HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

VIRGINIO VIGOLO APPELLANT

AND

WANDA MARY BOSTIN & LEOPOLDO VIGOLO (AS EXECUTORS OF THE WILL OF LINO VIGOLO DECEASED) & ORS RESPONDENTS

Vigolo v Bostin [2005] HCA 11
9 March 2005
P30/2004

ORDER

1. *Appeal dismissed.*

2. *The appellant pay the costs of the respondents as between party and party.*

3. *The costs of the appeal of the first and second respondents be taxed on the trustee basis and, to the extent that those costs exceed the costs borne and paid by the appellant as between party and party, be paid out of the estate.*

On appeal from the Supreme Court of Western Australia

Representation:

R I Viner QC with P Mendelow for the appellant (instructed by SS Chohaan)

M J Buss QC with L A Tsaknis for the respondents (instructed by Hudson Henning & Goodman)

CATCHWORDS

Vigolo v Bostin

Testator's family maintenance – Adequate provision for proper maintenance – Application by son of deceased – From 1973 to 1993 appellant made substantial contribution to deceased's family farming business – Deceased promised appellant that he would inherit family farm in return for his work in building up family assets – In 1993 relationship between appellant and deceased broke down – As a consequence parties entered Deed of Settlement to rearrange family affairs including ownership of family farm, which was purchased by the appellant and his wife – Deceased's will made no provision for the appellant – Jurisdictional question – Whether appellant left without adequate provision for his maintenance, education or advancement in life – Effect of Deed of Settlement on totality of relationship – Relevance of moral duty criterion.

Words and phrases – "adequate provision from his estate for the proper maintenance, support, education or advancement in life" – "moral duty".

Inheritance (Family and Dependants Provision) Act 1972 (WA), s 6.

1 GLEESON CJ. The appellant made an application under the *Inheritance (Family and Dependants Provision) Act* 1972 (WA) ("the Act"). The application was dismissed by McLure J[1]. An appeal to the Full Court of the Supreme Court of Western Australia failed[2]. The further appeal to this Court should be dismissed. The decision of McLure J was correct. The appellant, an able-bodied adult son of the testator, and a man of substantial means, based his application, not upon financial need, but upon what was said to be a moral claim upon the testator's bounty, arising out of previous business and family dealings. His case failed, not because moral claims are irrelevant, but because he was unable to bring himself within the relevant provisions of the Act.

The Act and moral claims

2 The short title of the Act refers to provision for family and dependants. The long title describes it as an Act to make provision for the maintenance and support of the family and dependants of deceased persons out of the assets of the deceased's estate.

3 The Act replaced the *Testator's Family Maintenance Act* 1939 (WA). In the second reading speech[3], the Attorney-General for Western Australia referred to a legislative review proposed by the Law Society of Western Australia in 1965. A Law Reform Committee agreed with a proposal to extend the class of potential claimants under the legislation, and to deal not only with wills but also with intestacies or partial intestacies. The Attorney-General said:

> "It is considered that society's attitude to the right of a man, or of a woman, for that matter, to dispose of his or her property as he or she thinks fit ... beyond doubt has changed. There is now a feeling that a deceased is under some moral obligation to make provision for the maintenance, education, and advancement in life of persons who in the normal course of human affairs had a close personal relationship with the deceased. Unless provision is made there should be means to satisfy the court that some provision should be made.
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> The decision to extend the right of application against intestacies or partial intestacies is a logical one. The terms of a will may be irrational or indeed immoral; but the same can apply where distributions of estates are made under a rule of law. For example, a wife who deserted her husband

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1 *Vigolo v Bostin* [2001] WASC 335.

2 *Vigolo v Bostin* (2002) 27 WAR 121.

3 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 March 1972 at 273.

> and children could take the whole of a small estate at the expense of children maintained by the deceased, this being pursuant to the present law found in the Administration Act. Such a case is not uncommon and the same redress should be available to deserving claimants in an intestacy as is given to claimants under a will."

4 The general structure of the Act follows a form familiar in all Australian States, and pioneered in New Zealand. The key provision is s 6. The power of a court to make an order under the Act is enlivened by the formation of an opinion that the disposition of the deceased's estate effected by will, or the law relating to intestacy, is not such as to make *adequate* provision from his estate for the *proper* maintenance, support, education or advancement in life of a person mentioned in s 7. The court is empowered, at its discretion, to order that such provision as the court thinks *fit* is made out of the estate of the deceased for that purpose. An order takes effect as a codicil to the will, or in the case of intestacy, as a modification to the applicable rules of distribution (s 10).

5 What has been described as the two-stage approach to the exercise of such a statutory power was explained by this Court in *Singer v Berghouse*[4], and is not in controversy in this appeal. It is evident that, depending upon the stage of consideration involved, the following judgments are required by the terms of s 6. What kind of provision for the matters referred to in that section should be regarded as adequate? What should be regarded as proper maintenance, support, education or advancement in life in the case of a particular applicant? If the court comes to exercise its discretion to make an order in favour of an applicant, what should it regard as fit provision for the purposes referred to in the section? Upon whom should the burden of such an order fall?

6 Each of those judgments is to be made by reference to criteria that are expressed in the most general terms. Two of the key words are "proper" and "fit". Fitness and propriety are value-laden concepts. Those values must have a source external to the decision-maker. Morality is the source of many of the values that are expressed in the common law, in statutes, and in discretionary judicial decision-making.

7 Section 7 of the Act sets out the categories of eligible claimants. Broadly speaking, they are spouses or de facto partners, children, grandchildren, and parents. However, the court may refuse to make an order in favour of an applicant on the ground that the applicant's character or conduct is such as in the opinion of the court to disentitle the applicant to the benefit of an order (s 6(3)). A value judgment is required. What is it about the character or conduct of an

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4 (1994) 181 CLR 201.

eligible claimant that might disentitle him or her to the benefit of an order? Once again, the Act gives no specific guidance.

8 These basic features of what is commonly called testator's family maintenance legislation have existed in Australia for almost a century. Such legislation is imbued with concepts of entitlement and disentitlement, claims and obligations, propriety and fitness, related to questions of inheritance. Australian courts, guided by decisions of this Court and of the Privy Council, have interpreted and applied the legislation by giving it a purposive construction. In its original form, the legislation conferred upon courts, in limited circumstances, a discretionary power to interfere with the exercise of freedom of testamentary disposition. Where such an interference was regarded as justified, it defeated the intention of a testator, and conferred a benefit upon an applicant at the expense of others whom the testator intended to benefit. From the beginning, a number of fundamental issues were obvious. Was this an extensive power to re-write a testator's will to make it conform to a judge's idea of how an estate should be distributed, or was it more limited, and, if so, in what way? Were issues of adequacy and propriety to be decided by reference only to minimum standards of subsistence? Was this merely a power to relieve the state of the burden of supporting indigent people? What account was to be taken of the expectations and needs of persons other than an applicant where a testator had made provision for such persons? In what circumstances should a testator's decision to disinherit a family member on grounds of character or conduct prevail?

9 The legislation was typically entitled by reference to objects of "family maintenance" and "family protection". The New South Wales Act of 1916[5], according to its long title, was: "An Act to assure to the widow or widower and family of a testator an adequate maintenance from the estate of such testator". Jordan CJ, in *In re Jacob Morris (Deceased)*[6], said: "[T]he Act is directed to making provision for the maintenance of members of a family who are found to be in need of such maintenance when the family tie has been broken by death." The original legislation was aimed primarily, although not exclusively, at the protection of women. In introducing the Bill for what became the 1916 Act, the New South Wales Attorney-General said[7]:

> "It is remarkable that in Australia, where the rights of women have developed so rapidly in the matter of property, we have wiped out

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

6 (1943) 43 SR (NSW) 352 at 357.

7 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 August 1916 at 578.

> whatever right a woman has in the estate of her husband. The dower which existed here for many years exists no longer. It was abolished in the year 1890, and to-day a man may leave the whole of his property, both real and personal, to any stranger to whom he chooses to leave it. The wife may have been with him a partner for forty or fifty years. She may have assisted him in acquiring whatever wealth he possesses; yet he, dying, may will the property away and leave her dependent on the kindness of friends or the charity of the State. During his lifetime he cannot do that, for it is incumbent on him to maintain his wife. The object of the bill is to secure that after her husband's death the right of the wife to get sufficient from his estate to maintain her shall continue, and the right of his children shall be equally preserved."

10 Plainly, this was not a complete account of the legal effect of the New South Wales Act. Yet it expressed the essence of the legislative purpose. The references to the rights of a wife or a child to maintenance after the death of a husband or father were not references to legal rights. The necessity for the legislation arose from the absence of such legal rights. The statute did not confer new rights of succession. It did not respond to the mischief identified by re-instating a right akin to dower, or otherwise by creating legal rights of inheritance. It preserved freedom of testamentary disposition, but subjected that freedom to a new qualification. The statute gave courts a discretionary power to make orders which would have the legal effect of altering the provisions of wills. Later, when expanded to cover cases of intestacy, it gave courts a discretionary power in effect to modify the statutory rules as to intestate succession.

11 From the earliest days, courts in expounding the legislative purpose have invoked moral values. The reason is not difficult to see. The mischief to which the original legislation was directed was the possibility of unjust exercise of testamentary capacity resulting in inadequate provision for a family member, typically a widow. By hypothesis, the testator had the legal right to dispose of his estate as he thought fit, and the person or persons left without adequate provision had no legal right to inherit beyond the extent provided for in the will. The justification for conferring upon a court a discretionary power to intervene, and to make an order modifying the legal effect of the will, was explained in terms of familial obligation, not unnaturally or inappropriately described as moral. That concept was employed, (and, as has already been observed, was employed in 1972 to explain the Western Australian Act the subject of this appeal), not only to account for the power of curial intervention, but also to illuminate the legislative purpose bearing upon the nature and extent of appropriate intervention. For example, at an early stage in the history of the legislation there arose a question whether the object of intervention was limited to providing an applicant only with what was sufficient for basic subsistence, or

whether it had a wider scope. Salmond J, in the New Zealand case of *Welsh v Mulcock*[8], said:

> "[T]he testamentary duty of a man towards his family is not limited to a merely eleemosynary provision sufficient to provide the necessities of existence. This may be the measure of the legal obligation of a husband or a father in his lifetime under the Destitute Persons Act, but it is not the measure of that moral obligation – that *officium pietatis*, as the Roman lawyers called it – which he owes to his family in respect of the testamentary disposition of his estate, and which is recognized and enforced by the Family Protection Act."

12 The "testamentary duty" which justified legislative interference with a free exercise of testamentary capacity, that is, the duty of a man to make provision for his wife and children, was seen as a moral duty. The legislation was not merely, or even primarily, concerned with relieving the state of the financial burden of supporting indigent widows and children. The courts were not empowered merely to make such provision for an applicant as would rescue the applicant from destitution. The legislative power was to make "proper" provision. Judicial explanation of what was meant by proper provision was based upon the idea of a moral obligation arising from a familial relationship. That is one of the fundamental ideas upon which the structure of our society is based.

13 Similarly, when courts came to address the discretionary question of making fit provision, they had to consider the interests of those upon whom the burden of an order might fall. In making decisions, courts have had regard to competing claims upon a testator (or, later, a person who died intestate). It would now be regarded as self-evident that a court would be readier to disturb a testamentary provision in favour of a beneficiary, such as a charity, with whom a testator had no connection than a provision in favour of dependent relatives[9]. Why is this so? The answer, again, lies in concepts of moral obligation.

14 This Court has also relied upon a dominant legislative purpose of enforcing moral duties as a reason for refusing to give effect to an attempt to contract out of making an application[10].

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8 [1924] NZLR 673 at 685.

9 See, for example, *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494 at 510 per Dixon CJ.

10 *Lieberman v Morris* (1944) 69 CLR 69.

15 Perhaps the most frequently cited statement of basic principle underlying this legislation is that of Salmond J in *In re Allen (deceased), Allen v Manchester*[11]:

> "The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

16 That statement was adopted by the Privy Council in a New South Wales appeal in *Bosch v Perpetual Trustee Co*[12]. *Bosch*, in turn, has been followed and applied in this Court many times. In *McCosker v McCosker*[13], Dixon CJ and Williams J, referring to what is sometimes called the primary or jurisdictional question, said:

> "The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life. As the Privy Council said in *Bosch v Perpetual Trustee Co (Ltd)* the word 'proper' in this collocation of words is of considerable importance. It means 'proper' in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent." (Footnote omitted)

17 In 1994, in *Singer v Berghouse*[14], Mason CJ, Deane and McHugh JJ said that in Australia it has been accepted that the correct approach to the exercise of

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11 [1922] NZLR 218 at 220-221.

12 [1938] AC 463 at 479.

13 (1957) 97 CLR 566 at 571-572.

14 (1994) 181 CLR 201 at 209.

jurisdiction under testator's family maintenance legislation is that stated by Salmond J in *In re Allen*.

18 Of all the cases that have come to this Court under the testator's family maintenance legislation of the various States, I have been able to find only three in which there is no reference in any of the judgments to concepts of moral claims or moral obligations[15]. There may be others but, in any event, they are rare. Sometimes, reference has been made to "natural claims". In *Coates v National Trustees Executors and Agency Co Ltd*[16], Dixon CJ, having referred to the decision of the Privy Council in *Bosch*, spoke of an adult son's "natural claims upon [his mother's] testamentary bounty" which "were much strengthened by his co-operation and support in the conduct of her business and of her affairs." The context makes it plain that what Dixon CJ described as "natural claims" were the same as what Salmond J had in mind in referring to a testator's "moral duty".

19 The same approach has been taken by the Supreme Court of Canada to corresponding legislation. In 1994, in *Tataryn v Tataryn*[17], McLachlin J, responding to an argument that the "moral duty" approach was inappropriate because of its uncertainty, said:

> "If the phrase 'adequate, just and equitable' is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts."

20 In her explanation of the concept of moral duties, as found in contemporary community standards concerning the behaviour of a judicious testator in the circumstances, McLachlin J spoke in terms that would be familiar to any student of Australian decisions on testator's family maintenance legislation.

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15 *Fox v Burvill* (1955) 92 CLR 334; *Cope v Keene* (1968) 118 CLR 1; *Easterbrook v Young* (1977) 136 CLR 308.

16 (1956) 95 CLR 494 at 509-510.

17 [1994] 2 SCR 807 at 820-821.

21 In *Singer v Berghouse*[18], Mason CJ, Deane and McHugh JJ doubted that the statement of Salmond J provided useful assistance in elucidating the statutory provisions. I do not share that doubt. I add, however, that it is one thing to seek assistance in elucidating statutory provisions, and another to substitute judicial exposition of statutory purpose for the legislative text. Their Honours went on to describe references to "moral obligations" as a gloss on the statutory text. If, by that, they meant that such references are not to be used as a substitute for the text, I agree. If they meant that such references are never of use as part of an exposition of legislative purpose, then I regret that I am unable to agree[19]. The descriptions of references to moral duty or moral obligations as a gloss upon the text was not new. In 1956, in *Coates v National Trustees Executors and Agency Co Ltd*[20], Fullagar J said: "The notion of 'moral duty' is found not in the statute but in a gloss upon the statute. It may be a helpful gloss in many cases, but, when a critical question of meaning arises, the question must be answered by reference to the text and not by reference to the gloss."

22 In the next paragraph of their judgment in *Singer v Berghouse*, Mason CJ, Deane and McHugh JJ went on to say that the concepts of "adequate" and "proper" in the statutory text were explained in *Bosch*. Then, in a passage bearing much similarity to what was said by Dixon CJ and Williams J in *McCosker*, they said[21]:

> "The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the *relationship between the deceased and other persons who have legitimate claims upon his or her bounty*." (emphasis added)

That formulation repeats the statutory term "proper", and directs attention to what is "appropriate" having regard to a number of specified circumstances which are said not to be exclusive. It concludes by referring to other persons who have "legitimate claims" upon the deceased's bounty. This assumes that the applicant is a person who has a legitimate claim upon the deceased's bounty, and directs

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18 (1994) 181 CLR 201 at 209.

19 A detailed examination of this aspect of *Singer v Berghouse* appears in the judgment of Ormiston J in *Collicoat v McMillan* [1999] 3 VR 803 at 815-821.

20 (1956) 95 CLR 494 at 523.

21 (1994) 181 CLR 201 at 209-210.

attention to the possibility that there may be others as well. It is far from clear that the concept of legitimate claims upon the bounty of a deceased is materially different from what other judges have described as moral claims, or natural claims. If their Honours thought there was a difference, they did not explain it. Their preference for the terminology of legitimate claims rather than that of moral claims (or, perhaps, natural claims) might be explained by the footnote references in the preceding paragraph, where "moral duty" and "moral obligation" were described as concepts that might well be understood as amounting to a gloss on the statute. Both references are to judgments of Murphy J. In the first, Murphy J took objection to the notion "that the appellant must establish his moral claim; in effect, his character and conduct must qualify him for the benefit of provision out of the estate."[22] In the second, Murphy J said that unless an applicant is left without adequate provision for proper maintenance, education, or advancement, he or she is not entitled to an order, even if the circumstances disclose a breach of moral obligation.[23] Those statements involve rejection of propositions which, if they ever had any currency in this area of the law, would have involved an argumentative attempt to deploy the idea of moral duty or obligation in a manner inconsistent with the structure and language of the statute. In 1979, in *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd*[24], Murphy J went so far as to describe references to moral claims as inconsistent with the legislative scheme. He was alone in that. The leading judgment in *Hughes* was written by Gibbs J, with whom Mason J and Aickin J agreed. Gibbs J referred to "the classical statement in *Bosch v Perpetual Trustee Co*" and quoted with approval the statement of Salmond J in *In re Allen*[25]. In *Goodman v Windeyer*[26], which was decided in the following year, once again the leading judgment was written by Gibbs J, with whom Stephen J and Mason J agreed. Gibbs J said that "[t]he principles upon which the court must approach an application under legislation of this kind were settled in *Bosch v Perpetual Trustee Co*"[27]. His judgment contained references to moral claims and moral duties.

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22 *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 159.

23 *Goodman v Windeyer* (1980) 144 CLR 490 at 504-505.

24 (1979) 143 CLR 134 at 158-159.

25 (1979) 143 CLR 134 at 146-147.

26 (1980) 144 CLR 490.

27 (1980) 144 CLR 490 at 496.

23 No doubt, from time to time, counsel will seek to press familiar concepts beyond their proper limits, and courts will find it necessary to warn against that. No doubt, also, as in the case of many statutes with a long history of judicial exposition, there may be a danger of losing sight of the text for the commentary. This danger is as old as law itself. It is not an argument against commentary.

24 Reference has been made earlier to various elements of the legislative scheme to which, in the past, judges have related ideas of moral claims and moral duty: the matter of "proper" provision; the making, by court order, of "fit" provision; the determination as to where the burden of an order should fall; and the question of character or conduct disentitling an applicant to provision. The same ideas have also been significant as a restraint upon unwarranted judicial intervention. An example may be seen in the judgment of Kitto J in *McCosker v McCosker*[28]:

> "This is the kind of case in which it would be much more pleasant to be open-handed with the testator's estate than to confine oneself to the jurisdiction under the Act. But even if I felt sure that I understood the whole situation so well that I could deal with the estate more justly than the testator dealt with it, I should still not feel justified in asserting that when he decided to give the respondent no more than he had already given him, and to leave his estate to members of the family who had been closer to him and to whom he had his own reasons for being generous, he failed to recognise a moral duty which lay upon him."

25 In explaining the purpose of testator's family maintenance legislation, and making the value judgments required by the legislation, courts have found considerations of moral claims and moral duty to be valuable currency. It remains of value, and should not be discarded. Such considerations have a proper place in the exposition of the legislative purpose, and in the understanding and application of the statutory text. They are useful as a guide to the meaning of the statute. They are not meant to be a substitute for the text. They connect the general but value-laden language of the statute to the community standards which give it practical meaning. In some respects, those standards change and develop over time. There is no reason to deny to them the description "moral". As McLachlin J pointed out in the Supreme Court of Canada, that is the way in which courts have traditionally described them. Attempts to misapply judicial authority, whatever form they take, can be identified and resisted. There is no occasion to reject the insights contained in such authority.

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28 (1957) 97 CLR 566 at 580.

This case

26 The decisions of this Court in *Coates* and *Hughes* dealt with a situation that has caused some difficulties in the operation of testator's family maintenance legislation. It is a situation that arises also in the present case: an application by an able-bodied adult son. In *Hughes*, Gibbs J[29], with whom Mason J and Aickin J agreed, approved what had been said by Fullagar J in the Supreme Court of Victoria in *In re Sinnott*[30]:

> "No special principle is to be applied in the case of an adult son. But the approach of the Court must be different. In the case of a widow or an infant child, the Court is dealing with one who is prima facie dependent on the testator and prima facie has a claim to be maintained and supported. But an adult son is, I think, prima facie able to 'maintain and support' himself, and some special need or some special claim must, generally speaking, be shown to justify intervention by the Court under the Act."

27 Fullagar J prefaced that by references to *Bosch* and the statement by Salmond J in *In re Allen*, and later said[31]:

> "The discretion given by the Act is obviously intended to be very wide. The size of the estate is always important, and there will commonly be needs and claims other than those of the applicant to be considered. But it is always, I think, primarily a matter of estimating need and moral claim. Often need and moral claim will co-exist. ...
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> In the case of an adult son, who has received an education and is well able to earn his living, the father's moral obligation can probably in most cases be regarded as discharged, and a wise and just testator may well feel himself at liberty (to use the words of Sir John Salmond) 'to do what he likes with his own'."

28 It is obvious that, in the passage cited in *Hughes*, Fullagar J was referring to a special need or a special moral claim. If, for "moral", one were to substitute "natural", or "legitimate", the meaning would not be different.

29 The appellant is the eldest of five children of Lino Vigolo (the testator) and Rosario Vigolo. The testator died in June 1997, leaving an estate worth $1.9 million. By his will, he made no provision for the appellant or for Rosario

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29 (1979) 143 CLR 134 at 147.

30 [1948] VLR 279 at 280.

31 *In re Sinnott* [1948] VLR 279 at 281.

Vigolo. His estate was divided equally between his other four children. At the time of the testator's death, the appellant was aged 40. McLure J determined that, as at 30 June 2000, the appellant and his wife (who were beneficiaries in a family trust) owned assets worth in excess of $2 million. His claim was not based on financial need, and it is unnecessary to go into the details. At the time of the hearing before McLure J, the four beneficiaries under the testator's will had net assets of approximately $202,000, $271,000, $216,000 (in those three cases, jointly with their spouses), and $70,000 respectively. Clearly, the appellant was in a much stronger position financially than his siblings, for whom the testator made provision.

30 The circumstances in which the testator made his will, leaving nothing to his widow and eldest son, were as follows. The facts are not in dispute and the following summary is largely taken from the submissions for the appellant.

31 In the early 1960s, the testator and his wife commenced farming on a conditional purchase property at Narrikup near Albany. In May and June 1972, they bought two adjoining properties. In 1981, the conditional purchase property was converted to freehold and registered in the name of the testator. All those properties together became known as the "Old Coach Road Farm".

32 The appellant left school in 1973 aged 16, and worked on the Old Coach Road Farm with his father and mother. In 1976, he also took another part-time job. By 1978, when he was 21, he had saved some money, and told the testator he wanted to buy his own farm. The testator persuaded him to buy, jointly with his parents, a farm known as the Albany Highway Farm. The three of them became partners in a business conducted on the Old Coach Road Farm and the Albany Highway Farm. The testator promised the appellant that, when the testator died, the Old Coach Road Farm would be inherited by the appellant. It was not contended that the promise gave rise to any enforceable legal or equitable rights. As will appear, the testator evidently considered that it was overtaken by later events. Furthermore, as McLure J pointed out, if any attempt had been made to base a legal or equitable entitlement on the promise, it would have been necessary to explore the assumptions on which the promise was made, such as that the business relationship would continue.

33 Over the next 15 years, the partnership continued. The promise was repeated several times. In 1988, the assets and liabilities of the partnership were transferred to a company in which the three former partners were equal shareholders.

34 In 1980, the appellant bought a house on Albany Highway with funds borrowed from a bank, and a contribution from his wife. In the early 1990s he bought a shop in a nearby town, from which his wife conducted a business. In 1991, the appellant and his wife bought another farming property. This accumulation of personal assets by the appellant was resented by the testator. It

led to a family dispute, and a break-up of the business relationship. The terms upon which the appellant and his parents divided their assets were contained in a Deed of Settlement of December 1993. The appellant withdrew from the company, and the company's property and other jointly owned assets were distributed between the appellant and his father and mother on an agreed basis. The appellant's mother made a gift to the appellant of the value of her interest in the Old Coach Road Farm, but, as part of the settlement, the appellant was required to purchase the testator's interest in the farm at market value.

35 In the Full Court, Sheppard AUJ said:

> "In 1993, father and son fell out. They fell out, not because of any wish of the son, but because the father resented the son and his wife building up assets that were not partnership or company assets. The father regarded [the appellant's] obligations as being owed entirely to the family. He was the eldest son; he would inherit the principal assets and he would, in due course, succeed his father as head of a traditional Italian family. But the father's decision to bring things to an end changed all that. [The appellant] agreed to the dissolution, maybe unwillingly, but nevertheless, he agreed and the transactions which gave effect to it were all conducted at arm's length. [The appellant] came out of all this comparatively well off. The bitter pill for him was that he had to pay a commercial price for the Old Coach Road farm when he believed all along that he was entitled to inherit it."

36 McLure J, at first instance, examined in detail the financial dealings between the appellant and his parents, and the terms of the dissolution of their business associations. She found specifically that the appellant was adequately and proportionately compensated for his contributions to the farming business. She also found that, compared with his siblings, the opportunities he was given by his parents were to his significant financial advantage. She held, and the Full Court agreed, that the appellant had failed to show that he was left without adequate provision for the matters referred to in the Act or that proper provision required that he ought to have been made a beneficiary in the testator's will. No successful challenge to that conclusion can be made.

37 When regard is had to the size of the testator's estate, the age and financial circumstances of the appellant, and the comparative situation of the appellant's siblings, and their claims on the testator's bounty, it is impossible to conclude that the testator left the appellant without adequate provision for his proper maintenance and advancement. The finding that the appellant was adequately compensated for his contribution to the family farming business and, indeed, advantaged by comparison with his siblings is significant. The testator's promise relating to the Old Coach Road Farm must be considered in the light of later events. The appellant and his parents agreed, at arm's length, to dissolve their financial relationship. They did so on proper commercial terms. Whatever

justification, in personal terms, might have existed for a grievance on the part of the appellant, it did not, in the circumstances referred to at the commencement of this paragraph, amount to a claim (moral, natural or legitimate) that demanded testamentary recognition by a judicious father.

38 The appeal should be dismissed. I agree with the costs orders proposed by Gummow and Hayne JJ.

39 GUMMOW AND HAYNE JJ. This is an appeal from the Full Court of the Supreme Court of Western Australia (Steytler and Parker JJ, Sheppard AUJ)[32] which dismissed an appeal against the rejection by a judge of that Court (McLure J)[33] of an application for an order under s 6 of the *Inheritance (Family and Dependants Provision) Act* 1972 (WA) ("the Act").

The parties

40 The appellant in this Court, and the unsuccessful party at first instance and in the Full Court, is Mr Virginio Vigolo, the elder son of the late Mr Lino Vigolo. Mr Lino Vigolo died on 3 June 1997 aged 69, leaving his widow and the five adult children of their marriage. Mr Lino Vigolo left an estate, the net worth of which at the date of his death was $1,913,144. By his last will dated 30 November 1994, he appointed his daughter Wanda and younger son, Leopoldo, executors and trustees and divided his estate between those two children, together with his daughters Nancy and Sandra, as tenants in common in equal shares. No question arises concerning the construction of the will. The testator made no provision for the appellant or for his widow, Mrs Rosario Vigolo. She was notified of the proceedings in the Supreme Court but took no part in the litigation.

41 The first respondents to the appeal are the executors of the will and, in addition, all four siblings were sued personally and are joined as second, third, fourth and fifth respondents to this appeal. The same counsel appeared for all respondents. There is no suggestion that the first respondents have not adequately represented the interests of all the beneficiaries[34]. Given the nature of the issues on the appeal which concern only the "jurisdiction" issue, it would have been appropriate if counsel had appeared only for the trustees and if the other respondents had submitted save as to costs. But no objection at the hearing of the appeal was taken to the course in fact pursued.

The family history

42 In the early 1960s, Mr and Mrs Vigolo commenced farming on a conditional purchase lease property near Albany. Thereafter, other properties were acquired and together were known as the "Old Coach Road farm". In 1978,

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32 *Vigolo v Bostin* (2002) 27 WAR 121.

33 *Vigolo v Bostin* [2001] WASC 335.

34 cf Nevill and Ashe, *Equity Proceedings With Precedents (New South Wales)*, (1981) at [1405].

Mr and Mrs Vigolo acquired other land which was identified in the evidence as the "Albany Highway farm".

43 The appellant was born in 1957. He left school in 1973 aged 16 and commenced working full-time on the Old Coach Road farm with his parents. He married in 1984 and the only child of the marriage was born in 1988.

44 In 1993, as a result of the breakdown in the relationship between the appellant and his father, the former's involvement with his parents in the family farming business came to an end. The parties entered into a Deed of Settlement dated 9 December 1993 ("the Deed of Settlement"). Among other things, this provided for the transfer of the Old Coach Road farm to the appellant and his wife as trustees of their family trust. The testator's share in the Old Coach Road farm was sold for $571,760. The share of Mrs Rosario Vigolo was valued at $228,240 and she made a gift thereof to the appellant and his wife. In respect of the Old Coach Road farm and other assets sold to them pursuant to the Deed of Settlement the total consideration was $1,012,454; allowing for the gift of $228,240 and for certain sums to be set-off, the cash balance payable by them on settlement was $251,737. This, with another sum for working capital, was borrowed by the appellant and his wife from a bank. In June 1998, after his father's death, the appellant and his wife sold the Old Coach Road farm for $1.68 million. It should be noted that the father made his last will some months after the Deed of Settlement.

The appellant's case

45 The leading judgment in the Full Court was given by Sheppard AUJ. His Honour recorded, as had McLure J, that financial need was not put as a basis for the appellant's case; rather, the essence of the case was said to be a "moral claim" based on his family dealings, in particular a "promise" made by the deceased to leave to the appellant the Old Coach Road farm in return for his dedication and hard work in building up family assets.

46 In his leading affidavit, the appellant stated the essence of the case put in support of his application under the Act as follows:

> "I believe that by reason of the promises made to me by my father which encouraged and persuaded me to live and work on the family farm and the other farming properties for very meagre 'wages', my contribution of my own savings to the purchase of the Albany Highway farm, my commitment to my father all my life until we dissolved our partnership in 1994, that I had to buy what my father had always told me would be my inheritance and the significant personal contribution I made over my lifetime towards 1994 to building up my father's estate, that I have a substantial claim to share in my father's estate at least equally with each of

my brother and my sisters such that inadequate provision has been made for me in my father's will."

The decisions at trial and on appeal

47 The primary judge found that on a number of occasions the deceased had said to the appellant words to the effect that he would inherit the Old Coach Road farm. On one occasion when the appellant raised with his father the low wages paid to him, he was told that he was paid only a small amount because the appellant would inherit the Old Coach Road farm when his father died.

48 Sheppard AUJ described the course of the appellant's relationship with his father and the family business as follows[35]:

> "Undoubtedly, the evidence establishes that [the appellant] made a very substantial contribution to the welfare of the family business and that of his father and mother. He made it over many years, commencing full-time work on the Old Coach Road farm when he was 16 years of age. Eventually, he became a partner in the family partnership and then a shareholder in the company which replaced the partnership in 1988. But, as the years went on, [the appellant], although he continued to do what he had done before, additionally began to acquire assets in which the company had no interest. This he did in conjunction with his wife. This was not something that pleased the deceased. So to speak, he wanted everything in the family. He complained to [the appellant] about his going his separate way. But [the appellant] was not receptive to his entreaties. Eventually, it was decided to end the business relationship which had existed between father and son for some 15 years and, really, when one takes into account the past, for much longer. There was a break-up of the assets effected by the deed of settlement which resulted in [the appellant] and his wife taking over the Old Coach Road farm and the deceased retaining the Albany Highway farm. The other assets of the company were divided or distributed in various ways … The various transactions are perhaps complicated by the existence of trusts. But the essence of what happened is as stated above."

49 His Honour continued[36]:

> "The upshot of this was that a balance of over $500,000 became payable by [the appellant] in effect for the acquisition of the Old Coach

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35 (2002) 27 WAR 121 at 143.

36 (2002) 27 WAR 121 at 143.

> Road farm. Although the amount he had to pay was substantially reduced by [his mother] making her gift to him of her entitlement under the distribution brought about by the deed of settlement, there was still a substantial balance to pay."

50 Of the falling out between father and son leading, among other things, to the Deed of Settlement, Sheppard AUJ remarked[37]:

> "They fell out, not because of any wish of the son, but because the father resented the son and his wife building up assets that were not partnership or company assets. The father regarded [the appellant's] obligations as being owed entirely to the family. He was the eldest son; he would inherit the principal assets and he would, in due course, succeed his father as head of a traditional Italian family. But the father's decision to bring things to an end changed all that. [The appellant] agreed to the dissolution, maybe unwillingly, but nevertheless, he agreed and the transactions which gave effect to it were all conducted at arm's length. [The appellant] came out of all this comparatively well off. The bitter pill for him was that he had to pay a commercial price for the Old Coach Road farm when he believed all along that he was entitled to inherit it."

51 It is not disputed that, as Williams J observed in *Lieberman v Morris*[38] of the then New South Wales legislation[39], "in the case of large estates, provision can be made for the well-to-do". In this Court, counsel affirmed that the application under the Act was not brought on the basis of financial need, but on the basis of a "moral claim" to adequate provision for the proper advancement in life of the appellant.

52 The submissions for the appellant referred to the narration by Sheppard AUJ of the course of the relationship between father and elder son and to the hurt sustained by the realisation that, contrary to the promise made, the appellant could only acquire the Old Coach Road farm by purchase. An understanding of this state of affairs was said to go to the core of what is required here of a wise and just testator to make proper provision in all the circumstances, namely to meet the promises made and satisfy the familial relationship between father and son and thereby provide for the advancement in life of the appellant.

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37 (2002) 27 WAR 121 at 144.

38 (1944) 69 CLR 69 at 91-92. See also *Re Leonard* [1985] 2 NZLR 88 at 91.

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

Section 6(1) of the Act

53 It is convenient now to turn to the central provision of the Act. In doing so, it should be observed that, in construing that legislation, a construction promoting the purpose or object of the legislation is to be preferred to a construction that would not promote that purpose or object. This is the approach to construction mandated by the *Interpretation Act* 1984 (WA), s 18.

54 Section 6(1) of the Act states:

> "If any person (in this Act called 'the deceased') dies, then, *if the Court is of the opinion that the disposition* of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, *is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life* of any of the persons mentioned in section 7 of this Act as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose." (emphasis added)

The persons mentioned in s 7 are a range of individuals extending beyond any surviving spouse and child of the deceased, and including parents and in some circumstances grandchildren of the deceased[40].

55 Several further points should be made concerning the construction of s 6(1). First, the sub-section is an example of a law which authorises the making of curial orders altering interests in property otherwise arising by operation of a law concerning testamentary succession and intestate succession. The legislation does not give effect to antecedent rights arising by virtue of familial relationships; rather, rights are created and enforced "in one blow"[41].

56 Secondly, in *Singer v Berghouse*[42], Mason CJ, Deane and McHugh JJ, speaking of the current New South Wales legislation[43], made observations

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40 The classes of persons specified in s 7 have been expanded by Pt 13 of the *Acts Amendment (Lesbian and Gay Reform) Act* 2002 (WA), but this litigation turns upon the legislation in its previous form.

41 *Fisher v Fisher* (1986) 161 CLR 438 at 453. See also *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24].

42 (1994) 181 CLR 201.

43 *Family Provision Act* 1982 (NSW).

applicable to the structure of s 6(1) of the Western Australian statute. Their Honours said[44]:

> "It is clear that, under these provisions, the court is required to carry out a two-stage process. The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question'[45]."

Their Honours went on to indicate that that description of the "jurisdictional question" meant no more than that the court's power to make an order in favour of an applicant was conditioned upon the court first being satisfied of the state of affairs predicated in what in Western Australia is the opening passage of s 6(1), ending with the words "made under this Act". In the present case, McLure J, having answered in the negative the "jurisdictional question", correctly said that it was unnecessary to go to the second stage of the process.

57 Thirdly, many of the decisions expounding upon the moral duties of testators and to which reference was made in submissions, beginning with *Allardice v Allardice*[46] and including *Bosch v Perpetual Trustee Co Ltd*[47], were decided upon legislation which did not then make provision with respect to intestate as well as testate succession. The utilisation of concepts of "moral duty" and "moral claim" appears to have originated in a series of judgments by Edwards J upon the first statute in the field, *The Testator's Family Maintenance Act* 1900 (NZ)[48]. Thereafter, in his judgment in the New Zealand Court of

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44 (1994) 181 CLR 201 at 208-209.

45 See, eg, *White v Barron* (1980) 144 CLR 431 at 456; *Bondelmonte v Blanckensee* [1989] WAR 305 at 307; *Golosky v Golosky*, unreported, New South Wales Court of Appeal, 5 October 1993.

46 (1910) 29 NZLR 959; affd [1911] AC 730, and decided upon *The Family Protection Act* 1908 (NZ). The provenance of the New Zealand legislation is traced in Grainer, "Is Family Protection a Question of Moral Duty?", (1994) 24 *Victoria University of Wellington Law Review* 141 at 142-144.

47 [1938] AC 463, decided upon the New South Wales Act of 1916.

48 *Laird v Laird* (1903) 5 *Gazette Law Reports* 466 at 467 ("natural duty"); *Plimmer v Plimmer* (1906) 9 *Gazette Law Reports* 10 at 24 ("moral duty"). In *Rowe v Lewis* (1907) 26 NZLR 769 at 772, a case upon *The Testator's Family Maintenance Act*

(Footnote continues on next page)

Appeal in *Allardice*, Edwards J, speaking with reference to *The Family Protection Act* 1908 (NZ), said[49]:

> "It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. … [T]he Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will."

58 Later, in *In re Allen (Deceased), Allen v Manchester*[50], a decision of Salmond J upon the same New Zealand legislation, there was a reformulation expressed as follows[51]:

> "The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances. If it is manifest that the testator has, whether consciously or inadvertently, failed to perform this duty, it is the right and duty of the Court to perform it for him by making such alterations in his testamentary dispositions as may be adequate, but no more than adequate, for that purpose".

59 Fourthly, the apparent enshrining of "moral duty" as an aid to interpretation of Australian family provision statutes by the Privy Council in *Bosch*[52], with approval by their Lordships of *Allardice* and *Allen*, was made on an appeal taken directly from Nicholas J sitting in the equity jurisdiction of the Supreme Court of New South Wales. The litigation bypassed this Court. Given the ultimate authority of the Privy Council in matters of State law, for many

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1906 (NZ), Chapman J referred to "the duty, morally speaking" of the testator in that case.

49 (1910) 29 NZLR 959 at 972-973.

50 [1922] NZLR 218.

51 [1922] NZLR 218 at 220-221.

52 [1938] AC 463 at 478-479.

years *Bosch* foreclosed too critical a reassessment in this Court of the importance of a "moral duty" for the construction of the Australian legislation.

60 Nevertheless, some caution in acceptance of the formulation adopted in *Bosch* is later apparent, for example, in the judgment of Dixon CJ in *Pontifical Society for the Propagation of the Faith v Scales*[53]. In *Stott v Cook*[54], Windeyer J observed:

> "Questions of duty, when not determinable by the fixed criteria of law, become questions of casuistry. Standards and principles may be stated. But their application to a particular case can seldom be beyond all debate even when all the facts are known."

More explicitly, in *Coates v National Trustees Executors and Agency Co Ltd*, Fullagar J said[55]:

> "If the result of the cases is that the expression 'breach of moral duty' has now to be regarded as a literal statement of the condition on which jurisdiction depends, then it is indeed to be regretted that any such term as 'moral duty' was ever used in connexion with testator's family maintenance. It is perhaps in any case to be regretted. No such term is used in any of the relevant statutes, and it is surely wrong to say that every order in favour of an applicant under any of the statutes has involved a moral reflection on the testator."

His Honour added, in a passage which will supply a key for the present appeal[56]:

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

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53 (1962) 107 CLR 9 at 20.

54 (1960) 33 ALJR 447 at 455.

55 (1956) 95 CLR 494 at 522. Williams J spoke to similar effect at 512.

56 (1956) 95 CLR 494 at 523.

61 Finally, with the amendment of the legislation in various jurisdictions[57] to include cases of whole or partial intestacy, there arose a need to reconsider the references to the "moral duty" of testators. In *Re Russell*[58], Lucas J said of the Queensland statute:

> "The shares in the estate which accrue to the various persons entitled to share in the distribution accrue to them, generally speaking, by operation of law and not as the result of any conscious or deliberate act on the part of the deceased, although it is of course possible that a man might make a deliberate decision not to make a will. It seems to me that the most practical way to look at the matter is to imagine that the deceased had made a will whereby he directed that his estate should be distributed as on intestacy, and then to consider the needs and moral claims of the persons who benefit from a distribution in this manner."

Thereafter, Jacobs J, dealing in *In the Estate of Brooks*[59] with the legislation in South Australia, was concerned with a case where not only had the deceased made no testamentary provisions but there was no living person other than his former wife with any claim upon his bounty. Jacobs J observed[60]:

> "I would be surprised to think that the Crown could assert any relevant need or moral claim."

62 In Western Australia, provision respecting intestacy was first made with the enactment of the present legislation in 1972. In the second reading speech on the Inheritance (Family and Dependants Provision) Bill, the Attorney-General said it was "logical" to extend the right of application and to give "the same redress … to deserving claimants in an intestacy"[61]. To accommodate the changes now reflected in s 6(1), s 6(2) was included. This states:

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57 For example, in New Zealand by s 22 of the *Statutes Amendment Act* 1939 (NZ); in New South Wales by s 9 of the *Conveyancing, Trustee and Probate (Amendment) Act* 1938 (NSW); in Tasmania by s 3 of the *Testator's Family Maintenance Act* 1957 (Tas); in Victoria by the *Administration and Probate (Family Provision) Act* 1962 (Vic); in Queensland by s 12 of the *Succession Acts Amendment Act* 1968 (Q); and in South Australia by the *Inheritance (Family Provision) Act* 1972 (SA).

58 [1970] QWN 22 at 56.

59 (1979) 22 SASR 398.

60 (1979) 22 SASR 398 at 400.

61 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 March 1972 at 273.

> "The Court in considering for the purposes of subsection (1) of this section whether the disposition of the deceased's estate effected by the law relating to intestacy, or by the combination of the deceased's will and that law, makes adequate provision for the purposes of this Act shall not be bound to assume that the law relating to intestacy makes adequate provision in all cases."

63 The significant changes made in the various jurisdictions, including Western Australia, to the family provision legislation in the course of the century of its existence indicate the need for caution in a continued reiteration, as an aid to construction of modern legislation, of the moral duty owed by testators to their spouses and children.

"Moral duty" and "moral claim"

64 In the early New Zealand case, *In re Rush, Rush v Rush*[62], Edwards J spoke of the legislature having "intrusted to the Court the duty of seeing that a testator does not sin in his grave" by leaving unprovided for "those whom nature has made dependent upon him"; the Court discharged this duty by providing in the first place for those, such as his wife, "to whom the law [including *The Destitute Persons Act* 1894 (NZ)] gave rights against him, in his lifetime". Then, in *Laird*[63], Edwards J returned to the notion of "natural claims" as supporting in a given case an order for a provision greater than that which the law of intestate succession would have conferred upon a claimant had the testator died intestate.

65 The next stage in New Zealand was the formulation of "moral duty" in the passages in *Allardice*[64] and *Allen*[65] which have been set out earlier in these reasons. By the steps traced in *Rush*, *Laird*, *Allardice* and *Allen*, the New Zealand judges were expanding upon what had threatened to become a narrow reading of the general words of the legislation.

66 The emergence of a criterion of "moral duty" thus was not calculated to contract the operation of the legislation, or to obstruct what otherwise might be good claims to an order. Yet, paradoxically, that may have been the tendency of the later case law.

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62 (1901) 20 NZLR 249 at 253.

63 (1903) 5 *Gazette Law Reports* 466 at 467.

64 (1910) 29 NZLR 959 at 972-973.

65 [1922] NZLR 218 at 220-221.

67 As the case law developed after *Allardice* and *Allen*, references to the "moral duty" of testators have been accompanied by a correlative "moral claim" upon the bounty of testators and to the absence of such a claim as informing an evaluation of the respective positions of the applicant and the various testamentary beneficiaries. For example, in *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd*, Gibbs J observed[66]:

> "The appellant is in very poor financial circumstances. His deserts may be small, but his needs are considerable. There were no competing claims on the bounty of the testatrix, who owed no moral duty to the Bethlehem Home for the Aged at Bendigo."

68 In his judgments in *Goodman v Windeyer*[67] and in *Hughes*[68], Murphy J expressed dissatisfaction with this focus upon notions of "moral duty" and "moral claim". His Honour stressed that the entitlement to make a claim was to be found in the terms of the statute. The applicant was not to be put additionally to the proof of a "moral claim". Nor did the existence of a "moral claim" remedy the absence in a particular case of an ability to make a claim under the legislation[69]. In New Zealand itself, doubts were expressed as to whether the subsequent case law[70] had taken the references in *Allardice* and *Allen* to "moral duty" beyond what could have been envisaged by the promoters of the original legislation[71].

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66 (1979) 143 CLR 134 at 148-149.

67 (1980) 144 CLR 490 at 504-505.

68 (1979) 143 CLR 134 at 158-159.

69 See the discussion of the judgments of Murphy J by Kirby P in *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24 at 28-29.

70 For example, in *Re Leonard* [1985] 2 NZLR 88 at 92, McMullin J identified the "essential questions" arising in every case under the *Family Protection Act* 1955 (NZ) as being "[w]as there a moral duty on the testator to provide for the claimants under his will? If so, did he fail to discharge it?". See also *Lewis v Cotton* [2001] 2 NZLR 21 at 34.

71 Grainer, "Is Family Protection a Question of Moral Duty?", (1994) 24 *Victoria University of Wellington Law Review* 141 at 145-148, 160-161.

69 Thereafter, in their joint judgment in *Singer*, Mason CJ, Deane and McHugh JJ, after referring to the statement by Salmond J in *Allen* and to the comments of Murphy J in *Goodman* and *Hughes*, said[72]:

> "For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to 'moral duty' or 'moral obligation' may well be understood as amounting to a gloss on the statutory language".

70 It is apparent that their Honours were not using the term "gloss" in its milder sense of an epexegetical comment or explanation. Rather, they were using it in the same sense as Williams J had done in *Coates*[73], that is to say, of a paraphrase which is apt to mislead.

71 This concern was similar to that expressed by Lord Wilberforce when dealing in *Ebrahimi v Westbourne Galleries Ltd*[74] with the "just and equitable" ground of winding up under the companies legislation. Speaking of several restrictive interpretations which were to be rejected, his Lordship said[75]:

> "First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances."

72 In similar vein in *Coates*[76], Fullagar J had warned against so treating the "moral duty test" as "to turn a guide into a tyrant, a commonly convenient factual test into a rule of law".

73 "Moral duty" may often have been used as a convenient shorthand expression intended to do no more than invite attention to the questions presented by the relevant legislation[77]. Its use, however, has led to reference being made to the "moral claims" of those who seek further provision and that is an expression

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72 (1994) 181 CLR 201 at 209.

73 (1956) 95 CLR 494 at 512.

74 [1973] AC 360.

75 [1973] AC 360 at 374-375.

76 (1956) 95 CLR 494 at 522-523.

77 *Collicoat v McMillan* [1999] 3 VR 803 at 818 per Ormiston J.

which is liable to being misunderstood[78] just as its progenitor "moral duty" may mislead. It is therefore better to forgo any convenience that these shorthand expressions may offer in favour of adherence to the relevant statutory language. In *Permanent Trustee Co Ltd v Fraser*[79], Kirby P and Sheller JA correctly indicated that what was said in the joint judgment in *Singer* should henceforth provide an appropriate guide to the construction and operation of the family provision legislation.

The correct approach

74 The correct approach to construction of the first or "jurisdictional" limb of provisions such as s 6(1) of the Act is that indicated in the joint judgment in *Singer*. Their Honours referred[80] to the statement of Gibbs J in *Goodman*[81]:

> "[T]he words 'adequate' and 'proper' are always relative. There are no fixed standards, and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards".

Their Honours then added[82]:

> "It is clear from this passage that his Honour was conveying that the primary judge was in essence making a value judgment in much the same way as a primary judge makes a sound discretionary judgment in personal injury cases when he or she assesses the quantum of damages say for pain and suffering, and for loss of amenities of life."

They earlier had observed[83]:

> "The evaluative character of the decision stems from the fact that the court must determine whether the applicant has been left without *adequate*

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78 *Collicoat v McMillan* [1999] 3 VR 803 at 818-819 per Ormiston J.

79 (1995) 36 NSWLR 24 at 29, 46 respectively; cf at 36 per Handley JA and *Collicoat v McMillan* [1999] 3 VR 803 at 815-820 per Ormiston J.

80 (1994) 181 CLR 201 at 211.

81 (1980) 144 CLR 490 at 502.

82 (1994) 181 CLR 201 at 211.

83 (1994) 181 CLR 201 at 210.

> provision for his or her *proper* maintenance, education and advancement in life." (original emphasis)

75 With these passages is to be read the preceding statement of their Honours[84]:

> "The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty."

For the present appeal, the references in the above passage to the totality of the relationship between the applicant and the deceased is of particular importance.

Conclusions

76 Both McLure J and Sheppard AUJ remarked that the present application under the Act was not of the same nature as a suit in equity relying upon principles of estoppel. Sheppard AUJ added[85]:

> "It is not a case for breach of contract, nor does it involve a claim based on actionable misrepresentation. It is a case under the Act and that is how it must be dealt with."

McLure J had indicated that, if the application had been a suit in equity:

> "no doubt it would have been necessary to explore whether the statements were based on any known assumptions (such as that the partnership would continue or that the members of the partnership would work together to build a family asset base)".

77 The appellant criticised these statements of the primary judge and in the Full Court as indicating an error of law in the application of the Act. They do not do so.

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84 (1994) 181 CLR 201 at 209-210.

85 (2002) 27 WAR 121 at 144.

78 The points made by their Honours helped to emphasise, by way of contrast, the attention required by the statute to the whole of the circumstances. These included not only the efforts of the appellant in building up the family assets over many years, but also the effect of the breakdown of the substratum of the family relationships upon which had depended the continuation of the representations made to the appellant by his father. Those relationships and the continued currency of the assurances given to the appellant were changed fundamentally by entry into the Deed of Settlement and the steps taken thereunder during the remainder of Mr Vigolo's life.

79 It also may well have been the case (as McLure J implied in the above passage) that any rights the appellant had outside the Act, resting upon the assurances given to him respecting the Old Coach Road farm, could not have survived the consensual, if reluctant, rearrangement of family affairs effected by the Deed of Settlement.

80 The appellant put forward as an apt factual analogy the statement by Gibbs J in *Hughes*[86]:

> "In fact [the applicant] was allowed by his father, and later by the testatrix, to live on the farm and treat it as his own. He has since acted on the assumption that the farm would be his and was led to do so by the conduct of his parents, if not by their express promises. Wise and just parents, having allowed him to base his life on that foundation, would not years later attempt to deprive him of what had become necessary for the support of himself and his family."

81 However, the difficulty for the present appellant is with the last sentence. Here, that foundation shifted radically with the Deed of Settlement and with it "the totality of the relationship" to which reference was made in *Singer*[87].

82 In oral submissions to this Court, counsel for the respondents properly emphasised the acceptance by Mason CJ, Deane and McHugh JJ in *Singer*[88] of the proposition that, in an appeal from an adverse decision at the "jurisdictional" stage, the principles that govern appellate review of discretionary decisions apply.

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86 (1979) 143 CLR 134 at 148. See also *In the Will of Hughes* [1930] St R Qd 329 at 334-335.

87 (1994) 181 CLR 201 at 210.

88 (1994) 181 CLR 201 at 212.

83 By that measure, it cannot be shown that McLure J erred and the Full Court correctly dismissed the appeal. Her Honour considered and rejected the appellant's case in terms of the "moral claim" advanced by him. But she did so in a detailed fashion which demonstrated full assessment of what was said in *Singer* to be required for the determination of the first or "jurisdictional" stage of the application[89]. No cause for appellate intervention arose.

Orders

84 The appeal should be dismissed. The appellant should pay the costs of the respondents as between party and party. Special provision should be made for the first and second respondents. Their costs of the appeal should be taxed on the trustee basis and to the extent that those costs exceed the costs borne and paid by the appellant as between party and party they should be paid out of the estate[90].

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89 (1994) 181 CLR 201 at 209-210.

90 cf *Hogan v Hogan* [1983] 2 NSWLR 561 at 562; *Practice Note* [1954] VLR 208.

85 CALLINAN AND HEYDON JJ. Should the Court make an order in favour of a son of substantial means for provision out of his late father's estate pursuant to s 6(1) of the *Inheritance (Family and Dependants Provision) Act* 1972 (WA) ("the Act") in circumstances in which he has received money's worth for his efforts in the family business? Does the Act permit or contemplate that an order may be made in fulfilment of a moral obligation only? If it does, what kinds of circumstances will give rise to such an obligation? These are the questions which this appeal raises.

Facts

86 The appellant is the eldest of five adult children whose father died on 3 June 1997, leaving an estate worth about $1.9m. By his will he devised and bequeathed his real and personal property to the other four of his children in equal shares. Neither the appellant, nor his mother who has not made an application under the Act, was a beneficiary.

87 The appellant was born on 20 October 1957. Within a few years of his birth, his parents began to farm land at Narrikup, near Albany. The land was leased from the Crown and covered 284 hectares. In October 1981, the appellant's father bought it. In 1972, the appellant's father and mother had bought two adjoining properties as tenants in common. The aggregation of the properties was called the "Old Coach Road farm".

88 When he was 16 years old, the appellant left school to work full-time on the farm with his parents. He was paid $40 per month. In 1976, as the income from the farm declined, the appellant obtained work in Albany including as a slaughterman, a cleaner and a labourer. He continued to work part time on the farm however. He diligently saved his earnings. In 1978, when he was 21, and had accumulated $10 000, he told his father that he wished to buy his own farm. His father, in response, proposed that they buy a farm together "because at the end of the day when he died, it would all be mine". The appellant maintained that like assurances were given to him over the ensuing years. Furthermore, the appellant claimed, on one occasion his father told him that his wages were low because the farm would be his when he, his father, died. The appellant's evidence of his father's assurances is uncontradicted. It found a measure of confirmation in the respondents' evidence that although they had not heard their father give the assurances, they had heard their mother, who was also a partner in the business, say to the appellant that the farm would be his one day.

89 In June 1978, the appellant and his parents purchased another farming business, the "Albany Highway farm" ("Albany"), as tenants in common. From September in that year, the farming business conducted on the Old Coach Road farm and Albany was carried on by a partnership of the appellant, his father and mother. Two of the appellant's sisters were partners at different times, although

this was specifically for taxation reasons. Profits were allocated equally between the partners at the end of each financial year. At no time was the real property an asset of the partnership.

90 In 1984, on the appellant's marriage, his wages were increased to $100 per week. His and his wife's costs of living were paid from other money derived from the farming business.

91 In 1986, the testator, the appellant's mother, the appellant and his wife purchased another farm ("Chokerup"). The funds generated by all of the farms were used to buy some investment properties, including the Great Southern Produce Markets on the Albany Highway and a service station at King George Sound.

92 In 1988, the assets and liabilities of the L Vigolo and Son partnership were transferred to L Vigolo & Son Pty Ltd ("the Company"). The business was then conducted by the Company in which the appellant, his father and mother were equal shareholders. On the birth of his first and only child, the appellant requested an increase in wages from his father. That request fell on deaf ears, but, as a compromise, the appellant was given a company chequebook to enable him to draw an allowance of $50 per week from the company's bank account for his wife. Following further complaints by the appellant in the early 1990s, his father increased this amount to $70 per week. At about this time, the appellant and his wife bought a hairdressing business at Mount Barker, which his wife conducted. Not long afterwards, they purchased a farm of 275 acres on Albany Highway at Narrikup.

93 Sometime during 1993, there was a falling out between the appellant and his father. It seems that the father regarded the family business as an enterprise that should be conducted on a monolithic basis, and that all assets acquired individually should become part of it. He complained bitterly about the separate accumulation of assets by the appellant and his wife. The relationship between the appellant and his father deteriorated and the appellant's involvement with his parents in the family business came to an end.

94 A Deed of Settlement dated 9 December 1993 was drawn up to record a division of the Company's assets between the testator and his wife, and the appellant and his wife. The assets were divided on an "arms-length" basis on a market valuation. Pursuant to the deed, the parents transferred the farm to the appellant and his wife. Its market value was $800,000. The father's share (valued at $571,760) was sold to and paid for by the appellant and his wife. The mother's share (valued at $228,240) was given to them. The farm was subsequently sold, in June 1998, by the appellant and his wife for $1,680,000.

95 The testator made his will on 30 November 1994 after the settlement was completed. He omitted the appellant from it as a beneficiary because he believed that he had made more than adequate provision for him during his lifetime, and also because his wife had given the appellant and his wife her share in the Old Coach Road farm.

96 The testator died on 3 June 1997.

97 On 27 February 1999, the appellant made his application under s 6(1) of the Act for, among other things, an order that he receive a sum equal to one fifth of the net assets of his father's estate. The appellant's application was not based upon financial need. It was framed in this way:

> "I believe that by reason of the promises made to me by my father which encouraged and persuaded me to live and work on the family farm and the other farming properties for very meagre 'wages', my contribution of my own savings to the purchase of the Albany Highway farm, my commitment to my father all my life until we dissolved our partnership in 1994, that I had to buy what my father had always told me would be my inheritance and the significant personal contribution I made over my lifetime towards 1994 to building up my father's estate, that I have a substantial claim to share in my father's estate at least equally with each of my brother and my sisters such that adequate provision has not been made for me in my father's will."

Decision of the trial judge

98 In dismissing the application, the trial judge (McLure J) noted that the appellant did not seek to rely upon an estoppel or contract. It was unnecessary for her Honour therefore to make any findings about any assumptions, induced by the father's promises to the appellant. Her Honour concluded that the appellant had been adequately compensated for his contributions to the farming business, and that it was to his financial advantage that he be given the opportunity, of which he availed himself, to become a partner in his parents' business. The trial judge found that the appellant had received, in the period from 1979 to December 1993, more than one-third of the total of the profits, salary and other income received by the testator, the mother and the appellant in total. Accordingly, this was not, her Honour said, a case in which a child was seeking compensation for wages or capital forgone on the basis of an expectation of the receipt of an inheritance to be bequeathed to him in the future. Nor was her Honour satisfied that the appellant's efforts added any special value to his father's estate. Rather, the value of the contributions of the father, mother and the appellant were approximately equivalent, and this equivalence was reflected in the benefits each received from the farming business. Her Honour was of the

view that the appellant did not therefore have a moral, or any other claim to justify provision for him out of his father's estate.

99 The primary judge also compared the financial position of the appellant with that of each of the respondents. Her Honour found that their financial circumstances were modest, and that their capacity to acquire substantial assets in the future was limited. On the other hand, the appellant's position was "substantially superior". Although the father's estate may have been large enough to accommodate some claim by the appellant, without significant prejudice to the respondents, it was not the role of the Court to rewrite a testator's will beyond what is required by the Act.

100 The primary judge held that the appellant was a person of significant means by reason in part at least of the opportunity given to him by his parents to participate in the farming business. Her Honour was not satisfied that the appellant had needs or requirements at the date of his father's death which he was unable to meet from his own resources. Nor was she prepared to hold that the testator failed to make adequate provision for the appellant's proper maintenance, education or advancement in life.

The Full Court of the Supreme Court of Western Australia

101 On his appeal to the Full Court, the appellant repeated the contention that he had a "moral claim" upon his father's estate. Sheppard AUJ, with whom Steytler and Parker JJ agreed, explained that claim in this way[91]:

> "It is plain on the face of the evidence that [the appellant] deeply resented the way events had developed. He, and her Honour appears to have accepted this, regarded the Old Coach Road farm as rightfully his in the sense that it would eventually come to him by way of inheritance when his father died. It is what he believed he had been promised in return for the dedicated years he had given his parents in the building up of the family fortune. The realisation that he could only acquire it by purchase came as a serious blow to him. He was deeply hurt by the turn of events. And his hurt was made the worse when he found that he was omitted from his father's will."

Sheppard AUJ however, emphasized the need to construe the language of the Act and warned of the danger of focussing unduly on the concept of a "moral claim". His Honour was of the opinion that the correct approach was as stated by

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91 *Vigolo v Bostin* (2002) 27 WAR 121 at 143 [98].

Mason CJ, Deane and McHugh JJ in *Singer v Berghouse*[92]: that the court must answer two questions. The first is whether the applicant has been left without adequate provision for his or her proper maintenance, education or advancement in life. If this question is answered affirmatively, only then will the court need to proceed to the second question, whether any provision, and if any, what provision, ought to be made out of the deceased's estate for the applicant.

102 Sheppard AUJ was of the view that the appellant had failed to demonstrate that he had been left without adequate provision and accordingly found it unnecessary to decide whether any provision in his favour ought to be made. He held that the appeal should therefore be dismissed. In doing so, his Honour emphasized that it was not the Court's task to make a new will for a testator just because it may seem fair to do so. The mere fact that a will might be, or seem to be unjust, was, in his Honour's view, insufficient to give rise to an entitlement under the Act.

The appeal to this Court

The appellant's submissions

103 The appellant submits that the Court of Appeal erred by determining that he had failed to demonstrate that he had been left without adequate provision for the "proper maintenance, support, education or advancement in life" by reason of the extent of his financial means. There was nothing in the language of s 6(3) of the Act to disqualify an applicant not in financial need from obtaining an order for provision by the Court.

104 The appellant asserted that he has a "moral claim" to share in his father's estate for these reasons: absence of disentitling conduct; the filial relationship; the repeated promise that the testator would give the farm to the appellant; the appellant's expectation that the promise would be fulfilled; the appellant's contribution to the building up of his father's estate; and the value of it.

105 In describing his claim as a "moral claim", we did not take the appellant to be doing more than asserting that it was proper for his advancement in life that some provision be made for him out of his father's estate[93]; he was only "suggest[ing] that the court ought to do what it is to be supposed that this testator would have done if he had known and *properly appreciated* all the circumstances

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92 (1994) 181 CLR 201.

93 *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494 at 523 per Fullagar J.

of the case"[94]. In this connexion the appellant emphasized the use of the word "proper" in s 6(1) of the Act.

106 The appellant submitted that the primary judge erred in denying a remedy to the appellant simply because he was "an adult of significant means" and had no "needs or requirements ... for which he was unable to provide from his own resources". Her Honour should have had regard to all of the circumstances of the case, especially to the business, financial and filial relationship of the appellant to the testator.

107 The appellant submitted that the Full Court fell into the same errors as the primary judge. Their Honours effectively treated the repeated promise and its non-fulfilment, and the surrounding circumstances as matters of no importance and irrelevant to the question whether the testator had made "adequate provision … for the [appellant's] proper maintenance ... or advancement in life".

108 In summary, both the primary judge and the Full Court erred, not only in eschewing "moral duty" and "moral claim" as relevant and important considerations, but also in giving to the Act, far too narrow a construction contrary to the way in which courts have traditionally construed it and its analogues.

The legislation

109 Section 6(1) of the Act empowers a court to make provision out of a deceased's estate for any person who can demonstrate that he or she has not received adequate provision for his or her maintenance, support, education or advancement in life. Section 6(1) provides:

> "**6 Claims against estate of deceased person**
>
> (1) If any person (in this Act called '**the deceased**') dies, then, if the Court is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of the persons mentioned in section 7 of this Act as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any

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94 (1956) 95 CLR 494 at 523 per Fullagar J. (Emphasis added)

such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose."

Sub-section 3 of s 6 provides:

"(3) The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient."

110 Under the Act, the classes of persons entitled to make an application under s 6(1) are defined by s 7. Section 7(1) provides:

"**7 Persons entitled to claim**

(1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons –

...

(c) a child of the deceased living at the date of the death of the deceased, or then *en ventre sa mere*;

..."

111 Similar legislation exists in each other Australian State[95] and Territory[96] and derives from legislation enacted in New Zealand in 1900[97]. The purpose of the Act, and its Australian analogues, is to permit a court in certain cases to displace a testator's dispositions on application by specified persons, and indeed, not only a testator's dispositions, but also distributions according to the rules

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95 See *Family Provision Act* 1982 (NSW); *Administration and Probate Act* 1958 (Vic); *Testator's Family Maintenance Act* 1912 (Tas); *Inheritance (Family Provision) Act* 1972 (SA); *Succession Act* 1981 (Q).

96 *Family Provision Act* 1969 (ACT); *Family Provision Act* (NT).

97 *The Testator's Family Maintenance Act* 1900 (NZ). For the history of the Australian provisions, see de Groot & Nickel, *Family Provision in Australia*, 2nd ed, (2001) at 1-5; Mason, *The Principles and Practice of Testator's Family Maintenance in Australia and New Zealand*, (1929) at 1-3.

applicable to intestacies[98]. The Act does not impose any limitation on a testator's power of disposition. Nor does it confer a statutory entitlement upon specified persons to receive a certain portion of a deceased's estate. If however the statutory conditions are satisfied, then the court is empowered under the Act to alter a testator's disposition to produce a result that is consistent with the purpose of the Act. The court's power to do so is discretionary.

112 In *Singer v Berghouse*[99], this Court construed ss 7 and 9 of the *Family Provision Act* 1982 (NSW), which was couched in similar language to s 6 of the Act. Mason CJ, Deane and McHugh JJ held that under the provisions of the New South Wales Act, a court is required to undertake two inquiries. The first is whether an applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second inquiry, as to the provision that should be made, will only be necessary if the first is answered affirmatively. The first inquiry has been described as the "jurisdictional question". In respect of it their Honours, after quoting the well known passage from the judgment of Salmond J in *In re Allen; Allen v Manchester*[100], said[101]:

> "For our part, we doubt that this statement [which referred to 'moral duty'] provides useful assistance in elucidating the statutory provisions. Indeed, references to 'moral duty' or 'moral obligation' may well be understood as amounting to a gloss on the statutory language[102]."

Their Honours added[103]:

> "The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the

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98 Section 6(2) of the Act.

99 (1994) 181 CLR 201 (Mason CJ, Deane and McHugh JJ, Toohey and Gaudron JJ dissenting).

100 (1921) 41 NZLR 218.

101 (1994) 181 CLR 201 at 209.

102 *Hughes v National Trustees, Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 158; *Goodman v Windeyer* (1980) 144 CLR 490 at 504-505.

103 (1994) 181 CLR 201 at 209-210.

applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty."

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

114 The first of the indications is the use of the word "proper". It implies something beyond mere dollars and cents. Its use, it seems to us, invites consideration of all of the relevant surrounding circumstances and would entitle a court to have regard to a promise of the kind which was made here. Unfortunately for the appellant however, and as will appear, the making of that promise is not the only, and is indeed, far from a conclusive fact in the appellant's favour. The use of the word "proper" means that attention may be given, in deciding whether adequate provision has been made, to such matters as what used to be called the "station in life" of the parties and the expectations to which that has given rise, in other words reciprocal claims and duties based upon how the parties lived and might reasonably expect to have lived in the future.

115 The next of the indications is the expression, in comprehensive language, of the sorts of provision that the court may order, that is, provision by way of maintenance, support, education or advancement. "Maintenance" may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. "Support" similarly may imply provision beyond bare need. The use of the two terms serves to amplify the powers conferred upon the court. And, furthermore, provision to secure or promote "advancement" would ordinarily be provision beyond the necessities of life. It is not difficult to conceive of a case in which it appears that sufficient provision for support and maintenance has been made, but that in the circumstances, say, of a promise or an expectation reasonably held, further provision would be proper to enable a potential beneficiary to improve his or her prospects in life, or to undertake further education. Significantly, and not inappropriately, one of the forms in which the appellant sought to put his case here was as a claim for advancement. That the idea of a "moral claim" may have been introduced as an aid to judicial deliberation before it was enacted that claims could be made upon intestate estates, does not, in our opinion render it less relevant or useful now that such claims may be made. In principle, there is

no reason why effect should not be given to a moral claim upon the estate of an intestate estate in the same way as it would have been, had the deceased left a duly attested will.

116 The last strong indication that moral duty, and what that can involve, moral considerations, is the reference in sub-s 3 of s 6 to disentitling character or conduct. It is clear from the way in which this sub-section is expressed, that *moral* considerations, in both the primary sense and any other sense in which "moral" can be used, may be relevant.

117 What we have said, that moral duty and moral obligation may be relevant and within the contemplation of the Act, is generally consistent with a long stream of authority in this Court. In *Coates v National Trustees Executors and Agency Company Limited*[104] Dixon CJ affirmed the several cases in New Zealand, the Judicial Committee and Australia which acknowledged and gave effect to moral claims. In the same case Williams J[105] referred in terms to a "moral duty" as did Webb J[106] and Kitto J[107]. Fullagar J was alone there in disparaging its utility[108]. In *Pontifical Society for the Propagation of the Faith v Scales*[109] Dixon CJ (McTiernan J agreeing) again affirmed the line of authority, to which he referred in *Coates*, and invoked "moral duty" as an appropriate basis for provision.

118 In *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd*[110] the Court was constituted by Barwick CJ, Gibbs, Mason, Murphy and Aickin JJ. In his judgment Gibbs J cited[111] with approval the well-known

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104 (1956) 95 CLR 494 at 509.

105 (1956) 95 CLR 494 at 512.

106 (1956) 95 CLR 494 at 516.

107 (1956) 95 CLR 494 at 526.

108 (1956) 95 CLR 494 at 523.

109 (1962) 107 CLR 9 at 20.

110 (1979) 143 CLR 134.

111 (1979) 143 CLR 134 at 146-147.

passage of Salmond J in *In re Allen; Allen v Manchester*[112] part of which was quoted in the joint judgment in *Singer*[113].

> "The Act is ... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

Mason J expressly agreed with the reasons of Gibbs J[114]. There only Murphy J[115] rejected the notion of "moral claim".

119 In *Goodman v Windeyer*[116] the leading judgment was written by Gibbs J. Stephen J[117], with a minor qualification, and Mason J[118] without qualification agreed with Gibbs J. Once again his Honour had cited the passage from *Allen* quoted above. He also referred to a "special claim"[119]. For the second time in such a case Murphy J[120] refused to countenance the existence and relevance of a "moral duty".

120 In the joint judgment of Mason CJ, Deane and McHugh JJ in *Singer v Berghouse*[121] their Honours said that the passage from *Allen* cited by Gibbs J

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112 [1922] NZLR 218 at 220-221.

113 (1994) 181 CLR 201 at 209.

114 (1979) 143 CLR 134 at 157.

115 (1979) 143 CLR 134 at 159-160.

116 (1980) 144 CLR 490.

117 (1980) 144 CLR 490 at 503-504.

118 (1980) 144 CLR 490 at 504.

119 (1980) 144 CLR 490 at 497.

120 (1980) 144 CLR 490 at 504-505.

121 (1994) 181 CLR 201.

provided no "useful assistance". They rejected the concepts of "moral duty" and "moral obligation"[122] despite the fact that Mason CJ had expressly agreed on both of the earlier occasions to which we have referred with the reasoning of Gibbs J.

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

122 We do not therefore think that the questions which the Court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors.

123 On any basis however in this case, we do not think that the appellant was entitled to succeed, whether a two staged inquiry is appropriate or not. The appellant has more than enough for his proper maintenance, support, education or advancement in life even assuming that the promise is relevant. It seems to us that the family settlement which was made in 1993 rendered the promise no longer relevant, or of any significance. The settlement ensured that the appellant would receive in money's worth everything, indeed somewhat more than the sum of his efforts over the years. The totality of the arrangements put this beyond doubt. That totality also took into account the fact that a promise had been made by including, as one of its components, the substantial gift by the testator's wife of $228,000 to the appellant. Why, it may be asked, should he now get more? Were he to receive the equivalent of the other third of the property, that is the further component that he says that he was promised, the disparity, to which we will refer in some detail later, between his means and those of the respondents would be even greater. The making of the promise may perhaps have given rise to a moral obligation, but that obligation must always have been subject to the satisfaction of other claims upon the bounty of the testator. It is not irrelevant that it was not demonstrated that had the appellant chosen to withdraw from the

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122 (1994) 181 CLR 201 at 209.

family business much earlier than he did, he would necessarily have been better off, either in 1994, or at the time of the hearing of his application.

124 The appellant is a middle-aged, married father of one dependent child, and is of substantial means. At the time of his father's death, he and his wife had assets worth approximately $1.5m. No evidence was adduced at trial of the amount of money required (or desired) by the appellant for his "proper maintenance, support, education or advancement in life", and no suggestion could be made that the appellant was unable to meet, from his own resources, the cost of properly maintaining, supporting, educating or advancing himself in life.

125 With respect to the appellant's "moral claim", the trial judge found that the appellant was "adequately compensated for the considerable effort, energy and expertise he devoted to the farming business". Although his drawings from the partnership were described as meagre, the income and capital that he took out of it over time were not. From 1979 to 1993, inclusive, the appellant received income of $580,298 and capital benefits of $838,533, totalling $1,418,831. The trial judge found that this was slightly more than one third of the total benefits received by his father, mother and himself.

126 The financial positions of the respondents at the time of the testator's death are also relevant. The second respondent was aged 36 and married with three dependent children aged nine, seven and one. She and her husband had net assets of approximately $249,125. She was employed as a real estate sales representative and her husband was employed as a hospital orderly.

127 The third respondent was aged 21 and single, with no dependants and lived with his mother at Albany. He had net assets of $35,512 and was a self-employed butcher.

128 The fourth respondent was aged 38 and married with two dependent children aged 11 and two. She and her husband had net assets of approximately $147,409. She was employed as a receptionist and her husband was employed as a motor mechanic.

129 The fifth respondent was aged 31 and married with two dependent children aged two and one. She and her husband had net assets of $159,414.42. She was employed as a bank officer and her husband was employed as a boilermaker.

130 In comparison with the respondents, at the date of the hearing, the appellant and his wife had assets worth approximately $2,375,000 comprising property valued at approximately $505,600 and VSV Family Trust assets totalling about $1,869,000.

131 Although it is true that the appellant's exertions contributed to the success of the family farming business, for the benefit of his father and ultimately perhaps the respondents generally, there is no suggestion that his exertions were in any way disproportionate to the exertions of his parents. There was no evidence that the appellant sacrificed other more lucrative or attractive opportunities to pursue the farming venture with his parents. The finding of the trial judge which was affirmed on appeal to the Court of Appeal, that the appellant does not have the "moral claim" that he asserted to share in his father's estate should not be disturbed.

132 The Court of Appeal did not err in upholding the trial judge's decision that the appellant failed to demonstrate that he was left without adequate provision under his father's will. Accordingly, we would dismiss the appeal with costs.