The Concept of Moral Duty in the law of Family Provision – a gloss or critical understanding?

1. *Introduction*

> It is the duty of the Court, so far as possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be.
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> *Re Allardice; Allardice v. Allardice* (1910) 29 NZLR 959 at 972-3, Edwards J

This pronouncement is striking in its reference to 'moral duty'. It is a statement made in the context of considering the distribution of property on death through the operation of family provision legislation, legislation that enabled a court to override a will in certain circumstances in favour of defined family members.[1] How does this concept fit in? Its inclusion in the judicial approaches to the legislation has led to comments and questioning in the context of contemporary reform debates. For example, in 1997 the New Zealand Law Reform Commission referred to it as 'obscure';[2] and three years earlier the High Court of Australia called into question the place of the idea of 'moral duty' in family provision legislation in its decision in *Singer v Berghouse (No 2)* (1994) 123 ALR 481 when Mason CJ, Deane and McHugh JJ remarked in their joint judgment that:[3]

> ...references to 'moral duty' or 'moral obligation' may well be understood as amounting to a gloss on the statutory language.

Prior to the comment in *Singer v Berghouse (No 2)* (1994) 123 ALR 481 Murphy J had been the leading recent exponent of this view not only that it was a gloss but that it got in the way. For example, in *Hughes v National*

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[1] The present Australian legislation is as follows: Family Provision Act 1969 (ACT), Family Provision Act 1970 (NT), Family Provision Act 1982 (NSW), Succession Act 1981 (Qld), Inheritance (Family Provision) Act 1972 (SA), Testator's Family Maintenance Act 1912 (Tas); Administration and Probate Act 1958 (Vic), Inheritance (Family and Dependants Provision) Act 1972 (WA). The UK legislation is the Inheritance (Provision for Family and Dependants) Act 1975.

[2] Law Commission, New Zealand, *Report 39: Succession Law - A Succession (Adjustment) Act,* Wellington, August 1997, para 34.

Trustees Executors & Agency Co of Australasia Ltd (1979) 143 CLR 134 at 158 he stated that the gloss on the Act 'is unwarranted and inconsistent with the language of the legislative scheme'; and in *Goodman v Windeyer* (1980) 144 CLR 490 at 504; (1980) 31 ALR 23 at 34 he commented that considerations of moral duty 'confused' the question of whether an applicant was left without adequate provision. Although the remarks in *Singer* were *obiter* they signal serious questioning about the continuing role of moral duty in family provision legislation.[4] Was the moral duty test a gloss? Virginia Grainer's work in New Zealand suggests that it was.[5] To add a further dimension to such considerations I reflect in this article upon what this moral duty means as a legal concept in its jurisprudential context.[6]

A right to leave property by will, which testamentary freedom embodies, is an expression of a particular way of thinking about property. It is that way of thinking about property that provides the jurisprudential foundation for understanding the emergence and validity of the idea of moral duty. Testamentary freedom is an expression of governing, through law, the destination of property after the death of its 'owner'. It presupposes private ownership of property in which the individual 'will', as determining agent, plays its part, and a will which has postmortem control as expressed in 'the will', as testament. The idea of private property is entrenched in Western legal jurisprudence, but it is not fixed. Property in this context is a bundle of rights

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3 (1994) 123 ALR 481 at 787 in the joint judgment of Mason CJ, Deane and McHugh JJ.

4 In *Permanent Trustee v Fraser* (1995) 36 NSWLR 24, the Court of Appeal acknowledged that the observations in the High Court were *obiter* but considered that the 'moral duty'test should remain a 'useful yardstick' until such time as the existing decisions were reversed expressly by the High Court: at 27, 31, Kirby P; at 36, Handley JA.

5 V Grainer, 'Is Family Protection a Question of Moral Duty?' (1994) 24 *VUWLR* 141 at 145.

6 In the article I draw on parts on my doctoral thesis: *'Family ' and 'Property': A History of Testamentary Freedom in New South Wales with particular reference to widows and children* (PhD thesis, University of New South Wales, 1993). Some of this material is also included in the Expert Report prepared for the Victorian Attorney-General's Law Reform Advisory Council in 1994, published as the first in a series of expert reports: *Expert Report 1: Family Provision*, Melbourne 1997. The Expert Report was provided to the New Zealand Law Commission when undertaking its work in relation to the New Zealand Act.

with respect to things[7] in which both the rights and the things themselves shift in meaning and effect over time, and in which the concept of private property is defined and protected by sophisticated and complex laws which defend an individual's right to ownership against others and against arbitrary invasion by the State. Property denotes ownership of rights in relation to things. Property rights, however defined, are about control.

The extent to which an individual may control things beyond his or her own lifetime is an expression of the 'value' or 'size' of the property rights accorded to an individual within the applicable framework of law and legal thinking. Within Western jurisprudence rights to enjoy and dispose of property may be valued highly of themselves as rights or individual freedom, or they may be qualified, held in check by rules of public policy and rules governing the form and mode of disposition. However, in terms of the social ramifications of testamentary freedom, a person's rights on death to dispose of property (as things) may be qualified principally by the rights or claims of others in respect of it. Testamentary freedom may be qualified or extinguished in respect of property in whole or in part by providing overriding entitlements to others, for example a surviving spouse and/or children. The individual's freedom to control may thus express both ideas about property and ideas about social responsibilities. At the conceptual level, testamentary freedom can be characterised as a power to provide for family members or it can be characterised as a power to take away from them. Either way, testamentary freedom cannot simply be considered in isolation. It is an aspect of rights of property viewed within a context of family responsibilities: it is a power with respect to property which has an impact in particular upon spouses and children.

Ways of thinking about property and the place of testamentary powers within property rights have altered over time. Professor Ronald Chester, an American scholar, has commented that 'the right of bequest was symbolic of

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[7] MR Cohen, 'Property and Sovereignty' (1925) 13 *Cornell LQ* 8, p 12 provides a more extended definition of a a property right as 'a relation not between an owner and a thing, but between the owner and other individuals with reference to things'.

the shift from feudal to individual conceptions of property in Western society'.[8] Arguments about a power of testation in this context focus, for instance, on such questions as whether a right of testamentary power should exist at all; whether, if it did exist, it should remain unqualified; and, if such a right were to be acknowledged, upon what basis was it to be acknowledged.

Family provision legislation was very much a late nineteenth century response to the potential (and actual) consequences of testamentary powers of men as husbands and fathers with respect to their wives and children. It was at the one time an expression of protection of widows and children, introduced in the wake of the introduction of female suffrage in New Zealand and Australia; and a curtailment or qualification on individual power by the State.[9] In the interpretation of the legislation the moral duty approach emerged.

2. *The moral duty test*

The case from which the statement of the 'moral duty' test was taken is *Re Allardice; Allardice v. Allardice* (1910) 29 NZLR 959, the first appellate decision under the *Family Protection Act* 1908 of New Zealand, the successor to the first such legislation, the *Testator's Family Maintenance Act* 1900. The power to override a will under these Acts arose when the will failed to make adequate provision for the proper maintenance of the spouse or children of a testator. The court could then superimpose an assessment of obligation to provide for certain people on death. The occasion of death brought a will into effect and with it the particular testator's assessment of obligation with respect to property on death. Under the *Testator's Family Maintenance* legislation the court could review that assessment and through law redefine those obligations. All the Australian jurisdictions followed New Zealand; tand

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8 R Chester, *Inheritance, Wealth and Society*, Bloomington, 1982, p 11.

9 See further R Atherton "The Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW): Husband's Power v. Widow's Right" (1991) *Australian Journal of Law and Society* 97-129; R Atherton, "New Zealand's Testators' Family Maintenance Act of 1900 - the Stouts, the Women's Movement and Political Compromise" (1990) 7 *Otago Law Review* 202-221; "Feminists and Legal Change in New South Wales, 1890-1916: Husbands, widows and 'family property'", in *Sex, Power and Justice: historical perspectives on lw in Australia*, D Kirkby ed, Oxford University Press, Melbourne, 1996, pp 168-187.

later so did the United Kingdom and some provinces in Canada.[10] The *Allardice* case was a landmark one in setting the pattern for the approach to the legislation in other jurisdictions.

The translation of the statutory threshold of being left without adequate provision for proper maintenance invited two different interpretations: firstly by placing emphasis on the notion of adequacy; and secondly emphasising the concept of what was proper provision. The notion of 'adequacy' seemed to suggest some basic minimum level of support which would prevent the applicant from ing a burden on the state in some sense, a purely economic and objective basis for the application of the jurisdiction. The concept of 'proper provision' could be more subjective, however, in the sense of being related to matters such as the size of the estate and the standard of living of the particular applicant during the lifetime of the deceased, an ethical basis of the jurisdiction.[11]

In the *Allardice* case itself the testator was survived by an ex-wife (the first Mrs Allardice), six children by her, his widow (the second Mrs Allardice) and seven children by her (six before marriage to her). The will was entirely in favour of the second family. Five of the children of the first marriage, three married daughters and two unmarried sons between the ages of thirty and thirty-eight, applied for provision under the *Family Protection Act* 1908. The estate was considerable. It was this fact, and the fact that the applicants were all adults, which allowed the court a full opportunity to consider the width of the jurisdiction under the Act.

At first instance Chapman J emphasised the notion of 'adequacy' in the legislative formula. He approached the task of assessing the inadequacy of provision on the basis that if the applicants were not destitute or approaching a position of want, an order could not be made on their behalf. The daughters were all married to men 'of some capability, all of whom are able to

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[10] See note 1 above.

[11] The distinction between an 'economic' and an 'ethical' approach to the jurisdiction was discussed by Kitto J in *Worladge v Doddridge* (1957) 97 CLR 1 at 16-17, referring particularly to the analysis of the New Zealand cases made by Clark J in *Re Greene's Estate* (1930) 25 Tas LR 15.

work';[12] the sons were able-bodied men.[13] None of them would have had any claim on their father had he been living.[14] As the children were not 'in want', Chapman J considered that there was no basis for making an order in their favour:[15] he could not consider 'what the father ought in justice to have done beyond the standard [he] derived from the statute' - and the standard, as interpreted by him, was limited.[16]

On appeal it was pressed by counsel for the applicants that the focus of the legislation was upon what was 'proper' and that this required the court to take into account especially the value of the estate, and to do this was not necessarily simply to embark on a redistribution of the estate without reference to the question posed by the legislation.[17] The decision of the Appeal Court responded to such submissions in articulating the `moral duty' approach as the standard against which the testator's conduct was to be measured for the purposes of the Act.

It was fitting that Sir Robert Stout, as one of the initiators of the introduction of the legislation[18] and now as Chief Justice of New Zealand, took part in the appeal judgment which was to shape the future of Testator's Family Maintenance in the courts. He began by giving a summary of the principles applied in the cases on the legislation so far (and in many of which he himself had also sat):[19]

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12 (1910) 29 NZLR 959 at 961.

13 *Ibid,* at 962.

14 *Ibid,* at 963.

15 *Ibid,* at 966.

16 This was not unlike the approach which had been taken in the first reported case under the legislation, *In re Rush* (1901) 20 NZLR 249, in which Edwards J considered that the jurisdiction under the legislation was to be regarded as an extension of the inter vivos obligations which the deceased had as defined in the *Destitute Persons Act* 1894: see especially at 253. The emphasis in *Re Rush* was upon the notion of 'adequacy' and that the obligations undwer the Act were somehow an extension of, and related to, the obligations of maintenance inter vivos.

17 *Ibid,* Skerret KC and SA Atkinson at 966-967; and at 968-969.

18 His role is considered in R Atherton, 'New Zealand's Testator's Family Maintenance Act: The Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago L Rev* 202.

19 (1910) 29 NZLR 959 at 969. The earlier cases were: *In re Phillips* (1901-2) NZGLR 192; *Handley v Walker* (1903) 22 NZLR 932; *Wilkinson v Wilkinson* (1905) 24 NZLR 156; *In re Cameron* (1906) 2 NZLR 907; *Munt v Findlay* (1905) 8 NZGLR 197; *In re*

> 1, That the Act is something more than a statute to extend the provisions in the Destitute Persons Act; 2, that the Act is not a statute to empower the Court to make a new will for a testator; 3, that the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of 'wife, husband, or children' where adequate provision has not been made for their proper maintenance and support by the will of the testator; 4, that - in the case of a widow, at all events, if not in the case of a widower - the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves.

In the first proposition Stout CJ distinguished the assessment on death from one which involved inter vivos obligations. The second and third propositions were inter-related: the second embodied the notion that testamentary freedom is preserved by the legislation in that the court is not substituting a will for that of the testator; the third limited the invasion into the will to the extent necessary to fulfil the jurisdiction. To that extent, although the will was affected, the court was not making a new will. The fourth proposition reiterated the view expressed in the earlier cases, namely that the widow's claim was in a different position from that of children (at least where the children were able-bodied adults).[20]

It was a useful summary and provided a convenient starting point in later cases.[21] Working from it the central question to emerge, however, was as to where the dividing line was to fall: between altering the will so far as necessary to provide 'proper' provision, which was allowed, and not making a new will for the testator, which was not. While Stout CJ gave a number of examples of things which could be considered, such as the means of the children and how the widow and children had been maintained in the past, which suggested that the standard was linked to a concept of moral obligation, it was the judgment of Edwards J that formulated an approach in

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Bleasel (1906) 8 NZGLR 743; *Nosworthy v Nosworthy* (1906) 26 NZLR 285; *Plimmer v Plimmer* (1906) 9 NZGLR 10.

20 *In re Rush* (1901) 20 NZLR 249; *In re Russell* (1907) 9 NZGLR 509; *Rowe v Lewis* (1907) 26 NZLR 769; *In re Going* (1907) 9 NZGLR 485; and see Chapman J at first instance (1909) 29 NZLR at 964.

21 As in the next Privy Council decision on the legislation, *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, from New South Wales, where it was quoted in full at 477.

terms of moral duty, seen in the opening quote.[22] This passage effectively crystallised the examples Stout CJ had been considering into a definite standpoint: a moral duty test expressed in terms of the 'just, but not a loving, husband or father'. It was only when the Court found that the testator had been plainly guilty of a breach of such moral duty, that the Court could make 'an order as appears to be sufficient, but no more than sufficient to repair it.[23] The Court of Appeal allowed the appeal of the daughters by awarding them annuities. The appeal of the sons was dismissed. On appeal to the Privy Council the decision of the Court of Appeal was affirmed.[24]

In *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 the Privy Council again confirmed this approach in relation to the Act. Lord Romer agreed with the analysis made by Salmond J in *In re Allen* [1922] NZLR 218 at 220:[25]

> 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.

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22 (1910) 29 NZLR 959 at 972-3.

23 *Ibid*. Edwards J had been the judge who heard *Re Rush* (1901) 20 NZLR 249 and *Laird v Laird* (1903) 5 NZGLR 466; and he did not wish to differ from anything he had said in either of those cases. Edwards J however considered that the amendment of the Act which permitted the court to make a lump sum award (Act No 59 of 1906, incorporated into the *Family Protection Act* 1908), gave a more extended meaning to the power of the court to remedy a testator's breach of duty than was given under the Act of 1900 - at 972.

24 [1911] AC 730. The executors and trustees of the will appealed to the Privy Council against the order made in favour of the daughters. There was little discussion other than for Lord Robson to comment that their Lordships did not see any reason to differ from the Court of Appeal in the general view taken as to the proper scope and application of the powers conferred under the Act: at 734. *Tyler's Family Provision*, 2nd ed, RD Oughton, Abingdon, 1984, p 8 n 28 points out some interesting facts about the Privy Council appeal. The Board only required argument from the unsuccessful appellants and the matter was argued for less than a full day, since part of the day was spent on the hearing in *Samaradiadiwakara v De Sarum* [1911] AC 753. Two of the members of the Board (Ld Shaw of Dunfermline and Ld de Villiers) came from jurisdictions where a fixed share system existed (Scotland and South Africa respectively). Further, the advice of the Board, given by Lord Robson, strongly emphasised that a Court sitting in London should not interfere with the discretion of a lower court sitting locally.

25 Cited by Ld Romer *ibid,* at 479.

Lord Romer also agreed with Edwards J in *Re Allardice; Allardice v Allardice* (1910) 29 NZLR 959 but re-stated the moral duty approach as follows:[26]

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

The Judicial Committee in *Bosch's* case [1938] AC 463 not only confirmed the creation of the 'juristic person' of the 'just and wise husband and father' suggested first by Edwards J in *Re Allardice; Allardice v Allardice* (1910) 29 NZLR 959, but also virtually endowed this person with 'perpetual succession'.[27]

3. *Origin of the moral duty approach*

What then was the source of the moral duty approach? To unravel this it is necessary to consider not only how the legislation came to include the term 'proper', but also why this was a relevant idea to have included at all. It was deliberate[28] and its source lies deep in the philosophical background to testamentary freedom.

The idea of testamentary freedom captures the same philosophical underpinnings as freedom of contract, *laissez-faire* economics and freedom of property. They all express the idea of freedom from State (or Crown) control in favour of individual determinism.[29]

The herald of the shift to individual conceptions of property rights was John Locke (1632-1704).[30] In celebrating property, along with life and liberty, as a

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26 *Ibid,* at 478-9.

27 McLelland, C, 'Fifty Years of Equity in New South Wales - A Short Survey' (1951) 25 *ALJ* 344, a paper delivered to the 7th Legal Convention of the Law Council of Australia. McLelland KC was a leader of the Equity Bar in New South Wales when he presented this paper and was soon to be elevated to the New South Wales Supreme Court in 1952 and later to the Court of Appeal in 1966.

28 See Atherton, n 18 above.

29 The doctrine of economic freedom, encapsulated in the concepts of *laissez-faire* and 'freedom of contract', in seen best in the writings of the English Classical economists, such as Adam Smith (1723-1790) and David Ricardo (1772-1823): see for example the excellent discussion in PS Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979.

30 Locke was an adherent of the natural law view of property. His justification of property lay in the principle of labour, that a person who `removed something from the state of

natural right, Locke can be said to have crystallised English notions of property in the seventeenth century. :"The end of Law", he stated, was "not to abolish or restrain, but to preserve and enlarge Freedom":[31] But this was not an unlimited concept:[32]

> …Freedom is not, as we are told, a liberty for every man to do what he lists...but a Liberty to dispose and order, as he lists, his person, Actions, Possessions and his whole Property, within the Allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.

Locke's views on 'property' need to be considered, however, in a particular historical context. His arguments, articulated for example in the *Two Treatises of Government*, have been described as 'an intellectual by-product of a struggle against an irresponsible monarchy'.[33] The principal purpose of his work was to justify the victory of parliamentary supremacy over absolute monarchy in the 'Glorious Revolution' of 1688.[34] While his ideas on property have been criticised as incomplete and not entirely consistent,[35] his advocacy for the protection of citizens in their 'lives, liberties and estates'[36] has formed the basis of the modern discussions of freedom of property and individual rights.[37] Individualism in relation to property was therefore essentially a movement *against* absolutist monarchy in favour of the protection of the individual against such monarchy; and the vehicle of such protection was

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Nature' and `mixed it with his labour' was justified in retaining it: *Two Treatises of Government*, 2nd ed, P Laslett, Cambridge, 1970, Chapter V, 'Of Property', par 27.

31 *Ibid, Second Treatise*, chapter VI, 'Of Paternal Power', para 57.

32 *Ibid.*

33 WH Hamilton, 'Property - According to Locke' (1932) 41 *Yale LJ* 864. The article appears to be a review essay on Paschal Larkin's book, *Property in the Eighteenth Century with Special Reference to England and Locke*, New York, 1930, or at least the publication of Larkin's book in 1930 was used as the occasion for the article.

34 By which the Roman Catholic James II was overthrown in favour of his Protestant daughter Mary and her husband, the Dutch stadhouder William of Orange (Mary II and William III).

35 Hamilton, n 33 above; R Chester, *Inheritance, Wealth and Society*, Bloomington, 1982, p 15; Laslett introduction, to the *Two Treatises of Government*, pp 105-6; Rev H Rashdall, 'The Philosophical Theory of Property', in *Property: Its Duties and Rights*, London, 1913, pp 45-47.

36 See Hamilton, n 33 above at p 868, n 6 as to the various forms in which this phrase appeared.

37 MacPherson analyses Locke's debt to the work of Thomas Hobbes (1588-1679): CB Macpherson, *The Political Theory of Possessive Individualism - Hobbes to Locke*, Oxford, 1962.

Parliament. Locke's was 'a defensive theory designed to protect the individual against the encroachment of the Crown in the seventeenth century'.[38]

The guiding principles by which such Parliament was to govern were developed principally through the work of the Utilitarians and the school of Classical Economists. Jeremy Bentham (1748-1832), the founder of 'Utilitarianism',[39] aimed to create a set of laws which would make society virtuous by application of the guiding principle of 'the greatest good for the greatest number'.[40] The 'greatest good' was translated as meaning the pursuit of happiness by the individual, and included within individual happiness was the individual exertion which led to the acquisition of property.[41] The value of individual exertion drew moreover on a tradition of Protestant ethics in relation to work and self-reliance.[42]

What place, then, did the concept of a power of testation have within this intellectual tradition? Testamentary freedom was not a simple concept. As one commentator remarked:[43]

> ...liberty of testation has fuelled imaginations and sparked debate for almost as long as man has recorded his colloquies.

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38 Larkin, n 33 above p 2 n 2. The 'insecurity of the landed interests under the Stuarts' provided the context: D Sugarman and GR Rubin, 'Towards a New History of Law and Material Society in England, 1750-1914' in *Law, Economy and Society - Essays in the History of English Law 1750-1914*, eds Rubin and Sugarman (Abingdon: Professional Books, 1984) p 42.

39 See generally, HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory,* Oxford, 1982; JM Morton, Jr, 'The Theory of Inheritance' (1894-95) 8 *Harv L Rev* 161. Bentham rejected the natural rights theory of his predecessors: 'Principles of the Civil Code', in *The Works of Jeremy Bertham - published under the supervison of his executor John Bowring,* Edinburgh, 1843, Pt I, ch VIII, 'Of Property', p 309a.

40 'Principles of the Civil Code', Pt I, ch II, 'Objects of the Civil Law', p 302.

41 See, for example, Rashdall, n 35 above, pp 47-51.

42 See, for example, HJ Laski, *A Grammar of Politics* (London: Allen & Unwin, 1925),p 180; HG Wood, 'The Influence of the Reformation on Ideas Concerning Wealth and Property', in Rashdall, n 35 above, p 132. RH Tawney considered that 'capitalism was the social counterpart of Calvinist theology': foreword to M Weber, *The Protestant Ethic and the Spirit of Capitalism (*London: Allen & Unwin, 1930, first published 1904-5), p 2. Note, however, Alan Macfarlane's thesis that 'individualism' in England emerged well before the sixteenth century: A MacFarlane, *The Origins of English Individualism: the family, property and social transition* (Oxford: Blackwell, 1978); and see the review of this work by JGA Pocock, (1980) 19 *History and Theory* 100.

43 NW Hines, 'Freedom of Testation and the Iowa Probate Code' (1964) 49 *Iowa Law Rev* 724 at p. 725.

As suggested above, it depends upon a certain understanding of rights in relation to property. It can also be seen as a banner of complex social and political ideas. It suggests freedom *from* something in relation to a particular activity. It is a loaded expression. In the writings of the various theorists mentioned above, questions such as whether a right of testation should exist at all, and whether, if it did exist, it should remain unqualified were considered in a number of ways. Where a power of testation was discussed in the context of rights of property, the assumption was often made that testamentary power was a natural extension of the rights of disposition of property *inter vivos*. Mill, for example, considered that the power of "bequest" was "one of the attributes of property" and that:[44]

> the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure.

The power of testation was seen both as an incentive to industry and the accumulation of wealth,[45] and as preferable to a system of fixed inheritance rights, which were represented as a disincentive to heirs to work and would therefore reduce the total wealth of a nation.[46] Subject only to such overriding limitations as the rule against remoteness of vesting, and rules which governed the validity of trusts, the owner's postmortem powers could reach down generations. But it was not an unlimited power. The extent to which the law contained that postmortem, or testamentary, power was governed to a large extent by the role that that power was seen to play in the context of family relations.

In the context of families the principal issues concerned the duty of a parent to provide for children to some extent; the separation of the notions of 'bequest' (testamentary power) from 'inheritance' (receipt of property through a will); and the incentive factor in the testamentary power of the parent. In

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44 Mill, *Principles of Political Economy*, (1848), Bk II, ch. 2, par 4.

45 H Sidgwick, *The Elements of Politics* (London: Macmillan & Co, 1897) ch VII, 'Inheritance'; J Wedgwood, *The Economics of Inheritance* (Harmondsworth: Penguin Books, 1939, first published 1929) pp 200-201.

46 Wedgwood, n 45 above, p 194; Laski, n 41 above, p 528; H Dalton, *Some Aspects of The Inequality of Incomes in Modern Communities* (London: Routledge, 1920) ch VII, 'Effects of the Non-Fiscal Law', especially s 4, at p 301.

such a context the arguments vacillated between the utility of the power of testation as an aspect of parental authority, and the question whether the power should be restricted.

Locke's views on the power of testation are seen particularly in his chapter entitled 'Of Paternal Power'. After referring to the general power of bequest Locke gave as a specific example the power of testation in the context of the claims of children. He saw it as 'a tye on the Obedience of his Children' and 'a part of Paternal Jurisdiction'; a power men have 'to bestow their Estates on those, who please them best'.[47] Even though the father's estate was 'the Expectation and Inheritance of the Children ordinarily in certain proportions', it was the father's power:[48]

> ...to bestow it with a more sparing or liberal hand according as the Behaviour of this or that child hath comported with his Will and Humour.

Through the 'hopes of an Estate' the father secured their obedience to his will.[49]

Jeremy Bentham and John Stuart Mill (1806-1873) both developed from Locke's ideas of property and the power of testation; and Mill built on Bentham. The power of testation was seen both an aspect of individual fulfilment and an instrument of social control. To Bentham it was considered 'advantageous', 'for the good of him who commands'.[50] A right of bequest

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47 Locke, n 38 above, par 72.

48 *Ibid.*

49 *Ibid,* par 73. Although Locke justified the concept of property on the basis of labour, he did not separate in his analysis of the power of testation the rationale of the labour-based right of property from the inheritance-based transfer of that property reflected in the above passage. He did not tackle the inconsistency in the latter aspect: that the children, through their 'Tye of Obedience' had gained property other than by their own labour. Some later theorists, such as Karl Marx, who saw value as deriving from labour, overcame this difficulty by rejecting the notion of private property, and with it inheritance, altogether (See for example the *Communist Manifesto* (1847-8). It is extracted in CB Macpherson, *Property: Mainstream and Critical Positions*, Oxford, 1978, p 61). Others sought to attack rather the *extent* of inheritance through the promotion of schemes of inheritance taxation (J Bentham, 'Supply without Burthen, or Escheat vice Taxation' (1795), included in *The Works of Jeremy Bentham* (1843), vol 2, p 585; A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, London, 1776, Bk 5, ch 2, app. to arts. I & II; JS Mill, *Principles of Political Economy with some of their applications to Social Philosophy*, London, 1848, Bk 2, ch 2, par 3)

50 J Bentham, 'Principles of the Civil Code', in *The Works of Jeremy Bentham (1843)* pt II, ch 5, p 337. Although Bentham expressed some concern that `in making the father

(the power of testation) was, however, different from a right of inheritance. The right of bequest, or gift after death, formed part of the idea of private property, but the right of inheritance, as distinguished from bequest, did not. As Mill stated:[51]

> That the property of persons who have made no disposition of it during their lifetime, should pass first to their children, and failing them, to the nearest relations, may be a proper arrangement or not, but is no consequence of the principle of private property.

Both Bentham and Mill, like Locke, also saw the role of testamentary power as providing an incentive to children. Bentham described it as a power to reward 'dutiful and meritorious conduct' and as[52]

> an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of their families.

Mill indicated that children were entitled to expect maintenance and education to the extent to make them independent and self-reliant, to 'enable them to start with a fair chance of achieving by their own exertions a successful life',[53] but no more. Mill also acknowledged that the calculation of this duty of provision was affected by the 'station in life' of the relevant individual:[54]

> When the children of rich parents have lived, as it is natural they should do, in habits corresponding to the scale of expenditure in which the parents indulge, it is generally the duty of the parents to make a greater provision for them, than would suffice for children otherwise brought up.

This was the extent of the moral right of a child to any provision from a parent; and conversely, the moral duty of the parent to satisfy it. However, if parents wanted to leave their children more than this, Mill considered that 'the means are afforded by the liberty of bequest':[55]

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a magistrate we must take care not to make him a tyrant' (*ibid*), he considered that fathers needed such a power not only for their own good but for the good of the community in preserving social order.

51 *Principles of Political Economy*, (1848), Bk 2, ch 2, par 3.

52 'Principles of the Civil Code', pt. II, ch 5, 'Of Wills', p 337.

53 *Principles of Political Economy*, (1848), ch 2, par 3.

54 *Ibid*.

55 *Ibid*.

> that they should have the power of showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness.

Should, however, this right of bequest, an integral aspect of the right of property, be subject to limitation? Mill considered this ‘an ulterior question of great importance’.[56] He saw property as ‘only a means to an end, not itself the end’, and that ‘the power of bequest may be so exercised as to conflict with the permanent interests of the human race’, such as ‘the mischiefs to society of ...perpetuities’.[57] Mill therefore acknowledged that the right of bequest was ‘among the privileges which might be limited or varied according to views of expediency’.[58] Hence he supported the rule against perpetuities as an expedient qualification in the interests of encouraging the utilisation of land.

But should the right of bequest be limited by, for example, a mandatory provision for children, as in the old Roman law of *legitima portio* or the French law of *legitime*? Mill's rejection of such a limit reflected the analysis of testamentary power as an aspect of paternal power seen in both Locke and Bentham.[59] Mill therefore defended the right of bequest in general terms. However, he accepted that a parent ought to be forced to provide for those who would otherwise become a burden to the State in an equivalent amount to what the State would have to provide.[60] As he considered it unacceptable that a person be left rich ‘without any necessity for exertion’,[61] he suggested that even though a person should have the power to dispose of his or her whole property by will, there should be a limit to the `right' of inheritance. A person should not have the power ‘to lavish it in enriching some one individual beyond a certain maximum, which should be fixed sufficiently high to afford the means of comfortable independence‘, hence Mill saw ‘nothing

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56 *Ibid,* par 4.

57 *Ibid.*

58 *Ibid.*

59 *Principles of Political Economy,* (1848), Bk II, ch 2, par 4.

60 *Ibid,* Bk V, ch 9 s 1.

61 *Ibid,* Bk II, ch 2, par 3.

objectionable in fixing a limit to what anyone may acquire by the mere favour of others, without any exercise of his faculties'.[62]

The power of testation was not seen therefore as an absolute power. Even Locke, who was closest to a natural right of inheritance, saw it as vulnerable to social control. Having enthroned rights of property ownership in individuals and the right of bequest with it, the problem for theorists from the early nineteenth century onwards was to tackle the question of how far that social control could impinge upon the power of testation. From Locke's time onwards, questions of curtailing the power of testation were characterised as doing precisely that: namely 'impinging' upon the freedom of the testator.

By the late nineteenth century the concept of 'testamentary freedom' embodied Locke's liberty of estate, Mill's and Bentham's concept of parental (paternal) authority, and a rejection of the system adopted in France after the Revolution of 1789. It was a loaded concept: loaded with this philosophical background and, as part of the transition from feudalism and caught up in the defense of the individual over absolutist monarchy, it was valued in large measure as part of the rights of property. Its definition and its defence lay in the realms of property law in the light of this history as part of the principle of gift.[63] It was diametrically opposed to the principle of fixed shares or forced succession.

Testamentary freedom, then, can be summarised as a power perceived as functional within a family context, but a power that was to be exercised within a framework of moral responsibility. In the classical exposition on testamentary capacity in *Banks v Goodfellow* (1870) 5 LR QB 549, Cockburn CJ provided a natural summary of the intellectual tradition of Locke and Blackstone contained in the doctrine of 'testamentary freedom':

> The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral

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62 *Ibid,* par 4.

63 LM Friedman, 'The Law of the Living, the Law of the Dead: Property, Succession and Society' (1966) 66 *Wisc L Rev* 340, p. 352.

> responsibility of no ordinary importance attaches to the exercise of the right thus given...The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law...[64]

What was the 'moral responsibility of no ordinary importance' which attended the power of testation? It was to provide for the maintenance, education and advancement in life of children: 'to enable them to start with a fair chance of achieving by their own exertions a successful life' (Mill); to 'encourage virtue' and to 'repress vice' in the testator's family (Bentham). The converse of this moral responsibility was the 'moral right' of children to receive such education 'as will enable them to start with a fair chance of achieving by their own exertions a successful life' (Mill). Freedom, in this context with respect to the power to control postmortem the distribution of property through wills, was not to exist in the abstract. Philosophically the freedom was located in a framework of moral responsbility, duty and obligation.

What then of the 'neglected claim' referred to by Cockburn CJ? Prior to the introduction of Testator's Family Maintenance legislation the only real avenue of attack was to challenge the testator's testamentary capacity.[65] By the end of the nineteenth century the development in liberal thought, typified in the writings of John Stuart Mill[66] and Thomas Green (1836-1882),[67] paved the way for state intervention generally, and, with it, legislation like the Testator's

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64 (1870) 5 LR QB 549, at 563-565.

65 See for example the study of capacity in cases in late nineteenth century New South Wales in RF Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11 *University of New South Wales Law Journal* 133.

66 JS Mill, in, for example, *On Liberty (*London, 1859) and TH Green, in for example, *Lectures on the Principles of Political Obligation*, in TH Green, *Complete Works*, II (London, Longmans, 1885-91).

67 TH Green, in for example, *Lectures on the Principles of Political Obligation*, in Green, *Complete Works*, II. This period in the development of liberal ideas is considered, for example, R Bellamy, 'TH Green and the Morality of Victorian Liberalism', in *Victorian*

Family Maintenance legislation. The 'new Liberalism' advocated a somewhat less individualistic, more morally responsible concept of property and the relationship between property and State intervention. The shift in thought, which accepted as a basic tenet that the State could legitimately intervene to curtail individual action, occurred in the wake of the Industrial Revolution and the economic and social dislocation left in its wake. Its aim was "to establish an ethical framework to prescribe and evaluate human behaviour and, where necessary, to re-create social institutions".[68]

New Zealand and the Australian colonies followed this changing pattern of ideas and put them into practice in legislation of their own. 'Testator's Family Maintenance" or 'Family Provision' legislation is an illustration of the application of these ideas in the context of testamentary power within families.

4. *The gloss?*

So how did the moral duty approach fit in? I suggest that in placing such a so-called 'gloss' on the key provision the various judges and courts were not confusing the basic principles of the Act, but rather recognising plainly its genesis: namely, that Testator's Family Maintenance legislation was developed in response to testamentary freedom, but not as a contradiction of it. Why do I suggest this? Testamentary freedom was based upon moral duty: it was a power with a 'moral responsibility',[69] to judge the disposition of property on death on the basis of 'the requirements of each particular case'. Testator's Family Maintenance was introduced only to correct aberrant exercises of that power - as the debates which led to the final form of the legislation confirmed.[70] To test the degree of 'aberration' against a standard expressed in terms of 'moral duty' was an utterly logical, consistent and unsurprising thing to have done. Testator's Family Maintenance legislation, athough in one sense a qualification on the testamentary freedom of the individual, is, in another sense, an extension of the exercise of testamentary

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Liberalism: Nineteenth Century Political Thought and Practice, ed R Bellamy (London: Routledge, 1990).

68 M Freeden, *The New Liberalism: An Ideology of Social* Reform (Oxford: Clarendon Press, 1978), p 40.

69 Cockburn CJ in *Banks v Goodfellow* (1870) 5 LR QB 549.

power *via* the court. As testamentary freedom was based on moral duty, why should it be so surprising to find an analysis of Testator's Family Maintenance legislation in similar terms?

So, I would argue, the moral duty approach was not really a *gloss* on the legislation at all: it captured its essence from words and phrases such as 'proper', 'sufficient', 'ought', 'such provision as shall seem fit'. Moreover, such an approach brought to the surface the natural connection between 'proper' or 'sufficient' provision and the disentitling conduct proviso that was included in the legislation from the outset.[71] Both were linked to moral duty: on the one hand conduct could assist in enhancing the moral obligation in a particular case, while disentitling conduct focused on a cancelling of the moral duty.

The moral duty approach, therefore, was neither accidental nor was it a gloss. It was pivotal. It expressed concisely the philosophical background of thinking about property as a bundle of rights, and in particular as rights to control and the expectations governing its exercise within the context of families. Moral duty and moral right went hand in hand. This understanding informs the analysis of the approach to family provision legislation. In the context of reform what really matters is whether the moral duty test, however regarded, should remain as the basis on which any questions under family provision legislation is evaluated. This also ties into the wider question of what role such legislation ought to play in the context of family property - does it have a role, and, if so, what is it? To see the background of the legislation in a framework of moral duty sets the context for a consideration of its operation at present. The problem for law reformers begins with the recognition of that context, not a dismissal of it as 'obscure', and proceeds with the assessment of the continued relevance of it in relation to the task of considering any alteration to the present law. If it is seen as being of continuing relevance, the difficulty will be as to how to render this legislatively in the context of family obligations at the beginning of the tweny-first century.

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70 See Atherton, n 18 above.

71 *Ibid*.

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