to an extension of inter vivos support obligations would send this message).

In England the commentary is less critical perhaps because the courts have taken a narrower approach, although some lament this and point to the New Zealand experience as a fairer outcome for adult children.[226] The "moral duty" concept comes in for criticism, however: "*It is far better for the courts to discard the generalised test of 'moral duty' which obscures the real basis of their decisions and give more explicit, if less prosaic, reasons for their decisions.*"[227]

The above criticisms are not new and have been raised time and time again. At the heart of these criticisms - uncertainty, the erosion of testamentary freedom, the lack of symmetry with inter vivos obligations - is the place of adult children in family provision legislation. Suggestions that the law should be made more certain and that the moral duty test be discarded, have adult children as the main casualties. The criticisms have been considered by law reform bodies over the past few decades. While the law reform bodies of New Zealand, Australia and British Columbia now all agree that adult children should not be entitled to apply as of right, this has yet to find its way into legislative amendments.

VI. Law Reform Opinion

A. Canada

The Law Reform Commission of British Columbia first considered the place of adult children in its 1983 report on succession rights.[228] The majority recommended that the

[225] R Freedman and C Berardino "Case Note *Tataryn v Tataryn Estate"* (1995) 15 Est & Tr J 6.

[226] A Borkowski *Textbook on Succession* (2nd ed, Oxford University Press Oxford, 2002) at 282-286 and N Peart and A Borkowski and "Provision for Adult Children on Death -The Lesson From New Zealand "[2000] CFLQ 333.

[227] RD Oughton, above n 161 at 91.

[228] Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983).

basis of the court's jurisdiction to make an order should not be changed.[229] It acknowledged a lack of certainty in the existing law but considered this disadvantage was outweighed by the ability to do justice in a particular case. Nuisance claims could be penalised by costs. It also noted that the Act was capable of a narrower application and that the wide discretion was largely of the judiciary's own making. This was a factor in favour of retaining the jurisdiction as it showed that judges found the broad discretion useful to avoid injustice.

It also acknowledged that "moral duty" was a nebulous concept but it was nevertheless an important part of the jurisdiction. Freedom of testation was secondary to the moral obligation to adequately provide for family and "*a broad discretion under the Wills Variation Act is essential to protect the integrity of the family unit by ensuring that what is really family property is not disposed of to strangers.*"[230] It considered financial need unnecessary, it being one of many factors that should be taken into account. Symmetry with inter vivos obligations was not necessary either as death altered such obligations - the deceased no longer requires his estate.[231]

Overall, the committee thought justice was more often done than not and the risk of litigation was something that had to be accepted, the price to pay. It also noted that if one door of challenge closed, another could open, citing the possibility of people challenging the will on the grounds of incapacity or undue influence. One member of the Commission disagreed. In his "Reservation" Mr Close criticised the judicial approach for lack of certainty and the courts for replacing the text - "proper maintenance and support" - with the more general "moral duty" test.[232] He considered the courts ill equipped to deal with moral obligations and criticised an approach that lacked symmetry between lifetime obligations and those on death. Again, it is adult children who are the main targets here and Close

[229] Ibid, at 78.

[230] Ibid, at 77.

[231] Ibid, at 75.

[232] Ibid, at 152-157.

went on to give his support to age restrictions on children, citing the approach of the Alberta and Manitoba law reform bodies.

In Alberta only dependants of the deceased can ask a court to override a deceased's will and only certain adult children qualify as dependants - those children who are over 18 and who are unable by reason of "mental or physical disability to earn a livelihood."[233] Age restrictions had always applied in Alberta but the Alberta Institute of Law Research and Reform reviewed this position in a 1978 report.[234] It recommended that no change be made as parents fulfilled their obligations to non disabled children by supporting them until 18 or until they completed training or education. It saw symmetry with inter vivos obligations as the basis for the jurisdiction as this created "*a clear and rational foundation for determining when a judge should have the power to make provision for the support of another from the deceased's estate.*"[235]

The Manitoba Law Reform Commission followed Alberta's lead. In its *Report on the Testator's Family Maintenance Act*,[236] the Commission criticised the ability of self supporting adult children to succeed in claims and the uncertainty and inconvenience it saw as flowing from the moral duty test, the effect of which was to transform family protection "*in substance…from a mere limitation on testamentary power into an emerging principle that children are entitled to a share of their parent's capital estate.*"[237] It recommended that family protection be restricted to a support function and duties after death should be consistent with those inter vivos. To reinforce the "dependence" basis of the jurisdiction it also recommended omitting "proper" from the legislation.[238] The jurisdictional formula in

[233] s1(d) Family Relief Act RSA 1980 cF-2 and now and s1(iv) of the Dependants Relief Act RSA 2000 cD-10.5

[234] Alberta Institute of Law Research and Reform Family *Relief*, Report No 29 (1978).

[235] Ibid, at 25-6.

[236] Manitoba Law Reform Commission *Report on the Testator's Family Maintenance Act*, Report No 63 (1985).

[237] Ibid, at 26.

[238] Ibid, at 52.

Manitoba is now "*reasonable provision for maintenance and support.*"[239] Eligibility is limited to minor children or those under 23 still in education or vocational training. The Commission also recommended inserting a clear purpose provision to reinforce that the Act's purpose was to continue inter vivos support obligations but the current Act does not contain one.

In British Columbia, the issue of adult children was again in the spotlight in a 2009 report.[240] This time the Commission favoured restricting adult non-spousal claimants to those unable to become self-supporting because of illness, mental or physical disability, or other special circumstances. The main reason seems to be that it would bring the jurisdiction in line with the legislation in most other Canadian jurisdictions. It considered that a temporary inability to be self-supporting due to full-time enrolment in an educational or vocational training program should be a basis of eligibility. These children could apply under the "special circumstances" category. The report led to a law change in the form of the Wills and Estates and Succession Act 2009. That Act substantially implements the Commission proposals but not in relation to adult children.[241]

B. Australia

Several of the Australian jurisdictions have looked at the issue. In 1974 the New South Wales Law Commission questioned whether the legislation still reflected the right basis on which to make awards.[242] It seems it did not elicit the response hoped for in terms of canvassing public attitudes. It therefore concluded that the time had not yet come for

[239] s2(1) The Dependants Relief Act C.C.S.M. c. D37.

[240] British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (2009).
[241] Section 60 Wills Estates and Succession Act 2009 retains the same provision.

[242] Law Reform Commission New South Wales *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974). For detailed discussion of this report, see R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD, Thesis, University of NSW 1993) Chapter 8 and R Croucher "Law Reform as Personalities, Politics and Pragmatics -The Family Provision Act 1982 (NSW):A Case Study" (2007) 11 Legal Hist. 1.

change and that the jurisdictional provision should remain, rather than being restricted to maintenance as in England:[243]

> *It and its counterparts have been closely analysed by superior courts and its purpose and application are well understood. Legislative intervention at this stage would not, in our view, add to the utility of the Act. Indeed, it may do harm*.

The outcome of this inquiry was to "*to extend existing principles, not to supplant them*,"[244] and the main change brought about by subsequent legislation was to extend the range of eligible applicants, including de facto spouses, former spouses and a general category of applicants based on dependence.

More recently, the catalyst for review in Australia has been a desire for uniform succession laws and the place of adult children has come up in this context. In its 1997 report,[245] the National Committee for Uniform Succession Laws recommended limiting the Act's scope so that the only applicants would be a husband, a wife, a non-adult child (under 18), and a person for whom the deceased person had a special responsibility to make provision. This could include those claimants whom the deceased had an obligation to maintain, who were disabled or studying full time.[246] In reaching this conclusion it cited extensively from Atherton's Expert Report[247] (where she recommended restricting the jurisdiction to maintenance) and the New Zealand Law Commission's 1997 report.[248]

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[243] Law Reform Commission New South Wales *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974) at [5.7].

[244] Ibid, at [1.6]. The extension of classes of eligible claimants has also been the main thrust of legislative amendments in all relevant jurisdictions.

[245] National Committee for Uniform Succession Laws *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997).

[246] Ibid, at 10-14.

[247] R Atherton *Family Provision*, above n 36.

[248] *Succession Law: A Succession (Adjustment) Ac*t (NZLC R 39, 1997).

The latest report of the Committee follows these recommendations and is accompanied by draft legislation incorporating them.[249] Non adult children can still apply as of right; adult children cannot.[250] The Bill provides that anyone can apply on the basis that the deceased owed them a responsibility to provide maintenance, education or advancement in life.[251] Adult children would therefore have to apply under this category.

The Bill was modelled on legislative amendments made to Victorian legislation in 1997.[252] In that state, the relevant legislation no longer includes a list of specific categories of people who are eligible to apply for family provision. Instead, the legislation provides that the court may order that provision be made "*for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.*"[253] The legislation specifies the various matters to which the court must have regard in determining whether the deceased had responsibility to make provision for a particular person. Eligibility is now based on circumstances rather than status but most of the circumstances are simply codification of the existing approach. Adult children, however, still come within the jurisdiction, the courts seeing it as a continuation of the old approach in relation to them. (This is despite the fact a report commissioned by the Attorney General recommended limiting children's claims to maintenance).[254]

New South Wales has since adopted the model Bill provisions but again, interestingly, not in relation to adult children. They are still able to apply as for right, without restriction.[255] In commenting on the model Bill, its mover noted that it would require adult children to

[249] National Committee for Uniform Succession Laws *Family Provision, Supplementary Report to the Standing Committee of Attorney Generals* QLRC Report No 58, July 2004.

[250] Others who can apply of right are : the wife or husband of the deceased person at the time of the deceased's death, a person who was, at the time of the deceased person's death, the de facto partner of the deceased person, a non-adult child of the deceased person: Clause 6(1).

[251] Clause 7(1) of proposed legislation.

[252] Administration and Probate Act 1958 (Vic) (introduced in 1997 by s 55 of the Wills Act 1997).

[253] s91 Administration and Probate Act 1958 (Vic).

[254] R Atherton *Family Provision*, above n 36.

[255] s57(c) Succession Act 2006.

demonstrate the deceased's responsibility to them which could lead to lengthy and expensive litigation. This was not desirable hence the rejection of the proposal.[256]

C. England

In a 2009 report looking at intestacy and family provision on death, the Law Commission notes that adult children may feel "disinherited" when left out of the will, particularly so when the testator has remarried.[257] It did not, however, recommend legislation addressing this sense of grievance as it was difficult to find a justification for it that was clear and consistent with the rest of the law:[258]

> *Simply removing the maintenance requirement in the case of children would leave the courts with an impossible task: how would they determine what would be reasonable provision? One or more criteria would have to be stated. "Fairness" by itself would be of no assistance; at best it would enable the courts to reach whatever conclusion is thought, subjectively, to be fitting in a particular case without stating whether the judge is to be guided by what the deceased might have wanted, what the survivors might want, what "ought" to have happened, and so on.*

And:[259]

> *[I]t has to maintain consistency with the law's general position on a parent's duty towards both young and adult children. The 1975 Act matches the general position in terms of the duty to maintain and provide for one's dependent children. Beyond* that the law imposes no *duty to provide for an adult child.*

Its preliminary view is that no change is needed.

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[256] Extract from New South Wales Legislative Council Hansard and Papers, Thursday, 26 June 2008 (Proof). Second Reading of Succession Amendment (Family provisions) Bill 2008. The Hon. John Hatzistergos Attorney General, Minister for Justice.

[257] Law Commission *Intestacy and Family Provision Claims on Death, Consultation Paper* No 191, 2009 at [5.1]-[5.19].

[258] Ibid, at [5.13].

[259] Ibid, at [5.15].

VII. Conclusion: Fresh Insights?

The Chapter's second purpose was to see if commentary and law reform reports from similar jurisdictions could provide New Zealand with fresh insights as to the place of independent adult children in the family provision jurisdiction. Unfortunately, the commentary and law reform literature provide none. The tone of the commentary and the law reform reports are almost identical and they draw on each other's work. The law reform commissions of Australia, British Columbia and New Zealand are united in their opposition to claims by adult children.[260] They see legislative amendment as necessary if the approach to adult children is to change. That is one lesson that can be learned from the comparative approach.

We have seen that perceptions differ as to the scope of the legislation and so if Parliament wants to map the boundaries of family provision legislation, it will need to do so far more explicitly. If it wants to keep it open, but financially focused, it may have to adopt a purpose provision to that effect. If it wants to remove notions of morality, it would be wise to leave out the word "proper" and carefully phrase the discretionary language. Even the more precisely mapped boundaries of the English legislation have caused some uncertainty, albeit to a much lesser extent. If self supporting adult children are to be removed altogether, age restrictions need to be introduced and provision made for minor children would have to be limited to maintenance until adulthood (itself defined).

One commentator has suggested that the statute itself provides limits and that a return to the language would lead to predictable awards.[261] The courts are not going to, that much is clear. Any change would have to be driven by the legislature. But this is just one part of a much bigger question and that is the basis for awards to adult children at all, their justification from a philosophical rather than a statutory interpretation point of view.

[260] Ironically, if the proposals were adopted it would mean that adult children would face an easier road in England.

[261] G Bale "Duty Owed to Able-Bodied Adult Children Under Testators' Family Maintenance Legislation and the Need to Adopt an Objective Approach" (1983) 14 ETR 35.

What the Chapter has also shown is that despite the thrust of the literature and commentary being the same across all three jurisdictions, it has been ignored. It is unclear why. Have the respective parliaments rejected the criticisms or have they been too busy to address the issue? (In New South Wales and Victoria we saw a rejection of recommendations that the jurisdiction be restricted to maintenance for dependants, or that adult children had to show a responsibility assumed by the testator, but these issues were decided before legislation was introduced to Parliament).

The same criticisms have been raised for several decades now but the legislatures have not been prepared to move on this issue. As noted, we do not know why. It may well be that the issue is not seen as pressing, the place of adult children being a very small part of the overall reform proposals.[262] The debates in England on the Inheritance (Provision for Family and Dependants) Bill 1975 have been described as "*the most lively and intelligent discussion of the principles of restricting freedom of testation since the original attempts at legislation in the 1930s.*"[263] That debate has not occurred in New Zealand. If it is to occur, it needs to be in a wider framework and give more attention to the validity of the family claim, rather than simply anchoring arguments on testamentary freedom, symmetry with inter vivos obligations and the lack of certainty created by adult children's presence in this jurisdiction. There are other viewpoints - as reflected in the case law discussion of all three jurisdictions - and these should be considered. The family provision legislation can be seen as representing a readjustment between the testator's interests and the interests of the family. The question for future reform is how far in the interests of the family it should go.

[262] The impetus for, and focus of, the reform process generally has been enlarging the classes of eligible claimants to reflect changes in society, providing greater protection to spouses, consolidating various pieces of succession legislation, amending the legislation's application to intestacy and a desire for uniform succession laws. As an example the 2009 report from British Columbia was 300 pages and the position of adult children took up only one.

[263] RD Oughton, above n 162 at 26. See also R Croucher "Law Reform as Personalities, Politics and Pragmatics -The Family Provision Act 1982 (NSW): A Case Study" (2007) 11 Legal Hist. 1 at 24 where she also notes the lack of debate at a legislative level.

Chapter Seven: The Case for Testamentary Recognition of Independent Adult Children

I. Overview

This Chapter puts the case for an adult child's right to testamentary recognition. Chapter Five concluded that the judicial approach was justified in its broadening approach to "maintenance and support" in an economic sense. Practical reasoning, however, could not justify the purely ethical approach to the Act, in particular the application of the Act to include emotional "support". This means that on whatever view of the appropriateness of such recognition generally the Act needs to be changed, thus providing an opportunity for a fresh debate on how adult children should fare in this jurisdiction. Chapter Six provided no fresh insights into the issue generally, the commentary reflecting the same opposition to adult children's claim as seen in New Zealand and yet the case law in those jurisdictions mirrored New Zealand's in its themes of family, reciprocity and entitlement, even if to differing degrees. Are there arguments supporting these themes or is the judiciary on its own? Chapter Five showed that there were some dynamic factors supporting the wider "emotional" approach but these were in other areas of law or policy, and not directly related to this jurisdiction. Can they be bolstered by arguments directly on point?

As noted, the literature and law reform opinion from New Zealand, Australia, British Colombia and England suggests the verdict is unanimous; testators should be able to disinherit their independent adult children. Testamentary freedom is the rallying cry and any erosion that does not reflect a testator's inter vivos obligations towards children must be resisted. But while commentators and law reform bodies pull in one direction, the case law has pushed in another and it reveals a strong desire to recognise the family bond. This is on the basis of status as a child, the importance of the parent child relationship, the expectations that arise from it and the reciprocity of family obligations.[1] The effect of these cases is that testamentary freedom still exists but only once the obligation of recognising the child is fulfilled.

[1] See case law described in Chapter Two and Chapter Six.

It may be an overstatement to say that the judiciary and the commentary represent two opposing philosophical views. Both see a place for testamentary freedom; it is not a case of all or nothing. Rather, it is a case of how far the scales should be tipped in the direction of individual property rights or in the direction of the family. While the commentary would wish the scales to tip more in the property direction, the case law, by recognising the belonging claim, has tipped it in the direction of the family. This has been the subject of much commentary and criticism but adult children have no champion in the New Zealand literature and this represents a gap in the debate. The purpose of this final Chapter is to fill that gap by showing that there are such arguments and that they mirror the judicial justification for such provision in New Zealand. It shows that the debate in New Zealand has been too narrowly focused and in the event of reform, the case for adult children needs to be put. It concludes, however, that neither position has the moral or legal high ground. The debate is evenly poised and ultimately, it is a policy decision for Parliament to make.

In putting the case for adult children we have to look outside New Zealand, Australia, Canada and England and this Chapter looks at the arguments coming out of Scotland, Louisiana and America. Scotland has been chosen as it currently has a system of "forced heirship" which may be under threat. (It was also the system on which Stout based his proposals in the 1890s). Louisiana abolished it in the 1980s. It is in the context of abolition or threatened abolition that defenders become vocal and provide us with the literature to inform the New Zealand debate. America has been chosen because it has no protections for independent adult children and, perhaps in a case of "the grass being greener", commentators there see much merit in systems that protect adult children whether by way of forced heirship or the discretionary model.

The literature from these jurisdictions emphasise the positive arguments in favour of the inheritance rights of adult children. Testamentary freedom is not their touchstone. However, because it features prominently in the debate and is the starting point for many of the critics, the Chapter starts with a brief discussion of the concept and counters, briefly, the arguments against further restrictions on it as they relate to adult children.

The focus is not on economic need, however broadly defined, but about the right to something from the estate based on status as a child. This is where the main debate lies. The arguments for limiting it to economic need are already well canvassed in the literature.[2] It does not seek to prove that one view point is better than another. As noted already, this is a value and policy judgment. But what it does seek to do is ensure that any future debate takes account of both sides of the argument. Related to this, inevitably, is the debate about the mechanism to implement any recognition - a discretionary or forced share model. This is touched on briefly at the end.

II. Testamentary Freedom

Testamentary freedom - the unrestricted power of bequest - was the backdrop to the parliamentary debates set out in Chapter One and has also been a central theme in the case law. It has therefore been a central theme in the current debate about the rights of independent adult children. For the purposes of this Chapter it is not necessary to go into the history or philosophy of testamentary freedom in any detail. Those issues have been discussed and summarised many times elsewhere.[3] Two things are useful to note, however. The first is that while theorists disagree on the source of the testamentary power, they agree in viewing it as a power of bequest; there is no corresponding right in the children or family

[2] Refer to the literature discussed in Chapter Three and in Chapter Six.

[3] For the philosophy of testamentary freedom see R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD Thesis, University of NSW, 1993) at 9-20 (hereafter R Atherton "Thesis"); R Atherton *Victorian Attorney General's Law Reform Advisory Council Expert Report 1 Family Provision* (Melbourne, 1997) at [2.10]-[2.40] (hereafter Atherton, *Family Provision*"); N Peart "The Direction of the Family Protection Act 1955" [1994] New Zealand Recent Law Review 193 at 210-213; D Batts "I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance" (1990) 41 Hastings LJ 1197 at 1217-1222; J Morton "The Theory of Inheritance" (1894) 8 Harv L Rev.161; A Borkowski *Textbook on Succession* (2nd ed, Oxford University Press, Oxford, 2002) at 252-256; RD Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984)) at 31-39 and J Wedgwood *The Economics of Inheritance* (George Routledge & Sons, Ltd, London, 1929) Chapter 8. For succinct histories of testamentary freedom in English Law, see G Miller *The Machinery of Succession* (2nd ed, Dartmouth Publishing Company, Aldershot, England, 1996) at 3-5; RD Oughton, Ibid, at 3-6, G Keeton and L Gower "Freedom of Testation in English Law" (1934-1935) 20 Iowa L Rev 326 at 339-344; J Dainow "Limitations on Testamentary Freedom in England" (1939-1940) 25 Cornell L Q 337 at 337-344 and O McMurray "Liberty of Testation and Some Modern Limitations Thereon" (1919-1920) 14 Ill L R 96.

to receive the property that the testator has a right to give to them.[4] This explains why the debate has generally been seen from the testator's point of view. Second, complete testamentary freedom in English law has been the exception rather than the rule. It existed only for a comparatively short time from 1891 to 1938 and has been explained as the product of historical accident, the result of "*an accidental coincidence of interests which all found freedom of testation convenient and desirable.*"[5] Even then, however, it was seen as a right that came with obligations. This is captured in the oft cited case of *Banks v Goodfellow*:[6]

> *The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given…*

Testators were expected to behave in a certain way. Unrestricted testamentary freedom could only exist in a society which recognised these obligations. Family was seen as the natural recipient of the estate and as such, had a natural expectation of inheritance. It would "*shock the common sentiments of mankind*" and "*violate what all men concur in deeming an obligation of the moral law*"[7] if it was left away from family. The Court went on to say that testamentary freedom could only operate in the context of these obligations:[8]

> *It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations. On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that*

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[4] See D Batts above n 3 at 1219 where she summarises the two camps. The natural law theorists saw it as a natural, and therefore irrevocable, right while the positivists saw it as a civil or statutory, and therefore terminable, right. The naturalists stated it was "natural" for property to go to the family rather than strangers; the positivists preferred property to go to the family to avoid confusion.

[5] See Oughton, above n 3 at 5.

[6] *Banks v Goodfellow* (1870) 5 LR QB 549 at 563.

[7] Ibid.

[8] Ibid.

the distribution of property after the owner's death would have been uniformly regulated by the law itself.

In relation to children, however, commentators have traditionally viewed the moral responsibility as getting them to adulthood and furnishing them with the means necessary to live a successful life through their own exertions. Once they are adults, the obligation ends.[9] Children may have expected something from their father's estate but they were only entitled, in Mill's view, to expect maintenance and education to the extent of making them independent and self-reliant, to "*enable them to start with a fair chance of achieving by their own exertions a successful life*" but no more.[10] If parents wanted to leave their children more than this Mill considered that "*the means are afforded by the liberty of bequest: that they should have the power of showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness*."[11] The commentary and law reform opinion canvassed in the previous chapter and in the literature review reflects this view.

A. Testamentary Freedom and Adult Children

The commentary in New Zealand and similar jurisdictions is written from the side of the testator, from the viewpoint of individual property rights rather than the rights of the family; the power of bequest is at the centre of it. Even the term "forced heirship" - which recognises the right of children to share in a portion of the estate - suggests something negative from the testator's point of view - something they have been compelled to give rather than something freely given.[12] It may take on a different slant when viewed from the child's perspective but first, the negative arguments are countered.

[9] See the summary by N Peart "The Direction of the Family Protection Act" above n 3 at 212.

[10] JS Mill, S Nathanson, *Principles of Political Economy with Some of their Applications to Social Philosophy* (Hackett Publishing Company Ltd, E book, March 2004), Book 2, Chapter 2 at124.

[11] Ibid.

[12] Batts' proposal to protect the rights of adult children appears to address this negative connotation by its name, "protected inheritance", thus viewing it from the child rather than the testator's point of view. See Batts, above n 3 at 1253.

The arguments here are well rehearsed and appear in many texts and articles.[13] Briefly, they are as follows: Testamentary freedom is a logical extension of an owner's freedom to deal with property during his lifetime.[14] Again, Mill is oft cited in this context: "*Bequest is one of the attributes of property; the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure.*"[15] The power is felt, psychologically, to represent an essential element of power over property.[16] Taking away testamentary freedom devalues that right. The next argument is that it is a weapon which can be used by the testator to extract favours from people and to control family members, to command their respect and attention. Locke refers to the power as a "*tye on the obedience of his children*" and to the ability of a testator to leave his estate to those who "*please them best.*"[17] In *Banks v Goodfellow*[18] Cockburn J stated: "*In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attentions which are one of its chief consolations.*"[19]

Bentham also referred to the incentive value of testamentary freedom. A testator can use it to reward dutiful and meritorious conduct; it is "*an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of families.*"[20] Again, if a testator cannot bargain with it the right loses some of its value. The

[13] See RD Oughton, above n 3 at 3-6; Borkowski, above n 3 at 252-256; Batts, above n 3 at 1219-1222; E Cahn "Restraints on Disinheritance" (1936-1937) 85 U Pa L Rev 139; P Haskell "The Power of Disinheritance: Proposal for Reform" (1963-1964) 52 Geo LJ 499; O McMurray, above n 3; Wedgwood, above n 3 at Chapter 8; T Turnipseed "Why Shouldn't I be Allowed to Leave My Property To Whomever I Choose At My Death" (2005-2006) 44 Brandeis LJ 737 at 755-761.

[14] See RD Oughton, above n 3 at 31.

[15] J Mill, above n 10 at 125.

[16] L Friedman "The Law of the Living,The Law of the Dead: Property, Succession and Society" (1966) Wis L Rev. 340 at 352-355.

[17] J Locke, *Of Civil Government, Two Treatises* (JM Dent & Sons, London and Toronto, 1924), Book II, Chapter VI, para. 72.

[18] *Banks v Goodfellow* (1870) 5 LR QB 549.

[19] Ibid, at 564.

[20] J Bentham "Principles of the Civil Code" in *The Works of Jeremy Bentham - Published under the Supervision of his Executor John Bowring* (Edinburgh, 1843) vol 1, 296-364, Pt II, ch 5 "Of Wills" at 337.

final argument is that it is an incentive to industry, for both the testator and his children. A person may decide not to work and build up wealth if they cannot leave it to whomever they wish and for the children, they may become idle and lead useless and unproductive lives if they are guaranteed an inheritance.[21] (Recall the judicial rebuke of the *Allardice* sons).

There are counters to these arguments. The first is that the power of bequest is not a necessary element of property ownership.[22] Further, people are generally more concerned about their property while alive than what happens to it after death and the living have more of an interest in it than the dead. Death therefore renders less essential, not more, the right to dispose of property.[23] The testator's wishes are afforded less respect than their rights while alive so society generally accords greater leeway to restrictions on testamentary dispositions than inter vivos ones.[24] (Again, the issue being that it is not a big step to place one more restriction on it if there are sufficiently strong arguments).

Some find it distasteful that testamentary freedom can be used as a weapon to leverage control and that this distastefulness diminishes the argument.[25] They argue that whatever the reasons for having children, parents must accept that children are independent human beings with their own character and everything that flows from that - likes and dislikes

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See also Nathan "An Assault on the Citadel: A Rejection of Forced Heirship" (1977) 52 Tulane Law Review 5 at 15:*"[C]hildren who know they will inherit from their parents, and who know they cannot be disinherited, can essentially ignore their parents with the confidence that they will nonetheless inherit a large portion of their parents' estates."*

[21] See RD Oughton, above n 3 at 32; Wedgwood, above n 3 at Chapter 8; Batts, above n 3 at 1219-1220.

[22] Montesquieu, for example, and Blackstone, argued that property died with the man. See the discussion in Borkowski, above n 3 at 254-255 and Wedgwood, above n 3 at 51. Even the New Zealand Law Commission acknowledged this in considering proposals for a claim based on capricious or unreasonable disinheritance: NZLC R 39 at [232]-9268].

[23] C Samuel, W Shaw & K Spaht, "What Has become of Forced Heirship?" (1984-1985) 45 La L Rev 575 at 594; Oughton, above n 3 at 31-32. The Court also made this point in *Tataryn v Tataryn Estate* [1994] 2 SCR 807 at 822-823.

[24] Batts, above n 3 at 1220 giving the examples of child support and maintenance obligations, creditors rights, and restrictions on using property for harmful purposes. See also RD Oughton, above n 3 at 33-34.

[25] Borkowski, above n 3 at 254.

strengths and weaknesses. Parents should not force children to conform to their wishes.[26] This sentiment is also apparent in the case law and perhaps also reflected in the leniency in application of the disentitling provisions. In *Wentworth v Wentworth*[27] the Court stated:[28]

> *Respectful submission to paternal wishes, even if they are reasonable, is not a condition of paternal duty…people's behaviour is influenced by their characters in ways from which few can escape, and of all people their parents have had most time and opportunity to influence character, understand it, become reconciled to it and tolerate its workings when unpleasant…The idealised just and wise testator of the present age knows now that he should not expect submission to his wishes, and knows that his children will be themselves no matter whether he likes it or not, and that they will feel free to interact with any hostile or unreasonable conduct of his own.*

It could also be argued that the threat of disinheritance makes some children less inclined to help their parents - the knowledge that they could provide services and be cut out of the will anyway acting as a disincentive.[29]

The incentive to industry arguments have been countered in various places.[30] In essence, the counter is that it fails to acknowledge that there are many other incentives to industry and that people are not likely to sit about doing nothing just because testamentary freedom may not be complete. As to the terrible prospect of idle and libertine sons, this concern may no longer hold in an age where adult children are generally middle aged when their

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[26] Batts, above n 3 at 1267.

[27] *Wentworth v Wentworth, Estate of G. M. Wentworth*, (unreported 14 June 1991) cited by Bryson J in *Wheatley v Wheatley* [2006] NSWCA 262 at [22].

[28] Ibid at [22].

[29] For the contrary view, see J Tate "Caregiving and the Case for Testamentary Freedom" (2008) 42 University of California Law Review at 129. The author argues that most of the historical justifications for testamentary freedom no longer hold but that a modern justification is the ability of the testator to leverage "eldercare" services from their children. See also M Oldham "Financial Obligations Within the Family - Aspects of Intergenerational Maintenance and Succession in England and France" (2001) 60 Cambridge Law Journal, 128 at 177.

[30] For example, Batts, above n 3 at1221; Oughton, above n 3 at 32 and Wedgwood, above n 3 at Chapter 8.

parents die and that the majority of families do not have the type of wealth that would guarantee children the luxury of doing nothing forever:[31]

> *Perhaps in an age when physical danger, rampant disease, frequent wars, plagues, natural disasters, and myriad other life-threatening and shortening factors severely curtailed adult life expectancies, the fear of children "waiting around" to inherit, rather than getting on with their own lives, may have had some currency. In our present era of miracle drugs, life-saving surgery and technology, health and fitness consciousness, and better diet, all resulting in increased longevity, it is not likely that sixty-year-old "children" are holding their lives in abeyance, waiting for eighty-five and ninety-year old- parents to finally die and leave them an inheritance.*

These are the main counters to the arguments put forward by those who see no obligation to independent adult children. But the main point of this Chapter is to put forward the positive arguments. Should the starting point be family or the individual? Can the former be put on a sound footing or is it just an instinctual response that children should receive an inheritance?

III. Arguments for Testamentary Recognition of Adult Children

A. An Instinctual Response or Something More?

Many people may consider it unfair that a parent has disinherited their child. Atherton calls this sense of unfairness a "*gut instinct*."[32] Another commentator says that advocates of a claim based on status cannot place it on any particularised grounds.[33] This was also the thrust of several law commission reports. The Alberta Institute of Law Research and Reform considered that economic obligations and symmetry with inter vivos obligations were the only "*rational*" basis for the law to impose duties on testators.[34] Likewise, the English Law Commission, in its 2009 Report, acknowledged that adult children may feel

[31] Batts, Ibid.

[32] R Atherton *Family Provision*, above n 3 at [1.1].

[33] Oughton, above n 3 at 37.

[34] Institute of Law Research and Reform, University of Alberta, Report No. 29 *Family Relief* (1978) at 25-26.

"disinherited" when left out of the will, particularly so when the testator remarried. However, it would not recommend legislation addressing this sense of grievance as it was difficult to find a justification for it that was clear and consistent with the rest of the law.[35] Even a supporter of adult children says he cannot put it on a rational basis:[36]

> *To begin with, I do not believe that need should necessarily be the exclusive criterion for the determination of the claims of spouse or children. I believe that consanguinity may be justification in and of itself for a claim to some portion of the property of the decedent. I would not attempt to offer a reasoned justification for this position, since it involves considerations which I do not believe have their roots in reason. I believe, however, that it is a view widely held, albeit inadequately articulated.*

Suggesting it is not rational, and that it is a gut level argument, makes it a hard case to sell. Is recognition of individual property rights rational but recognition of the family bond irrational? From the view point of testamentary freedom, the answer appears to be "yes". However, those advocating for adult children seek to place it on a firmer footing. The forced heirship jurisdictions are the place to start. Why do they recognise the rights of adult children to a share of the estate, economic need aside? The next section looks at the arguments that have come out of forced heirship jurisdictions before turning to those coming out of America.

B. Forced heirship

Forced heirship is the automatic right of children to inherit a fixed portion of the estate. It is generally a feature of civil law systems and is a concept derived from Roman law and the concept of legitima portio – the rightful share. It takes various forms and different names.[37]

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[35] England Law Commission *Intestacy and Family Provision Claims on Death*, Consultation Paper No 191, 2009 at [5.1]-[5.19].

[36] P Haskell, above n 13 at 525.

[37] It is called la reserve legal in France, legitim in Scotland, Pflichtheil in Germany. For a discussion of the concept and the forms it can take see O McMurray "Liberty of Testation and Some Modern Limitations Thereon" (1919-1920) 14 Illinois law Review 536; J Gold, T Robson, O Kahn-Freund, W Breslauer "Freedom of Testation"(1938) Modern Law Review at 304-306; J Dainow "The Early Sources of Forced Heirship: Its History in Texas and Louisiana" (1941) 4 La L rev 42; J Dainow "Forced Heirship in French Law" (1940) 2 La L Rev 669; A G Guest, "Family Provision and the Legitima Portio " (1957) 73 LQR 74; Borkowski above n 3 at 257-258 and Oughton, above n 3 at 1-3. For a comprehensive list of countries that

Forced heirship is based not only on dependence but also consanguinity so it recognises a child's right to a share in the estate regardless of age or need. It could be said that in such a system testamentary freedom represents an end point once the family has received its share of the estate. In New Zealand it could be seen as the starting point and the onus is on claimants to prove that provision or further provision is required:[38]

> *The principle of forced succession we might call social. Practically speaking, forced succession means succession within the family - to the wife, children, or other dependants. Forced succession imposes on the testator the obligation to care for members of his family before satisfying any other desires and needs. In a sense it converts private property at death to family property. The unit under the principle of gift is the individual; under the principle of forced succession it is the nuclear family…[T]he law of succession is deeply affected by tension between these two principles.*

In the English tradition the law of succession has been described as an attempt to express family in terms of property.[39] The forced heirship systems could, in contrast, be seen as an attempt to express property in terms of family. As noted above, the focus on testamentary freedom and the power of bequest places the owner of the property centre stage. Forced heirship systems focus on the right to an inheritance, the right to receive property rather than to bequeath it.[40]

The reasons for retaining forced heirship - and therefore the rights of adult children to inherit - have been forcefully put in the context of proposed abolition in Scotland and proposed and then actual abolition in Louisiana.

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have such a system, see R Brashier "Protecting the Child From Disinheritance: Must Louisiana Stand Alone?" (1996) 57 La L Rev 1 at 1, footnote 3.

[38] L M Friedman, 'The Law of the Living, the Law of the Dead: Property, Succession and Society' (1966) 66 Wis L Rev 340, at 362–3.

[39] T Plucknett *Concise History of the Common Law*, (5th ed, Butterworths, London, 1956) at 711.

[40] R Croucher "Editorial Introduction – Succession Law as an Attempt to Express the Family in Terms of Property" in *Families and Estates, A Comparative Study*, R Croucher (ed) (Kluwer Law International, The Hague, Netherlands, 2005).

C. Louisiana

Louisiana still operates a system of forced heirship but independent adult children are no longer protected heirs.[41] The Louisiana Constitution of 1921 and 1974 prohibited abolition of forced heirship but in 1989 the Legislature redefined forced heirs, limiting it to children under 23 or those "*of any age who, because of mental incapacity or physical infirmity, are incapable of taking care of their persons or administering their estates*."[42] In 1993 the Louisiana Supreme Court held that those Acts abolished forced heirship thus violating the Constitution and that redefining the provision according to age or ability was contrary to the principle of equality among descendants within the "forced portion, a defining feature of forced heirship.[43] It stated that equality served important social goals such as the elimination of family litigation, promotion of family harmony, strength and solidarity.[44] The case was followed by a constitutional amendment to give effect to the redefinition. (There are grounds for disinherison in Louisiana).[45]

During the debate, and after the amendments, many commentators spoke out strongly in support of forced heirship. Their arguments are along the same lines. They see forced heirship as "*an institution that expressed and enforced societal and moral values of a cohesive family unit where individualism and selfishness are sacrificed, or at least*

[41] See J Dainow "The Early Sources of Forced heirship: Its history in Texas and Louisiana" (1941) 4 La L Rev 42 The background to the changes is set out in some detail in K Miller "The New Forced Heirship Law, Its Implementing legislation, and Major Substantive Policy Changes of the Louisiana State Law Institutes Proposed Comprehensive Revision of the Successions and Donations Laws" (1996-1997) 71 Tul L Rev 223. See also K Connell-Thouez "The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections Upon the Integration of New Structures into A Classical Civil Law System" (19997-1998) 43 Loy L Rev 1.

[42] La Const art XII. S 5.

[43] *Succession of Lauga* 624 So.2d 1156, 1169 (La. 1993).

[44] Ibid, at 1170.

[45] Disinherison is the act of depriving a forced heir of the inheritance which the law gives him. In Louisiana, the grounds include: (1) injuring, cruelly treating, or attempting to kill a parent; (2) unjustly accusing the parent of a serious crime (one punishable by life imprisonment or death); (3) committing a serious crime; (4) interfering with the parent's attempt to make a will; (5) marrying while a minor without the parent's permission; and (6) failing to communicate with the parent for two years without just cause after attaining the age of majority and knowing how to contact the parent. For a discussion of these rules see M Nathan Jnr "The Unheralded "New" Disinherison Rules" (1999-2000) 74 Tul L Rev 1027.

stifled."[46] Individualism, reflected in the concept of unbridled testamentary freedom, is selfish. Forced heirship recognises this and makes it clear that self interest is not the only basis for succession laws. Advocates therefore see the family as something other than an economic unit, that considerations of love and support are integral to it and that these should be recognised and encouraged by the law.

How is the cohesive family unit fostered by forced heirship? The argument runs that it engenders loyalty to the family because everyone shares in its prosperity and therefore has an incentive to support each other. (Part of this is based on the fact that self interest is the greatest motivator, rather than love). It reinforces that all family members have duties and responsibilities but also rights and privileges.[47] To this end, it has been described as a brief for good children.[48]

There is reciprocity involved, integral to the concept of family, and this also encourages family bonding. Family harmony is supported by creating an expectancy but also by giving a legally protected status to each child and ensuring some degree of equality.[49]

Some have argued that its justifications are largely historical and that it should have been abolished; the family is no longer the economic unit it once was.[50] Security is now based

[46] K Spaht "What We had and What We Lost" (1997-1998) 43 Loy L Rev 43 at 44. See similar arguments in C Samuel, W Shaw Jnr, and K Spaht "What Has become of Forced Heirship?" (1984-1985) 45 La L Rev 575 at 592.

[47] K Spaht, Ibid, at 45. See similar arguments in C Samuel, W Shaw Jnr, K Spaht, and "What Has become of Forced Heirship?" Ibid, at 592. See also M McAuley, "Pro Portione legitima - A Polemic in Defence of Children as Heirs at Law" in R Atherton (ed) *Papers of the International Academy of Estate and Trust Law* (Kluwer Law International, The Hague, Netherlands, 2001) 249-257.

[48] M McAuley "Forced Heirship Redux: A Review of Common Approaches and Values in Civil Law Jurisdictions" (1997) 43 Loy L Rev 53 at 56.

[49] C Samuel, W Shaw Jnr, K Spaht "What Has become of Forced Heirship?" above n 46 at 593.

[50] M Nathan "A Rejection of Forced Heirship: An Assault on the Citadel" (1977) 52 Tul L Rev 5; G Le Van, "Alternatives to Forced Heirship" (1977) 52 Tul L Rev 29 at 44 and R Madoff "Unmasking Undue Influence" (1996-1997) 81 Minn L Rev 571 at 625-628.

on jobs or the welfare state.[51] Further, education has become the main way of passing wealth from the older generation to the younger generation for most American families:[52]

> *In modern times the business of educating children has become the main occasion for intergenerational wealth transfer. Of old, parents were mainly concerned to transmit the patrimony - prototypically the farm or the firm, but more generally, that "provision in life" that rescued children from the harsh fate of being a mere laborer. In today's economic order, it is education more than property, the new human capital rather than the old physical capital, that similarly advantages a child.*

This wealth transfer generally occurs during the parent's lifetime. The attenuation of economic ties within the family and this new process of wealth transfer are seen as arguments against a protected inheritance for adult children. But its supporters point to modern justifications. It is a symbol of family solidarity at a time of increased divorces and greater mobility amongst family members.[53] Divorce threatens the family; forced heirship keeps it together. It is a protection from "*serial polygamy.*"[54] In lamenting its abolition, one commentator wrote: "*Human existence begins with the family; thus, the law must protect the family from each and every onslaught.*"[55]

Further, it is not about parents having to leave something - they could spend all their money while alive. It is about recognition from the estate, if one exists.[56] There is no apology for

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[51] M Glendon *The New Family and the New Property* (Butterworths, Toronto, 1981). Glendon argues that an overall trend in the 20th century is a loosening of bonds between children and parents, an attenuation of ties. Security is now provided by a person's job or the State, not the family.

[52] J Langbein "The Twentieth Century Revolution in Family Wealth Transmission" (1987-1988) 86 Mich Law Rev, 722 at 732. It may well be the case in New Zealand too with increased attendance at tertiary institutions and the fact that most people will be well into adulthood by the time their parents die.

[53] C Samuel, W Shaw Jnr, and K Spaht "What Has become of Forced Heirship?" (1984-1985) 45 La L Rev 575 at 592-593; M McCauley, above n 48 at 56. See also E Cahn "Restraints on Disinheritance" (1936-1937) 85 U Pa L Rev 139 where he states that succession law promotes several interests, including the "*desire to promote family solidarity, the primal cell of communal solidarity*" at 144.

[54] M McAuley, above n 48 at 56.

[55] K Spaht "What We had and What We Lost" (1997-1998) 43 Loy L Rev 43 at 50.

[56] This counters the argument against an inheritance for adult children which runs along the lines that parents should be free to spend their money while alive and enjoy their retirement, the children having already received their inheritance though education. See, for example, R Croucher (previously Atherton) "How Free

recognising the importance of emotional ties, as if it was some irrational basis for the law, some second rate consideration. Such recognition is seen as necessary for the survival of the family and the community as a whole. In this respect, its role is seen as giving people a group identity, a sense of the continuity of life and responsibility to future generations. This function is considered just as important today even though the family may no longer be an economic unit:[57]

> *At a time when man is faced with threats to the survival of the species and to life on this planet, it is once again time to assume responsibility for future generations...To acquire this mentality, individuals need to be supported and nourished 'first, in small family, work and political societies'. Hence, the encouraging of family bonding is demonstrated. The family is necessary to transmit to generation after generation the accumulation of knowledge, experience and values which are essential to the continuation of civilization.*

The Louisiana situation also highlights a another central theme in this chapter and that is that the issue of whether to recognise adult children in succession laws is a value judgment and ultimately, may come down to a vote. As noted above, the *Laugar* case was followed by a constitutional amendment to give effect to the redefinition. This required a two thirds vote of the legislature followed by a state wide popular vote approving abolition.[58] (Several previous attempts to get legislative support failed). The vote followed a nationwide debate on the issue, played out on radio and television.[59] Some say the chief reason for the change was that divorce and second marriages caused people to become

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is Free? Testamentary Freedom and the Battle Between 'Family' and 'Property '" TC Beirne School of Law - Research Seminar Series 2009, February 2009: at 13: "*The liberal philosophers lauded the self-reliant individual and the value in the sweat of the brow as the true justification of property. The expression of that in our law is the right to some ease in our dotage and to let, indeed encourage, our children along their own road in life…It is, indeed, the age of the self-funded retiree."*

[57] C Samuel, W Shaw Jnr, K Spaht, above n 53 at 593 with internal quotes from M Glendon *The New Family and the New Property* (1979) at 240.

[58] K Lorio "The Changing Concept of Family and its Effect on Louisiana Succession Law" (2003) 63 La L Rev 1161 at 1171. (Several attempts failed before the vote went in favour of abolition: Ibid, at 1171).

[59] Those lamenting abolition say they did not have the same resources as the pro abolitionists to mount a successful campaign: C Samuel "Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage" (1997) 12 Tul Eur & Civ LF 183 at185.

estranged from children of their first marriage, with the result that they wanted to leave everything to their current spouse and children of that marriage. Another reason was that migrating retirees from other states found the idea foreign. Personalities also played a role and the abolition was promoted by prominent politicians.[60]

D. Scotland

Scotland still has a system of forced heirship.[61] The surviving spouse or civil partner and the issue of the deceased are each entitled to a fixed proportion of the deceased's net moveable estate irrespective of the terms of any will. These entitlements are generally referred to as "legal rights". The surviving spouse's legal rights are known as *jus relictae* (for a widow) or *jus relicti* (for a widower) while the children's legal rights are called legitim.[62]

In 2007 the Scots Law Commission suggested there should be a debate about whether it be retained for independent adult children and gave a preliminary recommendation that it should be abolished.[63] In its most recent report of 2009[64] it records that opinion was sharply divided on the issue and it could not give a recommendation one way or the other, stating it was a political issue. (Again, this makes it clear that it comes down to a value

[60] C Samuel, Ibid at 184-185. She notes that the politician pushing for reform was himself in a second marriage and feuding with the children from his first. Because his wealth was mainly realty, he was unable to move it out of the jurisdiction. She notes the campaign coincided "*conveniently*" with the popularity of individualist free market philosophy that eschews restraints on transfers of property. Lorio, above n 57 at 1171 states that there was also much support from military personnel from common law states who were serving in Louisiana at the time. She notes that opponents to the change included some older children from first marriages and a small group of law professors: Ibid, at 1172-1173.

[61] See H Hiram *The Scots Law of Succession* (2nd ed, Tottel Publishing, Edinburgh 2007), Chapter Three for an overview. A succinct statement is also found at Scottish Law Commission, *Discussion Paper on Succession*, August 2007 at [3.1-3.10].

[62] Scottish Law Commission *Discussion Paper on Succession*, Ibid at [3.4].

[63] Ibid at [3.100]. The Commission - at [3.78] - calls it a difficult and controversial question but as one commentator notes, the same issue has vexed the commission for twenty years: D Reid "From the Cradle to the Grave: Politics, Families and Inheritance law" Edin LR 2008 12(3) 391at 395. An earlier unimplemented report on succession recommended the same thing but abandoned it on the grounds that it lacked public support: Report on Succession (Scot Law Com No 124, 1990, at [3.10] and [3.11]. A cynic may say that Law reform bodies have an incentive to come up with problems to be fixed, as otherwise the raison d'être of such organisations vanishes.

[64] Scottish Law Commission *Report on Succession* April, 2009.

judgment and the will of the people). It therefore put forward two proposals for parliament to consider - one recognising adult children and the other not. It was unanimous, however, that there should be no change to a discretionary system and both its proposals are based on the forced heirship principles.[65]

In its 2007 report it set out the arguments for and against as follows:[66] The parent's property is to be regarded as family property which should be passed on to their children, particularly when the testator has remarried; parents have a moral duty to pass on their wealth to their own children rather than to more distant relative or strangers; disinheritance signals that the testator no longer regards the child as a member of the family; public opinion shows strong support for protection of children from disinheritance.

The arguments against are familiar: Symmetry with inter vivos obligations is important; children are generally self supporting at the death of a parent; there is a difference between moral duties and legal duties and the law should not concern itself with the former; the obligation to relieve the needs of adult children rests on the state not the parent's estate. Finally, it pointed to the inconsistency between duties to a spouse - which can be dissolved inter vivos - and to children: "*The prospective entitlement of a spouse or civil partner can be terminated before death by divorce or dissolution. There is no legal machinery available for parents to dissolve the parent-adult child relationship so as to prevent their children's claims*."[67]

The Scot's Law Commission's preliminary recommendation, and the arguments it is based on, are very much the same as those seen in New Zealand; they are arguments from the testator's point of view. Taken together, they have been described as a "*statement of possessive individualism, firmly in the liberal tradition.*"[68] The Commission also emphasised economics and needs, ignoring the importance of legal recognition as family

[65] Ibid, at [3.35]. It is currently under consideration by the Scottish government.

[66] Scottish Law Commission, *Discussion Paper on Succession*, August 2007 at [3.94].

[67] Ibid at [3.95].

[68] D Reid, above n 63 at 396.

members per se, suggesting that this is not a strong reason in itself.[69] Again, the commentators have put the other side of the argument which focuses, as in Louisiana, on kinship. There is recognition that sentimental interests come into play with inheritance and an inheritance may have a deep symbolic function for close family members which "*impact on the continuation of relationships, memories and even personal identity.*"[70] Surveys and studies in the United Kingdom suggest people value testamentary freedom but they value more highly their relationships with families. Finally, it has been argued that seeking to divorce moral and legal obligations is a moral or value judgment in itself.[71]

In summary, the arguments from the forced heirship perspective place the family at the heart of a stable society and acknowledge the emotional and symbolic aspects of inheritance. It is important for the law to foster these things and if there are social norms to this effect, to reflect those norms. These core arguments also permeate the literature coming out of America.

E. America

American States, other than Louisiana, have neither a discretionary system nor a system of forced heirship and for years American commentators have been calling for the protection of children, minor and adult, in the context of succession law. Some see merit in the New Zealand system while others prefer a forced heirship system.[72] The arguments supporting either approach, from a substantive view, are the same. Contrary to the New Zealand literature, these commentators view the matter from the child's perspective:[73]

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[69] H Hiram "Reforming Succession Law: Legal Rights" (2008) 12 Edin LR 81 at 84.

[70] D Reid, above n 63 at 397 citing J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (2000) at 15.

[71] D Reid, above n 63 at 403.

[72] Chester and Dayan prefer a discretionary system such as New Zealand's: R Chester "Should American Children be Protected Against Disinheritance" (1997) 32 Real Prop Prob & Tr J 405 and R Dayan "The Kids Aren't Alright" (2009) 17 Cardozo J Int'l & Comp. L. 375. Batts and Haskell opt for a system of forced shares or a "*protected inheritance"*: D Batts "I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance" (1990) 41 Hastings LJ 1197 and P Haskell "The Power of Disinheritance: Proposal for Reform" (1963-1964) 52 Geo LJ 499.

[73] Batts, Ibid at 1253.

> *Inheritance is separated from the concept of property, at least temporarily, and clearly wedded to the concept of family. The child's expectation, right, or interest in the asset is based not on ownership, but rather on relationship to the owner.*

1. The Call of Blood and Symbolism

As with forced heirship advocates, United States commentators focus on the recognition of blood, of status as a child. For them it is important to recognise this, independently of need:[74]

> *As old-fashioned as it may sound, the tie of blood and the responsibility it engenders to offspring is ample reason for protection of all children from disinheritance. It is this tie that forms the moral obligation to children above and beyond the simple demands of support.*

They argue that given the nature of the relationship - the sanctity and inviolability of the parent-child bond[75] - it should be recognised in and of itself. Wealth should not be a barrier to recognition. One argument runs that a child probably achieved wealth because of the education and values provided by the parents; it would therefore be illogical to deny that child an inheritance while providing one to a child who did not achieve as much. It would be a "*negative reinforcement*" of that upbringing.[76] To cover the other base, a child's lack of success may also be attributable to the upbringing. Either way it is the parents' influence which is at play and the child had no control over the situation.[77] (This is reflected in the title of an article putting the case for adult children: "*I Didn't Ask to Be Born*").[78]

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[74] Chester, above n 72 at 434.

[75] The bond is described as more ancient than society itself: D Batts above n 72 at 1197, citing H. Maine *Ancient law*, 132-33, 136, 162 (1970).

[76] D Batts, above n 72 at 1267.

[77] Ibid, at 1266-1267.

[78] D Batts, above n 72.

Symbolism is also important and a child is seen to be emotionally hurt if the importance of the relationship is not recognised at death:[79]

> *The decision to become a parent and accept the attendant joys and responsibilities of the child's dependence is worthy of formal renewal and acknowledgment at the death of the parent. The symbolism of the share may be more meaningful to the child than the substance of it; the cost to the unwilling parent who is now dead is, if anything, negligible by comparison.*

Death, then, is not just about property. It is symbolic and emotionally charged. Death is linked to love, giving, sharing.[80] An emotional legacy can be as important as a financial one.[81] Knowing your parents cared and recognised the bond has been described as "*psychic income*."[82] Studies in America also support the arguments noted in the context of forced heirship that inheritance plays a significant and irreplaceable role in family continuity: "*Inheritance helps perpetuate the family through time.*"[83]

But blood alone is not the only basis for the arguments. It is what flows from the relationship that perhaps places it on a firmer footing, on a more "rational" basis.

2. Expectations and Contributions

Some argue that a child has a reasonable expectancy of an inheritance and it is wrong to disappoint that expectation. One source of this general feeling is the status of kinship, of belonging to a particular family unit. The other is that it is unusual for people to disinherit

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[79] Ibid, at 1223.

[80] P Malaurie "Successions and Donations Under French Civil law", (1990) 5 Tul Civ LF 5 at 5-6.

[81] See J McMullen "Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests" Marquette University Law School Legal Studies research Paper Series, Research Paper No. 06-42, (2007). McMullen traverses case law where unfairness and hurt have flowed from disinheritance and attempts to control the child via testamentary freedom. She notes the bitterness that ensues.

[82] D Batts , above n 72 at 1241 citing a study by M. Sussman, J Cates and D Smith, The Family and Inheritance (1970) at 148. The symbolic nature of inheritance was starkly illustrated by the reaction of two adult children who had been disinherited in favour of the testator's sister and had expressed feelings of unfairness. Significantly, the estate was insolvent.

[83] Batts, Ibid, citing the study at 312.

their children. From these factors arises a reasonable expectancy of inheritance and "*repugnance*" if that is disappointed for no good reason.[84] Expectations also arise from the contributions made by the child to the family unit.[85] (As seen above, this is also the sentiment expressed in the discussion in *Banks v Goodfellow* about testamentary freedom).

According to the contribution theory, an adult child has contributed to a testator's estate by being a part of the family unit. Unless that child has behaved in such a way that would disentitle him or her, they should receive an inheritance. Some arguments address the indirect nature of contributions and others attempt to classify them in the context of a claim based on an implied promise.

As to the first, Batts argues that a child has earned the right to inherit by having to do what the parent wanted during minority and even beyond. Because the child did not ask to be born, and the parents chose to have the child, the parents are responsible for making decisions for the child that the child cannot make herself. While the child has no choice in making the contribution, "going along" benefits the family unit and allows each member to play out their role, thus earning the child the right to share in the family assets.[86]

Others also emphasise the fact that parents have a choice while children do not. Just as the child has acted involuntarily, the parent has acted voluntarily and for this reason, they must accept the obligations that flow from that. This turns the testamentary freedom argument on its head. Instead of seeing it is a restriction imposed, it should be seen as an obligation freely accepted. When someone chooses to marry and have children they restrict their right of testation: "*Forced heirship is really about the obligation to submit to the*

[84] E Cahn, above n 13 at 144.

[85] D Batts, above n 72 at 1224.

[86] D Batts, above n 72 at 1268-1269 gives the examples of moving to a new neighbourhood or city. These moves are usually based on parental objectives such as a better job opportunity or a perceived improved style of living. Sutton, in briefly exploring the community property approach for the Law Commission's 1997 report, made a similar point. He notes that in New Zealand, inherited property is not a bulwark but merely an opportunity. It is built up, increased, lost perhaps or maintained at a cost which is felt by the immediate family: R Sutton, "Law Commission Succession Project: Communal Property?" (1995) 25 VUWLR 53 at 58.

consequences of an act freely chosen."[87] A similar argument is made by Haskell who points to the income taken off us during our lifetimes for the furtherance of society's needs. We consider this an obligation of citizenship rather than an invasion of property rights - ie we are not reluctant to impose restraints when we consider the purpose worthy.[88]

3. Contributions, Reciprocity and Implied Promise

Leslie has argued that contributions and reciprocity can also give rise to an implied promise of an inheritance.[89] In summary, family members have a certain duty to each other and if they have fulfilled their duty there is an assumption that those family members will inherit. If the will disinherits one of the testator's closest family members, that relative may interpret disinheritance as a final breach of the testator's implied agreement to reciprocate for support and care furnished during the testator's lifetime.

Leslie's arguments are based on the premise that the family is not just about economic support but about emotional support and love and are summarised as follows: We rely on family members for support at various times of our lives, from infancy to old age. Individuals cannot develop and thrive without this support. We rely on our families to provide us with these fundamental needs because, unlike other basic needs such as food and housing, we cannot go into the market place and buy them. Instead, we rely on long term "trust" relationships, trust that is "*forged by strict allegiance to the principles of reciprocity*."[90] Family is the main trust relationship. Trust is necessary because we do not articulate our need for support through an ongoing bartering system, a regular tally up of who has done what for whom. It is an unspoken part of family life. Family members rely on this trust and support each other "*both in gratitude for the past benefits of the relationship and out of a sense of expectation of future assistance*."[91] Parents will provide

[87] M McAuley "Forced heirship Redux: A Review of Common Approaches and Values in Civil Jurisdictions" (1997-1998) 43 Loy L Rev 53 at 65.

[88] P Haskell "The Power of Disinheritance: Proposal for Reform" (1963-1964) 2 Geo L J 499 at 511.

[89] M Leslie "Enforcing Family Promises: Reliance, Reciprocity and Relational Contracts (1999) 77 NCL Rev. 551 at 574-575.

[90] Ibid, at 574.

[91] Ibid, at 583.

their children with love and financial support; children will respect their parents and act in a way that pleases them; older children will care for aging parents; and family members will avoid causing harm to each other.[92]

How does this fit in with the right of adult children to receive an inheritance? Leslie points to entrenched social norms. She argues that family members are aware of the cultural tradition of passing wealth intergenerationally and that social norms reinforce the idea that family members who are caring and supportive can expect an inheritance because the vast majority of testators do leave their estates to their closest family members.[93] Family members, through actions and offhand remarks, may reinforce this expectation, and may even make express statements of intention. Second, an inheritance is the final act of reciprocity. So long as family members have taken care of each other, they expect the reciprocal nature of the relationship to continue to the end.[94] Only when a family relationship has seriously deteriorated do most testators disinherit family members and in this case, it may well be that the family member has not performed their side of the bargain and therefore the reciprocity and trust did not exist.[95]

Leslie seeks support for this argument from case law surrounding undue influence, incapacity and will technicalities.[96] She argues that courts, in either upholding the challenge or the will, are enforcing implied family understandings instead of the testator's intent. Courts appear to look at whether the trust relationship existed. If it did, a court will find some reason to invalidate the will thus causing the testator's estate to be distributed via the intestacy statutes to the testator's closest family members. On the other hand if no trust-based relationship appeared to be functioning, either because it never existed or because family members appear to have breached it, courts will honour testamentary freedom and

[92] Ibid, at 581.

[93] Ibid, at 588. Conversely, non-relatives are also aware of that norm and would be less likely to expect (and thus to rely on) the prospect of an inheritance from a close friend in the absence of a clearly expressed statement to that effect.

[94] Ibid, at 588.

[95] Ibid, at 577.

[96] The same argument is made in M Leslie "The Myth of Testamentary Freedom" (1996) 38 Ariz L Rev 235.

give effect to the will. She argues that courts therefore understand that family members may make sacrifices on behalf of each other "*without ever reducing the reciprocity norm to an express understanding*."[97] She is not alone in arguing that there are indirect mechanisms to protect a child's natural right to an inheritance. Madoff also sees the idea of "contribution" as being behind the practice of American courts to use the undue influence doctrine as a family protection device.[98] This doctrine:[99]

> *understood in terms of normative rules….dictates that unless the family has done something to 'deserve' disinheritance, the bulk of a person's property should be left to his or her spouse and blood relatives...If the bequest fails to meet the prescribed norms the will is set aside and the property passes under the laws of intestacy.*

The United Kingdom studies noted above also suggest that families operate according to an implicit contract which is centred on reciprocity. Children look after elderly parents and parents look after children, even into adulthood. The parental obligation has been called a "no exit" one,[100] and it involves emotional and financial sacrifice. As Reid argues, need may be the factor with the very young and very old but rarely it is the source of the obligation.[101]

Because of this reciprocity, and the nature of family relationships, it has also been considered unnatural to disinherit your children.

F. The Unnatural Will

Family succession is considered normal and this is reflected in the fact that legal ambiguities are resolved in favour of family succession.[102] An example is found in our

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[97] M Leslie, above n 89 at 589.

[98] R Madoff "Unmasking Undue Influence*"* (1997) 81 Minn L Rev 571.

[99] Ibid, at 611.

[100] D Reid, above n 63 at 402.

[101] Ibid.

[102] Friedman, above n 38 at 358.

intestacy laws.[103] It is also found, as seen above, in the court's approach to will challenges. A will which neglects close relatives in favour of strangers is considered "unnatural."[104] As Friedman notes, this does not mean it is illegal but it does make it vulnerable to challenge via doctrines such as incapacity or undue influence. The presumption in favour of children is also seen in some American statutes which require the child to be specifically named and disinherited. Evidence of an intent to disinherit must be reasonably clear.[105] Even then, it pays to have a good reason:[106]

> *It can even be argued that when a sane, responsible man disinherits his children in favor of charity or a friend, he must have had a good reason-the children must have sinned against his rights to their respect and their love. If so, he is relieved in the public mind of his obligation to support them and to provide for them by will.*

The case law surrounding undue influence, incapacity and will technicalities therefore suggest a moral obligation to leave property to blood. When wills are challenged in this way courts appear to do the morally justifiable thing by distortion of doctrine. The tone of judicial commentary in this type of case is seen in the following case extract:[107]

> *[W]here as in the instant case the will does violence to the natural instincts of the heart, to the dictates of fatherly affection, to natural justice, to solemn promises, to moral duty, such unexplained inequality and unreasonableness is entitled to great influence in considering the question of testamentary capacity and undue influence.*

[103] Part 3 of the Administration Act 1969 deals with the distribution of intestate estates. Where a testator leaves a partner and issue, the partner takes the chattels and receives a fixed amount (prescribed by the Act) from the estate, with the residuary to be divided one third to the partner and two thirds to the issue: s77. If there is no surviving spouse, the children take all: s77.

[104] See the discussion by H Laube "The Right of a Testator to Pauperize his Helpless Dependants" (1927-1928) 13 Cornell L Q 559.

[105] Friedman, above n 38 at 359.

[106] Ibid, at 365.

[107] *Newman v Smith* 77 Fla. 667, 82 So. 236 (1919) cited in Haskell, above n 88 at 507, footnote 34.

It has been argued that in the absence of protections such as forced heirship or discretionary family provision legislation, indirect challenges will be made to wills that disinherit blood relations in favour of "strangers".[108]

G. Social Norms/Public Opinion

Much of the above discussion suggests there is a well entrenched social norm that parents will leave something to their children. Batts summarises a number of studies carried out over three decades in the United kingdom and America - the latter arguably the most individualist society in the world - which suggest that most people were concerned for their children, whether young or old, and the symbolic significance of inheritance. There was no conscious belief that children should be disinherited. Concern for adult children had increased in the later studies in the face of remarriage, amongst other factors. The studies also suggested that the tension was not so much between testamentary freedom and the rights of children to inherit but between the proper allocation of assets among survivors, especially when the size of the estate was small.[109]

In commenting on the Scots Law Commission Report, Reid notes that despite its emphasis on individualism, studies in the United Kingdom showed that people still see families as important and this is reflected in inheritance:[110]

> *The core thread of fixity is the continuing relationship between parents and children. This remains at the core even in complex families…the parent-child relationship is both predictable and privileged, as is seen very clearly in relation to inheritance.*

This is just as true for adult children as it is for minors and it counters the argument put forward by the Commission that if a testator can dissolve any obligations to a spouse, they

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[108] See Law Reform Commission of British Columbia Report *on Statutory Succession Rights* (1983) at 77; Chester, above n 72 at 426-427. Laufer also argues that the distortion of doctrines - such as undue influence or challenges in relation to capacity - caused by the "subterranean" desire to protect children from disinheritance - would be prevented by family provision legislation: "*Translating this popular desire into statutory policy would make our law more just and…less devious."* See J Laufer "Flexible Restraints on Testamentary Freedom" (1955) 69 Harv L Rev 277 at 314.

[109] Batts, above n 72 at 1242-1243.

[110] D Reid, above n 63 at 400 citing J Finch and J Mason, *Passing On: Kinship and Inheritance in England* (2000) at 59.

should also be able to do so for a child. The important difference lies in this "*fixity*". United Kingdom studies show that the vast majority of people want to leave something to their children. A recent United Kingdom report found that 89 per cent of respondents identified their children as the recipients of their estate[111] and the study disclosed support by parents for the concept of "*intergenerational solidarity*" and an inheritance for future generations.[112] The support was weakest amongst those with no children.[113] Two surveys commissioned by the Scots Law Commission in 1986 and 2005 also suggested that Scots do not support unfettered freedom of testation. There was clear support for an automatic share to go to a spouse but also strong support for the rights of children. Research shows that the parent/child relationship is central to the public's conception of inheritance and that it has little to do with need.[114] There was little to suggest that Scottish parents considered it a legal disability that they could not disinherit their children.[115] The studies also suggest that it is not considered disinheritance when the estate is left to the surviving spouse and that spouse is the child's parent. Inheritance is therefore seen as an intergenerational concept.[116]

Social norms therefore reflect a tendency to leave property to children. Studies can be pointed to as support for the protection of adult children. New Zealand has not carried out any large scale empirical studies on point. A recent Buzz Survey - 2006[117] - suggests people do not expect an inheritance and do not think they should have to leave wealth to

[111] K Rowlingson and S McKay "Attitudes to Inheritance in Britain" (2005), known as the "Rowntree Report" at 48 cited by D Reid, above n 63 at 401.

[112] "Rowntree Report", Ibid, at 40-44, cited by D Reid, above n 63 at 401.

[113] Reid, Ibid.

[114] Ibid, at 401.

[115] Ibid, at 405.

[116] Ibid, at 407 citing Mason and Finch "*Passing On*" at 70-71 and 174. Friedman also argues it is not seen as unnatural to disinherit children when there is a surviving parent: L Friedman "The Law of the Living and the Law of the Dead: Property, Succession and Society (1966) 66 Wis L Rev 340 at 362-363.

[117] This can be found at www.buzzthepeople.co.nz/recent results. This study was cited by Caldwell in support of his argument that people do not want testamentary freedom eroded by the claims of independent adult children and that the Law Commission's summary of community attitudes was more accurate than the judiciary's: see J Caldwell, "Family Protection Claims by Ault Children, What is Going on?" (2008) 6 NZFLJ 4.

their children but it is hard to know whether this was in the context of saving their money to leave to their children or whether if there was something left over, it should be given to children. The majority seemed to agree that it was important to leave wealth to the next generation and anticipated leaving assets to their children or the next generation. Another New Zealand study indicated that while most people valued testamentary freedom they would also leave property to their children in equal shares. The study also highlighted the symbolic importance of inheritance. It was tied to a sense of history and continuity over the generations which helped to shape their identity and that of current family members.[118]

Given the above, it is perhaps unlikely that New Zealand would stray too far from the sentiments expressed in the United Kingdom and America but there is a difference between people wanting to do it and the law making them do it. Arguably, the law should not diverge too far from social norms and from the reality of most people's lives.[119] By legislating for protection it could also promote such a norm if it was considered valuable for society generally and this is what was lamented when Louisiana abolished forced heirship: "*[L]aw also has a role in strengthening the family and this is what we principally lost.*"[120] Abolition was seen as "*a discordant development in a society which pretends to support the family and to promote family values.*"[121]

The other function of the law in such a situation could be to step in when the "normal" family response is not functioning, when the testator fails to conform with the implied promise, to protect the children from the renegade testator, the capricious and spiteful one. The purpose of the law in this context is beyond the scope of this Chapter. There are arguments from all sides and in the event of law change, New Zealand will have to decide on what basis it wishes to proceed.

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[118] D Thorns "*Inheritance Law and Family Change*" Paper presented at a Law Commission Seminar (1995).

[119] D Reid, above n 63 at 404.

[120] K Spaht "What We Had and What We Lost" (1997) Loy L Rev 43 at 50-51.

[121] K Connell-Thouez "The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections Upon the integration of New Structures into a Classical Civil Law System" (1997) 43 Loy L Rev 1 at 41-41.

If law change is to be based on social norms or public opinion, a proper survey should be carried out.[122] If it is canvassing public opinion it needs to be framed in a way that obtains accurate opinions. Questions asked in the abstract are not helpful as circumstances very often change the case. As Friedman noted:[123]

> *It is, for example, one thing to ask people, "Should obscene literature be banned?" and quite another to ask, "Should obscene literature be banned, if the banning must be done by three old ladies sitting in a secret room at city hall?*

Questions framed from the testator's perspective will produce different responses to those framed from the point of view of a child. "Should your parents be able to leave their entire estate to your brother even though you have treated them better?" is likely to elicit a negative response. "Should you have complete freedom to decide where your property goes when you die?" may well illicit a positive one.

V. Family and the Family Protection Act:

Recent New Zealand case law emphasises the importance of the parent child relationship, describing it as having primacy in our society. This gives rise to obligations of financial and emotional support.[124] In *Williams* v *Aucutt*,[125] the Court of Appeal articulated this concept through its application of "*support*" and the judgment discloses two different, but no doubt often related, basis for that. One is status as a child and the need for recognition that goes with that and the other is the reciprocity inherent in family relationships: "*In part it seeks support from the estate for support that has been rendered, albeit it without any promise of return such as would fall within the Law Reform (Testamentary Promises) Act*

[122] Social surveys have assisted the reform of succession law in England. For example, the English intestacy rules were reformed in 1925 as the result of a survey of a large number of wills in Somerset House to see how ordinary people actually behaved: See K Green, "The Englishwoman's Castle - Inheritance and Private Property Today (1988) 51 Mod L Rev 187, 208 and the English Law Commission's proposals on matrimonial property were related to the extensive survey carried out by Todd and Jones, *Matrimonial Property* (1972).

[123] L Friedman, above n 116 at 363, footnote 63.

[124] *Flathaug v Weaver* [2003] NZFLR 730 (CA) at [32].

[125] *Williams v Aucutt* [2000] NZLR 479.

1949" [126] - a final "tally up" as it were. These cases tip the scales in the direction of the family. This is seen not only in its interpretation of "*support*" but also in the case's reference to "*family assets.*"[127] This recognition of family also seems to underlie the dynastic concerns at play when adult children claim and succeed against a second spouse. Peart notes that in such cases courts endeavour to protect the interests of children of former relationships even if it is at the expense of surviving spouses.[128] The case law therefore reflects the arguments coming out of Scotland, Louisiana and America as to why adult children should be protected from disinheritance. (The case law from British Columbia does too, as do some statements from the High Court of Australia).[129] But it is not a sudden and extreme tilt in that direction; it is a continuation of an approach based on family rather than a sudden lurch away from unrestricted testamentary freedom. Acknowledging this is the starting point for future debate.

The Testator's Family Maintenance Act 1900 itself represented a restriction on testamentary freedom in favour of family, even if it had been confined to bare maintenance. (Other restrictions also exist).[130] But from the beginning, there has also been a persistent thread in the case law that the Act was as much about family as about economic need in isolation. The application of the Act to the luxuries in life suggests that family sentiment is at play rather than bare economic considerations. If the latter, it could easily have been confined to bare maintenance or tied to welfare provision. (The fact it has not been may

[126] Ibid, at [69] per Blanchard J. The majority, at [52], articulated it thus: "*A child's path through life is not supported simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to the family and having been an important part in the overall life of the deceased."*

[127] Ibid, at [52]. In the same paragraph it also refers to "*family possessions*." Exclusion from the "*family estate*" also justified an award in *Kinniburgh v Williams (*High Court, Hamilton, M 193/02, Heath J, 16 December 2003) at [37].

[128] N Peart "Awards for Children under the Family Protection Act" (1995) 1 BFLJ 224 at 226.

[129] See the case law discussed in Chapter Six, in particular *Price v Lypchuk Estate* 37 DLR (4th) 6 (BCCA) (sub nom *Price v Knutson*); *Tataryn v Tataryn Estate* [1994] 2 SCR 807; *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191.

[130] Eg Property (Relationships) Act 1976, Part 8 whereby a surviving spouse can elect to take under the will or make a claim under the Act, the entitlement under the latter perhaps being greater, the presumption of equal sharing applying. Rules against perpetuities and bequests contrary to public policy also place limits on it. For a brief discussion, see G Miller *The Machinery of Succession* (2nd ed, Dartmouth Publishing Company, Aldershot, England, 1996) at 7-13.

also reflect the argument, noted above, that death changes things. The testator no longer needs their money so unlike inter vivos support obligations, testamentary ones do not have to be so strictly confined). The discretionary system has never been just about need but about the testator's financial capacity - ie the size of the estate and competing claims - and their duty. Why should there be any obligation to give more than basic needs if not by reasons solely of the child's status as a family member?[131] Even the disentitling provisions suggest the family theme is central to the legislation, that there is an obligation to make provision for maintenance and support unless the claimant has breached the family rules or reciprocal obligations of love, support, respect. The idea of family is also seen in the amendments to recognise more claimants - thus expanding the concept of family.

This idea is also present, in an indirect way, in the Hansard debates leading to the Act's passage in 1900. Several MPs were concerned about the ability of the testator to disinherit a family member if they were undeserving and the insertion of "proper" could be seen as introducing those concerns - ie it may not be proper if you have breached certain family codes. This may also have reflected the position that most people left to family anyway but the concern was that they should not have to if the family member was undeserving.

The inclusion of the word "proper" also served the more significant purpose of tying provision to more than the basics and allowing a range of considerations to come into play. Those factors related to the family - the nature of family relations, the claimants conduct and so on. Even an early commentator saw the legislation as "tantamount" to a right to share in the property.[132] Another, describing the overall tone of New Zealand legislation, including the Family Protection Act, observed:[133]

> *[T]he common and persistent motive has been to use the implement of legislation to encourage and promote stable family life and to protect the welfare of the family and its*

[131] A point also made by P Haskell "The Power of Disinheritance: Proposal for Reform" (1964) 52 Geo L J 499 at 525.

[132] B Gray "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 233 at 238.

[133] J Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens and Sons, London, 1967) at 476.

members… Legislative emphasis on the family seems indeed to be stronger than in most other countries and may perhaps be found to be an authentic indigenous tradition.

More recently another commentator has seen a shift, by the government and the judiciary, towards a concept of family property and away from the concept of individual property rights. Peart cites the court's approach not only under relationship property legislation, the Family Protection Act and to constructive trusts but also government policy in terms of social welfare provision, as shifting more responsibility back to the family.[134] Arguably, our intestacy laws also recognise the rights of children as the natural recipients of the estate; it reflects society's sense of what should be done.[135]

Finally, it could be noted that testamentary freedom itself came with a moral obligation to family. The passages from *Banks v Goodfellow*[136] come to mind. Those passages, despite being decided in a period of unbridled testamentary licence, are consistent with the arguments in support of adult children. There, the Court thought that the common sentiments of mankind would be shocked if family did not inherit, such was their natural and reasonable expectation.[137] It is just that before 1900 and the passage of the Act the law did not recognise it expressly.[138]

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[134] N Peart "Towards a Concept of Family Property in New Zealand" (1996) 10 In'l Journal of Law, Policy and the Family" at 120-126.

[135] Contrast L Friedman, above n 116 at 355. He notes that intestacy laws could be seen as recognition that family are the natural heirs and that a person who dies intestate is voluntarily adopting the statutory plan and saving himself trouble and legal fees but: "*Intestacy is in fact mostly "chosen" only by default. It is a statutory plan adopted by government and imposed for social rather than individualistic reasons on all those who do not make use of volitional alternatives.*"

[136] *Banks v Goodfellow* (1870) 5 LR QB 549. See extracts on point in Chapter One.

[137] *Banks v Goodfellow* (1870) LR5QB 549 at 563 per Cockburn CJ.

[138] Challenges would have had to be made via other doctrines such as undue influence or incapacity. See discussion, for example, in R Atherton, "Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales (1988) 11 UNSW Law Jnl 133. Atherton also discusses the idea that testamentary frredom was premised on a moral obligation in her thesis - R Atherton "Family" and "Property": A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children" (PhD Thesis, University of New South Wales, 1993) at 224-225 and in R Atherton, "The Concept of Moral Duty in the Law of Family Provision - A Gloss or Critical Understanding?" (1999) 5 Australian Journal of Legal History 5.

Seen in the context of the Act's history and case law, in the context of wider legal and policy trends, and in the obligations seen as attaching to testamentary freedom itself, the focus of the recent case law and, in particular *Aucutt*, is not an extreme step. While it may not be justified on a practical reasoning analysis, the issue now is whether we expressly recognise it in our succession laws. What this Chapter shows is that there are valid arguments on both sides; neither position can claim the moral or legal high ground. Differences are irreconcilable and reasonable people can disagree on where the line should be drawn.

VI. Mechanisms for Protecting the Inheritance - the Procedural Aspect to the Debate

If New Zealand is to recognise the right of independent adult children to receive an inheritance, the inevitable question is how. The two choices are a discretionary system like the one New Zealand has now or one based on fixed shares. Just as the substantive tension arises between recognition of individual or family rights, the procedural tension arises between rigid formality and a desire for flexible estate administration and the varying needs of small, medium and large estates. Complexity comes from the desire to balance all these.[139]

Again, the arguments against both approaches have generally been written from the testator's point of view. Up to a point, fixed shares can take away the discretion to punish the undeserving or reward the deserving.[140] Unlimited discretion is seen as going too far into the testator's armchair but discretion is preferred when it is seen as striking a fair balance between testamentary freedom and the rights of *dependants - ie* not independent adult children.[141]

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[139] L Friedman, "The Law of the Living, the Law of the Dead: Property, Succession and Society" (1966) 66 Wis L Rev 340 at 378.

[140] The testator could still use the unrestricted portion to provide more to one child. There are also grounds for disinherison in some jurisdictions, Louisiana, for example.

[141] This is the conclusion drawn from the main critics of the judicial approach outlined in Chapter Three and the conclusion of the Law reform bodies outlined in Chapter Six. The criticisms are not as to the discretionary approach per se, but how it has been applied to adult children. The discretionary system has

Underlying the commentary, however, is a more fundamental objection and that is any erosion on testamentary freedom in the interests of independent adult children. The starting point of the following discussion is that there will be recognition and the debate about the advantages and disadvantages are in that context. The preference for fixed rights or a discretionary approach may be different once that is the starting point.

A. Fixed Shares

The obvious advantages of a fixed share regime are certainty, the convenience of automatic application and a measure of equality among children. This in turn lessens the expense of estate administration and the time taken to wind up estates and also arguably lessens the human cost in that there is certainty from the outset. The system also balances competing interests in a certain way, namely the protection of family members, testamentary freedom and protection of the deceased from accusations after one's death - ie that they were of weak mind, vindictive or incapacitated. It may also minimise indirect attacks on wills on the basis of undue influence and incapacity, the result of which could be the failure of the will and a distribution based on intestacy.

The main disadvantage of a fixed rule scheme is its rigidity. This brings us back to the beginning of our story and the parliamentary debates leading up to the original legislation in 1900. Stout's attempts to introduce a system similar to Scots law were rejected largely because of their automatic application. There was no room for the undeserving child to be disinherited and to distinguish between those in economic need and those well off. However, there are solutions to this. If the starting point is that need is not the only consideration, and may be a diminished consideration because of modern social safety nets and the fact most children will be adults at the time of their parent's death, the need argument is diminished. Further, the testator also has testamentary freedom in relation to his disposable part which can be used to favour more "deserving" children.

The mechanism could also be tailored to make sure that preference is given to minor children before independent adults. Batts, for example, in a proposal called "protected

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been maintained in all jurisdictions which have looked at the issue, the main change, if any, being the restriction on the rights of adult children to apply.

inheritance", gives preference to children who are dependent or disabled.[142] Her scheme also includes objective grounds for disinheritance of a child similar to those in Louisiana, but would not allow disinheritance for subjective reasons. As Batts notes, a child that one family would like to disown might be welcomed with open arms into another family. There are, however, societal norms or expectations that are held generally and to which most individuals are capable of conforming. Such a scheme may then allay the concerns of those who think unworthy children should not receive anything but also protect worthy children from the actions of an unreasonable testator who uses it as a weapon. Haskell also proposes a fixed share regime which may vary according to the need of the children and others have also considered various ways in which the fixed share could be structured. [143]

Difficulties may arise with balancing the claims of adult children with those of the surviving spouse. As the above surveys suggested, it is not considered disinheritance when the estate is left to the surviving spouse and that spouse is the child's parent. Inheritance is therefore seen as an intergenerational concept. Whether forced heirship can still work in a predictable way but have different outcomes depending on whether the surviving spouse is the child's parent or not is an issue that would have to be addressed.

Others reject forced heirship on the basis that it assumes every testator is a potential abuser of testamentary freedom. They would rather see a mechanism in place to correct any abuses of testamentary freedom should they occur - ie a discretionary system.

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[142] D Batts "I Didn't Ask to be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance" (1990) 41 Hastings LJ 1197 at 1253-1263. When there are surviving children of any age, Batts' scheme would automatically set aside for the children one-half of their intestate share of the estate, regardless of the terms of the will, and the children's share would take precedence over that of any other devisee, including the surviving spouse. Needs of dependent or disabled children would take precedence, but adult, nondisabled children could still receive a portion of the statutory fixed share.

[143] P Haskell, above n 131 at 518-525 and C Samuel, W Shaw & K Spaht C Samuel "What Has become of Forced Heirship?" (1984-1985) 45 La L Rev 575 at 595-604. The common theme of all proposals is to allow a sliding scale of entitlement depending on the needs of the claimants. Parallels can be drawn with the way the New Zealand courts apply the Act, ranking the spouse and the more financially needy above others.

B. Discretionary

The advantages of a discretionary system are the flipside to the disadvantages of those based on fixed shares. Family maintenance legislation is seen as less of a restriction on testamentary freedom - the testator is presumed innocent before being found guilty - and it promotes individualised justice. The court can tailor the outcome to the facts of the particular case and distinguish and prioritise between legal and moral obligations.

When first passed, the New Zealand legislation was seen as the perfect solution to the problem of how to balance the rights of the testator and the rights of the family:[144]

> *The legislation is an admirable illustration of the New Zealand propensity for what might be called individual as opposed to general justice - the anxiety to find a solution that will give the fairest result in each case*.

Arguably, certainty at all costs is also an unrealistic goal. Human relations are often messy and do not always fit into a perfect mould. In *The Path of the Law*, Holmes stated:[145]

> *[T]he logical method and form flatter[s] that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man.*

It is the unhappy families that generally appear at the court's door. As Tolstoy noted, "*Happy families are all alike; every unhappy family is unhappy in its own way.*"[146] A discretionary system can account for this. Again, people's preferences for one system or another would no doubt depend on the starting point. If the starting point is that adult children are going to inherit all circumstances permitting, - size of the estate, relationship with testator and so on - a discretionary system may seem preferable. New Zealand commentators have seen the recent Court of Appeal approach as akin to "judicial forced

[144] Robson, above n 133 at 472.

[145] OW Holmes, "The Path of the Law" (1896-1897) Harv L Rev 457 at 466.

[146] L Tolstoy *Anna Karenina*, translated by R Pevear and L Volokhonsky (Penguin Classics, 2004), Chapter One, opening line.

heirship".[147] However, the court is still able to balance and weigh competing claims and it may well be that a child would miss out if the estate were small and the surviving spouse had a paramount claim. The discretion provides a safeguard for the spouse, or others with stronger claims, in this situation.

Several United States commentators see the "family provision" statutes as the better approach if the rights of adult children are to be protected. Chester, for example, argues that the British Columbia approach is a good one, seeing it as predictable and generally respectful of the testator's wishes. (This is after referring to *Tataryn*, making it clear that perceptions differ depending on a person's starting point).[148] The discretionary approach also has other supporters who see the New Zealand and Australian case law as recognising a moral obligation to adult children regardless of need.[149]

As set out in the last chapter, the thrust of the criticisms is that it leads to a lack of uniformity which leads to the law being in disarray. It leads to unpredictable outcomes and therefore fails to provide a basis for negotiation or future planning. Glendon argues it would lead to abuses of the litigation process and makes the law a lottery whose outcome "*depends on the luck of the judicial draw and the competence of counsel and in which the only winners are lawyers.*"[150]

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[147] See R Sutton and N Peart "Testamentary Claims by Adult Children - The Agony of the 'Wise and Just Testator" (2003) 10 OLR 385 at 403-404 and N Peart "Forced Heirship in New Zealand?" (1996) 2 BFLJ 97.

[148] R Chester "Should American Children Be protected Against Disinheritance?" (1997) 32 Real Prop Prob & Tr J 405. Many commentators are critical of *Tataryn* for ignoring the text and purpose of the Act: See discussion in Chapter Six. Chester does not focus on this aspect of the debate - ie statutory interpretation; rather, he looks at the overall effect of the judicial approach to the Act and agrees with the outcome.

[149] For example see R Chester "Should American Children Be protected Against Disinheritance?" (1997) 32 Real Prop Prob & Tr J 405; A Dayan "The Kids Aren't Alright" (2009) 17 Cardozo J. Int'l & Comp L 375 at 391-400 and M Leslie "The Myth of Testamentary Freedom" (1996) 38 Ariz L Rev 236 at 270-273. They summarise the case law on the basis that it emphasises moral obligation and not financial need. This is true even on their reading of the Australian case law - see A Dayan, Ibid, at 397-399. (Chapter Six showed that the Australian case law still anchors the jurisdiction in financial need, unlike British Columbia and New Zealand).

[150] M Glendon "Family Law Reform in the 1980s" (1984) 44 La L Rev, 1551at 1553. Glendon was talking about discretion in the context of property rights between spouses but the comments are equally applicable in this context.

Such decisions, it is argued, should not be left to the idiosyncratic tendencies of individual judges.[151] It also inconvenient as it requires litigation which in turn leads to the depletion of the estate via legal costs. Litigation is also unpleasant for the family, perhaps engendering bitterness and ill feeling that "*poisons the well of family relationships forever.*"[152] Glendon argues that despite the disadvantages of a forced share system, they should not be replaced with a discretionary one which "*ignores the intent of the testator, promotes intrafamily litigation, depletes estates, and brings disarray into a relatively smooth-functioning area of the law.*"[153] Litigation would also take place at a time when the family was still adjusting to bereavement.[154]

The Scots Law Commission objected to such a system on the basis that there are no social norms that would be available to guide the court in the exercise of its very wide discretion and the courts would find the exercise of the jurisdiction challenging. Lord Wilberforce's speech in relation to the English Inheritance (Provision for Family and Dependants) Bill 1975 is sometimes cited in this context:[155]

> *It really is a very difficult jurisdiction. In the first place, it has the disadvantage that it places a premium upon those who can go to good legal advisers, prepare a good legal case and make a good presentation before the court. It certainly encourages disputes between families. It is also a very difficult jurisdiction for the judge to exercise…I can assure your*

[151] See F Hutley "Appeals Within the Judicial Hierarchy and the Effect of Judicial Doctrine on Such Appeals in Australia and England" (1973-1976) 7 Sydney L Rev 317 at 334. Bale also argues that the discretion conferred in this jurisdiction is too wide, the consequences of which are decisions that are "*arbitrary, unpredictable and based on the personal values of individual judges*": G Bale "Palm Tree Justice and Testator's Family Maintenance - The Continuing Saga of Confusion and Uncertainty in the B.C. Courts" (1987) 26 ETR 295 at 306, citing N Bala "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Can J of Fam L 15 at 16.

[152] K Spaht "What We Had and What We Lost" (1997) 43 Loy L Rev 43 at 47.

[153] M Glendon "Fixed Rules and Discretion in Contemporary Family law and Succession law" (1986) 60 Tul L Rev 1165 at 1191.

[154] Scottish Law Commission, *Discussion Paper on Succession*, August 2007 at [3.34].

[155] 358 HL Parl Deb col 933 quoted in R D Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984) at 27-28. (In the same debates, Lord Glaisdale stressed the importance of family ties in arguing in favour of protection for adult children: 359 HL Parl. Deb cols 1067-8).

> *Lordships that when one is sitting there and trying to make up one's mind what is fair and right for a particular man, of whose life history one knows little, what is fair and right to do as regards his divorced wife, his widow, a possible mistress, illegitimate children--to decide how to distribute the merits and demerits between these people is painful and exceedingly difficult. I am by no means certain that one is able in many cases to reach the right result. All one can do is to do one's best and hope that the result is what it should be. But it is not an ideal solution. It is not made ideal by using words such as "fair", "reasonable", "just" and so on. The difficulty of bringing about a good result remains intense*.

Of course, the Supreme Court in *Tataryn*[156] had no trouble articulating what those norms were so again, perceptions differ. Views may also depend on the trust people place in the judiciary on the matter of ascertaining social norms. We return again to the same issues that arose in the context of statutory interpretation and in the literature review - ie our position on such issues turns on our views of the judicial role which in turn, depends on a value judgment; reasonable people will differ.

Comments about palm tree justice and judicial activism "writ large" also come to mind.[157] This criticism of "judicial activism" was also apparent in the theory chapter (Chapter Four) and at some level may represent a general dislike of discretion per se, a lack of trust in judges to perform their task properly. This was one objection to the original English Act, it getting support on the basis that county judges would not get jurisdiction.[158] Glendon has also argued that discretionary systems should be avoided as "good" decisions depend on the quality of judges: "*Discretion may be the better part of valor, but it may not be the better part of the law.*"[159] Chester counters this on the basis that discretion is present at every level and it is simply cloaked better by logic and analysis the higher up the court system

[156] *Tataryn v Tataryn Estate* [1994] 2 SCR 807 discussed in Chapter Six.

[157] Bale describes it as palm tree justice in G Bale "Palm Tree Justice and Testator's Family Maintenance - The Continuing Saga of Confusion and Uncertainty in the BC Courts" (1987) 26 ETR 295. The reference to judicial activism "writ large" comes from A Oosterhoff, "Succession Law in the Antipodes: Proposals for Reform in New Zealand" (1997) 16 Est & Tr J 230 at 236.

[158] Noted in RD Oughton, above n 155 at 17.

[159] M Glendon "Fixed Rules and Discretion in Contemporary Family Law and Succession Law" (1986) 60 Tulane LR 1165, 1197.

you go.[160] He also suspects that underlying the rhetoric about discretion is the real fear - the erosion of testamentary freedom.[161]

If the starting point is that adult children are entitled to an inheritance, unless there is good reason for them not to, some of the arguments around this aspect of the debate may come into sharper focus. It is hard to get to the core of the objection when the overriding argument is that adult children should not inherit. Each has its advantages and disadvantages but a final decision cannot be made until New Zealanders are clear about the basis for its succession laws.

VII. Conclusion

The purpose of this Chapter was to fill a gap in the debate by describing the arguments for providing independent adult children with a right to an inheritance, economic need aside. It noted the ever present tension between family rights and individual rights in the law of succession and provided a fuller context for any further debate in New Zealand by viewing the arguments from the perspective of the family. It also sought to inject some balance into the debate by showing that testamentary freedom is not the starting point; restrictions already exist and it is better to view it in the context of whether a further erosion is justified, rather than suggesting that recognising the claims of adult children is an extreme step and the death knell of testamentary freedom. It also showed that the judiciary in New Zealand has been pulling the jurisdiction in line with these wider philosophical justifications and even though not justified on a practical reasoning analysis, the decisions are not necessarily inappropriate from a philosophical viewpoint.

In 1996 the New Zealand Law Commission stated that good laws of succession should be designed to promote the cohesion of New Zealand families, sustain property rights and expectations and assist efficient estate administration and dispute resolution.[162] It concluded that removing the right of adult children to apply as of right, and restricting any

[160] R Chester, above n 148 at 451-452.

[161] Ibid, at 152.

[162] Discussion Paper *Succession Law: Testamentary Claims* (NZLC PP 24, 1996) at [18].

claim to maintenance, was the way to do this.[163] Viewed from the perspective of the testator, and testamentary freedom, this may have seemed the logical step. What this Chapter shows, however, is that arguments can also be made that these goals are served by recognising the rights of adult children.

Few would argue with the importance of the family unit and that its proper functioning is important for society as a whole. The 1988 Royal Commission on Social Policy noted the importance of family for nurturance, social learning, belonging and identification and that love and support are critical throughout life not just infancy. It also observed that family is different from friendship; obligations, responsibilities and commitments differ and that it is the glue that holds society together.[164] Further, arguments relating to emotional support and harm are considerations reflected in other areas of our legal system.[165] The issue is whether we want to formally recognise this in the law as it relates to adult children.

The extent to which a society restricts testamentary freedom will reflect the values of that society. As an MP said in the debates on the 1900 Act, some will always think legislation goes too far while others will always think it does not go far enough.[166] Nothing changes. This is difficult territory to legislate as the core arguments are based on value and policy judgments. What I consider fair will differ from what others consider fair. What I consider fair may also change based on a number of variables. If the law is to be based on public opinion, proper surveys will have to be conducted but decisions on the appropriate legal response may also be based on other considerations, not just public opinion. Social norms may show that people leave their property to their children. The law could therefore reflect, promote and enforce these social norms. Law reformers could also go for

[163] The Discussion Paper (Ibid) was followed by a report: *Succession Law: A Succession (Adjustment) Act* (NZLC R 39, 1997). The recommendations to exclude adult children from the jurisdiction are reflected in the draft legislation set out in the report - see section 27.

[164] Report of Royal Commission on Social Policy, Volume IV, *Social Perspectives* (1988).

[165] For example, family law and its concepts of the welfare of the child, the psychological harm recognised in ACC law, in victim impact statements and in restorative justice conferences. See the other examples noted in Chapter Five, Part Two discussing the dynamic considerations in support of the court's broader ethical approach.

[166] Cadman, 1900 NZPD vol 113, col 618.

considerations based purely on certainty and efficiency in the administration of justice. This could mean fixed shares for adult children but it could also mean nothing at all. There are many factors that come into play. Whatever future legal responses are based on, the case for both sides has now been put. The verdict is for others to reach.

Conclusion

This thesis asks whether independent adult children are entitled to a share of their parent's estate and on what basis. It was born of criticisms of the current judicial approach to the Family Protection Act 1955. Critics argue that the judiciary's approach to the legislation is unjustified for two reasons. The first is that the courts are applying the Act incorrectly and that the jurisdiction should be confined to destitute adult children or those physically unable to earn a living. But underlying those criticisms is also a broader philosophical objection to the judicial approach; critics argue that testamentary freedom should not be eroded by recognising such a right. The thesis examines whether the critics are correct or whether the judicial approach is justified, both from a statutory interpretation perspective and a wider philosophical one. These two questions have not been answered in the New Zealand literature or those jurisdictions with substantially similar legislation. As conclusions have been carried over from chapter to chapter, and detailed conclusions were stated at the ends of Chapters 5, 6 and 7 in particular, the answers to the two questions posed by the thesis are only briefly set out below.

Over the course of a century or so, the judicial approach to adult children has shifted markedly. In *Re Rush*,[1] the Court thought it would be difficult for an adult child to succeed under the Act and cases in the first decade of the Act's life confined the jurisdiction to those in desperate financial straits or physically unable to earn a living. A century later, the Court of Appeal held that the Act also extended to claims based on "belonging". In 1900 and in 2000 the courts were applying the same statutory test. Statutory interpretation is therefore at the heart of the Act's story and the first, and main, examination of justification was from an interpretation perspective.

Practical reasoning is the best interpretative theory to assess the judicial approach to the Act. It recognises the strengths of the traditional theories but at the same time acknowledges they cannot always solve the interpretative task at hand. To avoid the fiction

[1] *Re Rush* (1901) 20 NZLR 479 (SC).

that they can, practical reasoning requires the interpreter to take each factor into account - text, history and purpose - but to give it only as much weight as it can bear. Practical reasoning's other strength is that it dictates a further interpretative touchstone, namely changes in the wider social and legal climate. This allows the law to keep pace with society, all other circumstances permitting. What the interpreter seeks to achieve is a "fusion of horizons", an attempt to find some common ground between an interpreter at the time the legislation was passed and one today.

As noted, the case law shows the courts applying the Act in both an economic and ethical sense. Application of the tests required by the practical reasoning method show that there can be a "fusion of horizons" between *Re Rush* and its destitution approach, and the "comfort" approach taken a century later in *Auckland City Mission v Brown*.[2] At each shift in the case law an analysis of text, history, purpose and wider changes in society, justifies the courts' broadening approach to economic provision. A key factor in this conclusion is the open textured nature of the statutory test. This means that not only can the concepts of "maintenance" and "support" and "adequate" and "proper" change from case to case, but also across time. Dynamic considerations play a key part in the Act's development. Changes in the wider climate, particularly in relation to gender and society's changing perceptions of "need", have left their mark on the Act.

The evolution of the case law also points to the conclusion in *Brown*. There are no sudden shifts in direction but rather a gradual broadening of approach from 1910 onwards once the pivotal cases of *Allardice*,[3] *Bosch*,[4] *Allen v Manchester*[5] and *Welsh v Mulcock*[6] emphasised that the Act was not confined to destitution and that the test was a relative one.

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[2] *Auckland City Mission v Brown* [2002] 1 NZLR 650 (CA).

[3] *Allardice v Allardice* (1910) 29 NZLR 959 (CA).

[4] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 (PC). *Bosch* was an appeal from New South Wales where the Privy Council approved the approach taken by the New Zealand courts in *Allardice*, Ibid, and *Allen v Manchester* [1922] NZLR 218 (SC).

[5] *Allen v Manchester* [1922] NZLR 218 (SC).

Application of those same tests does not, however, justify the purely ethical application of the Act and there cannot be a fusion of horizons between *Re Rush* and *Williams v Aucutt*.[7] The textual and dynamic arguments provide some support for the approach but are not strong enough to override evidence of purpose; that evidence shows that the Act was directed at economic maintenance and support. The approach can be explained, however. The Court in *Aucutt* took into account precedent, the "life of the Act", to justify its application of support to include "emotional support". Key to this was the evolution of the moral duty test, and precedents such as *Allardice*, *Bosch*, *Allen v Manchester* and *Re Harrison*.[8] These cases all refer to the testator's moral duty. Yet the first three still confined the jurisdiction to economic support and this is the correct approach under practical reasoning's approach to interpretation. The Act was phrased in a way that allowed some ethical factors to come into play - the disentitling provisions and the discretion are themselves recognition of that, as was the insertion of "proper" - but any wider "moral duty" test is not justified on a textual analysis. It was *Re Harrison* which represented a sharp - and incorrect - shift in the case law, expressly holding that financial need was not a requirement. In the 1980s, the courts started adopting this approach and the moral duty test was frequently applied in a broader sense. From here on in the case law evolved in a way that makes the *Aucutt* decision unsurprising. As cases had before, it recognised a claim based on "belonging" but its significance is that it did so based on the words of the Act, rather than a broader moral duty test.

Explanation is not justification, however and *Aucutt* is unjustified. This means the legislation has to be amended. Theories are important for what they say about our constitutional and legal structures and the current approach cannot be defended on even one of the most liberal theories of interpretation. The need for reform provides an opportunity for a fresh look at the issue as the debate in New Zealand is stale. Arguments are all from the view of testamentary freedom and the property rights of the testator and yet the case law

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[6] *Welsh v Mulcock* [1924] NZLR 673 (CA).

[7] *Williams v Aucutt* [2000] NZLR 479 (CA).

[8] *Re Harrison* [1962] NZLR 6 (CA).

puts the opposite case. Is there is any philosophical justification for the judiciary's approach? Do overseas jurisdictions provide us with fresh insights?

A comparative analysis shows how similarly situated jurisdictions have approached their legislation. Themes of family, entitlement, reciprocity and emotional support are present in the case law of British Columbia and the Australian States and Territories, although to differing degrees, showing that New Zealand is not out of sync with similarly situated jurisdictions in terms of case law. Yet nor is it out of sync when it comes to the tone of commentary and law reform reports. As in New Zealand, adult children have no champions in the debate and there are no fresh insights to be gained from a philosophical perspective. What the comparative analysis does show, however, and what is relevant to future reform, is that legislation conferring a discretion on the judiciary, and using open textured words, allows significant room for different perceptions of the legislation's scope. If adult children are to be excluded, or if their eligibility is to depend on their financial position, then the legislation must be more precisely mapped.

Looking further afield, New Zealand's judicial approach finds some support in the literature from forced heirship jurisdictions and from the United States. It shows that there are valid arguments based on symbolism, status, the call of blood, reciprocity, implied promises, and that all these substantially mirror the ethical approach to the case law in New Zealand. The debate in New Zealand has therefore been too narrowly focused and although not justified from a theory of interpretation perspective, the judiciary is not necessarily acting inappropriately from a wider philosophical one.

The conclusion from a theoretical perspective, however, means that the law must be amended to reflect one or other of the philosophical positions. As noted already, if adult children are to be excluded then the legislation will need to be amended to specifically say so. However, if Parliament finds the current position acceptable, and wants to retain the discretionary approach and the existing principles, the problems indentified in the practical reasoning analysis could most easily be overcome by defining support to specifically include emotional support. The Act is then brought into line with the current judicial approach and can be interpreted and applied against the existing body of case law. More

significant changes, however, such as introducing a form of forced heirship, would require far greater discussion and new legislation.

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Appendix A

New Zealand.



ANALYSIS.

Title.
1. Short Title.
2. Deceased person's estate liable for maintenance of wife, husband, or children.
3. Estate to be held subject to order.
4. Limit of time for making applications under this Act.
5. Orders made under this Act not to be mortgaged or assigned.

1900, No. 20.

Title. AN ACT to insure Provision for Testators' Families.

[*9th October, 1900.*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows :—

Short Title. 1. The Short Title of this Act is "The Testator's Family Maintenance Act, 1900."

Deceased person's estate liable for maintenance of wife, husband, or children. 2. Should any person die, leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as to the said Court shall seem fit shall be made out of the estate of the said deceased person for such wife, husband, or children: Provided that the Court may attach such conditions to the order made as it shall think fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this section. "Court" means the Supreme Court or any Judge thereof, and, in the case of deceased Maoris, the Native Land Court.

Estate to be held subject to order. 3. Upon such order being made as aforesaid, the portion of the estate comprised therein shall be held subject to the provisions of the said order.

Limit of time for making applications under this Act. 4. No application shall be heard by the Court unless such application as aforesaid shall be made within six months from the date of the grant of probate of such will.

Orders made under this Act not to be mortgaged or assigned. 5. No mortgage, charge, or assignment of any kind whatsoever of or over such provision made before such order is made shall be of any force, validity, or effect.

WELLINGTON: Printed under authority of the New Zealand Government, by JOHN MACKAY, Government Printer.—1900.

Appendix B

1955 *Family Protection* No. 88

3. An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons:

Persons entitled to claim under Act.
1908, No. 60, s. 33 (1)
1936, No. 58, s. 26
1939, No. 39, s. 22
1943, No. 20, s. 14
1947, No. 60, s. 15

(*a*) The wife or husband of the deceased:

(*b*) The children of the deceased, whether legitimate or illegitimate:

(*c*) The grandchildren of the deceased, being children (whether legitimate or illegitimate) of any child (whether legitimate or illegitimate) of the deceased:

Provided that no claim under this Act may be made by any such grandchild of the deceased, unless—

(i) The parent through whom he is related to the deceased has died (whether in the lifetime of the deceased or subsequently); or

(ii) That parent has deserted or failed to maintain the grandchild; or

(iii) The grandchild and the persons (if any) who have custody of the grandchild do not know the whereabouts of that parent; or

(iv) That parent is an undischarged bankrupt; or

(v) That parent is a mentally defective person within the meaning of the Mental Health Act 1911:

See Reprint of Statutes, Vol. V, p. 743

(*d*) The stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death:

(*e*) The parents of the deceased, whether their relationship is legitimate or illegitimate:

Provided that no claim under this Act may be made by any such parent, unless—

(i) The parent was being maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased immediately before his or her death; or

(ii) At the date of the claim, no wife or husband or legitimate child of the deceased is living.

Claims against estate of deceased person for maintenance.
1908, No. 60, s. 33 (1), (7), (10)
1952, No. 56

4. (1) Notwithstanding anything to the contrary in the Administration Act 1952, if any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act as aforesaid, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons.

...

Terms of order.
1908, No. 60, s. 33 (2), (3)

5. (1) The Court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the Court to disentitle him to the benefit of such an order.

(2) In making any such order the Court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

4. (1) Notwithstanding anything to the contrary in the Administration Act 1952, if any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act as aforesaid, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons.