HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter Nos A68 and A69 of 2002

KATHRYN FAY BARNS	APPELLANT
AND	
MALCOLM PHILLIP BARNS	FIRST RESPONDENT
ALICE ELIZABETH BARNS	SECOND RESPONDENT
MICHELLE LOUISE FISHER AND RHIANNA KATE FISHER BY THEIR NEXT FRIEND PETER CHARLES SYMES	THIRD RESPONDENTS

Barns v Barns [2003] HCA 9
7 March 2003
A68 and A69 of 2002

ORDER

1. *Appeals allowed.*

2. *Set aside the orders of the Full Court of the Supreme Court of South Australia dated 12 October 2001 and, in their place, order that the declaration in order 1 made by the Master be set aside and, in place thereof, declare that the Deed of 2 May 1996 does not operate to render incompetent an application by the appellant or the third respondents for an order for provision out of the estate of Mr Lyle Barns pursuant to the* Inheritance (Family Provision) Act *1972 (SA). Otherwise, order that the appeal to the Full Court be dismissed.*

3. *Set aside the order of Nyland J made on 24 April 2002, dismissing the appellant's claim, and remit the claim for hearing by the Supreme Court.*

4. *Costs of the proceedings before Nyland J and of the disposition of the appellant's application to be determined by the Supreme Court.*

5. *Set aside the order of the Full Court of the Supreme Court of South Australia dated 6 March 2002 and order that the costs of the appeal to the Full Court and of each appeal to this Court of the appellant and all respondents be taxed or agreed on an indemnity basis and be paid out of the estate to his or her respective solicitors.*

On appeal from the Supreme Court of South Australia

Representation:

Matter Nos A68 and A69 of 2002

S W Tilmouth QC with D M Haines QC and M F Crichton for the appellant (instructed by Boltons Lawyers)

M E Shaw QC with C S L Abbott for the first respondent in his personal capacity (instructed by von Doussas)

No appearance for the first respondent in his capacity as executor

No appearance for the second and third respondents

CATCHWORDS

Barns v Barns

Succession – Family provision – Deed between husband and wife – Mutual wills executed pursuant to deed – Effect of deed and wills upon family provision claim – Whether property the subject of deed and wills available as part of estate out of which provision made – Whether deed invalid for reasons of public policy – *Inheritance (Family Provision) Act* 1972 (SA), s 7.

Precedent – High Court and Privy Council – Conflict between two Privy Council decisions – Circumstances in which High Court should depart from Privy Council decisions – Where decision of Privy Council was on a matter of State law in appeal directly from primary judge in a State Supreme Court, rather than from High Court.

Words and phrases – "estate".

Inheritance (Family Provision) Act 1972 (SA), s 7.

1 GLEESON CJ. The appellant is the only daughter of the late Lyle Barns ("the deceased"), who died on 14 August 1998, and Alice Barns, the second respondent. The first respondent is the only son of the deceased and the second respondent. The first respondent is the executor of the will of the deceased, and the second respondent, in the events that have occurred, is the sole beneficiary. The appellant made a claim against the estate under the *Inheritance (Family Provision) Act* 1972 (SA) ("the Act"). The claim was dismissed by the Supreme Court of South Australia. The procedural steps involved in that dismissal have given rise to two appeals to this Court. The central issue in the appeals concerns the effect upon the operation of the Act of a deed made between the deceased and the first and second respondents, and of mutual wills executed pursuant to that deed.

The legislation

2 In his dissenting judgment in *Schaefer v Schuhmann*[1], a decision of the Privy Council on an appeal concerning the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW), Lord Simon of Glaisdale referred to the history of legislation of the kind presently in question[2]. Such legislation was enacted in order to subject freedom of testamentary disposition to discretionary curial intervention in certain classes of case, where moral rights and obligations of support were disregarded. It took as its focus of attention the family, which his Lordship described as "the social and legal institution within which these ... rights and obligations are worked out"[3]. Its purpose was "to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance"[4]. The first such legislation was enacted in New Zealand: the *Family Protection Act* 1908 (NZ). It was followed in New South Wales by the Act of 1916 mentioned above, in other Australian States, and in the United Kingdom by the *Inheritance (Family Provision) Act* 1938 (UK). The present South Australian Act repealed and replaced the *Testator's Family Maintenance Act* 1918 (SA).

3 The general scheme of the original legislation, which is replicated in the Act, but which has since been altered in later legislation in the United Kingdom, and some Australian jurisdictions, was relatively simple. It identified certain classes of person, typically a spouse, parent, child, or sibling, who might have a

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1 [1972] AC 572.

2 See also *Lieberman v Morris* (1944) 69 CLR 69.

3 [1972] AC 572 at 596.

4 [1972] AC 572 at 596.

moral claim upon the bounty of a deceased. Where a deceased who was subject to such a moral claim failed to make adequate testamentary provision for the maintenance, education or advancement of such a person, then the court was empowered, in its discretion, to order that provision for such person be made out of the estate of the deceased.

4 Such legislation was necessarily limited in its effect by the testamentary setting in which it operated. The capacity of a court to give effect to the moral claims of a person was limited by the extent of the deceased's estate, as well as by other competing claims on the deceased's bounty. The legislation had no practical effect in relation to property of which the deceased was not the beneficial owner at the time of death. Thus, a legally effective disposition of property prior to death placed such property beyond the reach of the legislation. This inherent limitation in the legislative scheme was emphasised by a statutory provision that an order made in favour of a successful claimant should take effect as a codicil to the deceased's will executed immediately before death.

5 In recent years, in some jurisdictions, amendments have been made to the legislative scheme. In New South Wales, for example, the *Family Provision Act* 1982 introduced a concept of a "notional estate"[5]. However, the Act with which we are concerned follows the original scheme.

6 Section 6 of the Act identifies the classes of person who are entitled to claim a benefit. Relevantly, they include a child of a deceased person. Section 7 provides that where a person has died domiciled in South Australia owning real or personal property in the State, and, by reason of his testamentary dispositions, or intestacy, a person entitled to claim a benefit is left without adequate provision for proper maintenance, education or advancement in life, the court may, in its discretion, "order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled". There is a time limit on making applications (s 8). The order for provision may specify what part of the estate of the deceased person will bear the burden of the provision (s 9). Every provision made by an order is to operate and take effect as if it had been made by codicil to the deceased's will executed immediately before death or, if the deceased was intestate, by a will executed immediately before death (s 10).

7 Three matters may be noted. First, provision may be made, and can only be made, out of a deceased's estate; that is to say, out of property which is beneficially owned by the deceased at the time of death and which passes to the deceased's legal personal representative[6]. Secondly, contractual obligations

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5 See also *Succession Act* 1981 (Q).

6 *Re McPhail* [1971] VR 534.

undertaken by a deceased during his lifetime, which bind an estate, may affect the property available to meet an order under the Act. For example, if, during his lifetime, a testator contracted to sell Blackacre, and the contract remained on foot at the time of death, although full beneficial ownership of Blackacre had not passed to the purchaser at the time of death[7], Blackacre would not be an available asset for the purposes of an order for provision, although the purchase price payable under the contract would be. And, of course, if the contract were subsequently rescinded, the position would change. Thirdly, the estate out of which an order for provision may be made is the available estate after meeting the liabilities of the deceased. Obligations incurred by a deceased, and binding upon a legal personal representative, must be taken into account in determining the extent of the estate out of which provision may be made.

The deed and wills

8 Because of the procedural background to these appeals, it is neither necessary nor possible to explain in full the family circumstances that gave rise to the appellant's application. The substantial merits of the case have never been litigated. The only facts proved in evidence are those that were regarded by the parties as material to certain legal issues raised for preliminary decision.

9 The deceased and the second respondent carried on business together as farmers near Wudinna in South Australia. The net value of the deceased's estate at the time of his death was about $1.8 million. There is no information before the Court as to the value of the assets of either the first or the second respondent. The first respondent had worked on the family farm for the whole of his working life. The appellant, who had two children, had been married and divorced. She and her husband had embarked upon a failed business venture. She had been made bankrupt.

10 Although the evidence on the topic is thin, it appears that the deceased and the second respondent had made some financial provision for the appellant. Subject to that provision, they wished their son, the first respondent, to inherit their assets. The evidence did not deal with the history of their financial relationship with their son, or the arrangements under which he worked on the farm. Those were matters that may have become relevant if the appellant's claim had not failed *in limine*.

11 The deceased and the second respondent took legal advice. A solicitor described that advice as relating to "the steps ... Lyle and Alice Barns should take should they wish to effectively exclude their [daughter] from participating in *the*

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7 *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191-192 per Deane J.

estate of the survivor of them" (emphasis added). This was said to be on the assumption that the first of them to die would leave his or her entire estate to the survivor. The present proceedings do not concern the estate of the survivor. They concern the estate of the first to die.

12 Pursuant to that advice, on 2 May 1996, a deed was entered into between the deceased and the first and second respondents. The deed recited that the first respondent was the natural son of the deceased and the second respondent, that the deceased had agreed with the other parties to make a will in a certain form, that the second respondent had agreed with the other parties to make a will in a certain form, that the deceased had agreed to act so as to ensure that all property owned by him *at his death* devolved in accordance with the will unless the other parties consented to the contrary, and that the second respondent had made an agreement to the like effect. By cl 3 of the deed, the deceased and the second respondent agreed to make wills in the form annexed, and not to revoke those wills without the written consent of the other parties to the deed. By cl 6, it was agreed that failure to perform the terms of the deed would give a right to specific performance. It is to be noted that there was nothing in the deed to prevent the deceased from disposing of assets during his lifetime. He agreed to act so as to ensure that all property owned by him at his death devolved in accordance with the agreed form of will[8]. The second respondent accepted a like obligation.

13 In accordance with the deed, the deceased executed a will. By his will, the deceased appointed the first respondent his executor. He gave the whole of his estate to the second respondent on condition that she survived him for 30 days (as she did). If she did not survive him, the whole estate was to go to the first respondent. Similarly, the second respondent executed a will. She appointed the first respondent her executor. She gave the whole of her estate to the deceased on condition that he survived her for 30 days. If he did not survive her, the whole estate was to go to the first respondent. Thus, if the wills remained unaltered, the first respondent would inherit the whole estate of whichever of his father or mother survived the other. It was that estate which the solicitor had set out to protect from claims of the appellant. The essence of the arrangement was that the estate of the first to die of Lyle and Alice Barns would devolve by will upon the survivor of them, and the estate of the survivor would devolve by will upon their son. It is the first of those steps that is presently in question.

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8 cf *Palmer v Bank of New South Wales* [1973] 2 NSWLR 244; (1975) 133 CLR 150.

The proceedings in the Supreme Court of South Australia

14 The proceedings were assigned to a Master of the Supreme Court, Judge Burley. The parties evidently considered that the effect of the deed and the mutual wills could have a decisive bearing on the outcome of the appellant's claim under the Act. The appellant, anticipating reliance on the deed and the wills by the first and second respondents, made a pre-emptive strike. She pleaded, in her Statement of Claim, that the deed was void as being contrary to public policy. Judge Burley ordered that the issue relating to the validity of the deed be heard and determined as a preliminary issue. He heard argument on the point, ruled in favour of the appellant, and declared that the deed of 2 May 1996 was void as being contrary to public policy. The argument was conducted on the agreed basis that the subjective intention of the parties to the deed was irrelevant. The Master found that the objective purpose of the deed was to preclude a claim under the Act that might otherwise be made by the appellant. He regarded the deed as a contract made "with a view to excluding the jurisdiction of the court under the Act", of the kind referred to in *Schaefer v Schuhmann*[9].

15 There was an appeal to the Full Court of the Supreme Court[10]. The appeal was successful. Lander J, with whom Prior J and Wicks J agreed, noted that the sole contention advanced "was that [the deed] was void because its effect precluded the [appellant and her children] seeking and obtaining provision under the Act". He held, following *Schaefer v Schuhmann*, that the deed, and the wills made pursuant to the deed, had that effect. This, however, was not contrary to public policy. He said that this was a legal consequence of the scheme of the Act, and that, although the legislatures in New South Wales and the United Kingdom had taken steps to deal with the matter, no similar steps had been taken in South Australia. If there was a problem, it was for the legislature, not the courts, to address. The appeal was allowed and the deed was declared valid.

16 The proceedings then came before Nyland J who, consistently with the reasoning of the Full Court, dismissed the appellant's claim. The appellant now appeals against the decision of the Full Court and that of Nyland J.

17 It will be necessary to deal with the appellant's argument based on public policy. However, since that argument depends upon a contention as to the effect of the deed, and the wills made pursuant to the deed, it seems logical first to form a conclusion as to that effect.

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9 [1972] AC 572 at 592 per Lord Cross of Chelsea.

10 *Barns v Barns* (2001) 80 SASR 331.

The effect of the deed and the wills upon a claim under the Act

18 Reference has already been made to an inherent weakness in the scheme of the Act, and its earlier legislative counterparts, as an instrument to deal with the mischief at which it is aimed. Provision under the Act can only be made out of the assets of which a person dies possessed. If property is not beneficially owned by a deceased, then (subject to later legislative amendments in some jurisdictions) it does not form part of the deceased's estate, and cannot be made a source of provision for a claimant under the Act. Furthermore, contractual obligations undertaken by a person prior to death, which bind the legal personal representative in the administration of the estate, may diminish the available estate out of which provision may be made. These considerations give rise to an issue which has divided judicial opinion from the earliest days of such legislation. It has never been the subject of authoritative decision by this Court, but it has been the subject of inconsistent decisions of other courts, including inconsistent decisions of the Privy Council. The issue is this: when a testamentary provision is made pursuant to a legal obligation on the part of the testator, is the property the subject of that provision available as part of the estate which may be redistributed under the Act? The cases to which reference will be made below illustrate the variety of circumstances in which such an issue might arise.

19 One possible solution to such a problem is to conclude that the obligation undertaken by the testator is to be given effect in the same way as any other obligation binding on the estate, and that the subject property is not part of the estate available to meet an order for provision under the Act. Another possible solution is to treat an obligation to make a will in a certain form as subject to the operation of the statute. The Act restricts freedom of testamentary disposition, and an agreement to make such a disposition is subject to the potential effect of that restriction.

20 The issue first arose in Tasmania in 1934. *Re Richardson's Estate*[11] concerned a testator who had long separated from his wife and who, for many years prior to his death, lived with a housekeeper. The testator and the housekeeper were business partners in a small business undertaking, and pooled their assets. They agreed to make mutual wills by which each was to leave the other all his or her property. Such wills were made. The testator died, leaving his whole estate to the housekeeper. The widow claimed provision under the *Testator's Family Maintenance Act* 1912 (Tas). At the time, there were only three permanent members of the Tasmanian Supreme Court. The case was heard at first instance by Nicholls CJ. He dismissed the widow's claim, noting that the Tasmanian legislation required the court to have regard to the net value of the

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11 (1935) 29 Tas LR 149.

estate, which was to be calculated taking account of all lawful liabilities to which the estate was subject. He held that the housekeeper had a claim to the estate which was such a liability, and that there was no available net estate. In that regard, he pointed out that the agreement for mutual wills was for valuable consideration, that the housekeeper had agreed to work without pay because of the agreement, and that, if the testator had broken his agreement, the housekeeper could have sued the testator's legal personal representatives for damages. The widow appealed. Nicholls CJ sat on the appeal, together with Crisp and Clark JJ. Nicholls CJ confirmed his earlier opinion and added[12]:

> "[T]he respondent's *rights* do not *arise* under the will. They arise contractually and exist independently of the will. If the testator had made no will, or had made a will leaving everything to his widow and daughter, he would have made a breach of his contract with the respondent. She then could have sued for damages for the breach, and the measure of her damages would have been the value of the testator's estate. Her *status* afterwards would have been that of a judgment creditor.
>
> It is true that the performance of the contract was to be, and actually was, in the form of a will, but, as is proved by the fact that it prevents a cause of action for breach arising, the will operates as the performance of the contract, not as bounty, as it would in the ordinary case of a testator giving, by way of a free gift, property which he had the right to dispose of as he pleased. As against the respondent, he had no right to leave his property to his widow and child ... What we are asked to do is to reduce contractual rights to the level of gifts under a will, and to make the performance of the contract the reason why we can prevent its full performance, and to do that by an order which ... will take effect as if it were a codicil, which as a fact the testator had no right to make." (emphasis in original)

The Chief Justice went on to say that, in any event, if there had been an available estate, the moral claims of the housekeeper so far exceeded those of the widow that he would have declined to make an order. Crisp J agreed with the last point, and considered that the appeal should be dismissed on discretionary grounds. Clark J took a different view on the legal issue raised by the Chief Justice. He said[13]:

> "But the contract between the testator and the respondent does not and never did subject the testator's estate to any debt or other lawful liability.

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12 (1935) 29 Tas LR 149 at 155.

13 (1935) 29 Tas LR 149 at 159-160.

> The obligation which the contract imposed on the testator was to make a will and by it to leave everything he had to the respondent. That the testator did, and thus he fully implemented his contract.
>
> And no order made under the Statute would alter that fact.
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> ...
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> The fact that the testator might have broken his contract appears to me to be quite irrelevant.
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> The Statute only applies on the testator's death, and if, having entered into such a contract as was made by the testator in this case, he dies leaving a will which implements his contract, then at the material time, that is to say, on the testator's death, the possibility which existed in his lifetime that he might not perform the contract has gone, and is replaced by the established fact that he has performed it."

21 As will appear, the reasoning of Nicholls CJ was later to be approved by the Privy Council. However, at the level of purely textual analysis of the statute, Clark J may have had the better of the argument. Nicholls CJ founded his decision primarily on the statutory reference to "net estate", and the requirement to take account of all lawful liabilities. But, in the events that occurred, because the testator performed his promise, the estate was under no liability to the housekeeper. This gives rise to a possible anomaly. If the testator had broken his promise, there would have been a liability to the housekeeper. She could have sued the estate for damages, and the measure of damages would have been the value of the estate. Was the housekeeper to be worse off because the testator performed his contract than she would have been if he had broken it? That anomaly may disappear if the contract itself was subject to the potential operation of the statute.

22 A similar problem came before the Privy Council, on appeal from New Zealand, in *Dillon v Public Trustee of New Zealand*[14]. As part of a family arrangement between a testator and his children, at a time when the testator was a widower, involving undertakings as to the conduct of a farming business, the testator agreed to devise his farming lands upon certain trusts for the benefit of his children. He fulfilled that agreement. By the time of his death the testator had remarried. His widow claimed under the *Family Protection Act* 1908 (NZ). The question was whether the land the subject of the specific devise was, relevantly, part of the estate out of which provision could be made for the widow. The New Zealand judges were divided on the point. The case went to the Privy Council. Their Lordships were informed that there was no authority on the point

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14 [1941] AC 294.

either in New Zealand or Australia[15]. Evidently, the Tasmanian Law Reports were not available. Their Lordships decided in favour of the widow, holding that the circumstance that the provisions in a will are in fulfilment of a contract *inter vivos* does not restrict the power of the court to redistribute the estate of a testator. Viscount Simon, dealing with a contention that the statute was not to be construed as defeating obligations incurred by a testator, or rights or equities acquired by third parties by contract in good faith and for valuable consideration, said[16]:

> "As Smith J in his dissenting judgment points out, if this was so, a young bachelor, who had agreed for a consideration to leave all his property by his last will to a relative, friend, or creditor, might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate. The manifest purpose of the Family Protection Act, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do."

23 His Lordship said that the existence of such a contract might be taken into account in considering what, if any, redistribution of the estate was just; but it could not override the court's discretionary power to make such a redistribution. He went on to consider the supposed anomaly mentioned above. He said that, if a person in New Zealand made and then broke a contract to make a testamentary gift, the measure of damages for breach would be affected by the possibility of redistribution due to the operation of the Family Protection Act. In principle, he said, the Family Protection Act affected the unqualified operation of the contract, whether the contract was fulfilled or whether it was broken. In other words, the contract took effect subject to the potential operation of the Family Protection Act.

24 The decision in *Dillon* was followed, and explained, by Street J in the Supreme Court of New South Wales in *Re Seery and the Testator's Family Maintenance Act*[17]. In that case, a testator agreed with his housekeeper that, if she worked for him for the rest of his life on certain terms, he would leave his house and contents to her by will. He did so. After he died, his children made a

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15 [1941] AC 294 at 297.

16 [1941] AC 294 at 303-304.

17 (1969) 90 WN (Pt 1) (NSW) 400.

claim for provision. The question was whether it was open to the court to throw any part of the burden of an order for provision on the property given to the housekeeper. Street J held that it was, explaining that the effect of *Dillon* was that a promisee's rights under a contract to leave property by will may be subject to an inroad made by an order under the statute without thereby giving any consequential right, either to damages or otherwise, to the promisee. The contract was subject to the potential operation of the statute.

25 That case went on appeal to the Privy Council under the name of *Schaefer v Schuhmann*[18]. The Privy Council, by majority, reversed the decision of Street J, and declined to follow *Dillon*. Lord Cross of Chelsea, for the majority, examined the rights of a person on whom a testator has agreed for valuable consideration under a bona fide contract to confer a benefit by will[19]. He said:

> "If the benefit contracted for is a legacy the testator is at liberty to dispose of his property during his lifetime as he thinks fit; but on his death, if he has failed to leave the legacy, the promisee can claim payment from his estate ... Further, if he dies insolvent then whether or not he has left the legacy by his will the other party to the contract is entitled to claim as a creditor for the amount of the legacy ...
>
> If the contract is to devise or bequeath specific property the position of the promisee during the testator's lifetime is stronger than if the contract is simply to leave a legacy. If the testator sells the property during his lifetime the promisee can treat the sale as a repudiation of the contract and recover damages at law which will be assessed subject to a reduction for the acceleration of the benefit and also if the benefit of the contract is personal to the promisee subject to a deduction for the contingency of his failing to survive the promisor. But if he can intervene before a purchaser for value without notice obtains an interest in the property he can obtain a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of it in breach of contract".

26 His Lordship answered the contention that any damages for breach of such a promise would be assessed in the light of the possibility of the exercise by the court of its statutory jurisdiction by saying that, at the date of action, it would be uncertain whether or not the occasion for the exercise of the court's powers would arise[20]. It may be remarked that it would also be uncertain whether the

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18 [1972] AC 572.

19 [1972] AC 572 at 585-586.

20 [1972] AC 572 at 586-587.

promisee would survive the promisor, but that was a contingency for which his Lordship would allow.

27 His Lordship rejected the notion that the mere fact that an estate is solvent and the contract performed turns the other party to the contract from a creditor into a mere beneficiary[21]. He quoted with approval the reasoning of Nicholls CJ in *Richardson*. He concluded that *Dillon* should not be followed.

28 Lord Simon of Glaisdale dissented. He thought that *Dillon* was correctly decided, and that it gave effect to the legislative purpose. He said that, in a case such as *Dillon*, the "promisee's contractual or equitable rights fall to be considered along with the dependant's statutory rights"[22]. Even on a narrowly technical approach, the property promised to the housekeeper in *Schaefer* remained the deceased's up to the moment of his death, and became part of the estate of the deceased. As a result, the interest of the housekeeper under the contract had to compete with that of the deceased's dependants under the statute[23].

29 In argument in the present case, an attempt was made to demonstrate that the effect of the deed and the mutual wills was that, upon his death, the deceased was not the beneficial owner of any property; for that reason there was no estate of the deceased within the meaning of the Act; and therefore the Act was incapable of having any effect. That argument, which appeared in some respects to confuse the position of the deceased with that of the second respondent as survivor, fails. The relevant principles are set out in the judgment of Dixon J in *Birmingham v Renfrew*[24]. He spoke of the doctrines of equity affecting the conscience of the survivor in a case of mutual wills. They give rise to what he called a floating obligation, suspended during the lifetime of the survivor, which descends upon the assets of the survivor at the death of the survivor and then crystallizes into a trust[25]. This may have been what the solicitors had in mind when referring to a course of action that would protect the estate of the survivor from a claim under the Act. But we are presently concerned with the estate of the deceased; the first to die.

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21 [1972] AC 572 at 588.

22 [1972] AC 572 at 597.

23 [1972] AC 572 at 597.

24 (1937) 57 CLR 666 at 688-689.

25 See also *In re Dale, decd* [1994] Ch 31 at 37 per Morritt J; and compare *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11.

30 In *Nowell v Palmer*[26], Mahoney JA spoke cautiously of the difficulty in defining the exact nature of the "interest ... of a special kind" which the promisee has in the assets of the promisor in a case such as the present. Up to and at the time of his death the deceased was the legal and beneficial owner of his assets; those assets passed to the first respondent, as executor; and the second respondent will in due course of administration become entitled to them under the deceased's will. That was the very method by which, in the deed, it was contemplated that the second respondent would acquire them. The deed provided for devolution by will. The deceased did not transfer his assets to the second respondent during his lifetime. No doubt there were a number of good reasons for that, perhaps including stamp duty. The arrangement embodied in the deed was that, if the deceased died before his wife, then she would inherit his assets *by will*. It was in her capacity as sole beneficiary under the deceased's will that the second respondent would acquire the assets that had belonged to him at the time of his death. That, however, is not her only capacity; and it is at this point that the conflict of judicial authority discussed above becomes critical. The second respondent is not only the sole beneficiary under the will of the deceased; she has rights under the deed. It is the consequence of the interaction between her rights as beneficiary, her rights under the deed, and the provisions of the Act, that must be determined.

31 The problem is not covered by any previous decision of this Court, or by any decision of the Privy Council on appeal from South Australia. The Full Court of the Supreme Court of South Australia, being confronted by two inconsistent decisions of the Privy Council on appeal from other jurisdictions, understandably followed the decision that was later in time. This Court, however, on an appeal from South Australia, should make up its own mind on the question of principle involved, giving due weight to the consideration that such an eminent authority as the Privy Council, upon re-examination, declined to follow its earlier decision, and also to the consideration that the South Australian legislature did not amend its legislation to meet the consequences of *Schaefer v Schuhmann*.

32 Ultimately, it is the meaning and effect of the Act that must determine the outcome. Whether the question is approached on a purely textual basis, or by reference to a purposive construction, the result appears to me to be the same. In terms of s 7 of the Act, there is no justification for a conclusion that the deceased left no estate out of which provision could be made for the appellant if a court saw fit. At the time of his death the deceased was the legal and beneficial owner of his assets. They passed to his legal personal representative, the first respondent, and in the course of due administration of the estate they will, in accordance with the intention expressed in the deed, devolve by will upon the

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26 (1993) 32 NSWLR 574 at 578.

second respondent. Furthermore, the estate is under no liability to the second respondent; the deceased performed his obligations under the deed and, in consequence of that performance, his estate devolves upon the second respondent.

33 The answer to the argument that this takes no account of the rights of the second respondent under the deed, and treats her as a mere beneficiary, is that the nature of the rights she obtained under the deed was such that they were always liable to be affected by the potential operation of the Act. Because the Act imposed a restriction on freedom of testamentary disposition, a promise to make a testamentary disposition was subject to the potential operation of that legislative restriction. The effect of the legislation could have been avoided by a disposition *inter vivos* so that the deceased died with no estate; that is inherent in the scheme of the legislation. But the effect of the legislative restriction on freedom of testamentary disposition cannot be avoided by a promise to make a certain disposition.

34 For the reasons given by Lord Simon of Glaisdale in *Schaefer v Schuhmann*, this conclusion also gives effect to the manifest purpose of the Act. The general principle of public policy on which the Act was based was described by Jordan CJ in *In re Jacob Morris (Deceased)*[27], in a passage adopted on appeal in this Court by Latham CJ[28], as "the making of 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". That policy is of public, as well as private, importance. To implement that policy, the legislature has conferred upon courts a discretionary jurisdiction to make provision out of a deceased person's estate in a manner that, to a greater or lesser extent, may override testamentary intention. A construction of the Act that permits a testator to nullify its operation by agreeing in advance to dispose of his or her estate in a certain fashion tends to defeat the purpose of the legislation. Such a construction is not required by the language of the Act.

35 The deed and the wills did not have the effect for which the first and second respondents contend. The assets of the deceased at the time of his death form his estate within the meaning of s 7 of the Act, and, subject to the liabilities of the deceased (which are relatively small), are available to meet an order under the Act in favour of the appellant if, in the exercise of the court's discretion, such an order is considered appropriate.

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27 (1943) 43 SR (NSW) 352.

28 *Lieberman v Morris* (1944) 69 CLR 69 at 78.

Public policy

36 On the conclusion reached above as to the effect of the deed, the question whether the deed is invalid for reasons of public policy does not arise. However, some brief observations may be made.

37 The appellant relied upon the decision of this Court in *Lieberman v Morris*[29], in which it was held that a covenant by a potential claimant not to make a claim under the corresponding New South Wales legislation was ineffective. The Court held that, on the true construction of the statute, such a covenant could not deprive a court of the discretionary jurisdiction conferred upon it. The meaning and effect of the statute was that the power of the court was unaltered and undiminished by such a covenant.

38 In the present case, there has been no attempt by an eligible claimant to contract out of the rights given by the Act. If, upon the true construction of the Act, the consequence of the deed was that there was no estate within the meaning of s 7, then a court would be obliged to give effect to that consequence. If the deceased had divested himself of all his assets before he died, then there would have been no estate within the meaning of s 7. In a colloquial sense, that might be described as defeating the operation of the Act; but in a legal sense that would simply produce a state of affairs upon which the Act would operate according to its terms. Unlike some corresponding legislation, the Act does not provide for a notional estate. The legislative purpose does not extend beyond dealing with a deceased's estate. A transaction which produces the consequence that a deceased person has no estate means that there is nothing that falls within the legislative scheme. If the Act and the deed had been found to have the legal consequences for which the first and second respondents contended, there would have been nothing to justify a refusal to give effect to those consequences.

39 The appellant also relied upon a qualification expressed in the reasons of Lord Cross of Chelsea, speaking for the majority in *Schaefer v Schuhmann*. His Lordship stated that he was considering "the rights of a person on whom a testator has agreed for valuable consideration *under a bona fide contract* to confer a benefit by will" (emphasis added)[30]. The meaning of the expression "bona fide" in this context is a little obscure. No doubt his Lordship was concerned with the obvious possibility that, if his general conclusions were correct, then it would be very easy for a person, who was not willing to divest himself or herself of all assets prior to death, to make, by deed or for nominal consideration, a binding contract to make a certain form of testamentary

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29 (1944) 69 CLR 69.

30 [1972] AC 572 at 585.

disposition and thereby leave the legislation with no work to do. But why could not a person, in good faith, set out to do that? In this case, the Court knows very little of the reasons behind the actions of the parties. It may be inferred that at least one of the purposes of the deed and the mutual wills was to make it impossible for the appellant to claim under the Act against the estate of the survivor of the deceased and the second respondent. Unless that, of itself, is sufficient to justify a conclusion that the legal arrangements were not bona fide, then the qualification expressed by Lord Cross would not be relevant. However, for the reasons already given, if the deed and the wills had that effect, it was only because of the scheme of the Act. There is no reason to describe conduct intended to produce a state of affairs that falls outside the scheme of the Act as, on that account, lacking good faith. If the deceased, during his lifetime, had given all his assets to charity, that would have left the appellant without a claim under the Act; but it would have been a bona fide gift, even if one of the reasons for making the gift was to deprive the appellant of a claim.

Conclusion

40 The appeals should be allowed. I agree with the consequential orders proposed by Gummow and Hayne JJ.

41 GUMMOW AND HAYNE JJ. On 24 April 2002, a judge of the Supreme Court of South Australia (Nyland J) dismissed an application under the *Inheritance (Family Provision) Act* 1972 (SA) ("the Inheritance Act") by the appellant, Kathryn Fay Barns. She had sought an order for provision out of the estate of her father, Lyle Phillip Barns ("Mr Barns"). He died on 14 August 1998. On 14 January 1999, probate of his last will dated 2 May 1996 was granted to the first respondent, Malcolm Phillip Barns ("Mr Malcolm Barns"), the child of the marriage of the deceased and his widow, the second respondent, Alice Elizabeth Barns ("Mrs Barns"). The appellant is the adopted daughter of Mr and Mrs Barns. The third respondents are two infant children of the appellant, who appear by their next friend.

The policy of the Inheritance Act

42 Reference first should be made to the *Wills Act* 1936 (SA) ("the Wills Act"). Section 4 thereof confers a power of testamentary disposition in broad terms. The exercise and effectiveness of this freedom of disposition are qualified by the formality requirements of the Wills Act and by the operation of the Inheritance Act[31]. This case turns upon the construction of the Inheritance Act. The long title describes the statute as "[a]n Act to assure to the family of a deceased person adequate provision out of his estate."

43 In *Coates v National Trustees Executors and Agency Co Ltd*[32], Dixon CJ remarked:

> "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."

In *Lieberman v Morris*[33], Rich J had traced the spread from New Zealand of the legislation, of which the Inheritance Act is an example. He observed that the subject of limitations on the power of testamentary disposition was one with which Roman law systems had been concerned for upwards of 2000 years; in English law, freedom of testamentary disposition had been restricted in various ways, for example in the case of realty by the widow's right to dower[34];

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31 See *Hill v Van Erp* (1997) 188 CLR 159 at 223-224.

32 (1956) 95 CLR 494 at 507.

33 (1944) 69 CLR 69 at 84-85.

34 Abolished in South Australia by s 46(3) of the *Administration and Probate Act* 1919 (SA) ("the Probate Act").

legislation such as the Inheritance Act placed an important limitation upon the rights of testators to dispose of property by will in such manner as thought fit.

44 Earlier, in *Holmes v Permanent Trustee Co of New South Wales Ltd*[35], Rich J (with the concurrence of Evatt J and McTiernan J) observed of the Testator's Family Maintenance Ordinance 1929 (NT) that this legislation was remedial in character and therefore to be construed so as to give the most complete remedy which its phraseology permitted; the court should not be alert in placing a restricted construction upon the terms of such a law. Thereafter, in *Worladge v Doddridge*[36], a case under the Tasmanian statute[37], Williams and Fullagar JJ referred to what had been said by Rich J in *Holmes* and added:

> "The provision can be made out of any part of the testamentary estate so that the whole of the estate corpus or income is available for the purposes of the Act. The jurisdiction is conferred in very wide terms and no court or judge would be justified in attempting to define it otherwise than in accordance with the ordinary natural meaning of the words of the section."

These statements in this Court provide the starting point for consideration of the issues of statutory construction upon which these appeals turn.

The facts

45 Mrs Barns was born in 1930, the appellant in 1957 and Mr Malcolm Barns in 1951. Mr and Mrs Barns carried on business together as farmers at Wudinna and elsewhere in South Australia from about 1950. By his last will, Mr Barns left the whole of his estate to his widow; he made no provision for his daughter or his son. However, on 2 May 1996, the date of the execution of his will, Mr Barns, with his wife and son, also executed a deed ("the Deed"). This stated that Mr Barns had agreed with his wife and son to make a will in the form set out in the First Schedule to the Deed and that his wife had agreed with him and their son to make a will in the form set out in the Second Schedule to the Deed. The Deed also recited agreements by the two testators to act in such a manner as to ensure that all property they owned at death devolved in the manner set out in the

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35 (1932) 47 CLR 113 at 119.

36 (1957) 97 CLR 1 at 9. See also the judgment of Barwick CJ, Mason and Murphy JJ in *Easterbrook v Young* (1977) 136 CLR 308 at 324, and, more generally, *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44; *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231 at 260-261.

37 *Testator's Family Maintenance Act* 1912 (Tas).

respective wills unless the other parties consented in writing to the testator acting otherwise.

46 Section 22 of the Wills Act conferred rights or powers of revocation upon Mr Barns, for example, by another will executed in the manner required by that statute. However, Mr Barns accepted a contractual fetter upon those statutory rights or powers. He did so by undertaking in cl 3.3 of the Deed not to revoke his will without the written consent of his wife and their son. He also agreed in cl 6.1 that, if he failed "to perform the terms of this deed", Mrs Barns and Mr Malcolm Barns "shall be entitled to specific performance of the terms of this deed".

47 The will of Mr Barns, executed in accordance with the First Schedule, appointed Mr Malcolm Barns executor and trustee and devised and bequeathed the whole of his estate to the executor upon trust to pay all just debts and, if his widow survived him for the period of 30 days, then to her. Mrs Barns did so survive the testator.

48 The will executed by Mrs Barns was in like form, save that the whole of the residuary estate was devised and bequeathed to her husband if he survived her for 30 days; if, as has proved to be the fact, that gift fails, Mrs Barns gives the whole of her estate to her son, Mr Malcolm Barns. Mrs Barns has covenanted in the Deed not to revoke that will without the written consent of Mr Malcolm Barns or his legal personal representative. There is also a provision that, in the event of her failure to perform the terms of the Deed after the death of her husband, Mr Malcolm Barns "shall be entitled to specific performance of this deed".

The administration of the estate

49 The Supreme Court had jurisdiction in relation to the granting of probate of wills of deceased persons within the State[38]. Section 121A of the Probate Act obliged Mr Malcolm Barns with the application for probate "in respect of the estate of" his father to disclose to the Supreme Court the assets and liabilities of the deceased known to him at the time of the probate application. This disclosed real and personal estate of a total value of $1,851,188.37 and unsecured liabilities of $31,013.73, comprising funeral expenses and a loan account of $28,066.93 with a family company.

50 The whole of the property of the testator is held by Mr Malcolm Barns, as executor, for the purpose of carrying out the functions and duties of

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38 Probate Act, s 5.

administration; equity does not recognise or create for Mrs Barns, the residuary legatee, a beneficial interest in any particular asset in the hands of Mr Malcolm Barns during the course of the administration[39]. What Mrs Barns has is a right to due administration of the assets in accordance with the duties of the executor; it is in that sense that she may be said to have an interest in the entire estate, which is capable of transmission both by her under her will[40], and by operation of law, as in *Official Receiver in Bankruptcy v Schultz*[41]. Mrs Barns also has the contractual rights and obligations created by the Deed. To these it will be necessary to refer further in these reasons.

The provisions of the Inheritance Act

51 The central provision is found in s 7(1). This states:

> "Where –
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> (a) a person has died domiciled in the State or owning real or personal property in the State;
>
> and
>
> (b) by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life,
>
> the Court may in its discretion, upon application by or on behalf of a person so entitled, order that such provision as the Court thinks fit *be made out of the estate of the deceased person* for the maintenance, education or advancement of the person so entitled." (emphasis added)

52 The persons entitled to claim the benefit of the Inheritance Act are identified in s 6. They include a child of the deceased person and any child of a child of the deceased, thereby including the third respondents, the grandchildren

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39 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 at 18; [1965] AC 694 at 707; *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 312-313.

40 *In re Leigh's Will Trusts* [1970] Ch 277.

41 (1990) 170 CLR 306 at 313-314.

of the deceased. Subject to a successful application for an extension of time made before "the final distribution"[42] of the estate (s 8(4)), an application must be made within six months of the date of the grant of probate in South Australia (s 8(1)).

53 A basic principle expounded, with reference to the then New South Wales statute[43], in *Easterbrook v Young*[44] is that:

> "[t]he making of an application does not stay the administration of the estate and, in some cases at least, administration must progress in order to expose the available value of the assets left by the deceased, whether by realization of property or by resolution of disputed debts or claims. The power to make provision out of the estate of the testator is referable to a state of affairs at the time the order is made."

54 In making an order, the court may impose "such conditions, restrictions and limitations as it thinks fit" (s 7(4)). The court may order that the provision consist of a lump sum or periodic or other payments or a lump sum and periodic or other payments (s 7(6)). Every provision made by an order shall, subject to the statute, "operate and take effect" as if made by a codicil to the will of the deceased person "executed immediately before his death" (s 10(a)). The order must "specify the amount and nature of the provision thereby made", "specify the part or parts of the estate of the deceased person out of which that provision shall be raised or paid", prescribe the manner in which the provision is to be raised and paid, and state any conditions, restrictions or limitations imposed by the court (s 9(1)). An order may be rescinded or altered on application made at any time and from time to time (s 9(5)).

55 In their judgment in *Easterbrook*[45], Barwick CJ, Mason and Murphy JJ observed that the provisions giving effect to the court order as if it were a codicil, thereby operating as on the death of the testator, had the consequence that there could be altered "the operation of the very dispositions of the will which might otherwise determine the capacity or power of the personal representative as well

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42 The term "final distribution" does not deny jurisdiction merely because executorial duties are complete: *Easterbrook v Young* (1977) 136 CLR 308 at 324.

43 *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW) ("the NSW Act").

44 (1977) 136 CLR 308 at 317.

45 (1977) 136 CLR 308 at 315.

as the beneficial interests which would otherwise arise". Further, the Court said that[46]:

> "[t]he evident purpose of the [legislation] is to place the assets of the deceased passing to the personal representative at the disposal of the court in the provision of maintenance for the nominated dependants of the deceased."

56 Later, in their joint judgment in *Schultz*, Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said that orders made under such a statute have the effect[47]:

> "not to change the benefits to be expected from the right to due administration arising pursuant to the will, but to superimpose upon the duty of due administration a judicial order made pursuant to statute. In other words, a new and independent obligation is created which has an impact upon the way in which the executor administers the estate pursuant to his or her existing duty, by compelling him or her to comply with the terms of the court's order. Each beneficiary's right to due administration is made subject to the terms of the order in the sense that the order governs the executor's actions to the exclusion of any inconsistent direction contained in or derived from the will."

It is in this way that the effectiveness of the exercise of the power of testamentary disposition conferred by s 4 of the Wills Act is liable to be overwritten by subsequent order superimposed under the Inheritance Act[48].

The litigation

57 The present application was made within six months of the grant of probate to Mr Malcolm Barns on 14 January 1999. The appellant instituted her application by a Statement of Claim filed in the Supreme Court of South Australia on 22 March 1999.

58 In the Statement of Claim, the appellant not only claimed an order under the Inheritance Act, but also sought a declaration that the Deed "is void and of no effect as against the claim of the [appellant]". There was a trial before a Master

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46 (1977) 136 CLR 308 at 315.

47 (1990) 170 CLR 306 at 315-316. See also the judgment of Kearney J in *McLeod v Johns* [1981] 1 NSWLR 347 at 349.

48 See *Bridgewater v Leahy* (1998) 194 CLR 457 at 495-496 [133]-[134].

(Judge Burley) of a separate issue upon agreed facts and in advance of a Statement of Defence. The Court made a declaration that the Deed was "void as being contrary to public policy". In respect of that declaration, there was an appeal by Mrs Barns and what was identified as a "cross appeal" by Mr Malcolm Barns. The Full Court (Prior, Lander and Wicks JJ) set aside the declaration and made a declaration that the Deed "is valid"[49]. Thereafter, the claim under the Inheritance Act was dismissed by Nyland J. The appellant obtained grants of special leave to appeal to this Court in respect of the orders made by the Full Court and by Nyland J. The first respondent, as executor of the will, is the effective opponent to the appeals.

59 The dispute in the Full Court had turned upon the question whether the Deed was void as being "contrary to public policy" because what was identified as "the mutual wills" arrangement had the effect of creating circumstances whereby the appellant could not make any claim under the Inheritance Act against the estate of the deceased. In *Lieberman v Morris*[50], this Court decided that a widow was not precluded from making an application under the New South Wales equivalent of the Inheritance Act by reason of her having covenanted with the testator not to do so. Later, in the course of their joint judgment in *Smith v Smith*[51], Mason, Brennan and Deane JJ referred to the statutory policy, discovered though not expressed in the legislation, which prohibited a person from contracting out of the benefits conferred by the legislation.

60 In the Full Court, the appellant relied, but unsuccessfully, upon analogous reasoning as rendering the Deed ineffective to achieve what otherwise was its apprehended operation to withdraw from the reach of the Inheritance Act the subject-matter out of which provision might be made by order in her favour.

61 However, assuming at this stage the validity of the Deed according to its terms, the anterior and essential question is one of construction of the Inheritance Act. It is whether there is by reason of the Deed and its implementation no "estate of the deceased" answering the description required by s 7(1) of the Inheritance Act for the provision thereout by order in favour of the appellant.

62 If that question be answered adversely to the appellant, then her application under the statute must fail. If the answer is that the Deed has not

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49 *Barns v Barns* (2001) 80 SASR 331.

50 (1944) 69 CLR 69.

51 (1986) 161 CLR 217 at 249.

brought about a state of affairs in which there is no "estate of the deceased", two consequences will follow. First, the appellant's application will go ahead for determination on the merits. Secondly, to the extent that an order is made in favour of the appellant, there will be an inroad upon the residue passing to Mrs Barns under the will of her husband. That in turn will diminish the estate to which the will she made in implementation of the Deed may apply.

The submissions

63 By operation of the law respecting testamentary succession in South Australia, a substantial estate passed under the will of which Mr Malcolm Barns has obtained a grant of probate. The submission put against the appellant by the first respondent is that nevertheless (i) the phrase "the estate of the deceased person" has a different meaning in s 7(1) of the Inheritance Act and (ii) there is, for the purposes of s 7(1), no property in the estate of Mr Barns and therefore nothing to which an order made upon the appellant's application could attach.

64 Proposition (i) is the necessary first step. The textual revision which would be required to the ordinary meaning of the phrase "the estate of the deceased person" was never clearly explained in submissions. What appears to be propounded is an added stipulation to s 7(1). This would exclude from what otherwise would be "the estate of the deceased" that property which passed under the will but did so otherwise than purely as a manifestation in the will of the testator's donative wishes and the continuation of those wishes until death and without revocation of the will; so much of the estate of the deceased, awaiting administration as described in *Easterbrook*, as had an additional provenance in contractual arrangements dehors the will could not be the subject of an order under s 7(1).

65 Here, the testator had covenanted in the Deed, with his wife and son, "not to revoke" his will which devised and bequeathed to his executor the whole of his real and personal estate. The testator did not revoke that will and, with the grant of probate, this determines the transmission of his estate. The residue is taken subject to the liabilities to be discharged in the course of administration.

66 In *Jervis v Wolferstan*[52], Sir George Jessel MR rejected the submission by Fry QC[53] that where a covenant to bequeath a share of residue had been fulfilled, the residuary legatees took not under the will but "as creditors under the

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52 (1874) LR 18 Eq 18 at 24-25.

53 (1874) LR 18 Eq 18 at 21.

covenant", whose interest was not part of the estate for the purpose of bearing its debts and liabilities. The Master of the Rolls said[54]:

> "The covenant by Mr *Swynfen Jervis* was simply that he would bequeath by will, or otherwise provide, that this share of residue should come to Mrs *Broughton*. He did bequeath it by will, and he therefore fulfilled his covenant. The effect of the bequest by the will was to make the lady a residuary legatee, and nothing else, and, consequently, when the trustees of her settlement received it they were simply in the position of a residuary legatee receiving a share of the residue".

67 The submissions of the first respondent in this Court appeared not to challenge these basic propositions of the general law[55]. Rather, it was submitted, in reliance upon other authority (in particular, *Schaefer v Schuhmann*[56]) to which it will be necessary to refer later in these reasons, that assets of the nature of those in *Jervis* cannot form part of "the estate of the deceased" within the meaning of s 7(1) of the Inheritance Act.

68 Nothing in law or in the policy of the Inheritance Act appears in support of a reading down of s 7(1) thereof to deny the appellant's claim on the basis, contrary to the fact, that there is no subject-matter of the deceased's estate. To read down in this way the scope of the statute would be to travel along a path of reasoning in the opposite direction to that to which this Court pointed 70 years ago in *Holmes*. It would facilitate the stultification of the object of the Inheritance Act by a simple expedient whereby testators covenanted not to revoke a particular will and died having observed that negative covenant.

The importance of construction

69 Undoubtedly the terms of the particular extra-testamentary obligation are vital to its legal character and operation. The effect of an undertaking such as that by Mr Barns in the Deed was considered in *Palmer v Bank of New South Wales*[57]. There, Barwick CJ (with whose judgment Gibbs J, Stephen J and Mason J agreed) emphasised that a covenant in this form imposes no obligation to keep until death the assets owned at the time of the exhibition of the will or to

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54 (1874) LR 18 Eq 18 at 24.

55 See Lee, "Contracts to Make Wills", (1971) 87 *Law Quarterly Review* 358.

56 [1972] AC 572.

57 (1975) 133 CLR 150.

keep any particular assets during the remainder of life[58]. A line of cases commencing in 1798 with *Jones v Martin*[59] was accepted in *Palmer* as supplying a caveat to these propositions. Of these cases, Barwick CJ said[60]:

> "A transaction by which the promisor has placed his property in the name of another and for the benefit of that other on his death, whilst really retaining it for himself in his lifetime, is for the purpose in hand a testamentary transaction which would be in breach of a promise to leave by will."

70 No such question arose on the facts of this case; there was no suggestion of breach of the negative covenant. In accordance with its terms, the restraint imposed by that covenant was spent upon the death of Mr Barns and thereafter it could impose no continuing obligation respecting the assets owned by the testator at his death.

71 A further example of the importance of construction of the relevant undertaking is provided by the decision of Turner and Knight Bruce LJJ in *Graham v Wickham*[61]. There, questions arose in the course of the administration in Chancery of the insolvent estate of the deceased James Wickham. He had covenanted by deed to give and bequeath by will the sum of £2,500 to be held on the trusts of his son's marriage settlement. Was (as the simple contract creditors of the estate submitted) the covenant performed by a testamentary provision for legacy, without regard to any deficiency of assets to meet the legacy? If so, the legacy would be met only out of anything that remained after payment of debts. Or (as the assignees of the trustees of the marriage settlement submitted) was the covenant performed only if there were assets in the estate sufficient upon due administration to answer the sum covenanted? The Court preferred the latter construction[62]. The assets being insufficient for that purpose, the covenant was unperformed and the assignees accordingly had a claim under the covenant for its

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58 (1975) 133 CLR 150 at 159.

59 (1798) 6 Brown 437 [2 ER 1184]; 5 Ves Jun 276 [31 ER 582].

60 (1975) 133 CLR 150 at 159.

61 (1863) 1 De G J & S 474 [46 ER 188].

62 A similar issue of construction arose in *In re Syme. Union Trustee Co of Australia Ltd v Syme* [1933] VLR 282 at 291 and was given a similar answer.

breach. This was a claim on a specialty[63] and at that time specialty creditors ranked ahead of simple or contract creditors[64].

72 Reference also should be made to the decision of Page Wood V-C in *Eyre v Monro*[65]. The testator devised and bequeathed his residuary real and personal estate upon trust to pay, among other sums, £3,000 in purported satisfaction of a covenant by the testator in his son's marriage settlement. The testator died owing a judgment debt which at that time ranked for payment by the executor ahead of the debts of several simple contract creditors[66]. The assets were sufficient for payment of the judgment debt and the £3,000. But if the latter were paid in priority to the simple contract creditors there would be nothing left for any of them. It was held that testamentary provision for the legacy of £3,000 did not satisfy the stipulations of the covenant on its proper construction. Therefore, the Vice-Chancellor concluded[67]:

> "the breach of the covenant lets in the trustee to prove as a specialty creditor",

and a declaration was made that the £3,000 was a specialty debt and was to be proved accordingly.

73 In the course of his reasons, Page Wood V-C remarked[68]:

> "It is true that, notwithstanding the covenant, the father might have disposed of the whole of his property in his lifetime, provided such disposition were not made in fraud of or for the purpose of defeating his covenant, as it was in *Jones v Martin*[69], which was referred to in the case

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63 *R v Williams* [1942] AC 541 at 555-556.

64 Spence, *The Equitable Jurisdiction of the Court of Chancery*, (1846), vol 1 at 193; Woodman, *Administration of Assets*, 2nd ed (1978) at 127. Section 59 of the Probate Act now treats specialty and simple contract debts as standing in equal degree.

65 (1857) 3 K & J 305 [69 ER 1124].

66 Spence, *The Equitable Jurisdiction of the Court of Chancery*, (1846), vol 1 at 192-193.

67 (1857) 3 K & J 305 at 309 [69 ER 1124 at 1126].

68 (1857) 3 K & J 305 at 309 [69 ER 1124 at 1126].

69 [(1798) 6 Brown 437 [2 ER 1184]; 5 Ves Jun 276 [31 ER 582]].

> before the House of Lords[70]. But the question is, whether, he not having so disposed of his property in his lifetime, his will is or is not to be construed so as to render the property of which he has not disposed available for the performance of his covenant."

It may be added that the decisions to which the Vice-Chancellor referred were among the authorities identified by Barwick CJ in *Palmer* in the passage set out earlier in these reasons[71].

The older authorities

74 Cases such as *Graham v Wickham* and *Eyre v Monro* are significant in three further relevant and related respects. First, the older authorities appearing to bear upon the subject of "testamentary contracts" are to be read with an eye to the complexities of the old law respecting administration of assets, particularly respecting the ordering of claims and assets. Secondly, despite the use to which these cases later have been put, they are not authority for any broad proposition that today where a legacy is left in fulfilment of an obligation to pay money the legatee is in a different position to any other legatee[72]; nor, contrary to what was said in *Schaefer v Schuhmann*[73], are they "inconsistent with the proposition that if the estate is solvent and the contract is performed the rights of the other party to the contract become simply the rights of a legatee". Finally, and to the immediate point for decision on these appeals, these cases suggest no ground to read down the ordinary meaning of the phrase "the estate of the deceased" in s 7(1) of the Inheritance Act.

Questions of law

75 Undoubtedly numerous issues of law still arise in cases where parties seek a remedy in respect of failure to perform an obligation to make a will in a particular form and leave it unrevoked, whether with a specific bequest or devise or otherwise. That which is propounded as a "contract" may, on consideration of the evidence, be no more than a family understanding or representation of intention which lacks binding effect. *Wells v Matthews*[74] is an example. If there

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70 *Logan v Wienholt* (1833) 1 Cl & F 611 at 630 [6 ER 1046 at 1054].

71 (1975) 133 CLR 150 at 159.

72 cf *Coffill v The Commissioner of Stamp Duties* (1920) 20 SR (NSW) 278 at 283.

73 [1972] AC 572 at 588.

74 (1914) 18 CLR 440.

otherwise be a contract, nevertheless its terms may be too uncertain. In *Horton v Jones*[75], Starke J and Evatt and McTiernan JJ held too indefinite an oral promise by a testator that "if you will promise to make a home for me and look after me for the rest of my life, I will leave you my fortune". In the same case, Rich and Dixon JJ[76] and Starke J[77] held that, in any event, given its subject-matter when made, the oral contract was unenforceable being a contract for sale or other disposition of land to which the Statute of Frauds applied[78]. Further issues may arise respecting the doctrine of part-performance[79] and proprietary estoppel[80].

76 None of these issues arises in the present case. Nor do any questions respecting the administration of estates, solvent or insolvent, to which reference has been made above.

Trust

77 It was submitted to the Full Court (and repeated in argument before this Court) that "the obligations" into which Mr Barns, Mrs Barns and Mr Malcolm Barns entered on 2 May 1996 (the date of the Deed and the wills) "gave rise to a trust" in favour of Mrs Barns and Mr Malcolm Barns and that, as a consequence, there was no property in the estate of Mr Barns which might be the subject of an order under the Inheritance Act[81].

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75 (1935) 53 CLR 475 at 489, 492.

76 (1935) 53 CLR 475 at 486-487.

77 (1935) 53 CLR 475 at 488-489.

78 cf *Birmingham v Renfrew* (1937) 57 CLR 666 at 677-680, 690-691.

79 *Maddison v Alderson* (1883) 8 App Cas 467.

80 *Dillwyn v Llewelyn* (1862) 4 De G F & J 517 [45 ER 1285]; *Olsson v Dyson* (1969) 120 CLR 365 at 378-379; *In re Basham, decd* [1986] 1 WLR 1498; [1987] 1 All ER 405.

81 (2001) 80 SASR 331 at 333.

78 Undoubtedly whilst the nature and content of trust and contract are distinct, there is no dichotomy between them[82]. Thus, as Mason and Deane JJ pointed out in *Gosper v Sawyer*[83]:

> "the trust, particularly the resulting and constructive trust, represents one of the most important means of protecting parties in a contractual relationship and of vindicating contractual rights".

That statement has an added significance as an illustration of a fundamental point made by Viscount Radcliffe in *Commissioner of Stamp Duties (Q) v Livingston*[84] when he said:

> "Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines."

79 The submission of the first respondent appears to involve alternative possibilities. The first is that the Deed on its proper construction was an immediate declaration of trust binding the assets of the two testators. The second assumes that there was no immediately effective declaration of trust but posits subsequent equitable intervention by reason of unconscientious conduct. Neither proposition should be accepted.

80 There is no substance in a submission by which the relations between the parties to the Deed were translated from the level of contract to that of trust so as to bind the property of Mr Barns forthwith and in advance of his death. In *Central Trust and Safe Deposit Company v Snider*[85], Lord Parker of Waddington, for the Judicial Committee, said[86]:

> "A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it

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82 *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569; *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liquidation) [Associated Alloys Case]* (2000) 202 CLR 588 at 603 [27].

83 (1985) 160 CLR 548 at 569.

84 (1964) 112 CLR 12 at 22; [1965] AC 694 at 712.

85 [1916] 1 AC 266.

86 [1916] 1 AC 266 at 270-271.

> would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust."

81 The answer to the second alternative depends upon somewhat different considerations. One concern of the doctrines of equity was to "enlighten and control the common law", as Deane J put it in *Muschinski v Dodds*[87]; his Honour added:

> "The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights."

82 However, in the present case, the essential obligation imposed upon Mr Barns was the negative stipulation in cl 3.3 of the Deed not to revoke his will without the written consent of Mrs Barns and Mr Malcolm Barns. There was no use or apprehended use of Mr Barns' statutory right or power conferred by s 22 of the Wills Act to revoke his will. There was no unconscientious conduct which might enliven equitable intervention to enforce by any doctrine or remedy of equity the contractual negative stipulation found in the Deed. What happened was that Mr Barns observed his obligations under the Deed and his will took effect according to its terms.

Mutual wills

83 Extensive reference was made in the Full Court[88] and in submissions to this Court to authorities concerning "mutual wills". But, upon examination, those decisions do not directly bear upon the issues in this case.

84 It may be accepted that were Mrs Barns, having taken the benefit of her interest in the unadministered estate of Mr Barns, thereafter to depart from her obligations owed to Mr Malcolm Barns in accordance with the Deed not to revoke her will without his written consent, such unconscientious conduct would attract equitable intervention. *Birmingham v Renfrew*[89] was such a case. The survivor had died leaving a new will and the case, as Latham CJ put it[90],

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87 (1985) 160 CLR 583 at 613.

88 (2001) 80 SASR 331 at 343-345.

89 (1937) 57 CLR 666.

90 (1937) 57 CLR 666 at 680.

concerned "a trust which is declared by the law to affect the conscience of his executor and of the volunteers who are devisees or legatees under his will". In the Supreme Court of Victoria[91], Gavan Duffy J had declared that the contract in question bound the executors of the will of the survivor and stood over all questions as to the form of further relief. Thereafter, the High Court dismissed the appeal, leaving it to the Supreme Court to formulate the terms of the constructive trust which bound the executors in their administration.

85 That outcome in *Birmingham* does not support the proposition for which the first respondent contends on this appeal. The contention (rejected in most academic writing on the subject[92]) is that, in these cases, a beneficial interest of the survivor in the assets of the first testator to die arises before the death of the first testator and the due administration of that first estate; the consequence is the withdrawal of the subject-matter from that estate. What is particularly significant for present purposes are the points emphasised in *Birmingham*[93] and in other decisions[94]. The propositions are: (i) it is the disposition of the property by the first party under a will in the agreed form and upon the faith of the survivor carrying out the obligation of the contract which attracts the intervention of equity in favour of the survivor; (ii) that intervention is by the imposition of a trust of a particular character; (iii) the subject-matter is "the property passing [to the survivor] under the will of the party first dying"[95]; (iv) that which passes to the survivor is identified after due administration by the legal personal representative[96] whereupon "the dispositions of the will become operative"[97]; (v) there is "a floating obligation" over that property which has passed to the survivor; it is suspended during the lifetime of the survivor and "crystallises" into a trust upon the assets of the survivor at death[98].

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91 *Renfrew v Birmingham* [1937] VLR 180 at 190.

92 Cope, *Constructive Trusts*, (1992) at 541.

93 (1937) 57 CLR 666 at 688-690.

94 For example, by Fullagar and Kitto JJ in the "secret trust" case: *Voges v Monaghan* (1954) 94 CLR 231 at 240-241.

95 *Birmingham v Renfrew* (1937) 57 CLR 666 at 689.

96 *Easterbrook v Young* (1977) 136 CLR 308 at 319-320.

97 *Attenborough v Solomon* [1913] AC 76 at 83.

98 *Birmingham v Renfrew* (1937) 57 CLR 666 at 689-690. Various questions respecting the incidents of the "floating obligation" remain to be resolved:

(Footnote continues on next page)

86 Proposition (i) indicates that what follows in succeeding propositions is not directed to the situation where the first party dies having revoked the "mutual will" without notice to the survivor during their joint lifetime. The first respondent relied upon *Bigg v Queensland Trustees Ltd*[99]. The facts in that case concerned the breach of an agreement not to revoke "mutual wills"; the first party to die (Mrs Bigg) had secretly revoked her will and the survivor (Mr Bigg) in the meantime had acted to his detriment on the footing that the mutual wills still existed. A declaration was made by McPherson J that the executor of the second will of Mrs Bigg, after discharging liabilities, held the estate on trust for Mr Bigg[100]. His Honour recognised that there were decisions, in particular *Stone v Hoskins*[101], which suggested an outcome to the contrary. *Bigg* has been criticised for finding a ground of equitable intervention by declaration of constructive trust where the appropriate action was no more than for damages for breach of the agreement[102]. On the other hand, McPherson J did refer to *In re Basham, decd*[103], in which principles of proprietary estoppel were applied where the plaintiff had continued to provide benefits to the deceased in the belief, encouraged by the deceased, that property would be left to the plaintiff by the deceased on that person's death.

87 It is unnecessary to undertake further consideration of *Bigg*. On no footing does the present case present facts which would attract the reasoning which McPherson J applied. Further, *Bigg* does not deal with the situation which would arise if, on the facts of that case, a dependant of the deceased by application under the Inheritance Act sought to intercept by order thereunder the making of a declaration of trust in favour of the survivor.

Underhill and Hayton, *Law Relating to Trusts and Trustees*, 15th ed (1995) at 393-394.

99 [1990] 2 Qd R 11; cf *Nowell v Palmer* (1993) 32 NSWLR 574 at 578.

100 [1990] 2 Qd R 11 at 17.

101 [1905] P 194.

102 Rickett, "Extending Equity's Reach through the Mutual Wills Doctrine?", (1991) 54 *Modern Law Review* 581 at 583-584.

103 [1986] 1 WLR 1498; [1987] 1 All ER 405.

Specific devises

88 The first respondent also invited attention to the situation which would have arisen if Mrs Barns, rather than taking as the residuary legatee, was devisee of a particular item of real property and provision to that effect had been made in performance of a requirement in the Deed. Speaking in passing of an analogous situation, Kay LJ, in delivering the judgment of the Court of Appeal in *Synge v Synge*, said[104]:

> "Then, what is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power of the Court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.
>
> It is argued that Courts of Equity cannot compel a man to make a will. But neither can they compel him to execute a deed. They, however, can decree the heir or devisee in such a case to convey the land … and under the Trustee Acts can make a vesting order, or direct that someone shall convey for him if he refuses."

89 The first respondent relies upon what was there said to support the propositions that (i) in such a case of breach of the obligation, the intervention of equity would mean that the real property would not form part of the "estate of the deceased" out of which provision might be made by order under s 7(1) of the Inheritance Act; (ii) yet, upon the appellant's argument, such an asset would be available if the contract were performed and the land did pass under the will as promised; (iii) this "anomaly" should be avoided by treating the land as not being part of the estate for the purposes of s 7(1) in either situation.

90 For the purposes of the issues that arose in *Central Trust and Safe Deposit Company v Snider*, the Privy Council was prepared to assume that such a contract "is one in its nature capable of specific performance as against volunteers under the testator's will"[105]. Later, in *Birmingham*, Dixon J said that the obligations of the survivor under a contract for "mutual" wills had always been enforceable in Chancery, but continued[106]:

> "Necessarily the remedy could not be the same as that by which executory contracts are specifically performed. In such cases the party is compelled

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104 [1894] 1 QB 466 at 470-471.

105 [1916] 1 AC 266 at 272.

106 (1937) 57 CLR 666 at 686-687. See also *Re Kerr* [1948] 3 DLR 668 at 679.

> to carry out his contract according to its tenor. But the relief was specific and was framed to bring about the result intended by the contract."

91 The result which was intended to be brought about by the contract to which Dixon J referred, and which equity would intervene to bring about, was the passing of property under the due administration of the will of the contracting party. It does not follow that in a case of breach the asset in question would not form part of the estate of the deceased for the purpose of s 7(1) of the Inheritance Act. The anomaly referred to does not arise.

92 Reference has been made above to the significance of orders made under such legislation as superimposing a new and independent obligation upon the due administration of the estate by compelling the executor to comply with the terms of the order[107]. In this regard, particular importance attaches to the provision in s 10 of the Inheritance Act that an order made under s 7 shall operate and take effect as if it had been made by a codicil to the will of the deceased executed immediately before death.

93 This was emphasised by McLelland J in *Lim v Permanent Trustee Co Ltd*[108]. That was an application under the NSW Act. A "fully secret" trust was alleged. His Honour noted the argument that, because such a trust took effect immediately upon the relevant communication of its terms to the proposed secret trustee and the acceptance by the latter, from that time the property was subject to the intended trust and upon death of the settlor was not "available as part of his estate to be affected by an order under the [NSW Act] (cf *Schaefer v Schuhmann*[109])".

94 McLelland J referred to authorities including *Voges v Monaghan*[110] for the proposition[111]:

> "The reason why the law imposes the obligation of a trustee upon a legatee who receives a testamentary disposition, having promised the testator or led him to believe that he would hold the property on certain

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107 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 315-316.

108 Unreported, Supreme Court of New South Wales, Equity Division, 26 March 1981.

109 [1972] AC 572.

110 (1954) 94 CLR 231 at 240-241.

111 Unreported, Supreme Court of New South Wales, Equity Division, 26 March 1981 at 5.

trusts, is because it would be unconscionable for the legatee to receive the property free of those obligations."

McLelland J then expressed his conclusion as follows[112]:

> "In my opinion there is no legitimate basis for denying to property given by will to an intended secret trustee thereof the character of being part of the 'estate' of the testator within the meaning of s 3 of the [NSW Act], out of which provision may be made by an order under that section. Any provision made by an order under that section operates and takes effect 'as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death' (s 4(1) of the [NSW Act]). *Consequently any such order diverting property away from an intended secret trustee must be treated as operating at a stage logically antecedent to the constitution of any such trust in respect of that property.* The existence of circumstances which would lead to the constitution of a secret trust therefore provides no impediment in law to the making of provision under the [NSW Act] out of property which would otherwise be subject to such a trust." (emphasis added)

Schaefer v Schuhmann[113]

95 Further reference now should be made to this decision. The reasoning of the majority of their Lordships, if accepted and if applicable to the present circumstances, provides the strongest support for the first respondent.

96 The appeal in that case was taken directly to the Privy Council from the decision of Street J in *Re Seery and the Testator's Family Maintenance Act*[114]. His Honour had considered the effect of a devise to Mrs Schaefer of a cottage and its contents by codicil on the condition that she still be employed by the testator as his housekeeper at the date of his death. The communication to Mrs Schaefer of the terms of the codicil before its execution was construed as a contractual offer which she converted into a binding contract by continuing to serve as housekeeper until the death of the testator[115]. An alternative

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112 Unreported, Supreme Court of New South Wales, Equity Division, 26 March 1981 at 8.

113 [1972] AC 572.

114 (1969) 90 WN (Pt 1) (NSW) 400.

115 (1969) 90 WN (Pt 1) (NSW) 400 at 404.

construction of the facts, later considered by the Privy Council[116], was that at the time of the execution of the codicil, a contract had been made obliging the testator not to revoke the gift provided Mrs Schaefer continued to serve him until his death.

97 Street J rejected the submission for Mrs Schaefer that (i) at the instant of his death the testator became a bare trustee of the cottage for Mrs Schaefer; (ii) the property therefore did not pass under the codicil; and (iii) therefore it could not be affected by the jurisdiction conferred upon the Supreme Court by the NSW Act. Street J considered those submissions as inconsistent with the reasoning respecting the New Zealand legislation in *Dillon v Public Trustee of New Zealand*[117]. An appeal by Mrs Schaefer taken directly to the Privy Council was upheld by majority and *Dillon* was not followed[118].

98 On various occasions, this Court has given consideration to the principles governing the departure by it from its own earlier decisions. The leading authority is provided by the joint judgment of five members of the Court in *John v Federal Commissioner of Taxation*[119]. However, the Court was not referred to authority considering the circumstances in which, since the abolition of all appeals to the Privy Council from Australian courts, the High Court will not follow a previous decision of the Privy Council in an appeal on a matter of State law which was taken not from the High Court but directly from a primary judge of a State Supreme Court. Nor from *Schaefer* does there appear any particular identification of the principles by which at that time the Judicial Committee itself would depart from one of its previous decisions, such as *Dillon*.

99 Legislation enacted between 1968 and 1986 placed this Court at the apex of the legal system in Australia[120]. The treatment of precedent in *Viro v The Queen*[121] was directed to what proved to be an interim situation after the commencement of the *Privy Council (Appeals from the High Court) Act* 1975 (Cth), in which this Court and the Privy Council, federal jurisdiction aside,

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116 [1972] AC 572 at 585.

117 [1941] AC 294.

118 [1972] AC 572 at 591-592.

119 (1989) 166 CLR 417 at 438-440.

120 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 113-114, 138-139.

121 (1978) 141 CLR 88.

shared side by side the function of declaring the law for Australia. *Viro*[122] supports the proposition that, after the 1975 statute, the High Court was not bound by any decisions of the Privy Council, whether given before or after that statute became effective. What does not clearly appear from *Viro* are criteria which, since the *Australia Act* 1986 (Cth) and the ending of all Australian appeals to the Privy Council, indicate when a decision such as *Schaefer* should not be followed by this Court.

100 In *Viro*[123], Gibbs J expressed the view that this Court "will not differ from a decision of the Privy Council any more readily than we will depart from one of our own decisions". That proposition is too wide. It does not allow for cases like *Schaefer* in which relevant decisions of this Court were not considered by the Privy Council[124]. *Oteri v The Queen*[125] is another and significant example.

101 Probably the best that can be said is, as Aickin J put it in *Viro*[126], that this Court will depart from a decision such as *Schaefer* "if in the proper performance of its duty it feels that it should do so".

102 Where, as in *Schaefer*, an appeal was taken directly from a primary judge, the Judicial Committee was deprived of the advantages that might have flowed from a consideration of the matter by this Court. That deprivation is particularly acute where the matter is one in which relevant considerations were stressed in earlier decisions of this Court to which the Judicial Committee apparently was not referred. Other considerations must include the existence, after the Judicial Committee (Dissenting Opinions) Order 1966, of any division between the members of the Board, and the extent to which subsequent decisions of this Court impaired one or more of the steps in the reasoning upon which the Judicial Committee proceeded.

103 In *Schaefer* there was a strong dissenting opinion tendered by Lord Simon of Glaisdale; the majority decision did not rest upon the principle carefully worked out in an earlier significant succession of cases, there being a departure from *Dillon*. Earlier and later decisions of this Court bear significantly upon the

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122 (1978) 141 CLR 88 at 93, 121, 132, 135, 150-151, 166, 174.

123 (1978) 141 CLR 88 at 121.

124 cf *Rejfek v McElroy* (1965) 112 CLR 517 at 519-520.

125 (1976) 51 ALJR 122; 11 ALR 142; [1976] 1 WLR 1272; see *Viro v The Queen* (1978) 141 CLR 88 at 161-162.

126 (1978) 141 CLR 88 at 174.

matter; reference has been made above to the significant subsequent decisions in *Easterbrook* and *Schultz*. The remedial nature of the legislation, stressed in the earlier decisions of this Court to which reference has been made above, received no particular attention in the judgment of the majority of the Judicial Committee.

104 In the end, the justification for not following an earlier decision construing a statute must be that the view taken of the statute in the earlier decision was wrong in a significant respect[127]. With respect to the majority judgment in *Schaefer*, it may be said, to adapt a statement in *Easterbrook*[128]:

> "[I]nsufficient attention has been given to the basic question of the construction of the words of the statute in the context in which they appear, including the evident purpose and policy of the statute."

105 The starting point of the analysis in *Schaefer* was the assumption that, whilst the legislation contained no definition of the "estate" out of which the court is empowered to make provision, the term "estate" could not mean "the gross estate passing to the executor" but must be given a confined meaning, to identify only "the net estate" which is "available to answer the dispositions made by the will"[129]. It may be significant that s 1(1) of the *Inheritance (Family Provision) Act* 1938 (UK) (since repealed by the *Inheritance (Provision for Family and Dependants) Act* 1975 (UK)) spoke of provision "out of the testator's net estate" and in s 5(1) "net estate" was said to mean:

> "all the property of which a testator had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death".

But the NSW Act at issue in *Schaefer* did not contain these provisions. Nor does the Inheritance Act.

106 However that may be, there is no reason to confine the South Australian statutory expression "estate" in this way. The detailed provisions in the legislation respecting the nature and extent of the orders which may be made and the effect given to such orders, as explained in the subsequent decisions in *Easterbrook* and *Schultz*, suggest the contrary.

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127 cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 440.

128 (1977) 136 CLR 308 at 324.

129 [1972] AC 572 at 585.

107 Secondly, their Lordships emphasised that (i) the statute gave the court power "to make such provision for members of the testator's family as the testator ought to have made, and could have made, but failed to make"[130]; (ii) the notion of "could have made" means "could … effectually have done himself"; (iii) if the making of a testamentary provision was in performance of an anterior contractual obligation, the testator was not doing something that could have been done by the testator "effectually" in the necessary sense[131]; and (iv) the statute operated to the prejudice of "volunteers" taking duly under the will but did not "reduce contractual rights to the level of gifts under a will"[132].

108 A difficulty with this approach to the matter is that where, as in the present case, the contract by Mr Barns was one not to revoke his will in favour of Mrs Barns, she cannot claim rights greater than she would have had immediately after the moment of the execution of the will. Those rights were subject to the court's jurisdiction under the legislation to make an appropriate order having effect as a codicil. A related point was made by McLelland J in *Lim* with respect to trust interests which bind property in the estate of the deceased, but with the occasion for equitable intervention to produce that result and the necessary condition for that outcome being the death of the testator. A treatment of an order made under the Inheritance Act as a codicil executed immediately before the death of the testator has a significant consequence. This is that any such order which diverts property away from the operation of such a trust operates at a logically antecedent stage to the constitution of that trust.

109 Reference then was made by their Lordships[133] to the prospect that an action for damages might arise in favour of the promisee under an arrangement such as that under consideration in this case by the promisor before death breaking the contractual stipulation. *Synge v Synge*[134] is authority for the proposition that an action for damages for anticipatory breach may lie in respect of a covenant to leave particular property by will. That cause of action would found a liability to be provided for in the administration of the estate. Such a possibility had been considered in *Dillon*. Their Lordships had observed[135]:

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130 [1972] AC 572 at 585.

131 [1972] AC 572 at 585.

132 *Re Richardson's Estate* (1935) 29 Tas LR 149 at 155, set out in *Schaefer* [1972] AC 572 at 589.

133 [1972] AC 572 at 587.

134 [1894] 1 QB 466.

135 [1941] AC 294 at 304-305.

> "Under a system of law which gives to the court no jurisdiction to alter, to the detriment of B, the devise made by A in B's favour, the compensation due to B from A's estate, if A fails to fulfil his contract to make the devise, will be the value of that which B should have received under the will. In New Zealand, however, this value is not necessarily the whole value of the interest which the testator agreed to devise, but is that value less the extent to which it would be reduced by a redistribution due to the application of the [*Family Protection Act* 1908 (NZ)]."

In principle, they continued, that statute "affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken"[136].

110 Later, in the majority opinion in *Schaefer*[137], difficulty was seen in making any deduction for this contingency; this was because "at the date of the breach sued on it would be quite uncertain whether or not any occasion for exercise of the court's powers under the [NSW] Act would arise on the testator's death". To perceive a difficulty is not to state an absolute. Much would depend upon the particular circumstances in which the court was called upon to make the assessment. The cases in the past concerning the valuation of remarriage prospects suggest that such a task would not be beyond the wit of common lawyers[138].

Statutory changes

111 Street J decided *Seery* on 4 July 1969. The Judicial Committee gave its reasons on 7 December 1971. The Royal Assent was given to the Inheritance Act on 13 April 1972. The *Testator's Family Maintenance Act* 1918 (SA) was repealed by s 3 of the Inheritance Act. Section 7(1) of the new statute, the critical provision, was in relevantly identical form to s 3(1) of the repealed statute. Should the Parliament of South Australia, given the order of events, be taken as having legislated on the footing that, in enacting s 7(1), it gave approval to the interpretation given provisions in this form by *Schaefer*?

112 Any such suggested rule of statutory interpretation "nowadays is little use as a guide and it will not be permitted to prevail over an interpretation otherwise

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136 [1941] AC 294 at 305.

137 [1972] AC 572 at 587.

138 See *De Sales v Ingrilli* (2002) 77 ALJR 99; 193 ALR 130.

appearing to be correct"[139]. The first respondent did not rely upon any such rule of construction.

113 However, it was submitted that this Court, even if persuaded in favour of the appeal, should stay its hand and deny the appellant the result to which she otherwise was entitled. This was because the Parliament of South Australia, by not legislating to redraw s 7(1), was to be taken as having endorsed *Schaefer*. Such a submission should be rejected. There is no such canon of construction, which would trench upon the judicial function. Nor is it a matter of particular significance that in another State, New South Wales, the *Family Provision Act* 1982 (NSW) makes provision for orders to be made out of "notional estate"[140] or that, in the United Kingdom, s 11 of the *Inheritance (Provision for Family and Dependants) Act* 1975 (UK) implements a detailed Law Commission recommendation[141] to empower the court in some circumstances to overcome the result in *Schaefer*.

Conclusions

114 In his dissenting opinion in *Schaefer*, Lord Simon of Glaisdale stressed as a starting point the "mischief" of the statute[142]. Likewise, in *Dillon*[143], their Lordships had begun with what they discerned to be the "manifest purpose" of the legislation. That approach was in conformity with what, for Australia, was mandated by the decisions of this Court.

115 At first instance in *Schaefer*, Street J had referred as follows to the position of a promisee under a contract binding a testator to make a will in a certain form[144]:

> "Where that which is promised is the making of a will in a stated form (irrespective of whether the promise is in some such terms as 'I will leave

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139 *Flaherty v Girgis* (1987) 162 CLR 574 at 594; see also *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329.

140 See *Kavalee v Burbidge* (1998) 43 NSWLR 422.

141 *Family Law: Second Report on Family Property – Family Provision on Death*, Law Com No 61 (1974).

142 [1972] AC 572 at 595-596.

143 [1941] AC 294 at 303-304.

144 (1969) 90 WN (Pt 1) (NSW) 400 at 407.

> you Blackacre in my will' or 'I will insert in my will a clause leaving you Blackacre') there is no unqualified warranty by the promisor that the gift will take effect. In particular the promisee does not, upon such promise being made to him, thereby acquire such an equity or interest in the property as to render the will a mere further assurance to him. *His rights to the property are to be drawn through the will and hence are subject to certain laws affecting testamentary succession*. A promisee's rights under a contract to leave property by will may, without any breach on the part of the testator, be subject to an inroad upon the property being made without thereby giving any consequential right, either to damages or otherwise, to the promisee under that contract. *An order under the [NSW Act] is an instance of such an inroad*." (emphasis added)

That reasoning, together with that of McLelland J in *Lim* in the passage set out earlier in these reasons, should be accepted and applied in the construction of the Inheritance Act.

Orders

116 Each appeal should be allowed. The orders made by the Full Court on 12 October 2001 and 6 March 2002 should be set aside. In place thereof it should be ordered that the declaration in order 1 made by the Master be set aside and in place thereof it be declared that the Deed of 2 May 1996 does not operate to render incompetent an application by the appellant or the third respondents for an order for provision out of the estate of Mr Lyle Barns pursuant to the *Inheritance (Family Provision) Act* 1972 (SA). Otherwise the appeal to the Full Court should be dismissed.

117 The appeal from the order of Nyland J made on 24 April 2002 should be allowed. The order dismissing the appellant's claim should be set aside. That claim should be remitted for hearing by the Supreme Court.

118 Nyland J made no order respecting costs. Nor did the Full Court. The Master ordered that the costs of the present appellant and all respondents as taxed or agreed on an indemnity basis be paid out of the estate to their respective solicitors.

119 The matter of costs in the proceeding before Nyland J and upon what will now be the subsequent disposition of the appellant's application should be for the Supreme Court. The costs of the appeal to the Full Court and of each appeal in this Court should be in the same form as that provided by the Master in respect of the proceeding before him. That order is undisturbed.

120 KIRBY J. The facts relevant to these appeals are described in the reasons of Gleeson CJ[145]. I adopt his Honour's statement of the background to the litigation, and his discussion of the provisions of the *Inheritance (Family Provision) Act* 1972 (SA) ("the Act")[146] and of the history of the decisions of Australian and Commonwealth courts upon the controversy that now falls for resolution[147].

121 As that history demonstrates, there have been two streams of judicial opinion. They came to a head in the Judicial Committee of the Privy Council in *Dillon v Public Trustee of New Zealand*[148] (concerning the operation of the New Zealand Act which was the original model for the legislation that followed[149]) and *Schaefer v Schuhmann*[150], an appeal from Australia[151] (concerning the operation of the New South Wales Act, as then in force[152]).

122 The latter decision of the Privy Council was unusual in that, within a relatively brief interval, their Lordships reversed the holding in *Dillon* and, within a short time of the introduction of the facility of dissent within the Privy Council, their Lordships divided. Lord Simon of Glaisdale delivered dissenting reasons, maintaining that the approach in *Dillon* was correct[153].

123 In my opinion, for the reasons given by Gleeson CJ, *Dillon* was correctly decided. Lord Simon's dissent in *Schaefer* is to be preferred. Although this Court continues to pay respect to the judicial reasons of the Privy Council, especially in respect of Australian appeals at a time when the Privy Council was a court within the Australian judicial hierarchy, we are not bound by such reasons[154]. As the final court of the Australian judicature, in a proceeding

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145 Reasons of Gleeson CJ at [9]-[13].

146 Reasons of Gleeson CJ at [6]-[7]; see also reasons of Callinan J at [142]-[143].

147 Reasons of Gleeson CJ at [20]-[30].

148 [1941] AC 294.

149 *Family Protection Act* 1908 (NZ).

150 [1972] AC 572.

151 From a decision of Street J in the Supreme Court of New South Wales: *Re Seery and the Testator's Family Maintenance Act* (1969) 90 WN (Pt 1) (NSW) 400.

152 *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW).

153 *Schaefer* [1972] AC 572 at 593, 597.

154 *Cook v Cook* (1986) 162 CLR 376 at 390.

brought before it for disposition, this Court is obliged to state its own conclusions. Not least is this so where the issue in such proceeding is (as here) the meaning and application of legislation enacted by a Parliament of a State of the Commonwealth.

124 The joint reasons of Gummow and Hayne JJ call attention to an early decision concerning the applicable Northern Territory law[155] where Rich J[156] in this Court stressed the remedial character of such legislation. Williams and Fullagar JJ elaborated on Rich J's observations in emphasising the wide jurisdiction conferred upon courts to disturb testamentary dispositions and the need to give the statute's "very wide terms" full effect in accordance with its language[157]. The passage of the years that have intervened since those words were written has reinforced that approach to the construction of statutes of such a kind[158]. It is the construction that this Court should apply in the resolution of the present appeals.

125 There is another principle that assists in deciding the approach that this Court should take to the point of principle upon which the Privy Council and other courts have divided.

126 Where conduct is affected by the terms of the written law, for example by a statute made by a legislature within the Commonwealth, it is the duty of judges, indeed of all persons, to obey, and give full effect to, that written law[159]. They must do so even when such effect involves a departure, indeed a significant departure, from obligations otherwise derived from the pre-existing unwritten law made by the judges.

127 In many recent decisions this Court has emphasised the primacy of the statutory text and the necessity to find legal rights and duties according to any

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155 See reasons of Gummow and Hayne JJ at [44] referring to the decision of Rich J in *Holmes v Permanent Trustee Co of New South Wales Ltd* (1932) 47 CLR 113 at 119.

156 Evatt and McTiernan JJ concurring.

157 *Worladge v Doddridge* (1957) 97 CLR 1 at 9; see reasons of Gummow and Hayne JJ at [44].

158 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424; cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

159 cf *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 577-580 [135]-[149], 590 [190]; 187 ALR 1 at 37-41, 55.

applicable statutory prescription, rather than by reference to pre-existing rules of the common law or of equity[160]. Those authorities teach the lesson that the starting point for resolving the respective rights and obligations of the parties in the present appeals is an ascertainment of the true operation of the Act. Private contractual arrangements, otherwise valid and binding between the parties and their successors, must, once valid legislation impinges on the conduct of parties, be understood and applied subject to the operation of that legislation, construed so as to achieve its purposes as expressed in the chosen language.

128 I agree with Callinan J[161] that legislatures, rather than courts, are normally better placed to give effect to large aspects of public policy[162]. However, with respect, that proposition merely states, and does not solve, the issue presented for decision in these appeals. That issue concerns what the Parliament of South Australia enacted as law by the terms of the Act that is under consideration. It is true that such a Parliament might, like others, have put the subject of these appeals beyond doubt (and, in the course of doing so, enlarged the operation of the Act and solved various other problems) by providing for a regime of notional estates. So much has been done elsewhere. But the Parliament of South Australia has not done this. That fact leaves it for this Court to declare the meaning and effect of the statutory provisions that are in question. No authority of this Court resolves that controversy. It is now our duty to do so in these appeals. Doing so is the proper function of the Court. It does not involve intruding into the law-making province of the legislature. On the contrary, this Court is giving effect to the law as made by the South Australian Parliament in terms of the proper construction of that law.

129 Approaching the issue in this way, I agree with Gleeson CJ[163] that the rights obtained by the deceased's widow (the second respondent) under the deed she executed with the deceased, were such that they were always liable to be affected by the potential operation of the Act. The mutual promises of the deceased and the second respondent to make a specified testamentary disposition, however otherwise enforceable according to the unwritten law, were subject to the potential impact of the restriction on testamentary disposition for which the Act provided. Only this construction gives effect to the purpose of the Act according to its terms. That purpose could not be defeated by an agreement, in advance, to dispose of the estate in a way that would tend to defeat the

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160 eg *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 116 [259].

161 Reasons of Callinan J at [159].

162 cf *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 591-592 [203]-[204].

163 Reasons of Gleeson CJ at [33]-[34].

achievement of the Act's objectives. Any authority that would give primacy to the unwritten law over the statutory text is not part of the law of Australia.

130 Having arrived at this conclusion it is unnecessary for me to reach a decision upon the arguments of public policy concerning the legal effects of the deed entered into by the deceased and the first and second respondents in May 1996[164]. I prefer not to do this and will therefore resist the temptation, offered by the appellant, that we should ride that unruly horse in this case[165].

Orders

131 I agree with the orders proposed by Gummow and Hayne JJ.

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164 cf reasons of Gleeson CJ at [36]-[39].

165 *Richardson v Mellish* (1824) 2 Bing 229 at 252 [130 ER 294 at 303] per Burrough J, cited in *Foster v Driscoll* [1929] 1 KB 470 at 498 per Scrutton LJ.

132 CALLINAN J. The principal issue that these appeals raise is one which calls for legislative, rather than judicial intervention (as has occurred in other jurisdictions) if longstanding understandings with respect to the effect of mutual wills and their invulnerability to testators' family maintenance legislation are to be overturned. As Stephen J said about such legislation in *White v Barron*[166]:

> "*This area of law is peculiarly the creature of statute.* A wave of legislation, beginning in New Zealand in 1900 and extending State by State and Province by Province throughout Australia and most of Canada until finally reaching England in 1935, has restricted testators' former freedom of testamentary disposition by enacting varying versions of testators' family maintenance legislation. From time to time the enactments have been amended, almost always in the direction of wider access to the relief which the legislation affords. This has no doubt occurred in response to the pressures created by social change. Thus, in most Australian jurisdictions a divorced wife, if entitled to alimony or maintenance from her deceased former husband, has become an eligible applicant for relief. In Western Australia a 'de facto' widow may now obtain relief and so, in a number of States, may illegitimate children. This is, then, an area of the law created by statute and in which legislatures appear to have been relatively responsive to the social changes which this century has seen. In New South Wales, from whence the present appeal comes, that State's Law Reform Commission reported as recently as 1977 on the *Testator's Family Maintenance and Guardianship of Infants Act*, 1916. In its Working Paper of 1974 the effect of a widow's remarriage upon her entitlement to apply for provision under the Act was discussed at length – pars 6, 18-6, 23. Incidentally, neither that Working Paper nor the Commission's final Report, LRC 28 (1977), proposes positive changes concerning income provisions limited to widowhood. In this jurisdiction such systematic investigation and reporting upon the adequacy of the existing law to meet the changing needs of the community, if coupled with willingness of legislatures to enact appropriate reforms, appears to me to offer a sounder basis for general rule-making, and for the changing of those rules from time to time, than will any reliance by appellate courts upon their own appreciation of those needs." (emphasis added)

The facts

133 These were relevantly the facts upon which the parties agreed so that the effect and validity of a deed for the making of mutual wills might be tested in the Supreme Court of South Australia as a preliminary point to the determination of the merits of a claim by the appellant for provision out of her father's estate.

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166 (1980) 144 CLR 431 at 439-440.

"Lyle Barns ('the deceased') and his wife Alice Barns (the second [respondent]) carried on business together as farmers near Wudinna and elsewhere from about 1950. Malcolm Barns the only surviving natural child of Lyle and Alice (the first [respondent]) was born on 10 June 1950. The [appellant] was born on 1 September 1957 and shortly afterwards adopted by [the deceased] and [the second respondent].

After leaving school at age 16 [the first respondent] worked on the then existing farm and subsequently at all material times on additional properties used in the family farming venture.

In 1980 the [appellant] married. …

In about 1987 a business venture of the [appellant] and her husband failed. The [appellant] became bankrupt. Her marriage was dissolved in June 1989.

…

In about November 1995 [the deceased and the first and second respondents] instructed [solicitors] to prepare [a deed and mutual wills].

On 2 May 1996 [the deceased and the first and second respondents] executed the Deed of that date (being a Deed prepared pursuant to the instructions described [above] and [the deceased] and [the second respondent] signed their Wills in the form provided by the Deed dated 2 May 1996.

Neither [the deceased] during his lifetime nor [the second respondent] at any time has revoked or varied their Wills of 2 May 1996."

134 The operative parts of the deed were as follows:

"3.0 Agreement to make Will

3.1 Lyle hereby agrees to forthwith make a will in the form of Lyle's Will.

3.2 Alice hereby agrees to forthwith make a will in the form of Alice's Will.

3.3 Lyle undertakes not to revoke or in any way add to or vary Lyle's Will, or make any further Will, without the written consent of:

3.3.1 Malcolm, or Malcolm's legal personal representative; and

3.3.2 while she is alive, Alice

3.4 Alice undertakes not to revoke or in any way add to or vary Alice's Will, or make any further Will, without the written consent of:

3.4.1 Malcolm, or Malcolm's legal personal representative; and

3.4.2 while he is alive, Lyle

4.0 Devolve Property

Lyle and Alice have agreed to act in such a manner as to ensure that all property owned by them at their respective deaths devolves in the manner set out in Lyle's Will and Alice's Will respectively unless Malcolm or Malcolm's legal personal representative consents in writing to Lyle and/or Alice (as the case may be) acting otherwise.

5.0 Acknowledgment

Subject to clause 4 of this Deed Lyle and Alice acknowledge that this deed is irrevocable.

6.0 Default

6.1 Lyle agrees that in the event of his failure to perform the terms of this deed that:

6.1.1 firstly, during the lifetime of Alice, Alice and Malcolm shall be entitled to specific performance of the terms of this deed and

6.1.2 secondly, after the death of Alice that Malcolm shall be entitled to specific performance of this deed.

6.2 Alice agrees that in the event of her failure to perform the terms of this deed that:

6.2.1 firstly, during the lifetime of Lyle, Lyle and Malcolm shall be entitled to specific performance of the terms of this deed and

6.2.2 secondly, after the death of Lyle that Malcolm shall be entitled to specific performance of this deed."

135 Materially identical wills for the deceased and the second respondent were set out in schedules to the deed.

136 Clauses 3 to 5 of the will of the deceased were as follows:

> "3 I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever kind and wheresoever situated unto my Executors UPON TRUST to sell call in and convert into money such parts thereof as shall not consist of money at such times and in such manner as my Executors shall think fit and with the fullest power and discretion in my Executors to postpone the sale calling in and conversion of the whole or any part or parts thereof during such period as my Executors shall think proper and to retain the same in its present form of investment without being responsible for any loss occasioned thereby and to hold the moneys to arise from such sale calling in and conversion of those portions of my estate remaining unconverted and any other moneys UPON TRUST to pay thereout all my just debts funeral and testamentary expenses and death duties (if any).
>
> 4 IF the said ALICE ELIZABETH BARNS survives me for the period of thirty (30) days then I give to the said ALICE ELIZABETH BARNS the whole of my estate both real and personal.
>
> 5 IF the said ALICE ELIZABETH BARNS predeceases me or fails to survive me for the period of thirty (30) days then I give to my son MALCOLM BARNS the whole of my estate both real and personal."

The earlier proceedings

137 The matter was heard at first instance by Judge Burley, Supreme Court Master. The appellant contended that the deed was void as being contrary to public policy and that no trust could arise under it in respect of the deceased's estate.

138 The Master was of the view that a constructive trust arose out of the deceased's will in favour of the ultimate beneficiary, the first respondent; and that, as a party to the deed the second respondent could enforce the deed during the deceased's lifetime. In the result however, he formed the opinion that the operative parts of the deed were void on the ground of contravention of public policy.

139 The first and second respondents appealed to the Full Court of South Australia[167]. The judgment of the Court, upholding the appeal, was given by Lander J with whom Prior and Wicks JJ agreed. After reviewing the authorities his Honour said[168]:

> "In my opinion, the authorities are clear. Agreements to make mutual wills have the effect of disentitling any other person who is not provided for in the will from making a claim under the Act.
>
> The deed has exactly the effect for which all parties contended, that is, it prevents the plaintiff and the claimants, in this case, bringing a claim under the Act. A contractual promise to make mutual wills operates as a debt due by the estate of each of the parties. It is not testamentary. That has been recognised by a number of commentators.
>
> The agreements are not void, in my opinion, as being contrary to public policy for the reasons identified by the majority in *Schaefer v Schuhmann*[169].
>
> The remedy is with the legislature.
>
> Indeed in New South Wales, the New South Wales Parliament enacted legislation following the decision in *Schaefer v Schuhmann* to guard against the result. The New South Wales Parliament has provided for prescribed transactions which include contracts providing for a disposition of property out of the person's estate. The Court is empowered to have regard to those prescribed transactions and may make an order designating such property, as the Court may specify, as notional estate of the deceased person, which is held by or on trust for the testator. The Court can order that provision be made out of that notional estate.
>
> The English Parliament has also legislated in relation to dispositions which are intended to defeat applications for financial provision under the *Inheritance (Provision for Family and Dependants) Act 1975* [(UK)].
>
> In my opinion, the deed is not contrary to public policy. It is therefore not void.

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167 (2001) 80 SASR 331.

168 (2001) 80 SASR 331 at 349 [122]-[129].

169 [1972] AC 572.

I would allow the appeal and set aside the declaration and order made by the Master. In lieu thereof I would make a declaration in the following terms:

> 'The deed between Lyle Phillip Barns (deceased) and Alice Elizabeth Barns and Malcolm Phillip Barns dated 2 May 1996 is valid.'" (footnote omitted)

The appeals to this Court

140 Competing considerations of social and legal policy are involved in these appeals. Parties should be held to their contracts. Another way of putting this is to say that a person should not be permitted to act fraudulently in relation to his or her contract. The courts should be concerned to enforce lawful contracts. There is no reason why mutual wills should be singled out as being unacceptably subversive of legislation for the protection of a deceased's family whilst gifts and other dispositions *inter vivos* should not. A person knowingly accepting a benefit with a burden attaching to it should ordinarily bear that burden, even absent an express assumption of any obligation[170]. There should not be any unnecessary intrusions upon the freedom of disposition of property by testators. As Dixon CJ said in 1962 in *Pontifical Society for the Propagation of the Faith v Scales*[171]:

> "All authorities agree that it was never meant that the Court should re-write the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court. An observer of the course of development in the administration in Australia of such statutory provisions might be tempted to think that, unchecked, that is likely to become the practical result."

141 On the other hand, statutory provisions for the benefit of classes of descendants should not themselves be too readily subvertible by steps patently

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170 It is noteworthy that Theobald, *A Concise Treatise on the Law of Wills*, 5th ed (1900) at 14, expresses the principle in terms analogous to benefit and burden:

> "It seems that two persons may agree to make mutual wills, which remain revocable during the joint lives by either with notice to the other, but become irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other."

cf Coke, *First Part of the Institute of the Laws of England*, 19th ed (1832) at 230b.

171 (1962) 107 CLR 9 at 19.

intended to achieve that purpose. As to that however, both the Full Court and the first and second respondents make the response that it is for legislatures, as they have done in other places[172], to enact specific provisions to counter attempts, *inter vivos*, to defeat statutory entitlements to gain access, or further access to a deceased's property. Other relevant considerations are that testators do sometimes make wayward or perverse dispositions by will without regard to their moral and familial obligations, and that it is unseemly, to say the least, that those having legitimate claims should be denied them for no good reason and possibly become a charge on the State.

142 The relevant enactment, the *Inheritance (Family Provision) Act* 1972 (SA) ("the Act") which has near analogues elsewhere in Australia, the United Kingdom and New Zealand, is an Act to ensure to the family of deceased persons adequate provision out of estates. By s 5, it has application to the estates of *all* deceased persons. Any claim, unless time be extended under the Act, must be made within six months of the grant of probate or letters of administration (s 8). Section 10 provides as follows:

"**Order to operate as will or codicil**

10 Every provision made by an order shall, subject to this Act, operate and take effect as if it had been made –

(a) if the deceased person died leaving a will, by a codicil to that will executed immediately before his death;

or

(b) if the deceased person died intestate, by a will executed immediately before his death."

143 Section 14 deals with administrators' liability:

"**Liability of administrators after distribution of estate**

14 (1) An administrator of the estate of a deceased person who has lawfully distributed the estate or any part thereof shall not be liable to account for that estate or that part thereof, as the case may be, to any person claiming the benefit of this Act, unless the administrator had notice of the claim at the time of the distribution.

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172 *Inheritance (Provision for Family and Dependants) Act* 1975 (UK); *Family Provision Act* 1982 (NSW).

(2) For the purposes of this section, notice of the claim –

(a) shall be in writing signed by the claimant or his solicitor;

and

(b) shall lapse and be incapable of being renewed unless, before the expiration of three months after the administrator receives notice of the claim a copy of an application by the claimant for the benefit of this Act has been served on him.

(3) Subsection (1) of this section shall not prevent the Court from ordering that any provision under this Act be made out of the estate, or any part thereof, after it has been distributed."

144 The general principle relating to mutual wills has been stated in the United States in this way[173]:

> "Such a contract creates an indebtedness of the promisor with the rules as to conveyance in fraud of creditors, and, after nonperformance, serves as the foundation of a debt. Thus, the revocation of the will document will not destroy the promisor's substantial obligation under the contract to make a will which provides for the passage of the property in question to the promisee." (footnotes omitted)

145 In *Bigg v Queensland Trustees Ltd*[174] McPherson J said this of mutual wills:

> "What matters is proof that the parties made an agreement to execute their wills in that form and that, expressly or by implication, they contracted not to revoke them. It is the contract rather than the form of the wills that attracts relief at law or in equity."

146 It is necessary to identify the nature of the rights and interests, if any, created by the making of mutual wills. A useful starting point is the judgment of Lord Camden in *Dufour v Pereira*[175] which is discussed by Dixon J in

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173 *Corpus Juris Secundum*, vol 95, §135 at 206-207.

174 [1990] 2 Qd R 11 at 13.

175 (1769) Dick 419 [21 ER 332].

Birmingham v Renfrew[176], to which I will refer in due course. In the former case, the Court went so far as to hold that the last will of the wife, made in breach of her agreed obligation to make a different will, was void[177]. The reporter of the subsequent English Report seems to have regarded the reasoning and conclusion as being consistent with two other decisions of the Privy Council, even though, in those cases the law to be applied was Roman-Dutch law which was the law of South Africa and Ceylon, where the parties were then respectively domiciled[178]. *Dufour* was considered in *Lord Walpole v Lord Orford*[179] in which it was contended that two persons had made an agreement to make reciprocal limitations upon their testamentary dispositions[180]. The Lord Chancellor (Loughborough) who had been counsel in *Dufour*, affirmed the approach of Lord Camden, although he thought that the case before him was distinguishable on its facts in that any agreement that the parties might have entered into was too uncertain to be enforceable[181]. As to what was said in *Dufour*, the Lord Chancellor expressly recorded[182]: "I do not dispute his [Lord Camden's] principles. They are very just, where they apply."

147 Reference should also be made to Hargrave where the judgment of Lord Camden in *Dufour* is more fully quoted[183]:

> "a mutual will is a revocable act. It may be revoked by joint consent clearly. By one only, if he give notice, I can admit. … There is a reciprocity, that runs throughout the instrument. The property of both is put into a common fund, and every devise is the joint devise of both.
>
> This is a contract."

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176 (1937) 57 CLR 666 at 689-690.

177 *Dufour v Pereira* (1769) Dick 419 at 421 [21 ER 332 at 333].

178 *Denyssen v Mostert* (1872) LR 4 PC 236 at 253; *Dias v De Livera* (1879) 5 App Cas 123.

179 (1797) 3 Ves Jun 402 [30 ER 1076].

180 (1797) 3 Ves Jun 402 at 415 [30 ER 1076 at 1083].

181 (1797) 3 Ves Jun 402 at 420 [30 ER 1076 at 1085].

182 (1797) 3 Ves Jun 402 at 419 [30 ER 1076 at 1084].

183 Hargrave, *Juridical Arguments and Collections*, (1799), vol 2 at 308.

148 In discussing *Dufour* in *Birmingham v Renfrew*, Dixon J was conscious that the principles stated by Lord Camden dated from a period when neither in law nor in equity was the view firmly applied that no-one but a party to a contract could enforce it. His Honour pointed out however that equity always provided an exception enabling the beneficiaries of a trust to obtain appropriate remedies in a properly framed suit in which the contracting party as trustee might be joined[184].

149 Of particular relevance to these appeals is the analysis by Dixon J of the nature of the rights and interests to which mutual wills give rise. Of these, his Honour said this[185]:

> "The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubt gifts and settlements, *inter vivos*, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, *inter vivos*, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged."

150 In *Hudson v Gray*[186], Higgins J[187] said that although *Dufour* had never been overruled, "no instance has been produced to us of a trust being actually established on its authority." Dixon J in *Birmingham v Renfrew*[188], pointed out that nonetheless "[m]any modern cases … recognize the principle [*Dufour* establishes] as undeniably sound."

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184 (1937) 57 CLR 666 at 686.

185 *Birmingham v Renfrew* (1937) 57 CLR 666 at 689.

186 (1927) 39 CLR 473; affirmed by the Privy Council in *Gray v Perpetual Trustee Co Ltd* (1928) 40 CLR 558; [1928] AC 391.

187 (1927) 39 CLR 473 at 499.

188 (1937) 57 CLR 666 at 689.

151 Dixon J added[189]:

> "But I do not see any difficulty in modern equity in attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallized on his death and disabled him only from voluntary dispositions *inter vivos*. On the contrary, as I have said, it seems rather to provide a reason for the intervention of equity. The objection that the intended beneficiaries could not enforce a contract is met by the fact that a constructive trust arises from the contract and the fact that testamentary dispositions made upon the faith of it have taken effect. It is the constructive trust and not the contract that they are entitled to enforce."

152 The reference by Dixon J to a floating obligation which crystallises invites comparison with a floating charge. It is well established that effect can readily be given to the latter. Until the occurrence of certain defined events the owner of [the charged] assets may deploy them generally as it deems fit, subject to the covenants in the instrument of charge, and not deliberately in such a way as to destroy or diminish the value or utility of the rights and interests of the person in whose favour the charge is created. In the same way, a "floating obligation" or a "constructive trust" of the kind contemplated by Dixon J may, and should be given concrete effect by crystallisation to, and for the benefit of the promisees under the agreement for the mutual wills on the death of the surviving mutual contractor. The fact that the surviving contracting party, who is the beneficiary under the will of the first of the two to die, may use, and indeed even ultimately use up in their entirety the assets passing under the first will, provides a reminder that in human affairs, even in legal affairs, perfection, and the complete effectuation of intention are sometimes not possible. That is not a reason for a court not to give as much effect as possible to the intentions of the parties. What the second testator may not do, as Dixon J points out, is diminish or devalue the first testator's estate by acts calculated to produce that result.

153 It is against that background and having regard to two cases in the Privy Council that these appeals fall to be considered. The longstanding understandings to which I referred at the beginning of this judgment are based upon the reasoning and decision of the Privy Council in *Schaefer v Schuhmann*[190] which expressly overruled the decision of the Privy Council in *Dillon v Public Trustee of New Zealand*[191], upon which the appellant relies although neither case

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189 *Birmingham v Renfrew* (1937) 57 CLR 666 at 690. See also at 676 per Latham CJ, 691 per Evatt J.

190 [1972] AC 572.

191 [1941] AC 294.

involved mutual wills. In *Dillon*, decided in wartime by the Privy Council, a testator, who had two sons and three daughters, after the death of his first wife, entered into an agreement with his two sons pursuant to which the latter were to devote their whole time to work on, or in respect of the testator's farms. In consideration of the sons' agreement, the testator undertook to devise and bequeath his farmlands to trustees upon trust for one of the sons and two of the daughters subject to an annuity in favour of the third. The testator remarried. Subsequently, he made a will in terms of his undertaking but leaving the residue of his estate to his second wife, the appellant. The appellant then made application under the *Family Protection Act* 1908 (NZ) for adequate provision for her proper maintenance and support out of the estate of the testator. The primary judge found for her and ordered that some of the property the subject of the testator's undertaking be transferred to her. On appeal, the Court of Appeal of New Zealand held that as the provision in the will for the children was made in fulfilment of a contract for valuable consideration, the court had no jurisdiction to make an order under the *Family Protection Act* which would cut down what the testator had, in fulfilment of his promise, left to his children. The appellant appealed to the Privy Council.

154 Viscount Simon LC delivered the judgment of their Lordships. He said this[192]:

> "There can be no dispute or doubt that the lands left to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their stepmother, unless, indeed, their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed. But these devisees are not creditors of the estate. They are beneficiaries under the will. … [T]he contract cannot oust the jurisdiction of the court, and there is nothing in s 33 of the Family Protection Act which restricts the court's power to re-distribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into inter vivos. … The manifest purpose of the Family Protection Act, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for … The court, in considering how its discretion should be exercised, and how far it is just and necessary to modify the provisions of the will, will pay regard to the circumstances in which the testator's will is drawn as it is, … but … the jurisdiction of the court to alter the distribution of the estate in favour of the applicant (widow, widower, or children, as the case may be) cannot be doubted."

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192 *Dillon v Public Trustee of New Zealand* [1941] AC 294 at 302-304.

155 None of the cases or the texts to which I have referred were cited in argument, or referred to by Viscount Simon LC.

156 A subsequent Privy Council, in *Schaefer v Schuhmann*[193], upon which the first and second respondents and the Full Court here relied, and in which *Birmingham v Renfrew* was cited in argument, was of the opinion that *Dillon* was wrongly decided and should be overruled. In the majority judgment, delivered by Lord Cross of Chelsea, their Lordships[194] made several criticisms of *Dillon*. First, they thought it clearly out of line with a body of other authority[195]. Secondly, the decision in *Dillon* had met with criticism both judicial and academic[196]. Thirdly, their Lordships thought it most unlikely that those who framed the relevant statutes, including the English *Inheritance (Family Provision) Act* 1938 had the problem posed by contracts to leave legacies or to dispose of property by will in mind[197]. Fourthly, their Lordships did not think that any particular view of public policy justified the result in *Dillon*, and that, in effect it was for the legislature, by explicit provision, and not the courts, to allow intrusions upon testators' rights to make contracts and testamentary dispositions[198].

157 On the other hand, Lord Simon of Glaisdale (dissenting) who was influenced by a view that he had of a "functional division [between husband and wife] of co-operative labour"[199] was of the opinion that *Dillon* was correctly decided. He expressly approved[200] what had been said at first instance by Street J[201]:

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193 [1972] AC 572.

194 Lord Wilberforce, Lord Parker of Waddington, Lord Hodson and Lord Cross of Chelsea; Lord Simon of Glaisdale dissenting.

195 *Schaefer v Schuhmann* [1972] AC 572 at 590: see *Re Richardson's Estate* (1935) 29 Tas LR 149; *Coffill v The Commissioner of Stamp Duties* (1920) 20 SR (NSW) 278; *In re Syme* [1933] VLR 282.

196 *Schaefer v Schuhmann* [1972] AC 572 at 592.

197 *Schaefer v Schuhmann* [1972] AC 572 at 592.

198 *Schaefer v Schuhmann* [1972] AC 572 at 592.

199 *Schaefer v Schuhmann* [1972] AC 572 at 595.

200 *Schaefer v Schuhmann* [1972] AC 572 at 600.

201 *Re Seery and the Testator's Family Maintenance Act* (1969) 90 WN (Pt 1) (NSW) 400 at 407.

> "A promisee's rights under a contract to leave property by will may, without any breach on the part of the testator, be subject to an inroad upon the property being made without thereby giving any consequential right, either to damages or otherwise, to the promisee under that contract. An order under the *Testator's Family Maintenance Act* is an instance of such an inroad."

158 I have formed the view that these appeals should be dismissed for these reasons.

159 First, legislation is essentially no more than the enactment of desirable social policy as it is perceived by the legislators of the day who have a right, subject only to constitutional inhibitions, to change it as society changes, or as any imperfections in it manifest themselves. Generally speaking, the Parliament, rather than the courts are better able to appreciate and to give effect to social policy. In *Lieberman v Morris*[202] Latham CJ put the matter this way[203]:

> "I refer to the passages quoted by Lord Atkin in *Fender v St John Milday*[204] to support the proposition that it is not for a court to invent a new head of public policy upon the basis of a speculation or belief that if the legislature had directed its attention to the question whether persons should be allowed to renounce statutory benefits the legislature would have provided that any such renunciation would be ineffective. It is quite easy for Parliament, if it wishes to do so, to provide against what is generally called 'contracting out.'"

160 His Honour then went on to give several instances of statutory intervention which had the effect of preventing contracting out.

161 The fact is that in several jurisdictions, as has already been pointed out, legislatures have from time to time intervened. The New South Wales Law Reform Commission recommended the adoption of a concept of "notional estate" to capture, for the purposes of this sort of legislation, property disposed of during life, a concept which it derived from anti-avoidance provisions already enacted in Canada, the United States of America and England[205]. That recommendation

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202 (1944) 69 CLR 69.

203 (1944) 69 CLR 69 at 81.

204 [1938] AC 10 at 10 et seq.

205 New South Wales Law Reform Commission, *Report on the Testator's Family Maintenance and Guardianship of Infants Act, 1916,* Report No 28, (1977).

appears to have accepted the correctness of *Schaefer* and its application to mutual wills. In its report to the Standing Committee of Attorneys General on Family Provision, National Committee for Uniform Succession Laws, the Queensland Law Reform Commission[206] expressly accepted that absent explicit anti-avoidance provisions, property the subject of a contract to leave a specific benefit by will was caught by the contract and gave rise to a specifically enforceable obligation against the estate as a result of the decision of the Privy Council in *Schaefer*.

162 That understanding based on *Schaefer* has also been consistently accepted in at least one leading text published since 1972 on trusts in this country, *Jacobs' Law of Trusts in Australia*. In the 1997 edition this appears[207]:

> "There has been no jurisdiction under the Testator's Family Maintenance legislation whereby the court may make an order in respect of property of the deceased which has been willed to the promisee as a specific bequest or devise in performance of a contract in that behalf. In New South Wales, the court now does [have] such power (in respect of the estates of those dying after 1 September 1983) by force of the *Family Provision Act* 1982, s 22(4)(f). Special problems arise with mutual wills. Mutual wills are made pursuant to an agreement between two testators whereby each executes a will in the same terms *mutatis mutandis* as the other and agrees to leave it unrevoked." (footnote omitted)

163 In a footnote to that paragraph the editors refer to the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW), *Administration and Probate Act* 1958 (Vic) (Pt IV), *Succession Acts Amendment Act* 1968 (Q) (Pt V), *Inheritance (Family Provision) Act* 1972 (SA), *Inheritance (Family and Dependants Provision) Act* 1972 (WA), *Testator's Family Maintenance Act* 1912 (Tas), *Family Provision Act* 1969 (ACT), *Family Provision Act* 1970 (NT) as effecting an alteration to the law applying prior to their enactment. Later, in a section of the work dealing with mutual wills, after discussing *Birmingham v Renfrew* this appears[208]:

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206 Queensland Law Reform Commission, *Report to the Standing Committee of Attorneys General on Family Provision*, Miscellaneous Paper 28, (December 1997) at 91.

207 Meagher and Gummow, *Jacobs' Law of Trusts in Australia*, 6th ed (1997) at 55 [273]. See also 5th ed (1986) at 52-53 [272].

208 Meagher and Gummow, *Jacobs' Law of Trusts in Australia*, 6th ed (1997) at 343-344 [1342].

"The preferred construction of Sir Owen Dixon's words is that the trust arises automatically on the death of the first to die because he made his will in reliance upon the promise of the survivor and by his death that will has become irrevocable.[209] The other view is that the survivor is put to his election; he may disclaim the benefits coming to him under the first will and escape the obligation to leave his will unrevoked in respect of property owned by him at his death, because the constructive trust does not arise until he elects to accept the dispositions in his favour under the first will.[210] But the fraud upon the party who dies first is practised when he dies with his will unrevoked, on the strength of the survivor's promise, thus depriving himself of the opportunity to make alternative testamentary arrangements; it is no satisfaction that the survivor may disclaim and then revoke his will for this diverts the devolution of the property of the deceased away from the beneficiaries he selected and to his next-of-kin.

It follows from the establishment of the constructive trust with the death of the first testator to die that the interest of a beneficiary designated under the arrangement to take on the death of the survivor, is vested from that time and throughout the life of the survivor and will not lapse if the beneficiary predeceases the survivor but will pass to his personal representatives as part of his estate.[211]

The constructive trust will apply only to the property taken by the survivor under the will of the first to die, if the agreement to the parties was to this effect.[212] This would free from the trust the separate estate of the survivor. But the general scheme of mutual wills attaches the trust to all the property of the survivor owned at the date of death of the first to die

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209 This seems to have been the view taken by Lord Camden in *Dufour v Pereira* (1769) 1 Dick 419 [21 ER 332] and by Clauson J in *In re Hagger* [1930] 2 Ch 190. See also Mitchell, "Some Aspects of Mutual Wills", (1951) 14 *Modern Law Review* 136 and Everton, "Betrayal of Faith and Prejudicial Reliance", (1974) 38 *The Conveyancer and Property Lawyer (New Series)* 27.

210 *Stone v Hoskins* [1905] P 194; *In re Oldham* [1925] Ch 75. This is the view taken by Professor Maudsley in *Hanbury's Modern Equity*, 9th ed (1969) at 231.

211 *In re Hagger* [1930] 2 Ch 190.

212 *In re Green, decd* [1951] Ch 148.

or after acquired by the survivor.[213] The result is to reduce the survivor to something less than an absolute owner but more than a life tenant."

164 Secondly, a decision to dismiss the appeals is in my opinion consistent with the reasoning of Dixon J in *Birmingham v Renfrew*[214]. His Honour's reasoning demonstrates that mutual wills are capable of creating, and do in fact create useful and enforceable equitable obligations even though the available estate may be diminished by *inter vivos* transactions not having as their object the defeat of the equitable interests created by the mutual wills.

165 Thirdly, *Schaefer* is the later of the two decisions of the Privy Council. There, the Privy Council expressly overruled *Dillon* and carefully examined other relevant authority. *Schaefer* had therefore better regard to previous authority. It has been generally accepted as stating the law in this country, as appears from the Law Reform Commission reports to which I have referred and the legislative responses to which it has given rise. I do not doubt that mutual wills have been executed on the assumption that *Schaefer* correctly stated the law, and that some testators have died believing that promisees under the mutual arrangements would succeed to their property. Furthermore, its reasoning is, I think, persuasive and applicable to this case.

166 Fourthly, presently in South Australia there is nothing at all to prevent the complete diminution of a testator's estate by gifts *inter vivos* or a transfer for full or no consideration. The only penalty might be the attraction of substantial stamp duty. Contracts for mutual wills also attract stamp duty[215]. This Court should not treat arrangements for mutual wills as being different from other *inter vivos* dispositions because the latter might attract more stamp duty.

167 Fifthly, the fact that the estate of a deceased vests in his or her executor or administrator on death does not, in my opinion, require any different result. The estate that vests is the estate as it was held by the testator, with all of its current liabilities and obligations. Nor does the fact that any entitlement might, under the wills in this case, be postponed for thirty days after the date of death, make any difference. The obligations continue to exist during this period.

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213 Astbury J in *In re Oldham* [1925] Ch 75 at 87, 88 suggests the trust attaches only to property held by the survivor at his death, but this would enable him to defeat the trust by *inter vivos* dispositions.

214 See also Carnwath J in *In re Goodchild, decd* [1996] 1 WLR 694 at 700; [1996] 1 All ER 670 at 675-676 applying *Birmingham*, and Brightman J in *Ottaway v Norman* [1972] Ch 698 at 713.

215 Section 4 of the *Stamp Duties Act* 1923 (SA) and, eg, the item entitled "Deed or transfer of any kind not otherwise specified in this Schedule" in Sched 2.

168 It was suggested during argument that the decision of this Court (Barwick CJ, Mason and Murphy JJ) in *Easterbrook v Young*[216] was determinative of the appeals in favour of the first and second respondents. There their Honours held[217] that the statutory expression "out of the estate of the testator" referred "to the assets *of which the testator might at his death dispose* and which have come or could come to the hands of the personal representative by reason of the grant of probate or letters of administration." (emphasis added)

169 It is necessary to bear in mind however the principal issue with which that case was concerned. This was whether completion of the administration of the estate of a deceased dying intestate so that his administrator was then holding the estate on trust for the persons entitled to take in their respective shares, barred an extension of time for and the making of a claim under, the relevant New South Wales Act. The case was concerned with a statutory intrusion upon rights and interests arising after and as a result of the deceased's death. It has nothing to say about any right or interest arising under a contract made before death. The Court[218] accepted that the reference to the estate of a deceased in s 3 of the Act under consideration there "constitutes a limitation on the power of the court to make an order." The words of the judgment in *Easterbrook* which I have earlier emphasised are important. By his contract the testator here, and the second respondent, for valuable consideration (mutual promises) agreed to limit their rights of disposition, any departure from which would constitute a fraud upon the other. Their actions created, as Dixon J puts it, "a floating obligation" coming into existence immediately on the death of the testator. In my opinion the decision in *Easterbrook* is not determinative of these appeals.

170 It was also suggested in argument that because s 10 of the Act provides that any provision made by the court is to operate and take effect as if it were a will or a codicil executed immediately before death, it should be inferred that the Act was intended to operate as if the testator had, in effect, resolved, and was entitled to resolve, to renounce his contractual obligations at the moment before death. To that I would give the answer that the majority of their Lordships did in *Schaefer* in respect of the similar provision under consideration there, that the presence of such a section is instead, a contrary indication. Of it, their Lordships said[219]:

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216 (1977) 136 CLR 308.

217 (1977) 136 CLR 308 at 318.

218 *Easterbrook v Young* (1977) 136 CLR 308 at 314.

219 *Schaefer v Schuhmann* [1972] AC 572 at 585.

> "The Act contains no definition of the 'estate' out of which the court is empowered by section 3(1) to make provision for members of the family. It is, however, clear that it cannot mean the gross estate passing to the executor but *must be confined to the net estate available to answer the dispositions made by the will*. Again if one reads the section without having in mind the particular problem created by dispositions made in pursuance of previous contracts the language suggests that what the court is given power to do is to make such provision for members of the testator's family as the testator ought to have made, and could have made, but failed to make. *The view that the court is not being given power to do something which the testator could not effectually have done himself receives strong support from section 4(1) which says that a provision made under the Act is to operate and take effect as if it had been made by a codicil executed by the testator immediately before his death*. That being the apparent meaning of the Act their Lordships pass to consider what are the rights of a person on whom a testator has agreed for valuable consideration under a bona fide contract to confer a benefit by will." (emphasis added)

171 Finally, even though an application made under the Act might result in a nil return to an applicant, the making of the arrangement for mutual wills does not of itself preclude descendants from applying under the Act. It is to the former situation that a legislature need address itself if it wishes for change[220]. In the jurisdiction of South Australia it has simply not so far done so.

172 For these reasons I would dismiss the appeals with costs.

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220 It was not suggested by either of the parties in this case that there was any analogue in South Australia of ss 54 and 55 of the *Property Law Act* 1974 (Q) which make enforceable by third parties contracts for their benefit "upon acceptance" of them.