From testamentary freedom to testamentary duty: Finding the balance

Working Paper No. CPNS 42

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Brisbane, Australia

October 2008

This research is funded by the E F and S L Gluyas Trust and the Edward Corbould Charitable Trust under the management of Perpetual Trustees Company Ltd

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CRICOS code: 00213J

ISBN 978-1-74107-234-1

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Abstract

In recent years legal challenges to charitable bequests by testators' family members have become more common in Australia. Many charities faced with the prospect of a disputed bequest have been reluctant to pursue the matter in the courts. A review of leading reported cases involving charitable bequests in wills reveals that the courts are vigorous in upholding proper family provision as against charitable bequests, portraying this provision as based on moral obligation. Proper provision for family and other dependants is supported by both legislation and the courts on public policy grounds. This concept is confined to Australia, New Zealand, Canada, and to a lesser extent England, which are the only countries with comprehensive family provision legislation. The generational transfer of wealth by baby-boomers over the coming decades provides a scenario for increasing conflict between families and charities over bequests. How should this be balanced with the notion of testamentary freedom?

This working paper is part of a series of research projects on bequests and planned giving funded by the E F and S L Gluyas Trust and the Edward Corbould Charitable Trust under the management of the Perpetual Trustees Company. Many issues require further investigation, including practical considerations for charities in pursuing bequests in wills, and a further report will be forthcoming from CPNS on this topic.

GLOSSARY

Administration of an estate – term used for the work of the executor in carrying out the terms of a will

Beneficiary – person or organisation benefiting under a will

Bequest – gift of an identifiable asset (not money) to person/organisation in will. However, the terms bequest and legacy are often used interchangeably in general usage

Civil law jurisdiction – a jurisdiction using European civil law as its basic legal system

Codicil – a change or addition to an existing will

Common law jurisdiction - a jurisdiction using English common law as its basic legal system (e.g. Australia, New Zealand, England and Wales, Canada (except for Quebec), and the United States (except for Louisiana)

Contingent bequest – gift of an asset dependent upon an event occurring

Curtesy – provision for a widower (no longer applies)

Discretionary jurisdiction – a legal jurisdiction which allows judges to make the decisions on essential matters based on the particular facts of a case

Dower – provision for a widow (no longer applies)

Escheat – reversion of land to the main lord (or the Crown) in the absence of any heirs.

Estate – the totality of the property which the deceased owned or had some interest at the time of death

Estates in fee simple or in fee tail – legal terms denoting real estate

Equity – a part of the English law system, based on principles of fairness, originally separate from common law, but now part of the overall system used in Australia and in other common law countries

Executor (m)/executrix (f) – a person appointed by a will-maker to ensure that the intentions in a will are carried out. It is no longer essential to differentiate these terms on the basis of gender. However, judges still often do so in judgements.

Family provision – term used in Australia and New Zealand for provision made for family members in a will

Family protection – term used in New Zealand for family provision; alternate term used is testator's family maintenance

Forced share – a fixed share of an estate left to a family member

Forfeiture – the loss of the right to an inheritance by egregious conduct e.g. killing the testator

Inter vivos – while alive

Intestate – Dying without leaving a will, or leaving an invalid will, so that the property of the estate passes by the laws of succession rather than by the direction of the deceased

Legacy – a gift of money to a person/organisation in will

Life interest – a lifetime gift, such as giving someone the right to live in a property until that person's death. On the death of the person given the life interest, the asset or capital is distributed according to the will.

Mesne lord – a holder of land in the feudal system who was an intermediate lord, being both landlord to inferior landholders and tenant of a superior lord.

Mortmain – literally 'dead hand'; originally referred to act of parliament which sought to prevent the bequest of land and buildings to the Church; in later succession law referred to acts of parliament which prevented bequests to charity, originally of land and buildings, and later, of money. Mortmain never applied in Australian law, and no longer applies in English law.

Mutual wills – wills which leave assets to each person in the same way (commonly applies between spouses)

Notional estate – assets which are returned to the estate of the deceased after death because they should not have been disposed of before death. This increases the estate for distribution (currently applies only in New South Wales)

Patrimony – traditionally, inheritance from a father's estate; in modern terms, the total inheritance in an estate

Pecuniary legacy – fixed sum of money expressed as a gift in a will

Personalty – personal property (cf. realty)

Probate – the granting of the right to administer a will

Residuary legacy – remainder of your (money) estate left as a legacy after bequests and specific legacies have been distributed and all debts cleared

Residue of estate – possessions, property and money remaining after all debts and gifts are distributed in accordance with the will

Reversionary legacy – a legacy consisting of the assets or money left after a life interest has been fulfilled.

Specific bequest – the gift of an identifiable asset such as jewellery or furniture

Succession law– the law relating to wills and estates

Testate – dying having made a will

Testamentary – referring to a will

Testation - the statements of intent in a will

Testator (m) /testatrix (f) – person who makes a will. It is no longer essential to differentiate these terms on the basis of gender. However, judges still often do so in judgements.

Testator's family maintenance – alternate (older) term for family provision

Will – a legal document expressing the intentions of a person for the distribution of their assets after death

Will-maker – a plain English term now sometimes used instead of testator or testatrix

INTRODUCTION

The purpose of this paper is to examine the interaction between family provision law and the freedom of a testator to leave a bequest to charity in a will. That the clearly stated philanthropic intentions of a testator should be overturned in favour of family members or other claimants is currently a contentious issue in family provision jurisdictions. The original purpose of family provision law was to enforce the proper maintenance and support of a testator's spouse and children. Family provision laws were introduced into Australia from New Zealand, and spread to Canada and the UK. No other jurisdictions have such laws. In the 108 years since their introduction in New Zealand, family provision laws have had their influence extended through judicial interpretation and active promotion of the priority of family claims on a testator's estate as part of public policy. Testamentary freedom, although never completely dominant in English law, is now seriously challenged in Australia.

A review of major reported cases shows that charities have been deprived of bequests, or had bequests substantially reduced, as a result of the primacy of family claims. However, family provision disputes do not always result in judicial decision as they are often settled through a mediation process. In more recent years, as the concept of 'family' has been extended to include de facto partners, same sex partners, wider family, and various dependants not envisaged by the framers of the original legislation, the primacy of family claims has become even more difficult for charities to overcome. At the same time, charities are seeking to strategically position themselves to benefit from the expected intergenerational wealth transfer from the baby boomer generation. Bequests from this source are needed to resource the increasing capital requirements required by charity as the welfare system is wound back due to demographic and fiscal pressures.

The paper first briefly examines the historical development of inheritance law in both civil and common law jurisdictions to provide a context for the subsequent discussion. Over the centuries the attitude of the state or crown to charities receiving bequests has varied widely, often being restricted in favour of dependants. The paper then considers the contest between charitable bequests in wills and family provision law in Australia and New Zealand. The historical tendency has been for the legal position to move from testamentary freedom to testamentary duty to family and dependants, with the position currently firmly entrenched in not only testamentary duty, but also moral duty to a wide range of dependants. The paper then turns to current law reform proposals, and considers how these might shift the balance between these parties.

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PROVIDING FOR THE FAMILY AFTER DEATH

It seems to be an accepted norm in most cultures that inheritance should be linked to blood ties. In most legal systems, the right to inherit is limited either by relationship or by amount. Either the group of related persons on whom inheritance may devolve is limited, as in common law systems, or the amount any one person may receive from inheritance is limited, as is the case in civil law systems.

Civil law jurisdictions[1] have traditionally favoured the forced share approach to testamentary dispositions, with spouses and children entitled to definite shares of an estate by statute, or by custom. This Roman law concept is still seen today in many jurisdictions, including in most European and South American countries,[2] in Japan, Scotland, and South Africa, as well as in a modified form in Quebec, Canada and in Louisiana, USA, and to a partial extent, in Ireland. The relevant Roman law principles are those of *terce* (the right of a surviving spouse to a life interest in one-third of the realty of the estate); *jus relictae* (the right of a surviving spouse to one-half of the moveable property of a deceased spouse if there are no children, or to one-third if there are children); and *legitim* (the right of children to one third of the parent's moveables if there is a surviving parent and to one-half if there are no surviving parents, all to be shared equally). In civil law jurisdictions, these were often expressed in the law of dower.

In modern civil law terms, dower has been abolished. In Quebec, for example, the term used now is 'family patrimony', and a surviving spouse is entitled to half the value of the divisible patrimony. The remaining half is distributed according to the will, or the intestacy rules of the Code Civil du Quebec.[3] In Scotland, the terms now used are 'prior rights' and 'legal rights' to property.[4] Prior rights only apply in the case of intestacy, and allocate specific amounts to a spouse or children. There are also 'legal rights' to moveable property applicable in intestacy. Legal rights can also apply if there is a will, but the beneficiary has to choose between the legal rights and the amount left in the will. In Japan, there is a statutory division of the estate of half to a spouse and half to all lineal descendants. If there are no lineal descendants, then the statutory division is two-thirds to a spouse and one-third to any lineal ascendants. \If there are no descendants or ascendants, then the division is three-quarters to a spouse and one-quarter to living brothers and sisters. There is no allowance for testamentary independence unless a specific will is made.[5]

The situation in the US is mixed, and confusing. The *Uniform Probate Code*[6] has been adopted in 16 states of the US,[7] although in various Revisions. Some states have adopted the Code in part in their legislation, but most have their own legislation on provision by elective forced shares.[8] Louisiana, still retaining a civil law system, has a forced share, the *legitime*, for children under 23, or who are mentally infirm or otherwise disabled from inheritance.[9] In the *Uniform Probate Code*, in intestate succession a spouse is entitled to all

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[1] Civil law jurisdictions are based on Roman law and are found in Europe and those parts of the world conquered, settled or influenced by European powers. These jurisdictions are to be compared with common law jurisdictions, based on English law, which are found in those parts of the world conquered, settled or influenced by Britain. Some countries, or parts of countries, have mixed systems because of their history (e.g. South Africa, Scotland, Ireland, Quebec, Louisiana) or by choice (e.g. Japan).

[2] M. B. Leslie, 'The Myth of Testamentary Freedom' (1996) 38 *Ariz. L Rev* 235 at 270.

[3] C.C.Q., L.Q., 1991, chapter 64, arts. 414-426.

[4] *Succession (Scotland) Act* 1964 sections 8 and 9 read with *The Prior Rights of Surviving Spouse (Scotland) Order* 2005.

[5] Ministry of Finance Japan (2006) *Comprehensive Handbook of Japanese Taxes,* Chapter IV, Inheritance and Gift Tax.

[6] Original version 1969, with Revisions in 1989 and 1990.

[7] Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.

[8] Elective share statutes allow the surviving spouse to take either an elective (forced) share of the estate, or to take whatever share they have been left in the will. See generally: L. Waggoner, 'Spousal Rights in our Multiple Marriage Society: The Revised Uniform Probate Code' (1992) 26 (4) *Real Property, Probate and Trust Journal* 683; R. Chester, 'Should American children be protected against disinheritance?' (1997) 32(3) *Real Property, Probate and Trust Journal* 405.

[9] Louisiana Civil Code (Ann.) Articles 1493, 1494. See generally: R. D. Madoff, C. R. Tenney and M. A. Hall, *Practical Guide to Estate Planning*, 2006 edition, chapter 6, 6-15.

the deceased's estate unless there are surviving parents or descendants not also the descendants of the spouse.[10] In effect, this disinherits the children of the marriage. Where there is a will, the Code provides for an elective share amount for a surviving spouse of between 3% and 50% of the estate depending on the length of the marriage.[11] This variable forced share applies regardless of the terms of the will.

The modern forced share approach can be contrasted with that of statutes in a small group of common law countries which give a wide discretion to the Courts to divide an estate under dispute, commonly referred to as family or dependants' provision. Family provision legislation confers rights on applicants, typically spouses, de facto spouses, children (including adopted and stepchildren), grandchildren and parents, to apply to the court to overturn bequests in wills which do not adequately provide for the maintenance and support of the applicants. This is clearly an interference with testamentary freedom, and is supported by both legislation and the courts on public policy grounds. The notion of testamentary freedom as we understand it today was a construct of the nineteenth century, an offshoot of the style of English laissez-faire liberalism fashionable at the time. However, it was recognised late in the nineteenth century that testamentary freedom of this type allowed some testators to ignore their responsibilities to close family, particularly spouses and children. This was regarded as particularly a problem in the then newly developing, but very wealthy, dominions of Australia, New Zealand and Canada, and was fanned by an indignant press which reported several notorious cases of wealthy men leaving their widows and children unprovided for in their estates.[12]

The legislation introduced into Australian states' law was based on innovative New Zealand legislation, the *Testator's Family Maintenance Act 1900*, which attracted much attention in the common law world at the time and was later copied for both testate and intestate situations in English law, and the provinces of Canada (except Quebec). The New Zealand legislation of 1900 had its genesis in an 1877 Act which enabled illegitimate children under 14 to apply for maintenance out of the estate of deceased parents,[13] the *Destitute Persons Act 1894* (NZ),[14] and in the *Native Land Court Act 1894* (NZ) which provided that Maori applicants were to be left with 'sufficient land for their maintenance' after claims alienating Maori land reserves to white settlers.[15] It is also possible that the introduction of the legislation was intimately connected with New Zealand's *avant garde* approach to social welfare, with old age pensions being introduced in New Zealand in 1898, and widows' pensions in 1911.[16] It could be argued that these state pensions encouraged even wealthy testators to leave their estates away from their spouses, especially wives.

The first incarnation of the legislation was in 1896, when a Bill on the Limitations of Disposition by Will was introduced into the New Zealand legislature by Sir Robert Stout, later Chief Justice of New Zealand. This Bill proposed a type of civil law forced share arrangement by which only one third of a testator's estate could be disposed of by will if he left a wife and

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[10] Article II, Part 2, 2-102

[11] Article II, Part 2, 2-202.

[12] J. Mackintosh, 'Limitations on Free Testamentary Disposition in the British Empire' (1930) 12(1) *Journal of Comparative Legislation and International Law* (3rd Series) 13, 13.

[13] B. J. Cameron, 'Family 'Protection', *An Encyclopaedia of New Zealand 1966* available at www.teara.govt.nz/F/FamilyProtection/FamilyProtection/en, viewed 11 October 2007. The name of this Act is not stated.

[14] This Act provided that in the case of **intestacy**, a widow was to receive one-third of any estate, and the children equal shares of one third of the estate.

[15] Section 131(2). See Waitangi Tribunal, *The Te Roroa Report 1992*, Te Roroa Claim, 03 Nga Whenua Rahui (Reserves), 3.1 Official Attitudes and Policies at www.waitangi–tribunal.govt.nz/reports/, accessed on 11 October 2007. No doubt the Maori claimants would not have seen this as appropriate. As the Report states: "By the time of the Native Land Court Act 1894 the 50 acre guideline (the original amount of land set aside for each Maori claimant)] had been watered down to a requirement that 'the owners have sufficient land left for their maintenance". It was, of course, entirely up to the Government Officials to decide how much land would be "sufficient".' This Act also provided in section 46 that: 'If a native leaves children without enough land to maintain then, his will disposing of his land otherwise is invalid'.

[16] Ann Beaglehole, *Benefiting Women,* Department of Internal Affairs, New Zealand., accessed on 17 July 2008 at www.msd.govt.nz/documents/publications/msd/journal/issue03/spj3-benefiting -women.doc

children, and one half if he left only children. This Bill was not approved because of its too obvious interference with testamentary freedom. A variation introduced in 1897 increased the amount to be disposed by will to one half in all cases, but was also unsuccessful. In 1898, the idea of forced shares was abandoned, and the first draft of totally discretionary testator's family maintenance legislation was introduced, with a second draft Bill being introduced in 1900. This latter Bill became the *Testator's Family Maintenance Act 1900* (NZ).[17]

This original New Zealand legislation of 1900 was replaced by the *Testator's Family Maintenance Act 1906*, which extended the time period for applications from six months to twelve months from the date of probate, and allowed for provision to be made in the form of either lump sums or periodical payments.[18] This Act was in turn repealed, and replaced by the *Family Protection Act 1908*.[19] Meanwhile, the idea of family provision quickly spread throughout Australia, and eventually to Canada and the UK.[20]

Current legislation on family provision in Australia varies from state to state,[21] and there are variations in wording in the legislation. Queensland, Tasmania and Victoria refer to 'proper maintenance and support'.[22] New South Wales, South Australia, the Northern Territory and the Australian Capital Territory use the term 'proper maintenance, education and advancement in life',[23] while Western Australian legislation has the term 'proper maintenance, support, education or advancement in life'.[24] Despite these differences, the High Court has encouraged uniformity of interpretation in its decisions.[25] Whilst true uniformity of interpretation cannot be guaranteed in the cases, since each will turn on its facts to some

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[17] See generally J. Dainow, 'Restricted Testation in New Zealand, Australia and Canada' (1938) 36(7) *Michigan L Rev* 1107, 1108-1110. The relevant provision of the 1900 Act was:

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

[18] See generally: J. Christie, 'Testators' Family Maintenance in New Zealand' (1918) 18(2) *Journal of Comparative Legislation and International Law* (New Series) 216-219.

[19] The testators' family maintenance provisions were contained in Part II of the *Family Protection Act 1908* (NZ), particularly at s 33. This latter Act was repealed by the current legislation, the *Family Protection Act 1955*: see section 16(1) of the 1955 Act and the Schedule to that Act.

[20] The first jurisdiction to copy the New Zealand legislation was Victoria in the *Widows and Young Children Maintenance Act 1906*, and then Tasmania in the *Testator's Family Maintenance Act 1912*, Queensland in the *Testator's Family Maintenance Act 1914*, Victoria (consolidating) in the *Administration and Probate Act 1915*, sections 108-117, New South Wales in the *Testator's Maintenance and Guardianship of Infants Act 1916*, South Australia in the *Testator's Family Maintenance Act 1918*, Western Australia in the *Guardianship of Infants Act 1920* section 11, British Columbia in the *Testator's Family Maintenance Act* (R.S.B.C. 1924 c.256), the Australian Capital Territory in the *Administration and Probate Ordinance 1929*, Part VII, the Northern Territory in the *Testator's Family Maintenance Order 1929*, and England in the *Inheritance (Family Provision) Act 1938*. The latter act differed from the other legislation in that the discretion allowed to the Court was much more restricted in monetary terms, though the statute required that the Court could intervene when the will did not make 'reasonable provision' for the maintenance of dependants.

[21] *Succession Act 2006* (NSW) section 59(2); previously, *Family Provision Act 1982* (NSW) sections 7, 8, and 9(2); *Administration and Probate Act 1958* (Vic) section 91; *Succession Act 1981* (Qld) section 41; *Inheritance (Family Provision) Act 1972* (SA) section 7(1); *Inheritance (Family and Dependants Provision) Act 1972* (WA) section 6(1).*Testator's Family Maintenance Act 1912* (Tas) section 3(1); *Family Provision Act 1970* (NT) section 8(1); and the *Family Provision Act 1969* (ACT) section 8(1).

[22] *Succession Act 1981* (Qld) section 41(1); *Testator's Family Maintenance Act 1912* (Tas) section 3(1); *Administration and Probate Act 1958* (Vic) section 91.

[23] *Succession Act 2006* (NSW) section 59(2); previously, *Family Provision Act 1982* (NSW) sections 7, 8, and 9(2); *Inheritance (Family Provision) Act 1972* (SA) section 7(1); *Family Provision Act 1970* (NT) section 8(1); *Family Provision Act 1969* (ACT) section 8(1).

[24] *Inheritance (Family and Dependants Provision) Act 1972* (WA) section 6(1).

[25] In Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494, Dixon CJ made this clear, stating that: 'The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided…' (at 506-507). In the same case, Fullager J, at 517, said that '…the searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach'.

extent, and the jurisdiction is wholly discretionary, the differences in wording have not caused any apparent undue confusion.

However, New South Wales has a major difference in policy, having adopted the concept of 'notional estate' in its legislation, and this has caused an apparent increase in the number of cases proceeding to court in that state. Notional estate consists of assets which are disposed of by a deceased in order to prevent or frustrate family provision claims of eligible persons after the deceased's death, by transferring the whole or part of the deceased's assets to a third person. It is irrelevant whether or not the third person holds the property as trustee.[26] The assets must be transferred in such a way that full valuable consideration in money or money's worth is not been given for the assets by the third person. There are three types of deferred asset transactions which are categorised as notional estate:[27]

- transactions which took effect within three years before the deceased's death which were entered into with the intention of denying or limiting family provision claims of eligible persons;
- transactions which took effect within one year before the deceased's death and were entered into at a time when the deceased had a moral obligation to make adequate provision for the maintenance, education or advancement in life of any eligible person; or
- transactions which took effect on or after the death of the deceased person.

The concept of notional estate was adopted in New South Wales in response to a decision of the Privy Council in *Schaefer v Schuhmann* [1972] A.C. 572, on appeal from New South Wales. The testator was an elderly man, who had recently taken on a new housekeeper, Schaefer. He promised to leave her his house, but she was otherwise unpaid for her work. He put this promise into his will by codicil. After he died, some six months later, one of his seven children applied for a family provision order. Street J in the NSW Supreme Court held that the house was part of the estate, and awarded provision to three of the deceased's daughters. The Privy Council overturned this decision, and found that the house was transferred under an enforceable contract. This meant that the house was not part of the deceased's estate, and could not be available for a family provision award. It was suggested in *Schaefer* that whether or not *inter vivos* transactions or testamentary dispositions made pursuant to contracts should be open to family provision applications is a matter of policy which should be dealt with by statute, but only New South Wales responded to that suggestion, presumably because the case was appealed from that state.

Most family provision disputes do not reach court, either because there is compulsory mediation required, or because there is an informal family settlement. However, a survey of 46 major reported cases involving bequests to charity in Australia and New Zealand (see Appendix A) shows that the charities involved lost the entire bequest in six of the cases, had their bequests substantially reduced in 35 of the cases, and prevailed against the family claimant in only five of the cases. Of the successful family provision claimants, 34 cases involved spouses and/or adult children (including step children and adopted children), four cases involved other family members, two cases had non-family claimants, and one case had a same sex claimant. The trend to support the concept of family, and a broadening concept of family, in case law is clear, and is grounded in public policy in both countries. Therefore, although family provision legislation was not originally introduced to deprive charities of philanthropic bequests, this has been one of its effects over time.

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[26] Sections 75-77 of the *Succession Act 2006* (NSW); previously, section 22 of the *Family Provision Act 1982* (NSW). Section 75 of the *Succession Act 2006* (NSW) describes notional estate in terms of 'relevant property transactions', which are transactions for which full valuable consideration has not been given. See also section 80(3). Previously, section 22(1) of the *Family Provision Act 1982* (NSW) described notional estate in terms of 'prescribed transactions' for which full valuable consideration had not been given in money or money's worth. The on-going review of succession law by the National Review Committee in Australia has completed its review of family provision law, and recommended that the idea of notional estate, as defined in New South Wales, should be adopted nationally.

[27] Section 80(2) of the *Succession Act 2006* (NSW); previously, section 23 (b) of *the Family Provision Act 1982* (NSW).

THE LEGAL HISTORY OF CHARITABLE GIVING AND BEQUESTS

The forms of wealth and the timing of its transfer between generations have changed significantly over English legal history. Land, rather than money or chattels was the main form of wealth in early historical times and wealth transfers occurred on birth, adulthood, accession to rank, marriage and death over different periods. In English law, wealth transfers to charity or bequests to charity in wills have not always enjoyed the support of the monarch, legislators or the courts. The public policy position on the propriety of charitable giving and bequests has alternated over time between positive support via legislation and the normative values of society and absolute discouragement through restrictive legislation and societal disapproval. After particularly vigorous swings in policy and fashion from the 16th to the 20th centuries, the 21st century is so far firmly in a positive phase generally for charitable giving and bequests. Only family provision law currently stands out against this trend.

Although inheritance is, in general, linked to family blood ties either by forced shares or by the requirements of family provision, there are limits placed on both. In addition, the right to inherit within a family can be restricted by the right of bequest to non-family members or to charity. Bequest law has its origins in Roman law, but the reasons for its introduction in Roman law no longer apply,[28] and some testators might regard the right of bequest to be very wide. However, this is not supported by legislation in family provision jurisdictions, which require provision for the family ahead of bequests to non-family members or to charity.

The early legal history of charitable giving and bequests in English law

The legal history of charitable giving and bequests in English law cannot be discussed without context, and that context requires a consideration of the law of mortmain.[29] The term mortmain is an anglicisation of the French term *mainmorte*, and translates literally as 'dead hand'. The origins of the term are disputed.[30] The concept of mortmain came into English law from Canon Law which had adopted a Roman law prohibition on the granting of land to the early Christian church. Canon law also adopted the Roman idea of a corporate community as the appropriate form of organisation for religious houses. Thus, religious communities were corporations in law, and land which came under their control fell into dead (corporate) hands. Roman corporations were not real persons since they had no existence outside the power granted to them by the state. Nevertheless, they became legal persons on the grant of state power, an example of the concession theory of corporate personality. Although legal theories of corporate personality have varied over time, the basic idea of the corporation as a separate legal entity is part of English law, being made clear in the seminal case of *Saloman v Saloman and Co Ltd* in 1897,[31] and continuing, despite various partial exceptions which have not affected the principle, until the present day.

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[28] This was often to provide heirs where there were no immediate relatives. Incorporation of non-relatives as heirs into a family, by adoption or even manumission, was common in Roman times. This was often the only way of introducing new blood lines into restricted family genetic pools, particularly of patrician families, but over time, even in powerful plebeian families.

[29] Two major sources form the basis of this section of the working paper: *The Catholic Encyclopedia*, Volume IV, 1908, 'Mortmain'. (New York: Robert Appleton Company). Nihil Obstat. Remy Lafort, Censor. Imprimatur. +John M. Farley, Archbishop of New York; and A. H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27(3) *The University of Toronto Law Journal* 257, 261.

[30] See: A. H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27(3) *The University of Toronto Law Journal* 257, 269 which gives a detailed history of the term. Oosterhoff states that one view is that since the term was used to denote lands held by religious orders, they were held in 'dead hands' because members of religious orders who had become professed were, in historical times, legally regarded as dead. Professed religious had given up their positions in the world, having taken their final vows of poverty and obedience to their superiors, and were regarded as having no civil or legal life after their profession. More mundane derivations were also offered - that the term came from the custom of holding a dying person's hand until that person was actually dead, or that the term had no meaning outside that given by the statutes which dealt with it. This latter meaning referred to the fact that when lands were lost to their feudal lords, they took with them their various attached rights of service to the Crown, so it was as if they were held by a dead person who could not render any service. Oosterhoff regards the last meaning as the most widely accepted.

[31] [1897] A.C. 22

In English law, mortmain originally only referred to attempts by the state to control ownership of land by corporations. This was because corporate holdings were repugnant to feudalism, a system of land holding brought to England from France by William of Normandy. In the feudal system, all land was held from the King. Grants of land (fees) were made to landholders, who held the land as head tenants of the King. Head tenants could make further grants to further tenants, establishing a chain of tenancy stretching back to the Crown. Each respective tenant owed duties to his immediate lord, particularly of military service, but also of forfeiture for crime, of escheat (reversion to the mesne lord) in the absence of a male heir, and of disposal in marriage of female heirs. The feudal structure therefore relied on the holding of land by natural persons who could render military service, die and leave heirs, be given in marriage contracts, or have their land confiscated for a crime. Legal persons who were not natural persons, such as corporations, could not do any of these things, and so did not fit into the feudal system.

Mortmain was extended to religious corporations, and later to charitable uses, restricting charities' ability to receive gifts of land *inter vivos*, or by will. The control sought over religious houses, church charities and other church corporations originally arose because although Emperor Constantine[32] had encouraged giving to the church, holdings of land by the church soon grew exponentially, and control over the lands donated or willed became concentrated in the hands of bishops. Even in those times monasteries, alms houses, orphanages and other charitable institutions of the church had special privileges such as tax relief, so that large holdings of church property were exempt from tax and other requirements of the law of the state.

English medieval landholders must have made use of this legal loophole to put lands in the hands of religious houses, and then retake them, because the Magna Carta of Henry III (1225) [33] makes reference to this practice at chapter 36, forbidding the gift of land to religious houses, which thus avoided taxes and other levies and duties attached to the land, and then taking back the land at a later date, or the making of an agreement to give land to a religious house on condition that the land donated should be given back at a future time.

The first Statute of Mortmain was passed in 1279, during the reign of Edward I.[34] The statute provided:

> *'Where as of late it was provided that* ***religious men should not enter into the fees of any without the will and licence of the lords in chief of whom these fees are held immediately****; and such religious men have, notwithstanding, later entered as well into their own fees as into those of others, appropriated, them to themselves, and buying them,* ***and sometimes receiving them from the gift of others****,* ***whereby the services which are due of such fees****, and which at the beginning, were provided for the defence of the realm,* ***are unduly withdrawn****, and the lords in chief do lose their escheats of the same; we, therefore, to the profit of our realm, wishing to provide a fit remedy in this matter…have provided, established, and ordained, that no person, religious or other, whatsoever presume to buy or sell any lands or tenements****, or under colour of gift*** *or lease, or of any other term or title whatever to receive them from any one, or in any other craft or by wile to appropriate them to himself,* ***whereby such lands and tenements may come into mortmain under pain of forfeiture of the same.*** *We have provided also that if any person, religious or other, do presume either by craft or wile to offend against this statute it shall be lawful for us and for other immediate lords*

[32] Flavius Valerius Constantinus, known as Constantine the Great (285?-337 CE) was the first emperor of Rome to be baptised as a Christian, an event which occurred on his deathbed. The Edict of Milan, which acknowledged toleration of Christianity (along with the pagan religions which still existed in the Roman world) when issued in 313, also recognised the right of the Christian church to hold property, and Constantine's law of 321 allowed gifts by will to 'the holy and venerable congregation of the Catholic Church'. See: *The Catholic Encyclopedia*, Volume IV, 1908, 'Mortmain'. (New York: Robert Appleton Company). Nihil Obstat. Remy Lafort, Censor. Imprimatur. +John M. Farley, Archbishop of New York; A. H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27(3) *The University of Toronto Law Journal* 257, 261.

[33] Various versions of Magna Carta were passed during the reign of Henry III, the son of King John. The religious lands loophole was referred to in Magna Carta 1217, cc36, 43; and re-enacted after Henry's majority as (1225) 9 Henry III., cc32, 36.

[34] (1279) 7 Edw. I, stat.2, c.13.

> *in chief of the fee so alienated, to enter it within a year from the time of such alienation and to hold it in fee as an inheritance. And if the immediate lord in chief shall be negligent and be not willing to enter into such fee within the year, then it shall be lawful for the next mediate lord in chief, within the half year following, to enter that fee and to hold it, as has been said; and thus each mediate lord may do if the next lord be negligent in entering such fee as has been said. And if all such chief lords of such fee, who shall be of full age, and within the four seas and out of prison, shall be for one year negligent or remiss in this matter, we, straightway after the year is completed from the time when such purchases, gifts, or appropriations of another kind happen to have been made, shall take such lands and tenements into our hand, and shall enfief others therein by certain services to be rendered thence to us for the defence of our kingdom ; saving to the lords in chief of the same fees their wards, escheats and other things which pertain to them, and the services therefrom due and accustomed.*' (emphasis added)

It is notable in this statute that even the King did not retain the lands forfeited for having been unlawfully removed from the possibility of service to each holder, and ultimately to the Crown, as this too would amount to mortmain. The King was required to pass the lands forfeited on to other holders who could render the services which were so valuably attached to all land grants. The original Latin text of this statute, known as *De Viris Religiosis,* (of religious persons) referred to the ultimate forfeit of the land to the King, as falling '*in manu nostram*' (in **our** hands, rather than in dead hands). Even the King could not hold lands in perpetuity.

The statute required the exercise of a right of entry in order to take back the land. If the right of entry was not exercised by the immediate lord within a year, or by the next lords within six months, or ultimately after a year had passed by the King, then there was an implied licence to hold the land in mortmain. Title to land held in mortmain was therefore voidable only.

A further statute of Edward I was passed in 1290[35] to allow the alienation of land from one freeman to another, with the incidents of land owed to the same immediate lord. However, the statute made clear that new holders could not hold the land in mortmain, so could not be religious persons (corporations sole) or groups (religious corporations).

In the time of Richard II, a 1391 statute identified and closed a further loophole which had arisen;[36] church buildings stood on ground which was hallowed (consecrated to holy and sacred purposes), and so beyond state control. This was not regarded as controversial. However, churchmen had begun to expand the land holding of each church building by taking adjoining land as churchyards and burial grounds, dedicating these additional lands as also hallowed. This extended the land holdings which were beyond state control. The statute required the churchmen to either immediately procure a licence in mortmain for this purpose, or to sell the land to another person who could render the services arising from that land. Licences to place or hold land in mortmain were easily available from the Crown,[37] but more commonly used were various means of avoiding the statutes which referred to mortmain. The device most frequently resorted to was to give or leave land 'to the use' of persons while the title remained with someone else, thus giving rise to a whole body of trust law which survives to this day. The 1391 statute also extended the Statute of Mortmain 1279 to non-religious corporations such as guilds, fraternities and 'mayors, bailiffs and commons of cities, boroughs and other towns that have a perpetual commonality'.[38] This was apparently in response to the growing wealth of such bodies, and their consequent increase in power, which might have presented a threat to the Crown.[39]

However, lands which had been placed in the hands of parochial clergy (who held as corporations sole), or of ecclesiastical or eleemosynary foundations (holding as corporations) before William's conquest of England were not subject to the laws of mortmain, as they were held under the old Saxon system of tenure known as frankalmoign (an Old French term meaning literally 'free alms'). This species of tenure required the holders to undertake the

[35] The Statute *Quia Emptores* (1290) 18 Edw. I, c. 3.
[36] (1391) 15 Richard II, c.5.
[37] The procedures were laid out in (1299) 27 Edw. I, stat.2 and (1306) 34 Edw. I stat.3.
[38] *The Catholic Encyclopedia*, Volume IV, 1908, 'Mortmain' (New York: Robert Appleton Company). Nihil Obstat. Remy Lafort, Censor. Imprimatur. +John M. Farley, Archbishop of New York.
[39] A. H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27(3) *The University of Toronto Law Journal* 257, 269.

worldly duties of repairing highways, building castles, and repelling invasions, but otherwise required only lasting prayer for the souls of the donor and his heirs. This was still the case when Henry VIII confiscated the monasteries and their lands in 1535,[40] so that those clergy and foundations holding their lands by frankalmoign were able to avoid confiscation and, ultimately, destruction, by acknowledging Henry as the supreme head of the Church of England. In 1545, Henry extended his pursuit of the lands held in mortmain which he could attack by applying his confiscation statute to other religious houses and chantries (churches or chapels on private land which were dedicated to the singing of masses for the dead).[41]

Henry had earlier identified the holding of land in mortmain by parish churches, chapels, churchwardens, guilds, fraternities, commonalities, companies or brotherhoods as an improper perpetuity in 1531.[42] The next logical step, given Henry's leaning to Protestantism, was confiscation of these lands to the Crown. Apart from Henry's desire to remarry, and the influence of his reading of Protestant writers, he was in need of money for the conduct of his wars and for various other fiscal shortfalls. The lands tied up in mortmain were a ready source of funds. In addition, purposes which had previously been seen as charitable, such as the singing of masses for the dead, and praying for the souls in Purgatory, were now seen as superstitious. Henry's statutes disallowed devises of land into mortmain for such purposes for periods greater than 20 years.

The early concept of charitable uses in English law

All statutes of mortmain were suspended during the reign of Henry's Catholic daughter Mary, by a statute of 1554.[43] However, in Elizabeth's time, although superstitious uses were still anathema, devises of land to charitable uses became again permissible.[44] The list of charitable uses in the preamble to the Statute of Elizabeth was:

> *'The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; the repair of bridges, ports, havens, causeways, churches, seabanks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriage of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.'*

However, as the list of uses was in the Preamble to the statute and not in the body of the statute, it was not part of statute law, but of the common law of England. Subsequent case law relying on the 1601 list of charitable uses has added to this body of common law.

Thus, in the time of Elizabeth I, although gifts of land to charitable corporations were not possible *per se*, they were permissible if there was a licence in mortmain, or the Crown elected not to exercise its right of entry, so giving an implied licence in mortmain. Further, all devises of land to an individual **in trust for a charitable use** were permissible, as were all gifts of personalty to both charitable corporations or to individuals in trust for a charitable use. Charitable trusts were therefore encouraged by the Statute of Elizabeth.

However, the fashion had changed again by the time of George II, when the giving of land to charities became identified as 'this public mischief [which] has of late greatly increased by many large and improvident alienations or dispositions to uses called charitable uses'.[45] The Mortmain Act of 1736 disallowed devises of land and interests in land to charitable uses, unless this had occurred more than a year before the death of the donor. Such dispositions were made void by the Act. The old mortmain legislation had merely rendered the title to donated or willed land voidable. Moreover, the Act was construed strictly by the courts, so

[40] (1535) 27 Henry VIII, c.28.
[41] (1545) 37 Henry VIII, c. 4.
[42] (1531) 23 Henry VIII, c.10
[43] (1554) 1 and 2 Philip and Mary, c.8, section 51.
[44] (1601) 43 Eliz. I, c.4, following on from (1597) 39 Eliz I, c.6.
[45] An Act to Restrain the Disposition of Lands whereby the Same become Inalienable (1736) 9 George II, c.36, Preamble. This Act is commonly referred to the Mortmain Act 1736.

that many gifts of land, particularly in wills, were designated as being for charitable uses and so void. The result was an expansion in the meaning of charitable uses.

The history behind this legislation is somewhat clouded, but the impetus for it resided in the divide between Whigs and Tories in English politics. The Whigs were the inheritors of the old Protestantism of the 17th century, and although not an entirely homogeneous group, were anti-church and anti-clerical.[46] The Tories were the party of the Anglican high church, pro-clerical, pro-philanthropy (especially church philanthropy), and even in some cases tainted by that horror of 17th and 18th century English politics, Popery. The passage of the Mortmain Bill through the Commons on April 15, 1736 was by a resounding 104 vote majority, although by this stage the colleges of the universities of Oxford and Cambridge had been exempted from the Bill. Kendrick states that the real target of the Bill was not the curtailment of mortmain, but rather the huge sums tied up in the clerical provision fund known as Queen Anne's Bounty, which at that stage held nearly £600,000.[47] This was made clear in the House of Lords debate on the Bill, which was passed by that House on April 20, 1736.

The growth of the concept of charitable uses

The Mortmain Act 1736 was so strictly construed that various means of leaving money to charity also were caught in its net. In *Attorney General v Lord Weymouth,*[48] the testator left a devise in trust to sell all his real estate to the use of Bethlehem and St George's Hospitals, but this was disallowed as a devise in mortmain since it was really a devise of the land in question, rather than the proceeds of sale of the land. Since a trust for sale was not a situation where land is alienated in perpetuity, but rather the contrary, this decision expanded considerably the mischief designed to be attacked by the Act. The trend of the early decisions was that bequests to charity would be void if the testator's interest in the property willed fell within the Act's scope of 'lands, tenements or hereditaments, or of any estate or interest therein or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments'. The decisions found void many bequests to charity which were not interests in land as such, but merely income streams attached to land such as rents and profits, tithes, tolls, and legacies to be paid out of growing crops.[49] Nor did the courts allow for the severing of void and non-void gifts where they were connected, such as land or buildings with unattached income streams to maintain them for charitable purposes. The whole bequest would be disallowed.

The law was reviewed in 1844 by the Select Committee on Mortmain which stated that 'the operation of the law is most unsatisfactory, leads to doubt, expense, uncertainty and litigation, and frequently defeats good and pious purposes…'[50] This ultimately led to the *Mortmain and Charitable Uses Act* 1888 (UK), which although it did not actually alter the law of mortmain, consolidated the law, and particularly the exemptions to the law, which had been made in an *ad hoc* way since 1736. In 1888, the exemptions were for certain assurances by deed or will for public parks, schoolhouses, public museums, the universities of Oxford, Cambridge, London, Durham and Victoria and their colleges, the schools of Eton, Winchester, Westminster and Keble, and assurances for trustees for societies for religious purposes, and for the promotion of education, art, literature, science, or like purposes.[51]

The 1888 Act retained as a Preamble the listing of charitable uses from the Preamble to the Statute of Elizabeth, and defined land as including 'any estate or interest in land'. The latter

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[46] Some Whigs were referred to as Church-Whigs, and were not anti-clerical, though low church, and as a faction, ultimately short-lived. They appear to have disbanded by the end of 1736. See: T.F.J. Kendrick, 'Sir Robert Walpole, the Old Whigs and the Bishops, 1733-1736: A Study in Eighteenth-Century Parliamentary Politics' (1968) 11 (3) *The Historical Journal* 412, 438-442.
[47] Ibid 439-440.
[48] (1743) 27 E.R. 11.
[49] A. H. Oosterhoff, 'The Law of Mortmain: An Historical and Comparative Review' (1977) 27(3) *The University of Toronto Law Journal* 257, 286.
[50] Report of the Select Committee appointed to inquire into the operation of the Laws of Mortmain, and the restrictions which limit the powers of making gifts and bequests for Charitable and Religious Purposes, London 1844, viii.
[51] 51 and 52 Vict., c.42, *Mortmain and Charitable Uses Act* 1888 (UK), Part III.

definition was problematic and an amending Act was passed in 1891[52] permitting devises of land to charitable uses subject to sale within one year of the testator's death, and altering the definition of land to exclude the terms 'any estate or interest in land', devises of 'money secured on land', or 'personal estate arising from or connected to land'. These latter changes overcame the long line of cases which made void bequests of money which arose from an interest in land. However, mortmain law continued to cause litigation and confusion until its repeal.[53] Mortmain legislation was finally repealed in the UK in the *Charities Act* 1960 (UK). The current UK legislation is the *Charities Act* 2006 (UK) which defines both a charity and a charitable purpose for the first time in English statute law.[54] However, the older common law is preserved in the Act.

In *Special Commissioners for Income Tax v Pemsel* [1891] UKHL 1, Lord Macnaghten had stated:

> *'Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.'*

This statement remained the touchstone of charitable purpose definition until the 2006 Act, and was interpreted accordingly in the major cases on point.[55] The 2006 Act defines a charitable purpose as:[56]

> *(a) the prevention or relief of poverty;*
>
> *(b) the advancement of education;*
>
> *(c) the advancement of religion;*[57]
>
> *(d) the advancement of health or the saving of lives;*
>
> *(e) the advancement of citizenship or community development;*[58]
>
> *(f) the advancement of the arts, culture, heritage or science;*
>
> *(g) the advancement of amateur sport;*
>
> *(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;*
>
> *(i) the advancement of environmental protection or improvement;*
>
> *(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;*
>
> *(k) the advancement of animal welfare;*
>
> *(l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;*
>
> *(m) any other purposes within subsection (4).*[59]

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[52] 54 and 55 Vict., c. 73.

[53] For example, the confusion is still evident in the House of Lords decision of *Attorney General v Parsons* [1956] 2 W.L.R. 153. See: A.D. Hargreaves, 'Mortmain in Mortmain' (1956) 19(3) *The Modern Law Review* 294, 297. See generally: Gino Dal Pont, *Charity Law in Australia and New Zealand* , Oxford University Press, 2000, chapter 1.

[54] House of Lords, Session 2005-2006, *Charities Bill*, Explanatory Notes, Commentary on the Clauses.

[55] *Chichester Diocesan Board of Finance v Simpson* [1944] UKHL 2; *Williams Trustees v Inland Revenue Commissioners* [1947] UKHL 1; *Gilmour v Coats* [1949] UKHL 1; *Baddeley (Trustees of the Newtown Trust) v Inland Revenue Commissioners* [1955] UKHL 1; *Morelle Ltd v Wakeling* [1955] EWCA Civ 1; *Scottish Burial Reform and Cremation Society v Glasgow Corp* [1967] UKHL 3; *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1971] EWCA Civ 13; *Fraser v Canterbury Diocesan Board of Finance* [2004] EWCA Civ 15.

[56] *Charities Act* 2006 (UK), section 2(2).

[57] Subsection 3 states further that in paragraph (c) "religion" includes: (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god.

[58] Subsection 3 states that paragraph (e) includes such matters as rural or urban regeneration and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness and efficiency of charities.

It is clear that charitable purposes are now very widely stated. This is partly the end result of the decisions based on mortmain law in the 18th and 19th centuries, which in fact were to restrict charitable bequests, but which had the ultimate effect of extending the list of charitable purposes, and partly because of changes in social mores and conditions in the latter part of the 20th and the early part of the 21st centuries. Moreover, the list of charitable purposes is now statutory, as well as a matter for the common law. This illustrates the present trend to encourage charitable giving and bequests as a part of public policy.

Charitable purposes in Australia

Charity law in Australia is in general based on the English common law described above. The *Report on the Definition of Charities and Related Organisations* 2001 stated:[60]

> *'A survey of the use of the term `charity' in Commonwealth and State Acts confirms the reliance on the common law. However, there are instances where the legislation adds to or subtracts from the entities that would normally be caught by the common law meaning. This suggests that the common law meaning of charity does not suit all purposes of public policy.'*

However, statutory definitions of charitable uses or purposes are to be found in the legislation of each State. For example, in Queensland the *Charitable Funds Act* 1958 (Qld), defines a charitable purpose as:

> *'…**every purpose which in accordance with the law of England is a charitable purpose**, and, without limiting or otherwise affecting the aforegoing, includes all or any of the following:*
> *(a) the supply of help, aid, relief, assistance, or support howsoever to any persons in distress (including, but without limiting the generality thereof, the supply of the physical wants of any such persons);*
> *(b) the education or instruction (spiritual, mental, physical, technical, or social) and the reformation, employment, or care of any persons;*
> *(c) any public purpose (whether of any of the purposes before enumerated or not) being a purpose in which the general interest of the community or a substantial section of the community (at large or in a particular locality), as opposed to the particular interest of individuals, is directly and vitally concerned;*
> *(d) the construction, carrying out, maintenance, or repair of buildings, works, and places for any of the purposes aforementioned;*
> *(e) any benevolent or philanthropic purpose (whether of the purposes before enumerated or not);*
> (f) *any analogous purpose declared either generally or in the particular case for the purposes of this Act by the Governor in Council by order in council published in the gazette to be a charitable purpose.'* (emphasis added).

Therefore, the UK definitions in the 2006 Act would be relevant to Queensland law as it currently stands.

Mortmain law has never applied in Australia. However, Queensland did originally have a restriction on the passage of property to charitable institutions in *The Religious Educational and Charitable Institutions Act 1861* (Qld).[61] The object of the Act was to enable incorporation of religious, educational and charitable institutions and to facilitate transmission of their property easily, safely and cheaply.[62] The only restriction was that any testamentary disposition of property had to be attested by three witnesses and registered a month before

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[59] Subsection 4 refers to any charitable purposes recognised by existing charity law (i.e. the existing common law about charities), or which are analogous to either the purposes listed in the Act or to the purposes recognised by existing charity law.

[60] *Report of the Inquiry into the Definition of Charities and Related Organisations,* Chapter 2, What is a Charity?, June 2001.

[61] This Act enabled religious, educational and charitable organisations to register under it, and to receive, *inter alia*, gifts of property which could be managed by them as perpetual corporations: see *The Religious Educational and Charitable Institutions Act 1861* (Qld), section 1.

[62] Preamble to *The Religious Educational and Charitable Institutions Act 1861* (Qld). The preamble was repealed 1908.

the death of the testator.[63] These requirements were interpreted strictly until their repeal in 1895.[64]

Reports of the parliamentary debates of 1861 show some confusion on the part of the legislators of Queensland. Some clearly thought that mortmain law applied in the colonies, which it did not. Some were influenced by reports of Catholic clergy attending deathbeds.[65] The Colonial Secretary of the day was reported to have said:[66]

> *'Although the state of society in which Mortmain had arisen had no existence here, there were certain contingencies which had arisen from that state of society which still existed.'*

The Attorney-General added:[67]

> *'[although it was] correct…that the statute of mortmain was not in force in the colonies… No doubt some persons in extemis might be worked upon to pass away property by testamentary disposition in an unjust manner.'*

After considerable debate as to whether the period of registration of the relevant dispositions of property should be twelve months, six months, or one month, and whether there should be certificates as to health and soundness of mind of the testator, and of consent of the family, the Bill was passed on August 9 1861 in its originally proposed form (with the requirement of only one month's registration, but of three witnesses).[68] The latter provision was repealed in 1895, after vigorous debate on its necessity.[69] The parliamentary debate of 23 July 1895 showed that some members were already strongly espousing family provision, although that terminology was not yet in use. The Secretary for Lands was firmly opposed to family provision stating:[70]

> *'The argument…was that, under proper safeguards, the family should be so recognised that property should not be diverted from them. That was nothing more nor less than an entail by statute…[that] proposal was certainly socialistic.'*

Another member said that:[71]

> *'he did not wish to prevent any man in his sound senses having the right of disposing by testamentary disposition of property which, according to his lights, would be a factor in encouraging and assisting religious or charitable institutions, but he could not agree that a man*

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[63] *The Religious Educational and Charitable Institutions Act 1861* (Qld), section 3. This provision was repealed in 1895.

[64] *In the Will of Swan* (1892) 4 QLJ 171; *Lascelles v McSwaine* (1894) 6 QLJ 44, upheld in M*cSwaine v Lascelles* [1895] A.C. 618 (Privy Council). The problems arising were not fully overcome until the *Charitable Funds Act 1958* (Qld) was passed to deal more effectively with the meaning of charitable purposes, and the *Trusts Act 1973* (Qld) prescribed the statutory grounds for *cy-près* applications of charitable trust property. Section 105 of the *Trusts Act 1973* (Qld) provides the procedure for *cy-près* applications, where the charitable trust left a bequest cannot be identified, or the bequest cannot be carried out in whole or in part, but there is a general charitable intention on the part of a testator. *The Religious Educational and Charitable Institutions Act 1861* was finally repealed by the *Associations Incorporation Act 1981* (Qld), though letters patent issued under it were preserved. The repeal was by original section 4 of the *Associations Incorporation Act 1981*, now renumbered section 144, which contains the savings provision.

[65] Even the Catholic members of the legislative assembly, in the debate, agreed that no other clergy did so at that time, but of course attendance at deathbeds in the Catholic tradition was for the purpose of the administration of the sacrament of last rites, Extreme Unction. Other members, however, denied religious prejudice, stating correctly that the requirements of the Act would apply to any religious corporation registered under the Act. These included both the then Anglican and Presbyterian corporate bodies, amongst many others.

[66] *The Courier* (Brisbane), Friday August 9 1861, page 3. Hansard was not in operation in 1861. The Colonial Secretary was Sir Robert George Herbert.

[67] Ibid. The Attorney-General was Mr Pring, later Mr Justice Pring.

[68] Ibid.

[69] *Queensland Parliamentary Debates* (1895) Volume LXXIII, 23 July 1895, 303. The vote on the repeal of section 3 was carried 37 votes to 21.

[70] Ibid at 296.

[71] Ibid at 297 – the Hon. J.R. Dickson.

must necessarily be compelled to leave his accumulations to those whom he had brought into the world or who were connected with him by consanguinity.'

Other members were in favour of family provision, but with reservations:[72]

'…he thought a man should primarily look after those he had brought into the world, and that he had no right to leave them upon the community for support when he could provide for them, still they must have observed sons and others who were not worthy of the father who brought them here and who had no claim beyond relationship to be considered to such an extent…' .

Many were firmly in the family provision camp however: [73]

'…a law should be passed forbidding a man to will the whole of his property away from his family…He spoke with no feeling of antagonism to any religious body or charitable institution, but in the sincere belief that it was wise to safeguard the property of persons who might be subjected to undue influences of various kinds. How often had they seen instances where members of families had been cruelly ill-treated by testators leaving their property to found art galleries or to support some Little Bethel or religious institution!'

Or:[74]

'He would like to know why it should be in the power of a man to will his money to any institution and leave his wife and children in poverty and misery, as had been done in hundreds of cases…A man's family was his natural obligation and he ought to look after their welfare. If the Attorney General had brought in a Bill to prevent people from giving their property to these religious institutions, and letting their own families go without, he would be doing more good for the people. The churches were well able to look after themselves.'

Thus, although not strictly on the point of the legislation before the House, family provision notions were already starting to take a firm hold in Queensland, five years before the passage of the seminal New Zealand legislation,[75] and 19 years before Queensland's own Act.[76]

TESTAMENTARY FREEDOM AND CHARITABLE BEQUESTS

As the history of mortmain law shows, control over testamentary bequests was taken to the extreme in the early 19th century, until the Victorian era, when subscribing to charity while living and testamentary independence for the will-maker again encouraged philanthropy. In the 19th century, while freedom of testation was unlimited in England and its dominions, a more reasoned approach was taken in US commentary with suggestions that to consider the right of bequest to be without limits or 'an almost natural right' had ethical ramifications beyond what might have been an accurate statement of the common law at the time.[77] The subsequent move between 1900 and 1938 to limit testamentary independence by family provision legislation in some common law jurisdictions had the undoubted effect of reducing some charitable bequests in wills. Of course, many argue that this sort of legislation is not an infringement on testamentary independence, because its original purpose was to provide family **maintenance** only, and testamentary freedom was to be otherwise retained. But the case law shows that the courts have gradually expanded their discretion, using the moral duty argument.

Clearly, the impetus to philanthropy in wills has varied in each historical period, depending on the mood of the times. In the 21st century, should the right to make bequests to charity again

[72] Ibid at 298 – the Hon. G Thorne
[73] Ibid at 299 – Mr Cross.
[74] Ibid at 300 – Mr Daniels.
[75] *Testator's Family Maintenance Act 1900* (NZ).
[76] *Testator's Family Maintenance Act 1914* (Qld).
[77] M. West, 'The Theory of Inheritance Tax' (1893) 8 (3) *Political Science Quarterly* 426 at 429. West gives the example of a Wisconsin statute (Laws of 1891, chapter 359) which limited the freedom of bequest by providing that no person leaving a widow, child or parent could bequeath more than half his estate to any benevolent, charitable, literary, scientific, religious or missionary society.

be unlimited? Or should provision for family take precedence? The case of *Edwards v Terry*[78] is illustrative of the position in Australia. In that case, the testatrix left 40% of her estate to the Salvation Army, 40% to the Royal Blind Society, 5% to the executrix and 15% to her only child, a son aged 56 at the time of the application. On application for further provision, the son, in very necessitous circumstances, was granted 71% of the estate, which, with the 5% to the executrix, limited the charities to 24% of the estate instead of the original 80%. This was despite the fact that the son had a troubled relationship history with his parents, including assaults on both, and an apprehended violence order being in place at one point.

The judge did not see this as disentitling, but rather followed the two stage process described by the High Court in *Singer v Berghouse*[79]: first, was the applicant one permitted by the Act and second, was the provision provided in the will adequate? He concluded that it was not and ruled accordingly. Why was the son not disentitled by his violence towards his aged and frail parents? Why did the judge not consider the fact that the testators, husband and wife in turn, had deliberately limited the amount left to their son, to be more decisive? His reasoning included that the son's diagnosed Attention Deficit Hyperactivity Disorder (ADHD) was sufficient to forgive all transgressions, including his violence, and this is entirely in line with authority, which is clear that a poor relationship with a parent or parents does not mean that an applicant will not be entitled to provision.[80] There are many similar cases in the reports, and despite many affirmations of the proposition that it is not within the courts' power 'to recast the testator's will or to redress inequalities or fancied injustice…',[81] the position in relation to such cases remains as it was expressed in the early New Zealand case of *Welsh v Mulcock*:[82]

> *'No doubt the effect of the statute is to decree that a man's will may be no more than a tentative disposition of his property and that the function of ultimately settling how his estate shall devolve must be exercised by the Court.'*

In early cases on family provision, while disentitling conduct was taken more seriously by the courts, its effect was never regarded as fatal in all cases. As Mr Justice Edwards said in *Plimmer v Plimmer*:[83]

> *'I do not think that the statute was intended to enable the Court substantially to make such a new will for the testator as it considers…ought to have been made. I do think that the powers conferred upon the Court ought to be exercised with very great caution. In the case of a widow the difficulties that surround the exercise of these powers are comparatively small. There are few persons who will not think that every testator, whatever may have been the difference between his wife and himself, ought to provide for his widow in a reasonable manner, unless she has clearly been guilty of some grave breach of the law or of conventional morality. The statute provides that, if she has, such matters may be brought before the Court in answer to her claim. In the case of adult children the case is far more difficult. No one can ascertain, and it is quite incapable of proof, what circumstances may justify a parent in disinheriting his child. Habitual disrespect, an evident determination not to devote himself to useful pursuits but to live upon the proceeds of his father's labours rather than his own, or an idle, useless life, may well justify a father in leaving his son wholly unprovided for by his will…Yet it could be quite impossible to bring such matters before the Court in a tangible shape. It is of the breath of family life that the family skeleton be kept in the family cupboard.'*

This grappling with the particular circumstances of each case was something which gave the legislation, in the view of some American commentators especially, a strong ethical appeal, in addition to its emphasis on awards based on need.[84] Since the American system is one of

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[78] [2002] NSWSC 835. For a similar case where an only son had a very poor relationship with the testatrix, his mother, see *Wheatley v Wheatley* [2006] NSWCA 262.
[79] (1994) 181 CLR 191.
[80] See John K De Groot and Bruce W Nickel, *Family Provision in Australia*, 3rd edition, Lexisnexis Butterworths, 2007, at paragraph [2.32] – [2.42].
[81] *Allardice v Allardice* [1910] 29 NZLR 959, 975; affirmed [1911] A.C. 730.
[82] [1924] NZLR 673, 682.
[83] 9 Gazette Law Reports 10, 21 (New Zealand).
[84] J. Laufer, 'Flexible Restraints on Testamentary Freedom: A Report on Decedent's Family Maintenance Legislation' (1955) 69(2) *Harvard L Rev* 277 at 313. This is still the view of many US commentators.

elective forced shares to specific family members, usually spouses, US commentators are almost universally impressed with the judicial discretion allowed in family provision laws, particularly in relation to the flexibility of applicant permitted, moral claims, and the way such laws can deal with changing social circumstances.

The New Zealand Law Commission has taken a firm view on this very flexibility recommending in its 1997 report that both the size of the applicant pool and the moral claim basis of awards be curtailed. The Report states:[85]

> *'The test of a will-maker's "moral duty" has never been expressly approved by Parliament as a test for entitlement. The test assumes that there is a general acceptance of the exact content of a will-maker's moral duty to adult children. No social inquiry the Commission knows about supports this assumption. The test also makes a second incorrect assumption: that New Zealand society is culturally and ethnically homogenous…The consequences of the absence of any norm of this kind are that a deceased's perception of his or her moral duty is overruled by a particular judge's assessment of current social norms. This assessment is necessarily based on the judge's personal sense of the fitness of things…Failure by the courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker's arrangements results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the court's distribution is more commendable than the will-maker's…'*

The Law Reform Commission of British Columbia, on the other hand, in its review of family provision law in that province in 1982 argued that the moral obligation dimension was important, stating that 'a broad discretion under the Wills Variation Act is essential to protect the integrity of the family unit by ensuring that what is really family property is not disposed of to strangers'.[86]

This expresses the philosophical nub of the family provision argument. Is accumulated wealth within a family the property of the family in perpetuity? Or should a testator have the freedom to alienate family wealth to charitable or other causes? Theoretically, a deceased's wishes are supposed to be honoured, no matter how inappropriate or outlandish these may seem to be in a family's eyes. In *Grey v Harrison*, the Victorian Court of Appeal said:[87]

> *'It is one of the freedoms that shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit. Rights and freedoms must, of course, be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity, as it were, to interfere with the testator's dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator's bounty and give it to someone else. In conferring the discretion in the wide terms found in section 91 [of the relevant Victorian Act], the legislature intended it to be exercised in a principled way. A breach of moral duty is the justification for curial intervention and simultaneously limits its legitimate extent.'*

Although international human rights treaties do not refer directly to the disposal of property on death, all refer to the family as the fundamental 'group unit of human society', and to the right to privacy in relation to one's affairs in relation to family, home or correspondence.[88] However, succession law, which includes family provision law, is not governed by any public international law regime, such as those contained in human rights treaties, so the term is used loosely in the above quote from *Grey.* If there are international aspects to a particular will, this is a matter for private international law, and is governed by the provisions of the

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See for example, Ronald Chester, 'Should American Children Be Protected Against Disinheritance?" (1997) 32(3) *Real Property, Probate and Trust Journal* 405.

[85] New Zealand Law Commission, *Report 39: Succession Law: A Succession (Adjustment Act): modernising the law on sharing property on death* (August 1997), 'Introduction' at paragraphs 33 and 34.

[86] Law Reform Commission of British Columbia, *Statutory Succession Rights*, WP 35, 1982, 149. This is still the current view in British Columbia, especially since *Tataryn v Tataryn* [1994] 2 SCR 807.

[87] (1997) 2 VR 359, 366.

[88] Universal Declaration of Human Rights 1948, Articles 12 and 16(3); International Covenant on Economic, Social and Cultural Rights 1966, Article 10; International Covenant on Civil and Political Rights 1966, Articles 17 and 23.

Hague Convention on the Conflicts of Laws Relating to Testamentary Dispositions[89] as expressed in domestic laws of those countries who are parties to it, or in some countries by domestic laws giving a similar effect.

Human rights treaties refer to the family as the central unit of human organisation and state that its interests should be actively protected and promoted.[90] If this is so, it is possible to argue that the maintenance of family wealth within the family unit through inheritance is important to both the perpetuation of the family and of society itself. Total freedom of testation would threaten this process. It is also possible to argue more narrowly that consanguinity is an end in itself. This is certainly the original basis of family provision law, that consanguinity, if nothing else, binds the generations of a family. Obligations to the 'call of blood' have supported the moral claim notion in family provision law – a parent has a moral duty to his or her children, even from beyond the grave, even if their relationship while living was less than satisfactory. Testamentary freedom might permit this obligation to be ignored.

On the other hand, human rights treaties also protect individual rights as personal rights, and testamentary freedom is presumably one of these personal rights.[91] Testamentary freedom embodies the concept of ownership of property and the right to pass on property by will even though the testator is dead. The testator's ownership survives his or her death, which can seem a bizarre notion, but is one which is crucial to dealing with property in all systems of political organisation which are not based on community property. Testamentary freedom is really about control of property by the dead person, and can also lend itself quite readily to control of the living by the dead person. The testator can either provide for the members of his or her family, or not. He or she can attach conditions to the bequests made, provided they are not against public policy. He or she can make commentary on any relations, exact revenge, and assert his or her personality in ways which may not have been possible in life.

In the 19th century the individual right to testamentary freedom was expressed to be:[92]

> *'The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass.* ***Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given****…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…'*
> (emphasis added).

The original family provision legislation in New Zealand was not meant to be other than a statutory adjunct to the expression of this form of testamentary freedom. A testator might dispose of his or her property as he or she saw fit, but not before responding to the 'moral responsibility' for proper provision for any spouse and children. Having thus ensured by statute that he or she had adequately followed his or her 'instincts, affections and [the] common sentiments of mankind', the testator was free to engage in whatever testamentary frolic he or she chose. However, as with all discretionary legislation, family provision law soon took on a life of its own. Judges faced with varied fact situations formulated questions such as: What was proper? What was adequate? What was the content of a testator's moral

[89] A 1961 Convention of the Hague Conference on Private International Law. Australia is a party, together with 31 other nations.
[90] Universal Declaration of Human Rights 1948, Article 16(3); International Covenant on Economic, Social and Cultural Rights 1966, Article 10(1); International Covenant on Civil and Political Rights 1966, Article 23.
[91] Universal Declaration of Human Rights 1948, Article 2; Covenant on Economic, Social and Cultural Rights 1966, Article 3; International Covenant on Civil and Political Rights 1966, Article 2.
[92] *Banks v Goodfellow* (1870) 5 LR QB 549, 563-565, per Cockburn CJ.

responsibility? What persons were family members? What property was the estate for provision purposes?

In the 21st century, total testamentary freedom is not found in any organised legal system, so the choice is really one between a discretionary system of family provision law and a system of forced shares, with the testator having the freedom to dispose of the residue to the benefit of any person or cause. Does either system lend itself more easily to charitable bequests?

It is difficult to say that the US elective forced share system itself promotes philanthropy at death. Many influences are at work in relation to charitable bequests in wills in the US, most notably the estate tax. In the US system of elective forced shares, it is clear that after the widow's share is provided for, any or all children may be disinherited almost with impunity,[93] so that bequest of the residue to charity is made easier. Perhaps this accounts in part for the size of philanthropic testation in the US, in addition to an estate tax system which allows spousal and charitable exemptions of 100 percent. However, even in the US children can use the common law doctrines of undue influence,[94] insane delusion, testamentary libel and lack of testamentary capacity to challenge a parent's will.[95] There is also provision for the preterrmitted child (a child born or adopted after a will is made, and omitted entirely from that will), who may be able to apply for his or her share of an estate as if the deceased had died intestate.[96] Indeed, it could perhaps be argued that undue influence cases in the US, though not a common occurrence, operate in a quasi-family provision manner to support the courts' view that family should be provided for before non-family, or even charities. In *Carpenter v Horace Mann Life Insurance Co*, the Arkansas Court of Appeal stated:[97]

> *'Where the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart,* ***to the dictates of parental affection****, to natural justice, to solemn promises,* ***and to moral duty****, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence.*' (emphasis added).

This could be a statement from any case in family provision jurisdictions of the past 100 years, and similar cases in the US argue for a strong cultural bias, based on moral duty, towards family protection when the issue is brought before the US courts.[98]

It is equally clear that bequests to charity in Australia and other family provision countries will always be able to be contested in the courts under the current law. It can never be said that a will is the final word in a discretionary system of family provision law. As the Privy Council expressed it in *Bosch v Perpetual Trustee Co*:[99]

> *'The task of exercising the power must always be one of great difficulty and delicacy. It must always be one largely of guesswork, especially in a case like the present, which is concerned with children of tender age of whose needs in the future nothing can be predicted with certainty.'*

However, their Lordships then had no difficulty at all in predicting with a great deal of certainty what they considered would be an appropriate amount for each child, even though the children were, at the time of the case, only 5 and 6 years of age. The bequest of £257,000 to the University of Sydney was reduced by a total of some £100,000 plus the costs of the

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[93] This does not apply to Louisiana, which, with a civil law system, has a forced share (the legitime) for children under 23. However, pressure was brought to bear on Louisiana to reduce the legitime age limit to 23.

[94] See for example, *Carpenter v Horace Mann Life Ins. Co.* 730 S.W. 2d 502 (Arkansas Court of Appeal, 1987).

[95] R. Chester, 'Should American children be protected against disinheritance?' (1997) 32(3) *Real Property, Probate and Trust Journal* 405 at 412. However, these are rare events in US jurisprudence.

[96] Uniform Probate Code (US) Article II Part 3, 2-302. In some states of the US, a child born before the will is made may also be covered by pretermitted child legislation.

[97] *Carpenter v Horace Mann Life Ins. Co.* 730 S.W. 2d 502 at 507. See, for greater detail of undue influence cases in the US: M. B. Leslie, 'The Myth of Testamentary Freedom' (1996) 38 *Ariz. L Rev* 235 at 290.

[98] M. B. Leslie, 'The Myth of Testamentary Freedom' (1996) 38 *Ariz. L Rev* 235 at 268.

[99] [1938] A.C. 463 at 483 per Lord Romer.

action. This sort of decision is commonplace in family provision law, and to some appears ripe for law reform.

LAW REFORM PROPOSALS

Discussion has been ongoing on the need for a uniform approach to family provision legislation in Australia. The Queensland Law Reform Commission has been coordinating a joint project with the Standing Committee of Attorneys General to investigate uniform succession laws for some time. The project is divided into four stages, of which one is family provision. The papers so far produced on family provision have been:

- Issues Paper W47: The Law of Family Provision (1995); also published by the Law Reform Commission of NSW as Issues Paper 11 (February 1996);
- The National Committee's Final Report to the Standing Committee on Family Provision (No. 28, December 1997); and
- Supplementary Report on Family Provision, (No. 58, July 2004); also published by the Law Reform Commission of NSW as Report 110 (May 2005), including a model *Family Provision Bill*.

The relevant question arising from these reports for our purposes is whether any restriction of the pool of applicants in family provision cases will assist charities in retaining bequests made to them in wills. In the 1997 report, the National Committee recommended the curtailment of family provision in the uniform laws in that the only appropriate applicants would be a husband, a wife, a non-adult child,[100] and a person for whom the deceased person had a responsibility to make a provision (as defined in the Victorian *Administration and Probate Act 1958*). De facto spouses were not included. However, in the supplementary report of 2004, de facto spouses were included,[101] and this was reflected in the *Family Provision Bill 2004* which accompanied the report. Clause 6(1) of the Bill lists:

- the wife or husband of the deceased person at the time of the deceased's death,
- a person who was, at the time of the deceased person's death, the de facto partner of the deceased person,
- a non-adult child of the deceased person.

Clause 7(1) further provides that a person to whom the deceased owed a responsibility to provide maintenance, education or advancement in life may apply for provision.

The recommended approach therefore combines a status criterion and a circumstances criterion for application.[102] The status of the applicant as wife, husband, de facto partner or minor child will be considered, or, if persons other than those listed in clause 6(1) apply, a circumstances approach based on whether the deceased had responsibility to make provision for the applicant will be used. Adult children would clearly fall into the 'circumstances' category in this regime, presumably based on dependency. The issue of whether same sex partners should be included in either the clause 6(1) category, the clause 7(1) category has been left for each separate jurisdiction to decide.

Clause 6(2) defines a 'non-adult child' as a child of the deceased person who was a minor when the deceased person died, or who was born after the deceased person died,[103] but does not include a step-child of the deceased person in the definition. The time limit for applications is not later than 12 months after the deceased's death: clause 9(1). Clause 10(1) is the operative provision allowing the court to make an order for provision if the person is an appropriate applicant, and the will has not made adequate provision for the proper

[100] This meant a child less than 18 years of age.
[101] Supplementary Report on Family Provision, (No. 58, July 2004) paragraph 2.92.10.
[102] Rosalind F. Croucher, 'Towards Uniform Succession Laws in Australia' Keynote address to the National Council of the Trustee Corporations of Australia, 18 April 2007.
[103] This refers to what is currently called in some jurisdictions a child *en ventre sa mere*, the traditional legal term for an unborn child.

maintenance, education or advancement in life of that person. The numerous matters to be taken into account by the court are listed in clause 11(2).

The model Family Provision Bill 2004 does not really address the issue of whether restriction of the pool of applicants will assist charities in pursuing bequests. It merely provides that any moneys held by the administrator of the estate for charity are not to be regarded as distributed to the charity until they are fully vested in that charity. Thus, any administrator faced with a family provision claim could not distribute the charitable bequest until the application for family provision has been heard.[104] This does not change the current position. Moreover, if the moneys have been distributed, they can be reclaimed after a successful family provision application declares them to be notional estate.[105] This extends the current position, because at present only New South Wales allows this option.[106]

While any proposed restriction in the pool of applicants may assist charities to retain bequests, the National Committee has also recommended that the concept of 'notional estate' in the New South Wales legislation be adopted nationally. In particular, the recommendations promote the necessity of severing joint tenancies before death in appropriate situations,[107] and the clarification of the situation when the recipient of provision subsequently dies and passes the provision assets on to third parties.[108] This may have a detrimental effect on the retention of bequests in wills by charities, as New South Wales case law shows. It should be noted, however, that agreement on the inclusion of notional estate is far from unanimous across the various state law societies. For example, the Queensland Law Society believes that notional estate provisions are not a necessary reform,[109] given the decision in *Bridgewater v Leahy*.[110] However, New South Wales has now adopted the model provisions (except as to permitted applicants) as Chapter 3 of the amended *Succession Act 2006* (NSW) – see the *Succession Amendment (Family Provision) Bill 2008*, introduced into the New South Wales parliament on 26 June 2008. The Bill was passed by the Legislative Council on 24 September 2008 and was sent to the Legislative Assembly for concurrence on the same day. The Bill repeals the former *Family Provision Act 1982* (NSW), and may give impetus to the adoption of the model provisions, or some of them, in other states.

At the same time as the Australian review has been taking place, the New Zealand Law Commission has reviewed the family provision legislation in that country and has recommended that adult children should not be appropriate applicants on the basis that such children are seldom in need and that a moral basis for provision for adult applicants over 19 is absurd, and a mere gloss on the legislation unsupported by the parliament.[111] No legislative action has been taken on any of the recommendations made in New Zealand to date.

In Canada, the Uniform Law Conference of Canada (ULCC) produced a uniform *Dependants' Relief Act* in 1974 which was enacted by Ontario, Manitoba, New Brunswick, Prince Edward Island, North West Territory and Yukon Territory, and adopted in similar form in the Code Civil du Quebec. Apart from Manitoba, which was the last province to adopt the uniform Act in 1990, the other Canadian jurisdictions which enacted the uniform legislation have renamed, reviewed, or adapted it since it was first implemented. Although the uniform *Dependants' Relief Act* remains as a recommendation of the ULCC, no further adoptions have occurred since 1990. In addition, British Columbia has produced the *Report on Statutory Succession Rights*, from which there have been no resulting alterations to the law,[112] and Manitoba the

[104] Model *Family Provision Bill 2004*, clause 14(4).
[105] Model *Family Provision Bill 2004*, clause 14(5). See sections 79 and 81 of the *Succession Act 2006* (NSW).
[106] See also section 76(2)(b) of the *Succession Act 2006* (NSW).
[107] Clause 27(2)(b). See also section 76(2)(b) of the Succession *Act 2006* (NSW).
[108] Clause 27(2)(a). See also section 82 of the Succession *Act 2006* (NSW).
[109] John de Groot, *Family Provision Claims and the Family Law Intersection,* STEP seminar, Brisbane, 28 July 2008.
[110](1998) 194 CLR 457, where property disposed of *inter vivos* was held to be subject to claims in equity under the doctrine of undue influence and of unconscionable bargains.
[111] New Zealand Law Commission, *Report 39: Succession Law - A Succession (Adjustment) Act: modernising the law on sharing property on death* (August 1997).
[112] British Columbia Law Institute WP 35, December 1983.

Report on Wills and Succession Legislation which recommended some very minor alterations to the law of family provision.[113] As only Alberta, British Columbia, Manitoba, Nova Scotia and Saskatchewan have law reform commissions in Canada, any strong impetus to reform family provision law has not been observable beyond academic writings.[114]

However, most of the Canadian provinces already do not allow applications for family provision from adult children, unless disabled in some way,[115] or from step-children,[116] and some restrict applications from de facto[117] and same sex partners.[118] Nevertheless, this type of restriction in family provision laws could be difficult to implement in Canada because of the operation of the *Canadian Charter of Rights and Freedoms*, especially article 15(1),[119] and it seems that the interaction of family provision law and the non-discrimination provision of the Charter has not been fully worked through to date.

It appears that proposals for law reform in family provision jurisdictions will not necessarily benefit charities. Therefore, charities should take an active interest in the proposals to ensure their interests are considered, given the continuing case law trend against their success in retaining bequests across all jurisdictions.

CONCLUSION

It is difficult to understand why, in 2008, an adult of full capacity and understanding cannot choose to leave the entirety of his or her estate to a charity of his or her choosing, after having provided for any surviving spouse (including a de facto or same sex partner of more than 2 years standing) and dependent children (defined as those under (say) 21, or even 25). In Australia, neither the model bill nor the New South Wales legislative amendments of 2008 represent major law reform. If inheritance law was to be completely reviewed, then it is possible that more testamentary freedom would be appropriate in the circumstances of the 21st century, especially in the context of a continuing comprehensive social security system.

Major law reform could involve a system of fixed shares for spouses and dependent children, and freedom for the remainder, or testamentary freedom with a family provision requirement for spouses and dependent children only. While some might argue that this casts the burden of caring for hapless relatives onto the social security system, and therefore taxpayers generally, it can equally be argued that increased bequest income would relieve the social security and charitable subsidy systems of at least the same amount, and with less uncertainty attached.

In the absence of more profound law reform proposals on inheritance law generally, it would seem advisable that charities should support the current uniform family provision law

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[113] Manitoba Law Reform Commission Report 108, March 2003.

[114] G. Bale, 'Palm Tree Justice and Testator's Family Maintenance - The Continuing Saga of Confusion and Uncertainty in the B.C. Courts' (1987) 26 *E.T.R*. 295; D.C. Simmonds, 'Succession Law Reform in Ontario: An Old Cat Needs a New Kick' (1991) 10 *Estates Journal* 297; L. Amighetti, *The law of dependants' relief in British Columbia*, Carswell Legal Publications, 1991; Ronald Chester, 'Disinheritance and the American Child: an alternative from British Columbia (1998) 1 *Utah Law Review* 1; Cameron Harvey and Linda Vincent, *The Law of Dependant's Relief in Canada* , Carswell Legal Publications, 2nd edition, 2006; Sheila Nemet-Brown, *Canada Quantum Digest – Spousal Support and Dependant's Relief*, International Press Publication, 2007.

[115] Saskatchewan is alone in having a 'needs' category for children over 18, while British Columbia, Nova Scotia, Newfoundland and Labrador, and Ontario do not specify an age for the definition of 'child'. Five provinces specify a 'child under 18', although Yukon has a 'child under 16', and the North West Territories and Nunavut have a 'child under 19'.

[116] Ontario, Manitoba, the North West Territories and Nunavut have categories of 'dependant' which **could** include a step-child, though this is not made explicit.

[117] Nova Scotia and Newfoundland and Labrador. This can also depend on the definitions used. For example, in Alberta, the definition that could include a de facto is that of 'adult interdependent partner', but not all de facto spouses will fit this description.

[118] Same sex partners are excluded in all provinces except Prince Edward Island.

[119] Article 15 (1) states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

proposals, and lobby for the model bill to be adopted, minus the notional estate provisions which do not generally assist charities in pursuing bequests. This would provide a limited applicant pool, and be a move towards testamentary freedom to leave a charitable bequest in a will.

FURTHER RESEARCH DIRECTIONS

Further research is required to explore the dynamics of the decision making process of charities facing a family provision application, the drivers behind the apparent increase in family provision applications, and public attitudes to charities in this context. In this paper only reported cases involving bequests to charity have been reviewed but the vast majority of cases are settled through negotiation or mediation well before court proceedings. An understanding of the issues in unreported cases may additionally assist in the law reform process and give all concerned an insight into the themes underlying, and drivers behind, family provisions claims. The usefulness of charities being represented in mediations and court cases needs also to be considered.

These issues will be pursued through semi-structured interviews with those who play a part in contesting and/or settling family provisions claims. It is intended to interview eastern seaboard specialist estate lawyers in private practice and trust companies who have a recognised practice with advising clients about such matters. This will include those who specialise in wills and estate law and also litigation lawyers who often appear for family claimants. Specialist mediators who regularly mediate family provision claims will also be interviewed. In addition, representatives of charities with active bequest programs will be interviewed about their views on such claims and experiences.

APPENDIX A

Selected cases on family provision in Australian and New Zealand jurisdictions which have involved charities:

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Royal North Shore Hospital v Crichton-Smith	1938	High Court	NSW	Widow	Six charities in all	The widow was not entitled to maintenance expressed in the will since she already had such maintenance because of a deed of separation. The charities received her share.
Bosch v Perpetual Trustee Co	1938	Privy Council	NSW	Two minor sons left legacies of £15,000 each	Remainder of estate of £257,000 left to the University of Sydney	Legacies to sons increased from £15,000 each to £25,000 each; residue to the university after costs.
Dehnert v Perpetual Executors and Trustees Association of Australia Ltd	1954	High Court	VIC	Adopted daughter	Charities not named	The adopted daughter had the will varied in her favour to three times the original legacy.
Thomas v Perpetual Trustee Co Ltd	1955	High Court	NSW	Daughter and granddaughter	Eight charities in all	After expiry of a trust, proceeds of will declared to be under intestacy. Daughter and granddaughter appropriate beneficiaries as against charities.
Pontifical Society for the Propagation of the Faith v Scales	1962	High Court	QLD	Widow and adult son	Ten charities in all	At first instance, widow provided with the income from £20,000, and adult son with £3000 and £10000 on the death of his mother; adult son's provision denied *in toto* on appeal.
Hughes v National Trustees Executors and Agency Company of Australasia Ltd	1979	High Court	VIC	Only son of a testatrix who left entire estate to charity	Bethlehem Home for the Aged, Bendigo	Entire estate awarded to son despite some evidence of bad relations between the testatrix and the son.
Green v Perpetual Trustee Co Limited	1985	NSWSC	NSW	Son, in prison, claiming as against two charities	Two charities named in will	Son was awarded $3000 after six months out of prison, and a further $3000 after twelve months out of prison. A sum of $65,000 was set aside in trust to buy a house or to be invested in a house by the trustee. This sum was to revert to the charities in equal shares if the son could not stay out of jail for 10 clear years.
Maybury v Public Trustee	1986	NSWSC	NSW	Step daughter of testator	Seven charities left 2/3 of a $1 million estate	Will varied to leave step daughter a home unit worth $110,000 and $40,000 cash.
Hoadley v Hoadley	1988	NSWSC	NSW	Son of testator left no provision; daughter claiming increased provision	Heart Foundation of Australia; Sydney Hospital Foundation for Research	Daughter awarded increased provision to $80,000; son awarded $65,000 with the proviso that if he had not ten clear years out of prison by 28 February 2007, the $65,000 was to go to the charities equally.
Anasson v Phillips; Pompeus v Phillips	1988	NSWSC	NSW	The only daughter and grandchildren of testatrix	Microsearch Foundation left about $2.5 million of a $3 million estate	Legacy to the Foundation reduced to $750,000.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Quek v Bulllock; Quek v Beggs	1990	NSWSC	NSW	Two children of testatrix left without provision; claim to notional estate	South Granville Baptist Church	Notional estate found. Two real estate properties and the proceeds of another donated *inter vivos* declared to be the estate, totalling about $450,000, to be divided equally.
Re Gardner	1994	QSC	QLD	Only adult daughter of testatrix	Testatrix left entire estate to Amnesty International (Qld) and the Sisters of Charity	Daughter awarded $100,00 out of a net estate of about $220,000.
Public Trustee v Rosa Alvaro	1995	SASC	SA	Widow and children of deceased testator	Anti-Cancer Foundation of the Universities of South Australia; the Asthma Foundation of South Australian Inc	The will making the bequests to the charities involved was set aside as invalid because of the deceased's mental state at the time of the making of the will. An earlier will leaving the deceased's estate to his wife and children was to be reinstated.
Byrne v Galland	1995	NSWSC	NSW	Adult daughter of testator	Testator left entire estate in equal shares to the Royal NSW Institute for Deaf and Blind Children and the Challenge Foundation	Adult daughter awarded $90,000 from a total estate of about $99,000.
Grant v Public Trustee	1996	NSWSC	NSW	Adult daughter and son	Whole estate of $690,000 left to charity	Daughter awarded $50,000 and son awarded $75,000.
Shearer v Public Trustee; Hawke v Public Trustee	1998	NSWSC	NSW	Two daughters and one son (all adults) left no provision at all in their mother's will	National Heart Foundation of Australia and the Australian Kidney Foundation in equal shares	The will was not varied.
Brokenshire v The Equity Trustees Executors Agency Company Ltd	1998	VSC	VIC	Nephew omitted from will which he challenged as made under undue influence	Eaglehawk Uniting Church	Nephew unsuccessful.
Kent-Biggs v ANZ Executors Trustee Company Ltd	1999	NSWSC	NSW	Adopted daughter claiming from step-mother's estate	University of Sydney	Will varied to award $100,000 for adopted daughter, leaving about $1.1 million (after costs and commission) for the University of Sydney.
Re Wright	1999	QSC	QLD	Only adult daughter of deceased left $50,000	Remainder of total estate of $675,000 left to a single charity	Will varied to provide $225,000 for the adult daughter. Remainder to charity.
Mitrovic v Perpetual Trustee Co Ltd	1999	NSWSC	NSW	Adult niece of testatrix left $5000	Remainder of estate left to charity	Will varied to award adult niece $125,000.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Richard v AXA Trustees Ltd	2000	VSC	VIC	Adult daughter with a psychiatric illness left in the hands of the trustees with discretion as to the disbursement of both income and capital	Entire residual estate left to a charitable trust for the benefit of the Brotherhood of St Laurence, the Royal Victorian Institute for the Blind and the Salvation Army.	Will varied to award daughter $650,000 of which not more than $550,000 was to be used to purchase a house, and the remainder to be invested.
Schultz v Goldsmith	2000	NSWSC	NSW	Adopted son left 25% of the estate	Salvation Army, Eastern Territory (25%), the Lutheran Concordia College of Adelaide (25%), and the Smith Family organisation of Griffith (25%)	Adopted son awarded 50% of the estate, with the remaining 50% to be divided equally among the three charities.
Wolnizer v Pubic Trustee	2001	NSWSC	NSW	Only surviving son (an undischarged bankrupt) who received one third of the estate in the will, but requested a larger share	WIRES (NSW) (1/12) and the Bobby Goldsmith Foundation (3/12)	The will was varied in the son's favour to reduce the legacy to the Bobby Goldsmith Foundation by 1/12. All other bequests were unvaried.
Marshall v Redford	2001	NSWSC	NSW	Children of testator whose whole estate was left to charity	RSPCA (NSW)	One son compromised for $91,500, leaving a net estate of $255,453. The will was then varied to award $40,000 to the daughter, and $75,000 to the other son. The remainder went to the RSPCA.
Hogan v Clarke	2002	NSWSC	NSW	Estranged daughter	Children's Hospital Westmead (by succession)	Plaintiff's claim denied; bequests to charity contained in will retained
Lee v Hearn	2002	VSC	VIC	Non-relative, sometime carer, claiming a moral duty owed to him	The whole estate (except for some specific legacies) was bequeathed a charitable trust	The claimant's right to provision was refused.
Blundell v Curvers	2002	NSWSC	NSW	Husband claiming an interest in substantial artworks collection left solely to charity	Various charities (unnamed)	Artworks ordered to be sold and husband granted half-interest in proceeds of sale of artworks.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Pata v Vumbuca	2002	NSWSC	NSW	Nephew	Challenge Foundation, the Deaf & Dumb Society of New South Wales and the New South Wales Institution for Deaf & Blind Children (in equal shares)	Legacy to the nephew of $70,000, a life estate in a home worth $450,000 and a capital sum of $240,000 for repairs to the property. The charities to retain the residual rights to the property after the nephew's death (i.e. their legacy to be reduced from approx $350,000 each, and the remainder deferred).
Edwards v Terry	2002	NSWSC	NSW	Only son claiming an increase in the 15% of his mother's estate left to him	Royal Bind Society and the Salvation Army originally left 40% each of the estate (the executor was left 5% which was not disputed)	Son successful in claiming almost 71% of the remaining estate, the executrix retaining 5%. The remaining estate (24%) was split equally between the charities.
Novak-Niemela v Perpetual Trustee Co Ltd	2002	NSWSC	NSW	Widow and adult son	Apart from small bequests to the widow and son, the entire estate was tied up in a trust until 2080 which could pay at its discretion the widow, son, grandchildren, and the Salvation Army Property Trust. After 2080 the trust assets were to be paid 60% to the Salvation Army and 40% to the testator's grandchildren, or (as substitute) great-grandchildren.	The widow was awarded the testator's interest in a home unit, and $100,000 and the son was awarded a bequest of $408,000 out of the total estate of about $1.5 million (after costs).
The Auckland City Mission v Brown	2002	NZCA	NZ	Adult daughter claiming increased provision	Auckland City Mission and the Salvation Army (both these charities were left the residue), and the Cancer Society (left a specific bequest of $500,000). The deceased's will left some $3 million to charity,	This was an appeal from the High Court of New Zealand which had increased the adult daughter's provision to $1.6 million. This appeal reduced that to just over $850,000 (about 20% of the estate) to be paid from the residue of the estate. This case has now been distinguished decisively as turning very particularly on its facts in both Henry v Henry [2007] NZCA 42 and Montgomerie v Public Trust [2007] NZHC 804. These latter cases restore the status quo as regards applications by adult children in New Zealand.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Mahon v The Perpetual Trustee	2004	NSWSC	NSW	Adult daughter claiming home unit and lump sum from father's estate	Mackillop Family Services Ltd as trustee for the St Vincent de Paul Boys Orphanage, Melbourne	Adult daughter awarded home unit and lump sum of $40,000 effectively halving the legacy to the orphanage.
Perry v Olliffe	2004	NSWSC	NSW	Adult daughter (other sibling made no claim) left income on half the estate for 20 years (which had expired) with 80% of the residual estate to go to charities	New South Wales Cancer Council and Salvation Army NSW Property Trust	Each daughter granted 37.5% of the capitalised estate, and the two charities 9.5% each (two grandchildren of the deceased received 3% each).
Carstrom v Boesen	2004	NSWSC	NSW	Claimant in position of daughter (though possibly not biological daughter) left $75,000 of $300,000 total estate; each charity received $47, 000	Salvation Army, the St Vincent de Paul Society, the Uniting Church In Australia Property Trust, the Smith Family	Claimant awarded $150,000 of the $300,000 estate, the amount to be taken from each charity's provision.
Phillips v Hunt	2005	NSWSC	NSW	Widow left only a life interest in the matrimonial home, but application for family provision made out of time	Trustees of the Sisters of Mercy (North Sydney) for the purposes of Our Lady's Home at Waitara; St Gabriel's School for Deaf Boys at Castle Hill conducted by the Christian Brothers; Trustees of the Sisters of Charity for the purposes of the Sacred Heart Hospice at Darlinghurst.	The time for application being extended, the court ordered that the will be varied so that the home could be sold and the proceeds paid to the widow to the extent of 70%; 30% to be paid to the three named charities.
Hunt v Delaney	2005	NSWSC	NSW	Two of three siblings abandoned by their deceased mother as children, and left no provision in her will	St Vincent de Paul Society and the Royal Blind Society in equal shares	$150,000 to the son and $200,000 to the daughter out of a total estate of around $430,000.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Morton v Little; Price v Little	2005	NSWSC	NSW	Adult daughters left legacies of $20,000 each	Foundation for the National Parks and Wildlife due to receive over $1 million	One adult daughter awarded $350,000 and the other $100,000, reducing the charitable bequest to around $590,000.
Powell v Monteath	2006	QSC	QLD	Stepson with no provision in stepmother's will	Queensland Cancer Fund and National Heart Foundation of Australia (Qld)	Stepson awarded a lump son of $40,000 out of a total estate of approximately $235,000.
Groser v Equity Trustees	2007	VSC	VIC	Widow left a life interest in home	The estate (except for specific legacies to children and grandchildren) was bequeathed to various charitable trusts	The court ordered that the home be sold to provide for the continuing care of the widow in a nursing home or hostel (similar to Phillips v Hunt).
Nelligan v Crouch	2007	NSWSC	NSW	Same sex partner, though the relationship had ceased before the death of the testator	Whole estate left to Royal Flying Doctor Service (RFDS), after gift to Crouch as executor failed	Partner awarded a legacy of $100,000, effectively reducing the legacy to the RFDS by about two-thirds.
Trustees for the Salvation Army Property Trust v Becker	2007	NSWCA	NSW	Friend of testatrix left almost the entire estate by second will in contention, with small legacies to the charities	Testatrix left entire estate to the Salvation Army and the Royal Flying Doctor Service in equal shares under first will in contention	Second will declared valid; charities deprived of all but small legacies and had to bear the burden of costs. An application for leave to appeal to the High Court of Australia was rejected by that Court with costs against the charities.
Ansett v Moss	2007	VSCA	VIC	Second son of testator denied relief at first instance.	Testator, after providing for wife and children, left the bulk of his estate to a charitable trust.	On appeal, the court said that 'arguable that a wise, just and wealthy testator had a duty to make better provision for vicissitudes facing a son currently without financial means.' Therefore, appellant's prospects of success 'not necessarily negligible' on further application.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Abrego v Simpson	2008	NSWSC	NSW	Husband of a marriage of short duration left only the contents of his wife's home, provided he collect them within three months of her death. In her will, she accused him of physical and emotional abuse.	After pecuniary legacies, she gave the residue of her estate as follows: 1/17th to the Foundation Fighting Blindness, 1/17th to Diabetes Australia (NSW), 1/17th to the Cancer Council of New South Wales, 7/17ths to St Gabriel's Church at Bexley for the charitable purposes of that church and the remaining 7/17ths to St Patrick's Catholic Church in Sydney for the charitable purposes of that church.	The husband was awarded a life interest in the matrimonial home and a pecuniary legacy of $50,000. The other pecuniary legacies were not interfered with. Therefore the substantial costs were borne by the residue, reducing the amount to be distributed to the charities by more than $120,000.
Jacques v Public Trustee of Queensland	2008	QSC	Qld	Daughter left a house and $30,000 plus the income of a trust of the residue set up by the deceased for her daughter's maintenance and support during her lifetime. The remainder of the trust after the daughter's death left on trust to the two named charities	Queensland Cancer Fund and the Australian Neurological Foundation (Queensland Bequest Fund)	The daughter made application for a change in the trust arrangements so that the bulk of the capital should be paid into her superannuation fund. This would have deprived the charities of the bulk of the capital in the remainder. The judge declined to interfere with the trustee's investment arrangements, thus preserving the position of the charities. The charities were not represented in the action.

CASE NAME	YEAR	COURT	STATE	CLAIMANT	CHARITY/IES INVOLVED	OUTCOME
Groser v Equity Trustees Ltd	2008	VSC	VIC	Trustees, seeking to determine whether prior order concerning Mrs Groser could be carried out given her death (see *Groser v Equity Trustees Ltd* [2007] above, and Attorney-General (Vic) seeking to protect the interests of the charities under the trust established by Mr Groser	Charitable trust set up under Mr Groser's will	Order concerning Mrs Groser could not be carried out, given her intervening death. Charitable interests protected. All costs borne by estate.
Townsend v Nichols	2008	NSWSC	NSW	Sister of deceased claiming to be dependant	A one sixth part of the estate was left to each of The Australian Cancer Foundation for Medical Research; The Australian Quadriplegic Association Limited; The Salvation Army; and The Paraplegic and Quadriplegic Association of New South Wales	The sister was successful in her claim, and was awarded $200,000 taken from the charities' shares of the estate. Costs were also payable from the estate. The charities did not appear or give evidence at the hearing.

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