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CONTRACTS TO MAKE WILLS AND THE FAMILY PROTECTION ACT 1955: IS THE PROMISEE A CREDITOR OR A BENEFICIARY?

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I. INTRODUCTION

The once innovative provisions of New Zealand's Family Protection legislation[1] suffer from the serious flaw that they may be rendered nugatory if the deceased dealt with his property, during his lifetime, in such a way as to exclude the court's jurisdiction.[2] Deserving claimants may be defeated, intentionally or unintentionally, by inter vivos dispositions, outright or to trustees. The focus of this paper will be on a second expedient: a contract in which the testator agrees to devise or bequeath property in his will.[3]

Section 4(1) of the Family Protection Act 1955 provides:

> ... if any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom and on whose behalf application may be made under this Act as aforesaid[4], the court may, at its discretion on application so made, order that such provision as the court thinks fit shall be made out of the *estate of the deceased* for all or any of those persons.

Because the 'estate of the deceased' is neither defined[5], not is its meaning abundantly clear from the context of the Act, some courts have held that contracted testamentary property is not included within the section 4(1) meaning of 'estate' because it was not free for the deceased to dispose of as he chose.[6] According to this interpretation, called the *creditor theory*, under the contract the promisee receives a right to an effectual transfer of the relevant asset under the promisor's will, thus the promisee is to be treated as a person having rights to the nominated benefit arising independently of the will under a contract to devise or bequeath. The promisee is, therefore, in the position of a creditor, and will be satisfied ahead of applicants under the Family Protection Act. The contrary view, called the *beneficiary theory*[7], is that the promisee receives the property as a beneficiary in the testator's will and must, therefore, be subject to any law affecting a beneficiary under a will, including the jurisdiction of the court to make a family provision order.

The recent judgment of White J. in *Breuer v. Wright*[8], itself inconsistent with an earlier High Court judgment of Wild C.J. in *Re Webster (decd.)*[9], draws attention to two conflicting Privy Council analyses of whether a contractual testamentary provision is subject to a family protection order : *In re Dillon (decd.)*, *Dillon v. Public Trustee and Others*[10] (appealed from the Supreme Court of New Zealand), in which the Board approved the 'beneficiary theory', and *Schaefer v. Schuhmann*[11] (appealed from the Sup. Court of New South Wales), in which the'creditor' theory' was preferred.

The issue to be considered in this paper[12] is whether the promisee under a contract to confer a benefit by will is a creditor or a beneficiary of the estate of the deceased. After detailing the judicial history of this dilemma, it is proposed to examine the competing policy considerations: freedom of testation and sanctity of contract versus the statutory objective of adequate provision for dependents of deceased persons. Finally, the writer will suggest an equitable solution to the controversy.

II. NEW ZEALAND FAMILY PROTECTION LEGISLATION

A. Legislative History[13]

Relative freedom of testamentary disposition was characteristic of English law in the nineteenth century.[14] Sometimes this resulted in a testator disregarding his family obligations and making insufficient or no provision for his wife and children. This was prevented in systems of law, such as in Scotland, which are founded upon the Roman Civil Law, by setting aside for the widow and children definite shares of the estate.[15] The spirit of reform which was active in New Zealand at the turn of the century created an exception to the English norm which was unique in the field of family provision legislation in the Common Law world. The Testamentary Family Maintenance Act 1900 gave the court jurisdiction in certain circumstances to override a person's testamentary dispositions and to substitute for them provisions which the court thought fit. The purpose of the legislation can be seen from its title:

> An Act to insure... Provision for Testator's Families.

The Act of 1900 was subject to amendment[16], and was later embodied in a consolidating measure, the Family Protection Act 1908. Section 33(1) provided for the maintenance of the family of any testator who had by his/her will not made adequate provision therefor, an order for provision to be made out of the "estate of the said deceased person". That Act was in turn extensively amended[17] so as to extend the principle of the legislation to the estates of intestates and to widen the class of possible applicants. The law was again consolidated in the Family Protection Act 1955, section 33(1) became section 4(1) in the new Act.

B. Application[18]

The legislation entrusted the judiciary with the task of implementing the statutory scheme of "adequate provision for proper maintenance and support". In an obvious example of judicial lawmaking, the courts invented the 'moral duty' test so that the Act would not avail only to self-evidently "needy" claimants. Salmond J. in *Re Allen (decd.)*[19] declared that the Act was designed to enforce the moral obligations of the testator to make such provisions as a just and wise father would make in the interests of

his dependants had he been fully aware of all the relevant circumstances.[20] In that case, it was said that the surviving spouse need only show that the testator had failed to make proper provision for her maintenance as would enable her to[21]

> ... live with comfort and without anxiety in such state of life as she was accustomed to in [his] lifetime.

This reflects the generous and liberal application of the Act by the New Zealand courts. One commentator suggests the rationale for the moral duty test is that the Act is concerned with the protection of the family as a unit in society. For this reason[22]

> ... the courts became concerned not only with economic questions of necessities and substance but also with the ethical questions of morality and family justice.

III. THE OSCILLATING CASE LAW

A. Dillon *v.* Public Trustee of New Zealand

1. The Facts

As a compromise to litigation brought against him by his children, Henry Dillon contracted to leave, by his last will, his farm on trust for one son and two daughters in equal shares, subject to an annuity in favour of a third daughter. Two years later, the testator, aged 81 and a widower married again. He made a fresh will setting out the promised provisions[23], leaving the residue of his estate to his second wife.

2. Supreme Court[24]

On an application by the widow under the New Zealand Family Protection Act 1908, Northcroft J. held at first instance that the court was not precluded from encroaching upon the contractual devise of the farm lands should that be necessary to make adequate provision for the second wife. Accordingly he made an order in her favour. The learned judge agreed with the view of Chapman J. expressed in *Gardiner v. Boag*[25], discussed and approved by the Full Court in *Parish v. Parish*[26], that the Act is[27]

> ... a declaration of state policy, and that, as such, it is paramount to all contracts.

Those two cases decided a wife could not surrender her statutory right to maintenance and support out of the estate of the deceased husband in a contract with her husband, before or after the marriage. His Honour, Northcroft J, reasoned[28]:

> ... a fortiori, a husband may not contract himself out of his obligations even though the contract be made before marriage.

3. Court of Appeal[29]

The Court of Appeal held that since the devise of the land was made in fulfilment of a contract for valuable consideration, the land was not available to satisfy the claim of the applicant. Advocating the creditor theory, Ostler J observed that such a contract, if made with a stranger,

would have, upon the testator's death, made that stranger a creditor of the estate with an enforceable claim against it.[30] The majority emphasised that the contract was made in the ordinary course of business, and the fact that it was with the testator's own children should not make any difference. Chief Justice Myers referred to the rights of the promisees under the contract to enforce their interest in the particular property (e.g. right to recover damages equal to the value of the equity of the lands if the contract is breached or unperformed), and concluded that it would be extraordinary if the law permitted them to be in a worse position if the Family Protection Act applied than if the testator had committed a breach of his contract.[31]

The Chief Justice was of the view that the learned judge below had misapplied the two authorities upon which he relied - the statute was only paramount to contracts between the testator and entitled claimants in which the latter surrenders their rights under the Act. However, Myers CJ and Ostler J would allow an exception to their general rule if the purpose of the contract was to abrogate the widow's statutory rights, because this would be in breach of the statutory duty on the part of the testator. In the writer's opinion, this exception is not supported by logic: a bona fide intention should not defeat a duty, if such exists; nor should a mala fide intention affect the character of the property, because the contract itself is not tainted with fraud. Whether it is supported by policy will be discussed in Part IV of this paper.

In his dissenting judgment, Smith J said the farming lands were part of the estate because they passed by the exercise of the testamentary power and by nothing else. As a formulation of the beneficiary theory, he argued that the agreement created no rights in land whatever, only rights to have the last will made in a particular way and the testator had fulfilled his contract by framing his will in that way. As a result, the court could make an order over the property.

4. Privy Council[32]

On a further appeal, the Judicial Committee of the Privy Council restored the order of Northcroft J, following closely the reasoning of Smith J. The testator's children, Viscount Simon, L.C., giving the opinion of the Board, said, were simply devisees and not creditors. The testator did

what he had contracted to do, and if he had broken his contract the children's rights to damages or specific performance would have to be assessed or granted subject to the possible or actual impact of the power of the court under the Act. Their Lordships were prompted by their perception of the intention of the Act. They stated[33]:

> The manifest purpose of the Family Protection Act, however, is to secure on grounds of public policy, that a man who dies, leaving an estate which he distributes by his will, shall not be permitted to leave widow and children inadequately provided for.

The Board disagreed with Northcroft J who regarded s.33 of the 1908 Act as imposing upon a husband the 'obligation' to make adequate testamentary provision for the maintenance and support of his wife. Rather, the Privy Council considered the statute conferred upon the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contained.[34] Although the testator's will-making power remains unrestricted, in this writer's opinion it is fictional to suggest there is no duty on the testator to frame his will in a certain way. The legal sanction is the intervention of the courts to alter the dispositions.

Viscount Simon made the significant comment[35]:

> The interposition of the court should take place, of course, only after considering all relevant circumstances, and among these circumstances may be the fact that the testator was under obligation to third parties.

Their Lordships thus acknowledged, in part, the principles of sanctity and certainty of contract and the respect which should be accorded to them. To the Privy Council which decided *Dillon v. Public Trustee of New Zealand*, a balancing of interests would always be in order, but family provision which is 'reasonable' in the circumstances was the predominant principle.

5. Reaction

Dillon's case received a mixed response, further emphasising the inconsistent law on this subject. In *Olin v. Perrin*[36], a case on all

fours with *Dillon*, decided in the Ontario Court of Appeal, Laidlaw J.A. thought that *Dillon* was wrongly decided. Gillanders J.A., in the same case, accepted *Dillon* as rightly decided. Egbert J. in the Supreme Court of Alberta said by way of dictum that *Dillon* was a somewhat surprising decision[37], but it was accepted as correct in *In re Brown (decd.)*[38] by Turner J in the New Zealand Supreme Court. Disapproval of the Privy Council decision prompted exempting sections being included in the statutes of Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan. These sections state that where a testator bona fide and for valuable consideration contracts to leave property by will, such property shall be exempt from the statute except to the extent that the property exceeds the consideration received by the testator.[39]

The New Zealand Family Protection Act, however, was re-enacted in 1955 after *Dillon*'s case with no relevant amendments. Under well-established practices in statutory construction, that case should be regarded as having been approved and endorsed by legislation re-enacted in virtually the same terms.[40]

B. Schaefer *v.* Schuhmann

1. The Facts

The testator, Edward Seery, engaged a housekeeper, Mrs Elizabeth Schaefer, at a weekly wage. By a codicil to his will, he left his house and land to her if she was still employed by him as a housekeeper at the date of his death. Mrs Schaefer read the document before it was executed. Because he had left her the house the testator soon stopped paying her wages. On this evidence, the Privy Council held that the testator had bound himself by an enforceable contract to leave the property to his housekeeper by his will.[41] After his death, his four adult daughters applied for further provision under the terms of the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954: the terms of s.3(1) of that Act being indistinguishable from s.33(1) and s.4 (1) of the New Zealand Family Protection Acts.

2. Supreme Court of New South Wales[42]

In the Supreme Court of New South Wales, Street J. found no distinction

between *Dillon*'s case and the issue in *Schaefer*'s case. He referred to *Dillon* as a powerful, and in his view, a conclusive decision. The learned judge concluded that the effect of the decision of the Privy Council was but an instance of the general proposition enunciated in *Re Brookman's Trust*[43]:

> If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form, and it is not owing to any act of his that the child does not take.

He therefore held that the court had jurisdiction to interfere with the disposition to the housekeeper. Mr Justice Street found that three of the daughters had made out deserving claims for relief and ordered their legacies to be increased by charging the property given to Mrs Schaefer and reducing the residue of the estate.[44]

3. Privy Council[45]- majority

On appeal, Mrs Schaefer did not dispute that the testator had failed to make adequate provision for the three daughters or the propriety of the orders made by the court in their favour. Rather, she contended that the court had no jurisdiction to throw any of the burden of such orders on the property given to her but that the whole burden should come out of the residuary estate left to the three sons. She argued that an order under the Act could not override or destroy equitable proprietory rights acquired by the third person under a contract in which the deceased promised to leave property to such person by will.

In a complete volte face, the majority of the Privy Council declined to follow *Dillon*'s case, Lord Cross of Chelsea giving the advice of the Board concluded[46]:

> If and so far as it is thought desirable that the courts of any country should have power to interfere with testamentary dispositions made in pursuance of bona fide contracts to make them, it is, their Lordships think, better that such a power should be given by legislation framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies, as flow from the decision in *Dillon*.

Their Lordships considered the apparent meaning of the Act to be that the court is given power to make such provision for members of the testator's family as the testator ought to have made, and could have made, but failed to make. In other words, the court is not being given power to do something which the testator could not effectually have done himself. In their opinion this receives strong support from s.4(1) of the New South Wales Act which states that a provision made under the Act is to operate and take effect as if it had been made by a codicil executed by the testator immediately before his death. The testator would not be entitled to dispose of contracted property by such a codicil contrary to the agreement, therefore their Lordships infer that the court cannot affect such property either. There is no similar provision in the New Zealand Act but Lord Cross believes: [47]

> ... section 4(1) of the New South Wales Act only emphasises and makes explicit what would be implicit in the Act if it were not there.

Thus, the beneficiary theory was firmly rejected in favour of the creditor theory.

The anomalies to which their Lordships refer were convassed by Myers C.J. in *Dillon*, and brought him to the same conclusion as the majority in *Schaefer*. The common law relating to contractual testamentary benefits may be summarised as follows[48]:

(a) *Hammersley v. De Biel*[49] decided that if the testator fails to leave a legacy as he has contracted to do, the promisee can claim the amount of the legacy from the estate of the promisor.

(b) Even where the promisor keeps the promise and leaves the legacy, the promisee may still be regarded as a creditor of the estate rather than a beneficiary under it. So that, for example, the value of the estate for duty purposes is reducible by the amount of the obligation: *Coffill v. Commissioner of Stamp Duties*.[50]

(c) If the promise to leave specific property (as distinguished

from a general legacy) the promisee is in a stronger position, since if the promisor deals with the property in his lifetime in a manner inconsistent with the contract, the promisee can treat the promise as repudiated and sue for breach. Damages will be assessed subject to a reduction for the acceleration of the benefit, and for the contingency of his failing to survive the promisor if the benefit is personal to the promisee. If he is able to intervene before the property reaches the hands of a bona fide purchaser without notice, he can, with an injunction, restrain the testator for disposing of it. The promisee has a right to specific performance against anyone who takes the property with notice, or even those who take without notice if volunteers (e.g. testamentary beneficiaries). *Synge v. Synge*[51] and *Central Trust and Safe Deposit Co. v. Snider*[52] are authorities for these propositions.

(d) If the testator dies insolvent, then whether or not he has performed his promise, the other party to the contract is entitled to claim as a creditor for the amount of the legacy, in competition with other creditors of the same degree: *Graham v. Wickham*[53]. In the case of a specifically enforceable contract, the promisee is entitled to specific performance as against the trustee of the insolvent estate, and so is in a better position than a creditor having only a debt: *Ex p. Rabbidge, In re Pooley*[54]; *Re Bastable, ex p. The Trustee.*[55]

(e) The promisee's position is much weaker if the contract is to leave a share of the residue, since residue is only ascertained after debts have been paid: *Jervis v. Wolferstan.*[56] But even in that case, the testator will not be permitted fraudulently (in the sense used in equity) to render his promise nugatory by making substantial gifts inter vivos or by way of specific legacy: *Gregor v. Kemp.*[57]

Their Lordships considered three anomalous results arising from the *Dillon* decision[58]:

(1) Where the testator dies insolvent, the promisee is entitled to the property in the case of a specifically enforceable contract, or to claim as a creditor for the amount of a general legacy. But if the testator dies solvent, the whole property might be given to the family protection claimants to the exclusion of the promisee.

(2) Where a testator parted with property specifically promised during his lifetime, he would have to pay damages at that date. If the contract was kept the property might be taken from the promisee by an exercise by the court of its power under the Act. In *Dillon*'s case, Viscount Simon suggested there was no difficulty because any damages which the promisor was ordered to pay would be assessed in the light of the possibility of the exercise by the court of its jurisdiction. In other words, the award of damages, which will repay the loss suffered by B from A's breach of contract, is the equivalent of the benefit which B would have enjoyed if the contract had been performed, but that benefit is the value of the property less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act 1955. Lord Cross retorted[60]:

> ... it is difficult to see how in practice any deductions could be made for the contingency since at the date of the breach sued on, it would be quite uncertain whether or not any occasion for exercise of the court's powers under the Act would arise on the testator's death.

Also, the reasoning in *Dillon* forgets that the promisee may have a right to specific performance.

(3) If the promise did bring about a situation where the testator was, at the date of his death, trustee for the promisee,

> then it is difficult to see how a family protection order could be made against the property. If this is so, *Dillon* authorises the court to intervene with property beyond its jurisdiction.

These anomalies were considered sufficiently serious to justify rejecting the decision in *Dillon*.

4. Privy Council - dissentient

In his forceful dissenting judgment, Lord Simon of Glaisdale considered it more desirable to adopt a construction which accorded with the ascertainable intention of the legislature. He perceived the statutory objective to be the prevention of family dependants being thrown on to the world with inadequate provision when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance.[61] In his Lordship's view, *Dillon*'s case was correctly decided.

The basis of Lord Simon's opinion is primarily public policy. He finds authorities to support his interpretation and attempts to reconcile the 'anomalies', but does not hide the fact that he is choosing the result which 'promotes justice between conflicting interests'.[62] Lord Simon suggests it is best to give the court a discretion to decide each case on its facts.

Such a solution would balance the three sorts of social obligation to which legal effect has been given.[63] The first of these is the enforcement of contractual obligations if the promisor makes, or dies in, default. Secondly, the law (as developed in the courts of Equity) will generally compel the personal representative to do what the deceased should have done. Thus, where A covenants to bequeath property to B, A's personal representative will generally be constructive trustee of the property for B. The third type of obligation - that of a deceased to provide for his dependants - arises juristically from the statute, which empowers the court to order the personal representative to do what the deceased should himself have done. Lord Simon concluded[64]:

> But in the instant situation, in my view, none of the

> three types of obligation overrides any other; they are concurrent. The promisee's contractual or equitable rights fall to be considered along with the dependant's statutory rights.

In deference to the emphasis put on the 'anomalies' by the majority, Lord Simon tentatively suggested three ways of reconciling *Dillon*'s case with the Common Law.[65] First, he suggested damages for breach of the statute. This was persuasively rejected by Lord Cross as impractical.[66] Secondly, the court could imply into every covenant to leave property by will a proviso: "subject to the statutory discretion vested in the court to order family protection". Lord Simon argues an implied proviso would be closely analogous to the refusal of the law to allow any contractual derogation from its discretionary power to order maintenance for an ex-wife: *Hyman v. Hyman*[67]. In this writer's view, *Hyman* is not authority for such a wide proposition - such a proviso can only be read into a contract entered into by the dependant. This is already the law in New Zealand[68], but Lord Simon does not provide a logically compelling reason to extend the principle to contracts entered into by the testator other than to effect his Lordship's preferred policy. A third alternative is to draw a distinction between a promise to leave by will a specific sum or asset on the one hand, and a share of the residue on the other. This would be unjust in some instances, and is not convincing as it resolves only some of the authorities. Lord Simon concludes with a scathing rebuke of the majority[69]:

> ... the alleged anomalies largely disappear if ancient authorities decided in a different social context are not carried forward hypnotically to what may seem their logical conclusions regardless of the impact of a modern statute of clearly ascertainable social purpose.

Early in his judgment, his Lordship presents a fact situation which would result in gross injustice if *Dillon* was overruled[70]:

> ... a widower is left with two infant children; he proposes marriage to another women, promising to bequeath her the whole of his estate if she will accept him; she does accept him on these terms; he dies shortly afterwards; the court is powerless to order any provision out of his estate for his infant children.

In the writer's view, this is certainly unfortunate but no more so than if

the husband had gambled the money away, or transferred the property inter vivos, in which case the court cannot protect the children. The scope of the court's jurisdiction and meaning of the 'estate of the deceased' should not be determined on the basis of arbitrary examples of injustice. It is also unfair to defeat the expectations of the promisee. If the desired result is inconsistent with the promisee's Common Law rights as a creditor of the estate, and cannot be achieved without straining the language of the Act, then the appropriate solution is not judicial, as attempted by Lord Simon and *Dillon*, but legislative amendment.

5. Is Promisor a Trustee?

The Privy Council did not seriously consider whether an equitable interest in the land had passed to Mrs Schaefer upon the making of the contractual devise. If the testator was merely a trustee of the property, it would not be part of his estate[71] and therefore outside the jurisdiction of family protection statutes.

Counsel for Mrs Schaefer submitted that where a contract is made to leave specific property by will the testator becomes a constructive trustee for the promisee.[72] The only asset which then remains in the testator is the bare legal title. The Board did not explicitly accept this submission, but based its decision on acceptance of the creditor theory rather than the beneficiary theory of entitlement. One commentator has argued that the case could have been simply decided on the basis that the testator had alienated his interest in the land before he died, and it was not part of the property the subject of his will.[73]

Authority for this proposition is *In re Edwards (decd.)*[74] in which the testatrix made a contract to leave her home to her housekeeper. Jenkins L.J. in the Court of Appeal said the effect of the contract was that[75]

> ... at the time of her death the testatrix was a bare trustee of the property for the [promisee]...

Romer L.J. said that[76]:

> ... the testatrix had parted with the whole beneficial interest in the property to the [promisee].

Likewise, Lord Parker for the Privy Council in *Central Trust and Safe Deposit Co. v. Snider* said[77]:

> ... if a person agrees for valuable consideration to settle a specific estate he becomes a trustee of it for the intended objects.

In Re Edwards was considered in *Re Seery* but Street J chose to follow the apposite decision of *Dillon*[78]:

> In effect the decision in *Dillon*'s case brings about a situation in which the promisee under a contract to make a will in a particular form must accept that, whatever equities he may have in the property the subject of that contract... his rights are subject to inroads being made upon the property by a court exercising statutory jurisdiction under legislation such as the Testator's Family Maintenance Act of this State or the Family Protection Act of New Zealand.

In the writer's opinion, this conflicting and uncertain state of the case law can only be adequately remedied by legislation. As the next two cases show, New Zealand has not been saved from judicial inconsistency.

C. Re Webster (decd.)[79]

1. The Facts

The testatrix devised and bequeathed her house to three sons in fulfilment of a contract with them: they agreed to pay all outgoings in respect of the house and renovate and maintain the same in consideration of the testatrix leaving the house to them as tenants-in-common in equal shares, subject to their paying to her other son and three daughters the sum of £1,400 to be divided equally between them. The testatrix lived for seventeen years after the will was made and at her death the house was valued at four times the value assessed in 1956. At the time the will was made the children would have shared in the assets equally and borne the liabilities equally.[80] Proceedings were brought by the deceased's daughters under the Family Protection Act.

2. The Decision

The issue in the case for Wild C.J. came down to whether the court should apply *Dillon* or *Schaefer*. The learned Chief Justice accepted the authority of *Schaefer*. He perceived the ratio of the Privy Council's advice to be that the 'estate' out of which provision can be made is that part of it which the testator is free to deal with. Because of the similarity in the essential terms of s.4 in the New Zealand Act and s.3(1) in the New South Wales Act, Wild C.J. concluded that the above principle must now apply in New Zealand as it does in New South Wales. Accordingly, there was no property to which an order could apply. He expressed the opinion that although in *Schaefer*'s case the Privy Council merely declined to follow *Dillon*'s case, the effect is the same as if the Board had expressly overruled it.

3. Testamentary Provisions Legislation

Before Wild C.J., a new argument was pressed that would not have been available in appeal from New South Wales. Under the Law Reform (Testamentary Promises) Act 1949, s.3(1), if a testator promises to make some testamentary provision in return for work performed or services rendered, and fails to honour his promise, it is to be enforced against the executors in the estate for:

> ... such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstance in which the promise was made and the services rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband....

This provision, which was put into its present form by amending legislation in 1961[81], shows clearly that in cases to which the Act applies, the testamentary promise claimant in New Zealand is not given automatic superiority over members of the family, but must take his chances along with everyone else. One commentator has noted[82]:

> ... today we have comprehensive and eclectic provisions granting the court wide discretionary powers capable of embracing nearly all conceivable situations. These powers are broad enough to permit a court to satisfy its own sense of justice in the individual case.

It was argued on behalf of the applicants that this enactment affected the meaning and scope of the 'estate' mentioned in s.4 of the Family Protection Act 1955: contracted property should not be automatically excluded from the court's jurisdiction but enforced against the estate only to such an extent as the competing statutory and contractual claims deem reasonable. Because the Testamentary Promises legislation applies to promises which may be contractually binding (s.3(8)), similar considerations as those detailed in s.3(1) should be relevant to the enforcement of contractual promises. The learned Chief Justice dismissed this argument on the ground that the legislation only supplemented and did not displace any remedies available to those who claim under contracts to make wills.[83]

But it may be objected that Wild C.J. gave too little weight to the 1961 amendment. It specifically required the court to 'balance' the testamentary promise claims against claims of other creditors and members of the deceased's family. Prior to 1961, the court only had this balancing power if the testator himself had failed to specify a set amount, or if his promise related to real or personal property other than money. If he chose to promise money, then the amount promised would rank as a debt in the estate, presumably with priority over family protection claimants. In this writer's opinion, the 1961 amendment is a valuable indication of legislative philosophy. It may be argued that a testamentary promise is of lesser quality, by definition, than a contract, and so requires different considerations, but this does not destroy the fact that the legislature favours the court exercising a discretion by 'balancing the equities'.

D. Breuer v. Wright[84]

The testator contracted to forgive a business debt - and this was done in a codicil to his will. After finding that a valid contract existed, White J. had to consider a claim by the widow under the Family Protection Act 1955. After outlining the decisions in the three cases already discussed, the learned judge referred to the New Zealand Court of Appeal decision in *Lilley v. Public Trustee*[85] in which the Law Reform (Testamentary Promises) Act 1949 was analysed. Mr Justice White compared the 'balancing test' required by that legislation with the principle in *Dillon*'s case that the interposition of the court should take place only after considering all relevant circumstances, including the fact that the testator

was under an obligation to third parties.[86] He further observed that the Family Protection Act 1955 was a consolidation Act to which the presumption that Parliament does not intend to alter the existing law applied.[87] Also relevant was the lack of any legislative amendment to alter the result in *Dillon*'s case.[88]

White J. concluded that at first instance he should apply the ratio decidendi of the Privy Council in *Dillon*'s case, that being an appeal from the New Zealand Court of Appeal[89], but admitted favouring that decision in preference to *Schaefer* anyway. That was because it had been the law in New Zealand for many years and better accorded with the history of our legislation.

The rest of this paper will consider how this conflict of diametrically opposed decisions should be resolved.

IV. POLICY CONSIDERATIONS

There is an urgent need in New Zealand for a decisive and authoritative resolution to the conflict between the beneficiary theory and the creditor theory. Whether the provisions of our Family Protection legislation should extend to property, the subject of a contract to confer a benefit by will, must ultimately depend upon policy considerations: the objective of the Act, and relevant social and legal values.

A. Legislation

Section 3 of the Destitute Persons Act 1894 provided:

> Every near relative of a destitute person, if that relative is of sufficient ability, is liable for the maintenance of that destitute person in a manner hereinafter provided.

The legislation more specifically ensured maintenance of wives by their husbands, and of children under sixteen years by their parents. It was argued during the debate of the Testator's Family Maintenance Bill 1900 that if a man, while alive, left his wife or family destitute, they had the Destitute Persons Act 1894 under which provisions might be made for their maintenance and support, but similar powers should be given in the event of the husband dying.[90] This reasoning found favour in the New Zealand Parliament as evidenced by the enactment of the Bill, described by one commentator as[91]:

> ... unquestionably one of the great and original contributions of New Zealand to modern law.

The necessity or at least the desirability, in the public interest of family protection legislation is demonstrated by the way in which, after originating in New Zealand, it spread through the Australian States and most of Canada, and was adopted is modified form in England in the Inheritance (Family Provision) Act 1938.

In the writer's opinion, there were three elements in the rationale behind the aforementioned legislation. The first element was society's belief that the head of the house has an obligation to provide for his

dependent family - during his life, and after it. This was enunciated by the Privy Council in 1938[92]:

> The dominant purpose of the [New Zealand Family Protection] Act is to enable the court to remedy a breach by a person of his moral duty as a wise and just husband or father to make proper provision, having regard to his property, for the maintenance, education and advancement of his family.

This 'old-fashioned' attitude is no longer so persuasive as a result of the move away from a patriarchial social structure. It is still relevant where one spouse is the family breadwinner.

The second element was articulated by Lord Simon of Glaisdale under the heading 'the mischief of the statute' in his judgment in *Schaefer*[93]:

> Men and women necessarily have different functions to perform in the creation of new members of society and in their upbringing to independent membership. a functional division of cooperative labour generally calls for a sharing of the rewards of the labour.
>
> ... the man incurs an obligation to share the loaf with the woman and the woman acquires a right to share in it.

Marriage is seen as a partnership but there is more opportunity for equal earning capacity and accumulation of wealth between spouses. A more modern objective of the family provision legislation is a sharing of assets upon death[94], rather than one spouse 'providing' for the other.

The third element was expressed by the Hon. Mr McNab, M.P., when moving the second reading of the Testator's Family Maintenance Bill 1900, in these terms[75]:

> The question to be decided in regard to this Bill was, was the State to be liable for the wife and children, or was the estate to be liable? The estate of the deceased person should be responsible.

Thus, the Act was passed partly to prevent dependants of the testator becoming a burden to the state[96]. With the growth of the welfare state, the state is more willing to support 'destitutes' e.g. Domestic Purposes

Benefit, Widows Benefit.

The Act has become more than one simply for the protection of destitute persons because implicit in the Act and explicit in the court's decisions is the recognition of society that dependants have adequate maintenance, not merely subsistence, and also that the surviving spouse receives a fair share of the deceased's estate. Even adult children of independent means have claims for proper maintenance provided they can prove the breach of a moral duty neither fulfilled in the testator's will nor during his lifetime.[97]

The essential question is whether the rationale and objectives extend to giving the court jurisdiction to intervene with contracts to devise or bequeath property. This would be in accord with the liberal appreciation of the Act, and would ensure its objectives could not be avoided. The principles opposed to these purposes are freedom of testation, sanctity of contract, and certainty of contract.

B. Freedom of Testation

Limitation on the freedom of testation is, in fact, a principle of greater antiquity than the principle of free testation.[98] The protection of the family as an essential unit in society has been a primary concern of most systems of law, thus it is generally regarded that family claims are a legitimate restriction on will making.[99] However, it has been said[100]:

> ... the intention of the testator should be interferred with as little as possible having regard to the objects of the Act.

Indeed, s.11 of the Family Protection Act serves as a reminder to the court of the importance of the testator's reasons for making his will. The Privy Council has been at pains to point out that the Family Protection Act does not impose any duty to frame a will in any particular way: it merely confers upon the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains.[101] This, in the writer's opinion, is an artificial proposition for although there is no

legal obligation, the testator is said to have a 'moral duty' to make adequate provision, and the courts unmistakenly do revise a will. Certainly the will stands until impeached, but giving the court power of interference implies an obligation of sorts. The courts claim they have no power to re-write the will in a way they consider just, but surely they go some way towards doing that. As Harman J. has said[102]:

> ... under the Act a man's will is no more than a tentative disposition of his property pending an ultimate decision by the court.

It is the writer's view that principles of testation are not ones which should override the court's power to make orders over contracted testamentary benefits.

C. Contractual Principles

Next, consideration is given to the importance of contractual principles. Sir George Jessel, M.R., declared in 1875[103]:

> [I]f there is one thing which more than any other public policy requires/is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice.

The age of laisse -faire passed and to some extent took with it the above concepts.[104] By the middle of the twentieth century notions of inequality of bargaining power and unconscionable contracts had highlighted the fact that freedom of contract was no longer sacred.[105] But these historic foundations of the law of contracts are not yet anachronisms for as Barker J. in the High Court in 1976 commented[106]:

> The old laws concerning the sanctity of contract have less rigid application than they did in Victorian days, however, the principle that contracts fully negotiated should be upheld by the courts is one which should be borne in mind.

Wide-ranging judicial discretion has been a feature of recent New

Zealand legislative contractual reform, such that sanctity and certainty of contract become merely considerations in achieving a result which is fair and just. For example:

> Minors' Contracts Act 1969
> Illegal Contracts Act 1970
> Contractual Mistakes Act 1977
> Contractual Remedies Act 1979
> Credit Contracts Act 1981.

If commercial contracts can be impeached on grounds of 'injustice' and 'unfairness', so should family provision defeating contracts. Such a discretion is given to the court by s.21 of the Matrimonial Property Act 1976: an agreement, made under s.21 by the husband and wife for the specific purpose of contracting out of the provisions of the Act, shall be void where the court is satisfied it would be unjust[107] to give effect to the agreement. The majority in *Schaefer* were unwilling to read in such a discretion into the Family Protection Act.

D. Conclusion

The Privy Council did not doubt that *Gardiner v. Boag*[108] and *Parish v. Parish*[109] were rightly decided: a wife could not surrender her statutory right to maintenance and support out of the estate of her deceased husband in a contract with her husband, before or after marriage.[110] Likewise in regard to the Destitute Persons Act 1910, it was held in *A. v. A.*[111] that no agreement between husband and wife is effective to prevent the wife enforcing any liability for her maintenance or affect the jurisdiction of the Magistrate to make a maintenance order. That result was authorised by s.24 of that enactment. Therefore it may be argued that the absence of any such provision in the Family Protection Act leaves the court with no authority to avoid a contract between the parties. But the result in *Gardiner* and *Parish* is based on policy[112]:

> ... [the Act] is a declaration of state policy, and that as such is paramount to all contracts.

The decision in *Schaefer* seems inconsistent with approval of these two

cases. The majority limit their decision to[113]:

> ... contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in the normal course of arranging his affairs in his lifetime....

What they term a 'bona fide contract'. In the writer's opinion, if sanctity of contract is the preferred principle then this exception to the general rule in *Schaefer* is not justified; but if the preferred principle is family provision, then the *Schaefer* decision cannot be supported. There is no half-way house. But which is the preferred policy?

Sanctity and certainty of contract are no longer rigid principles but flexible considerations for the court's discretion. Freedom of testation is a fallacy. Thus, opposition to court interference with contracts is not as strong as it once was. But still the question remains: does the rationale behind the Family Protection Act demand it? That rationale has changed since 1900. The Act goes beyond relief of destitution to provision in a 'manner in which the dependants were accustomed'. That is not such a strong reason for impeaching contracts. But so long as the intention is to provide support and maintenance to deserving claimants (however these terms are defined), then that objective should not be defeated by contracts to confer benefits by will. A power of judicial review over such contracts is desirable so as to promote the legislative intention. Justice is achieved neither by always upholding the contract nor by over-generously providing for the family, but by "balancing the equities".

Remembering that full title is not actually transferred until the will takes effect, no great hardship is incurred by the promisee if his expectation is to a degree defeated - as there is always an element of uncertainty because the time of death of the testator/promisor is unpredictable. Solemn regard should be given to the contract, especially if it is a 'commercial agreement' but each case should be decided on its unique facts. The promisee should rank as a beneficiary and not a creditor of the estate.

V. RESURRECTING THE BENEFICIARY THEORY

If one concludes that the beneficiary theory gives effect to the preferred social policy, then the decision in *Schaefer* must be rendered nugatory. This may be achieved in two alternate ways:

(i) a decisive Court of Appeal judgment approving *Dillon*; and

(ii) Legislative amendment.

A. Appellate Authority

The Court of Appeal is the most competent judicial body to interpret indigenous social welfare legislation. This is because of the need to consider policy which may well be unique to New Zealand as a product of its legislative and social philosophy over the last century.[114] The only time the New Zealand Court of Appeal has decided this issue it has preferred the creditor theory - though not unanimously.[115] It is not wise to predict the outcome of an appeal of, for example, *Breuer*, because of the possible influence of *stare decisis*: a discussion of which is beyond the scope of this paper.[116] However, indications of the present courts' attitude to this type of legislation lend weight to the conclusion that the beneficiary theory reflects contemporary social attitudes, as articulated by the New Zealand judiciary.

The court,in exercising its discretion under the Family Protection Act, has endeavoured, particularly in recent times, to ensure that its conscience will be guided by the social values prevailing at the time. This can be seen from the cases of *Re Wilson*[117], *Re Z*[118], and *Re Sutton*[119]. The cautious and conservative decision in *Schaefer* is thought to be aptly described by these words of Woodhouse J. in *Reid v. Reid*[120]:

> ... social legislation which affects everybody is not always the comfortable environment of lawyers whose usual preserve is the conventional structure of property and contractual rights which have grown up around the interests of a relatively small and rather more affluent section of the community.

The Court of Appeal, which invented the moral duty test to enhance

justice, has applied the oft-cited *dictum* of McCarthy P.[121]:

> ... the Family Protection Act is a living piece of legislation and an application of it must be governed by the climate of the times.

On the basis of this cursory look at the approach of the Court of Appeal, there can be discerned a likened interpretation and flexible application of social welfare legislation that is more in accord with the beneficiary theory than the creditor theory.

B. Legislative Amendment

Intervention by the legislature would create a definitive source of law and could encompass an embracing reform in this area. Legislative schemes in England, Canada and New South Wales are three alternative approaches New Zealand could adopt.

1. England

In the Report of the Law Commission (England) 1974[122], distinction was drawn between a contract leaving property by will where the intention of the promisor is to defeat a claim for family provision and a contract to leave property by will where there is no such intention. In the former case, the Commission thought that the court should have power to order family provision out of the benefit accruing to the promisee after taking account of any valuable consideration which had been given for the contract. In the latter case, where the necessary intention is not established, the Commission saw no ground for giving the court power to interfere. Further they recommended that the court should have like powers where a deceased has entered into a contract that his personal representatives were to pay money or transfer other property out of his estate. Similarly, courts would be able to interfere with property transferred inter vivos, up to six years before death, if it was in their opinion, on the balance of probabilities, that in making the disposition, it was the intention of the deceased to defeat a claim for family provision. To arguments that these provisions would involve too great an interference with the freedom of an individual to dispose of his property as he pleases, that uncertainty would be created in the transaction of property, and it would be difficult in the case of a deceased person to produce evidence of an intention to

defeat the claims of family members, the Commission answered[123]:

> In our view... it is a matter of overriding importance to ensure that family provision laws are effective.

The Commission felt any damages recoverable by the promisee for a breach of contract by the deceased should be reduced by the amount necessary to give effect to the order for family provision. Unfortunately, they did not consider the result of a breach of contract whilst the promisor was alive and the difficult task of reducing damages to take account of possible family protection claims.

The Commission's recommendations were enacted in the Inheritance (Provision for Family and Dependants) Act 1975.[124] Sections 10-13 detail the power of the court in relation to transactions intended to defeat applications for financial provision.

2. Canada

The relevant clause of the Canadian Draft Uniform Relief Act provides as follows[125]:

> 16. Where a deceased:
>
> (a) has, in his lifetime, bona fide and for valuable consideration entered into a contract to devise and bequeath any property real or personal; and
>
> (b) has by his will devised and bequeathed that property in accordance with the provisions of the contract;
>
> the property is not liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the deceased therefor.

If the requirements (a) and (b) of this provision are satisfied, the court would examine all contracts with a view to determining whether the consideration for the contract was enough. This is not a role the courts are likely to perform enthusiastically as[126]:

> ... it has been settled for three hundred years that the courts will not inquire into the adequacy of consideration.

The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium. How can a court measure the value to a testator of a promise by his housekeeper, say, to look after him for the rest of his life - yet this is what the courts must do. Often a slight inequality of consideration is quite unintentional.

In the Canadian Draft Act, unlike the English Act, intention to avoid family provision is not a necessary criteria. 'Bona fide' in paragraph (a) relates to whether the contract is binding or not.[127]

3. New South Wales

The Law Reform Commission of that State commented in its 1974 Working Paper[128]:

> Our view is that a legislative policy which, through the Act, restricts the freedom of testation must, if that policy is to be given full weight, be supported by a restriction on the freedom to enter into contracts to make wills.

The Commission was aware that no proposal would be entirely satisfactory as it follows that one suffers if the rights of the other are said to be exclusive. It concluded that the better approach was to allow the court to balance the equities between the applicant on the one hand and the person named in the contract and the will on the other hand.[129]

These views crystallised in the Commission's 1977 Report as a draft bill.[130] It explicitly recommended that *Schaefer v. Schuhmann* be overruled.[131] Under clause 11(1) of the Draft Family Provision Bill, the court would be given power to appoint property promised by the deceased to pass to a person on or after his death, but only to the extent by which the value of the property exceeded the value of the consideration to the deceased at the date of the promise. If there is no discrepancy, the court cannot make an appointment. Sub-section (2) declares that the court shall have regard to all the circumstances of the case, including the circumstances in which the promise was made by the deceased person, the relationship if any of the parties to the promise, and the conduct and

and financial resources of those parties.

Section 11 of this Bill is based on s.11 of the English Act, but with an important modification. The former does not restrict the courts review power to contracts made with the intention of defeating an application for family provision. Sub-section (2) of the Bill is very similar to s.11(4) of the English Act requiring the court to consider all the circumstances. A useful illustration of how this might operate is given in the Commission's 1974 Working Paper[132]:

> ... where an applicant is a needy and deserving widow, her claim might prevail over that of a person who gave undervalue for his contractual benefit; or, where the claims of an applicant are less strong and almost full consideration was given for the benefit, the applicant might receive nothing or only part of that which the court might otherwise have ordered.

The court may also consider the nature of the transaction: a family or a commercial arrangement. However, like the English formulation, the courts are required to inquiry into the adequacy of the consideration.

4. Recommendations

The simplest amendment New Zealand would adopt would be to define 'estate' as including contractual testamentary benefits. The most elaborate amendments would be of the English and New South Wales prototypes.

In this writer's opinion, 'intention to defeat family provision' should not be a pre-requisite to intervention by the court for the following reasons. First, it would be difficult to determine the true intention of the deceased, often resulting in mere speculation. Cordial family relations would not necessarily indicate a bona fida intention, as, for example, a father may still wish to benefit his favourite son! Secondly, no convincing reason has been given why bona fide intention releases property from the jurisdiction of the court. If the objective of the Act is to provide for deserving claimants, then they should be provided for from property disposed of by contract even with the best of motives. Thirdly, it is best left for the court to consider whether the deceased's intentions and conduct towards the claimant make the latter more deserving of family provision and out of which property it should order provision.

The writer also submits that examination of the inadequacy of consideration should be a factor to be weighed by the court, and not a rigid pre-requisite to invoking the jurisdiction of the court. This is because of the difficulty that would be encountered by the courts in valuing respective promises.

New Zealand has lost its initiative as innovator in Family Protection legislation. It should now adopt and adapt the English and New South Wales models.

IV. CONCLUSION

Lord Cross of Chelsea commented in *Schaefer*[133]:

> The question whether contracts made by a testator should be liable to be wholly or partially set aside by the court under legislation of this character is a question of social policy upon which different people may reasonably take different views.

The law has been oscillating for the past fifty years and must be urgently clarified by a decisive Court of Appeal judgment or preferably a legislative amendment before further injustice is done.

The parameters of the court's jurisdiction must be determined on the basis of policy. The creditor theory commands the weight of authority and has the practical advantage of being easy to apply. However, it leads to the following anomalous result: the family protection claimant cannot lose his rights by agreeing with the testator that he will not bring family protection proceedings (*Gardiner* and *Parish*) but the testator can achieve the same result by contracting with favoured beneficiaries. It is extraordinary that what the testator cannot do with the family protection claimants concurrence, he can do behind the latter's back.

The application of the Family Protection Act as evidenced by the moral duty test, has gone beyond the Act's original rationale. It would seem essential that if the Act is to achieve its liberal and beneficial purpose, it should not be easily defeated. The beneficiary theory is more in accord with public policy and ensures that the provisions of the Act are not avoided by a contract to confer a benefit by will. In the writer's opinion, the prime objective of the Family Protection Act - justice-is more likely to be achieved by giving the court a discretion to 'balance the equities' between the promisee and deserving family provision claimants than by affording either automatic superiority.

.....

FOOTNOTES

[1] The prioneering legislation, original in the Common Law world, was enacted in 1900 under the title of the Testator's Family Maintenance Act, and became Part II of the Family Protection Act 1908, and in an extended and amended form is now the Family Protection Act 1955.

Similar statutes were subsequently passed in all the Australian states, several Canadian provinces, and England. For general reference, see: A.C. Stephens, *Family Protection in New Zealand* (2 ed., Butterworths, Wellington, 1957); R.J. Davern Wright, *Testator's Family Maintenance in Australia and New Zealand* (3 ed., The Law Book Co., Sydney, 1974); E.L.G. Tyler, *Family Provision* (Butterworths, London, 1971); M. Nyein, *The Family Protection Act 1955: Its Effect and Operation in Recent Times*, LL.M. Research Paper, (Wellington, 1981).

[2] For property out of which the court has no jurisdiction to order provision, see: Blacktop (ed.) *Nevill's Concise Law of Trusts, Wills and Administration in New Zealand* (7 ed., Butterworths, Wellington, 1980) 333-4.

[3] In fact, contracts relating to wills, i.e., where a testator has agreed for valuable consideration under a bona fide contract to confer a benefit by will, can be broadly classified under four headings. First, contracts to devise or bequeath specific property; secondly, contracts to leave a legacy; thirdly, contracts to leave either the whole or a specified part of the testator's residuary estate; and fourthly, contracts not to revoke wills: C.H. Sherrin 'Contracts to Make Wills' (1972) N.Z.L.J. 576. A fifth may be added: contracts to forgive debts, e.g. *Breuer v. Wright* (1981) Unreported, Wanganui Registry, A10/81.

[4] Section 3(1): Persons entitled to claim under the Act are the wife or husband of the deceased, children or grandchildren of the deceased, and in certain circumstances the stepchildren and parents of the deceased.

[5] Section 2(5) merely deems property which is subject of any donatio mortis causa made by the deceased to be included within the 'estate'. The Administration Act 1969, s.2, which defines estate to mean "real and personal property of every kind, including things in action", is of no assistance.

Cf. Inheritance (Provision for Family and Dependants) Act 1975 (U.K.) s.25: "net estate"... means (a) all property of which the deceased had power to dispose by his will (otherwise than by a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, ... etc.

[6] *Schaefer v. Schuhmann* [1972] A.C. 572, 585; *Re Richardson's Estate* (1935) 29 Tas. L.R. 149, 155 per Nicholls C.J.

[7] For a more detailed analysis of the two theories, see: I. Hardingham 'Schaefer v. Schuhmann: Promisee or Dependant' (1971) 10 W.A.L.R. 115; W.A. Lee 'Contracts to Make Wills' (1971) 87 L.Q.R. 358.

[8] (1981) Unreported, Wanganui Registry, A10/81.

[9] [1976] 2 N.Z.L.R. 304.

[10] [1941] N.Z.L.R. 557.

Footnotes Contd.

[11] [1972] A.C. 572.

[12] It is not intended to consider whether a New Zealand court must follow a Privy Council decision, on appeal from New Zealand, or is free to follow a later, conflicting Privy Council decision appealed from another jurisdiction. See: *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878. Also, it is assumed that the testator made a binding contract in each case, even though the judges sometimes disagreed amongst themselves on this point. I.e. *Schaefer*'s case *supra* n.11, 583-585 cf. 594-595. *Infra* n.41. *Breuer*'s case, *supra* n.9, 1-14.

[13] See Stephens, Davern Wright *supra* n.1. Also J.C. Robson (ed.) *New Zealand: The Development of its Laws and Constitution* (2 ed., Stevens and Sons, London, 1967) 471-476.

For the Australian experience, see Davern Wright *supra* n.a. For the English experience, see Tyler *supra* n.1. For the Canadian experience, see G. Bale 'Limitation on Testamentary Dispositions in Canada' (1964) 42 Can. Bar Rev. 367. For the law in the United States, see W.F. Fratcher 'protection of the family against disinheritance in American law' (1965) 14 I.C.L.Q. 293.

[14] Absolute power of testation existed from the middle of the seventeenth century until 1938 subject to minor restrictions as to time, purpose and public policy: Stephens, *supra* n.1, 12.

[15] Principle of legitim, or fixed, or forced shares: the surviving spouse and children of a deceased may automatically be entitled to a specified proportion of a deceased's estate, so that the deceased's testamentary power applies only to the remainder.

[16] Testator's Family Maintenance Amendment Act 1903, Testator's Family Maintenance Act 1906.

[17] Family Protection Amendment Act 1921-22; Statutes Amendment Act 1936, s.26; Statutes Amendment Act 1939, ss.22 and 23; Statutes Amendment Act 1943, s.14; Statutes Amendment Act 1947, s.15; Social Security Amendment Act 1950, s.18(3); Death Duties Amendment Act 1953, s.17.

[18] See Stephens, Davern Wright, Nyein, *supra* n.1.

[19] *Allen v. Manchester* [1922] N.Z.L.R. 218, 220; quoted and approved by the Privy Council in *Bosch v. Perpetual Trustee Co. Ltd.* [1938] A.C. 463, 479 and *Dun v. Dun* [1959] A.C. 272, 291. The moral duty test originated in the very early history of the Act: *Re Allardice* (1910) 29 N.Z.L.R. 959. It was receently confirmed in the Court of Appeal in *Re Sutton* [1980] 2 N.Z.L.R. 50.

[20] See Stephens, *supra* n.1, 86-99.

[21] *Allen v. Manchester*, *supra* n.19, 222.

[22] J. Caldwell 'Family Protection Act 1955 - Moral Duty and Adult Children' [1982] N.Z.L.J. 215, 216.

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Footnotes Contd.

[23] With certain exceptions, marriage generally has the effect of revoking any will previously made by either party: s.18 Wills Act 1837 (U.K.), s.13 Wills Amendment Act 1955 (N.Z.).

[24] [1938] N.Z.L.R. 693. The net estate (assets less liabilities) was worth £5,841, of which £3,875 was the estimated value of the benefits to be received by the three devisees under the clause in the will which conformed with the contract. This left a net residual value of £1416.

[25] [1923] N.Z.L.R. 739, 745. The wife covenanted with her husband, post-nuptially, that in the event of the decease of her husband, she would not be party to any proceedings to obtain any further or other sum or sums from his estate under the Act. The court held that this covenant was void as being contrary to the policy of the law, and did not exclude the jurisdiction to make an order in favour of the plaintiff.

[26] [1924] N.Z.L.R. 307, 307-313. In an ante-nuptial contract, the testator covenanted to leave £400 to the applicant by his will, and the applicant agreed to accept this sum in full satisfaction of all her claims against the estate of the testator after his death. The court held she was entitled to apply for further provision under the Act.

[27] *Supra* n.24, 695.

[28] *Idem.*

[29] [1939] N.Z.L.R. 550. Myers C.J. and Ostler J, Smith J dissenting.

[30] *Ibid.*, 561.

[31] *Ibid.*, 588-589.

[32] [1941] N.Z.L.R. 557, [1941] A.C. 294. Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Wright, Lord Porter.

[33] *Ibid.*, 562.

[34] *Ibid.*, 560 This view has been expressly followed in: *Re Barclay (decd.)* [1957] N.Z.L.R. 919; *Re Blakey (decd.)* [1957] N.Z.L.R. 875; *In re Strawbridge (decd.)* [1952] G.L.R. 442; *In re McDowell (decd.)* [1958] N.Z.L.R. 455. Cf. *In re Ruddell (decd.)* [1944] G.L.R. 489 per Fair J.

[35] *Ibid.*, 561.

[36] [1946] 2 D.L.R. 461.

[37] *In re Willan Estate* (1951) 4 W.W.R. (N.S.) 114, 134.

[38] *Brown v. Guardian Trust and Executors Co. of N.Z. Ltd.* (1955) 105 L.J. 169 (unreported). See Juristor 'Contract to leave property by will' (1956) 32 N.Z.L.J. 332.

[39] See Bale, *supra* n.13, 385. Also note criticisms of *Dillon* by D.M. Gordon (1941) 19 Can. Bar Review 603, and (1942) 20 Can. Bar Review 72, countered by an anonymous reply in 19 Can. Bar Review 656.

Footnotes Contd.

[40] See R.J. Scrutton 'Ousting the Family Protection Jurisdiction' (1977) N.Z.L.J. 57, 62; and the comments of Denning LJ in *Royal Crown Derby Porcelain Co. Ltd. v. Russel* [1949] 2 KB 417, 429: a court should be especially slow to overrule an 'interpretative decision' if the statute has been re-enacted in the same terms.

[41] The majority were prepared to accept Mr Justice Street's view in the lower court that an enforceable contract to devise existed on the ground that the terms of the codicil constituted a contractual offer which was turned into a binding contract by the housekeeper continuing to serve the testator, the codicil being a sufficient memorandum for the purposes of the Statute of Frauds. Alternatively, it was put that the contract did not materialise until the testator, having executed the codicil which was previously read over by the housekeeper told her that, as he had left her the house by will, he was not going to pay her further wages and she acquiesced in the arrangement; on the latter view the agreement would have amounted to a contract not to revoke a gift provided the promisee continued to serve the promisor until the latter's death and no memorandum would have been necessary. *Supra* n.11, 583-585. Lord Simon, dissenting, held no contract between the deceased and the appellant was ever established, because there was no contractual offer by him - *Maddison v. Alderson* (1883) 8 App. Cas 467 being authority. *Supra* n.11, 594-595. For comment on this issue, see R.D. Gilbert 'The Return of Elizabeth Maddison's Ghost' (1972) 46 A.L.J. 522.

[42] *Re Seery and Testator's Family Maintenance Act* [1969] 2 N.S.W.R. 290.

[43] (1869) L.R 5 Ch. App. 182, 192 per Giffard LJ.

[44] The net estate remaining after payment of debts, duties, and expenses was worth $68,700 including the house and its contents worth $14,500. By his will, Edward Seery gave each of his four daughters legacies of $2000 and left the residue of his estate equally between his three sons. All the children were over 21 at the date of their father's death. The learned judge decided the legacies of $2000 to two married daughters should be increased to $12,000 each, and the unmarried daughter should receive a legacy of $4000 in place of her legacy of $2000 and in addition a life interest in a fund of $8000. A fourth, married, daughter had not established that she was left without adequate provision for her proper maintenance. The effect of the order so far as Mrs Schaefer, the housekeeper, was concerned was to substitute a gift of $2000 for the gift of the house and furniture worth some $14,500. The appellant is a married woman, with three children, and had looked after the testator for 8 months. There is no suggestion that the relations between the testator and the appellant were other than those between employer and employee.

[45] [1972] A.C. 572. Lord Cross of Chelsea, Lord Wilberforce, Lord Hodson, Lord Parker of Waddington, Lord Simon of Glaisdale dissenting.

[46] *Ibid.*, 592.

[47] *Idem.*

[48] See W.A. Lee 'Contract to Leave Property by Will' (1972) 46 A.L.J. 191, 192-193; Scrutton, *supra* n.40, 63; Sherrin 'Contracts to Make Wills' (1972) 122 N.L.J. 576.

Footnotes Contd.

[49] (1845) 12 Cl.& Fin. 45; 8 E.R. 1312. (House of Lords).

[50] (1920) 20 S.R. (N.S.W.) 278.

[51] [1894] 1 Q.B. 466. For the right to cancel the contract and recover damages for breach, see Contractual Remedies Act 1979, ss.7, 8 and 10.

[52] [1916] 1 A.C. 266.

[53] (1863) 1 De G.J. & Sm. 474; 46 E.R. 188.

[54] (1878) 8 Ch. D. 367; see W.A. Lee "Schaefer v. Schuhmann' (1972) 88 L.Q.R.320, 322.

[55] [1901] 2 K.B. 518.

[56] (1874) 18 Eq. 18, 24.

[57] (1722) 3 Swanst. 404; 36 E.R. 926.

[58] *Supra* n.45, 586-7.

[59] *Supra* n.32, 563. For an application of this rule, see *Commissioner of Stamp Duties v. Loughnan* [1948] N.Z.L.R. 626, C.A.

[60] *Supra* n.45, 587.

[61] *Ibid.*, 596.

[62] Cf. Lord Jowitt, L.C. who insisted that for judges to look at social and political issues was "to confuse the task of the lawyer with the task of the legislator": (1951) 25 A.L.J. 296.

[63] *Supra* n.45, 596-7.

[64] *Ibid.*, 597.

[65] *Ibid.*, 598-9.

[66] *Supra* n.32, 563.

[67] [1929] A.C. 601, 629 per Lord Atkin.

[68] *Gardiner v. Boag*: *supra* n.25, *Parish v. Parish*: *supra* n.26; also *Hooker v. Guardian Trust and Executors Co. of N.Z.* [1927] G.L.R. 536 - the testator's widower covenanted with the defendant company not to make a Family Protection claim. The court held the deed could not bar the plaintiff from pursuing a claim.

[69] *Supra* n.45, 600.

[70] *Ibid.*, 594.

Footnotes Contd.

[71] See *Public Trustee v. J.A. Kidd* [1931] N.Z.L.R. 1; *Re Donkin (decd.)* [1966] Qd.R. 96; *Re McPhail (decd.)* [1971] V.R. 534.

[72] *Supra* n.45, 575.

[73] R.A. Sundberg "The Problem in Schaefer v. Schumann - A Simple Answer?" (1975) 49 A.L.J. 223.

[74] [1958] 1 Ch. 168.

[75] *Ibid.*, 176.

[76] *Ibid.*, 179.

[77] *Supra* n. , 271-272.

[78] *Supra* n.42, 295.

[79] [1976] 2 N.Z.L.R. 304.

[80] The value of the property at the time of the contract was £2450. £1400 was to be paid to the four non-contracting children, decreasing the net value to the three contracting brothers to £1050. £ 1400 divided by four equals £350. £1050 divided by three equals £350.

However, the government valuation of the property as at 1 July 1974 was $21,600 - a quadrupling in value, attributable in part to the repairs and improvements effected by the brothers, but also largely from the effect of inflation on property values.

[81] Law Reform (Testamentary Promises) Amendment Act 1961, s.2(1).

[82] P. Burns "Testamentary Promises" [1965] N.Z.L.J. 200. See also: B. Coote "Testamentary Promises Jurisdiction in New Zealand" *The A.G. Davis Essays in Law* (Butterworths, London, 1965).

[83] *Reynolds v. Marshall* [1952] N.Z.L.R. 384, 393.

[84] (1981) Unreported, Wanganui Registry, A10/81.

[85] (1978) 2 N.Z.L.R. 605.

[86] *Supra* n.32.

[87] *Maxwell on Interpretation of Statutes* (12 ed.) (Sweet and Maxwell, London, 1969).

[88] Cf. some Canadian provinces, *supra* Part III A5.

[89] 26 *Halsbury's Laws of England* (4 ed.) para. 584; *Baker v. The Queen* (1975) A.C. 774.

[90] N.Z. Parliamentary Debates Vol. III, 1900: 504.

[91] Joseph Laufer, Harvard University Law School, in a letter to the Hon. Mr Webb, quoted: NZPD Vol. 307, 1955: 3292.

Footnotes Contd.

92 *Bosch v. Perpetual Trustee Co. Ltd.* [1938] A.C. 463, 478; quoting and approving the statement of Salmond J. in *Re Allen* [1922] N.Z.L.R. 218, 220.

93 *Supra* n.45, 595-596. See also Hon. Mr Hanon, M.P., N.Z.P.D. Vol. III, (1900): 505 -

It was well known that very often wealth and property accumulated by the husband was not the result altogether of his own efforts, but was the result of the combined labour, brains, and penuriousness of the husband and wife.

94 Cf. Matrimonial Property Act 1976: equal sharing of property on divorce.

95 *Supra* n.90.

96 This view has not gone completely unopposed, see: J. Laufer "Flexible Restraints on Testation" (1955) 69 Harv. L.R. 277, 301.

97 M.F.L. Flannery "Family Protection: Coach and Four Through an Act of Parliament" [1978] N.Z.L.J. 451, 454.

98 Stephens, *supra* n.1, 3-11; F.R. Jordan "Limit on the Power of Testamentary Dispositions" (1908) 5 C.L.R. 97, 98-101.

99 Tyler, *supra* n.1, 1; Gold "Freedom of Testation: The Inheritance (Family Provision) Bill) 1938" (1938) 1 M.L.R. 296, 299:

English law in its present insistence on free testation is in marked disharmony with most other legal systems;

Supra n.15.

100 *In re Baker* [1962] N.Z.L.R. 758, 776 per Leicester J.

101 *Supra* n.32, 560; *supra* n.34.

102 *Welsh v. Mulcock* [1924] N.Z.L.R. 673, 682.
Note also the comments of the Hon. Mr Pitt, M.P., A.G. during the second reading of the Testator's Family Maintenance Bill, N.Z.P.D. Vol. 138, 1906: 148 -

One recognises that in an Act of this sort one is really altering a man's will - making his will for him as it were....

See also: *In re Ruddell* [1944] N.Z.G.L.R. 489 per Fair J.

104 P.S. Atryah *The Rise and Fall of Freedom on Contract* (Clarendon Press, Oxford 1979),625-6, 681-715; J.M. Keynes *The End of Laissey-Faire* (Hogarth Press, London, 1926).

105 E.g. Moneylenders Act (UK) 1900, which gave the court power to reopen moneylending transactions if the rate of interest was excessive and the transaction was harsh and unconscionable.

Footnotes Contd.

106 *Rigden v. Rigden* (1976) Unrep., Rotorua Registry M27, 76.

107 For what may be considered unjust, see s.21(10). For the approach of the courts to this issue, see *Donnelly v. Donnelly* (1981) 4 M.P.C. 52, per Greig J. who emphasised that due regard must be given to the right of the spouses to enter into and be bound by an agreement.

108 *Supra* n.25.

109 *Supra* n.26.

110 See also: *Hooker v. Guardian Trust and Executors' Co. of N.Z. supra* n.68; *Re Julso* [1975] 2 N.Z.L.R. 536. The position is the same in Canada, see (1964) 42 Can. Bar Rev. 391-393; and Australia *Lieberman v. Morris* (1944) 69 C.L.R. 69.

111 [1967] N.Z.L.R. 357.

112 *Supra* n.24.

113 *Supra* n.45, 592. Cf. Sutton, *supra* n.40, 61 "The logic of their Lordship reasons seems to apply to all forms of contracts to make wills, whether bona fide or normal, or not".

114 This has been recently acknowledged by Lord Simon of Glaisdale. In an appeal to the Privy Council from the New Zealand Court of Appeal's finding that the proceeds from the sale of shares in a company constituted matrimonial property within the meaning of the Matrimonial Property Act 1976, their Lordships advised Her Majesty that this was:

> ... a matter of discretion in which the court appealed from is much more favourably placed than their Lordships to consider the relevant local considerations.
> (1982) 1 N.Z.F.L.R. 193, 199.

McCarthy P. has said the Privy Council faces difficulties in "understanding the backgrounds to New Zealand cases, even our social philosophies, our ways of life, sometimes even our language" [1976] N.Z.L.J. 380.

115 *Supra* n.13.

116 *Supra* n.9.

117 [1973] 2 N.Z.L.R. 359.

118 [1979] 2 N.Z.L.R. 495.

119 [1980] 1 N.Z.L.R. 50.

120 [1979] 1 N.Z.L.R. 572, 582.

121 *Re Wilson*, *supra* n. 54, 362.

122 The Law Commission *Second Report on Family Property: Family Provision on Death* (Law Com. No. 61) 1974, paras. 226-242.

Footnotes Contd.

123 *Ibid.*, para. 191.

124 Repealing The Inheritance (Family Provision) Act 1938.

125 1970 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada.

126 Cheshire and Fifoot *The Law of Contract* (5 ed., Butterworths, Wellington, 1978), 67.
Cf. s44 Matrimonial Property Act.

127 *Supra* n.122, para. 234.

128 Law Reform Commission of New South Wales. *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act 1916*, 1974, para. 11.54.

129 Law Reform Comm. N.S.W. *Report on the Testator's Family Maintenance and Guardianship of Infants Act 1916*, 1977, para. 2.11.1.

130 *Idem.*

131 *Ibid.*, para. 1.7 with recommendation.

132 *Supra* n.128, para. 11.57.

133 *Supra* n.45, 592.

1 Folder Sh	SHEPPARD, A.W. Contracts to make wills and the Family Protection Act 1955.

~~426,858~~

Due	Borrower's Name
15/7	AWSheppard.
20/8	C Plu[illegible]
10/5	AWSheppard.
7/4	AWSheppard
	Gordon Be[illegible]
	HAMISH D[illegible]