

Is Family Protection a Question of Moral Duty?

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The Law Commission is at present undertaking a review of succession law in New Zealand. Whether the concept of "moral duty" is a satisfactory basis for determinations under the Family Protection Act 1955 is one of the issues the Commission is addressing in the context of the succession project. This article is based on a paper written by the author for the Law Commission. It examines the rationale behind the introduction of the original family protection legislation and the development of the concept of moral duty in this context. The article discusses a number of reasons for the author's conclusion that the use of the concept of moral obligation should be abandoned and replaced by a more clearly defined test based on dependence and need.

I INTRODUCTION

Making a will is an act of faith. No one can be certain that after their death their wishes will be carried out. Under the Family Protection Act 1955 certain family members, identified by the Act, can apply to the court for provision from testators' estates if it can be shown that the testators, in disposing of their estates in the way specified by their wills, failed to make adequate provision for the proper maintenance and support of the claimants.

In applying this legislation the court frequently refers to the concept of moral duty. The thesis of this article is that the concept of "moral duty" is not a satisfactory basis for determinations under the Family Protection Act 1955 (the Act). Instead the bases for determinations under the Act should be the needs of dependants,¹ the testators' promises of testamentary compensation exchanged for goods and services during the testators'

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1 Some Australian family protection provisions include a dependency requirement. For example, the Queensland Succession Act 1981 requires that before making an order in favour of claimants (with the exception of spouse and children), who are eligible because they are dependants, the court must be satisfied "having regard to the extent to which the dependant was being maintained or supported by the deceased person before his death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant" s 41(1); a similar limitation is found in the Family Provision Act 1982 (NSW) which requires that a former wife or husband of the testator, or a person claiming support on the basis of sometime dependence or sometime membership of the household, must satisfy the court that factors exist which warrant the making of an application.

lifetimes and special circumstances when property is identified as family property and should be dealt with as such.²

Family protection legislation was originally introduced to provide a mechanism for ensuring that testators met the needs of dependent family members. Over time the ends met by the legislation have changed. The interpretation of the legislation on the basis of moral duty is now inappropriate given the prevailing social, philosophical, political and economic climate and people's understanding of the family.

Furthermore, little heed is paid to the advantages of testamentary freedom and the disadvantages of family inheritance by family protection legislation based on the concept of moral duty.

II THE ORIGINAL RATIONALE BEHIND THE LEGISLATION

Family protection legislation was originally introduced to provide a mechanism for ensuring that testators met the needs of dependent family members.

From the early 1890s until the passing of the Testator's Family Maintenance Act 1900 there were numerous parliamentary debates³ on the subject of restricting testators' testamentary freedom. Four Bills on this issue were introduced before the 1900 Act was finally passed. The Act was a compromise between the proponents of family protection legislation and its critics.

The reasons put forward for the introduction of the legislation focused on the concern that families were being left destitute when breadwinners bequeathed their property to outsiders (often churches and charitable institutions),⁴ without having first adequately provided for their families. The breadwinners were usually understood to be the husbands and the problem was seen to be exacerbated by the widows' poor prospects of earning a living.⁵ Concern was voiced that destitute families became a burden on the state and on their local communities.⁶ It was intended that the Act would provide a mechanism for

2 In particular this relates to Maori concepts of ownership as expressed for example in Te Ture Whenua Maori Act 1993. Discussion of Maori perspectives on the issues raised is beyond the scope of this article.

3 NZPD vol 92, 1896: 585; NZPD vols XCVII-XCVIII, 1897: 546; NZPD vol CII, 1898: 418; NZPD vol III, 1900: 503; NZPD vol II3, 1900: 613; NZPD vol 138: 148.

4 NZPD vol 92, 1896: 585, 586 per Mr Seddon and Mr Lawry; NZPD vol CII, 1898: 418, 421 per Mr Symes, 422 per Mr Hogg.

5 NZPD vol III, 1900: 503, 505 per Mr Hanan. It is interesting to note that by the early 1890s women were in an extremely vulnerable economic position and that discussion on reform in this area was contemporaneous with women's suffrage. See RF Atherton "Women and Testamentary Freedom" (1988) 2 University of New South Wales Law Journal 133; RF Atherton "The Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW): Husband's Power v Widow's Right" (1990) Australian Journal of Law & Society 97.

6 NZPD vol III, 1900: 503, 509 per Mr McNab.

ensuring that testators met the material needs of their dependent relatives to relieve the state and/or community of that burden.⁷

Discussions about the proposed legislation were premised on the belief that men had a duty and/or obligation to maintain their families both in life and after death, and that the state had a duty to ensure that men fulfilled their duties to their families.⁸ The intestacy provisions and the Destitute Persons Act 1894 were cited as pre-existing legislative recognition of the duty of familial support.⁹

The emphasis of the parliamentary discussions about the testators' duties was on familial support. Very little mention was made of any duty on the testators' part to pass on a share of their wealth to family members merely in recognition of the familial relationship or because of the nature of the wealth as "family property." When this was raised it was by the critics of the Act who expressed concern that the legislation would result in the alienation of family property from the blood line.¹⁰

A further reason given for the introduction of the legislation was to ensure that widows who had assisted their late husbands to accumulate and maintain property held only in their late husbands' names could retain a share of that property after their husbands' deaths.¹¹

While there appeared to be a consensus about the duty of breadwinners to provide for their dependants,¹² the critics of the proposed legislation maintained that the breadwinners themselves were in the best position to assess the appropriate provision to make for their various family members.¹³ They expressed concern that the legislation would have unjust results, with the court making orders in favour of those who had already received a share of the testators' wealth via *inter vivos* gifting¹⁴ and such

7 And so too today, M Henaghan and P Tapp in their chapter "Legally Defining the Family" in M Henaghan and WR Atkin *Family Law Policy in New Zealand* (Oxford University Press, Auckland, 1990) 1, 39 comment that "a concern for human rights and the public purse extends the definition of family [under the Family Protection Act 1955] to include both nuptial and ex-nuptial children."

8 NZPD vols XCVII-XCVIII, 1897: 546, 549 per Mr Meredith.

9 NZPD vol III, 1900: 503; NZPD vol 113, 1900: 613.

10 NZPD vols XCVII-XCVIII, 1897: 546 per Sir Robert Stout, 547 per Captain Russell, 584 per Mr J Hutchinson.

11 NZPD vol XCII, 1896: 585, 586 per Mr Seddon; NZPD vols XCVII-XCVIII, 1897: 546, per Sir R Stout; NZPD vol III, 1900: 503, 505-506 per Mr Hanan; NZPD vol III, 1900: 613, 614 per The Hon Colonel Pitt.

12 NZPD vol III, 1900: 503, 506 per Captain Russell.

13 NZPD vol CII, 1898: 418, 422 per Mr McLean; NZPD vol III, 1900: 613, 615 per The Hon Sir GS Whitmore.

14 NZPD vol III, 1900: 503, 506 per Captain Russell.

unworthy claimants as spendthrift children,¹⁵ widows who were seen to have failed in their duties¹⁶ and widowers who had deserted their spouses.¹⁷

The 1900 Act accommodated these criticisms by giving the court the discretion to order "such provision as the said Court shall seem fit" if the testator had failed to make "adequate provision for the proper maintenance and support"¹⁸ of immediate family members. There was no guidance given in the Act as to what was "adequate provision". Nor was there mention of moral duty. It was the judges, in their early explanations of the exercise of their discretion under the Act, who identified this concept as being of central importance.

From the outset, because of the indeterminacy of the requirements of the Act, judicial interpretation and discretion have been crucial in the development of the family protection regime. Given the nature of the judgment the court is required to make it is inevitable that this is a jurisdiction in which the individual judge's life experience, morality and notions of familial responsibility play a major part.¹⁹ It is also an area in which decisions are necessarily driven by the particular facts of each case.²⁰

III THE EARLY JUDGMENTS 1900-1910

Within ten years of the introduction of the family protection legislation the concept of moral duty became established as a basis for making determinations under the Act.

During the first ten years two approaches to the Act were taken. The first of these was conservative. Legislation already in force, namely the Administration Act 1879 and the Destitute Persons Act 1894, was used as a basis to establish the content of the requirements under the family protection legislation. In some cases the court inferred that the amount a claimant should receive under the family protection legislation should be consistent with the amount that the claimant would receive if the matter were to be dealt with under the Administration Act.²¹ This inference was rejected in the 1903 case of *Laird*.²²

Parallels were drawn between the Destitute Persons Act 1894 and the family protection legislation both with regard to entitlement and quantum. Numerous references were made in the judgments to the understanding that the Act was primarily intended to

15 NZPD vol CII, 1898: 418, 420 per Mr Monk, 422 per Mr J McKenzie, 424 per Mr Crowther.

16 NZPD vol CII, 1898: 418, 419 per Mr Seddon; 421 per Mr Monk, 426 per Mr Massey.

17 NZPD vol XCVII-XCVIII, 1897: 546 per Mr Seddon; NZPD vol CII: 418, 419 per Mr Seddon, 426 per Mr Massey.

18 Testator's Family Maintenance Act 1900, s 2.

19 *Allardice v Allardice* (1910) 19 NZLR 959, 973 per Edwards J.

20 *Allardice* above n 19, 974 per Cooper J.

21 *In re Phillips* (1902) 4 GLR 192; *In the Will of James Rees* (1902) 5 GLR 145.

22 *Elizabeth Laird v Alexander Smith Laird and Others* (1903) 5 GLR 466, 467-477.

benefit those who would have a claim against the testator if the testator were alive.²³ The orders made were frequently for maintenance in the form of periodic payments²⁴ rather than lump sums which could eventually be left to others on the claimant's death.²⁵ The emphasis was on meeting applicants' material needs.

The other approach was to determine the requirements of the Act both as to entitlement and to quantum by reference to "moral duties" on the part of the testator and the corresponding "rights" on the part of the claimant.²⁶ The moral duty appeared to go beyond meeting needs. Very early on there were hints that family members had a duty to make bequests to family members, irrespective of whether they required maintenance and support, merely because of their familial relationship.²⁷ However, even in cases where the rhetoric indicated that the judges imbued the Act with a wider moral component, need remained a prerequisite.²⁸

The first decade of the operation of the family protection legislation culminated in the landmark Court of Appeal decision in *Allardice*.²⁹ By then the judicial gloss that it was the court's duty to ascertain if the testator had been guilty of a manifest breach of that moral duty which a just, but not loving, husband or father owes towards his wife or children, was firmly in place.³⁰

IV THE JUDICIAL UNDERSTANDING OF THE CONTENT OF THE MORAL DUTY IN THE FAMILY PROTECTION CONTEXT

In the last eighty four years since Allardice was decided, the concept of moral duty in the family protection context has developed to the extent that today the duty is considerably more extensive than any duty envisaged by the instigators of the original legislation.

23 *Rush v Rush* (1901) 20 NZLR 249, 253; *Wilkinson v Wilkinson* (1904) 24 NZLR 156, 157; *Handley v Walker and Others* (1903) 22 NZLR 932, 933.

24 This was so despite s 3 of the Testator's Family Maintenance Act 1906 which stated explicitly that orders could be made for lump sum, periodic or other payment.

25 See *Rush*, above n 23, 254; *Laird*, above n 22, 468.

26 In *Rush*, above n 23, 253 a moral element is implied in the statement of Edwards J that it was the duty of the court to see that "a testator does not sin in his grave by leaving those whom nature has made dependent on him unprovided-for". In *Laird*, above n 22, 467 Edwards J referred to "natural duty" and "natural claims" while in *Plimmer v Plimmer* (1906) 9 GLR 10, 24 Edwards J specified that the testator had a "moral duty" to support his wife both in life and in death. Chapman J in *Rowe v Lewis and Another* (1907) 24 NZLR 769, 772 referred to the duty of the testator "morally speaking" to consider the claimant's case.

27 See for example *Plimmer*, above n 26, 21.

28 *Allardice* above n 19, 972.

29 This decision was approved by the Privy Council [1911] AC 730.

30 *Allardice* above n 19, 972, 973.

There are a number of elements to the concept of moral duty as it is currently understood.³¹

For example, such factors as the financial position, the marital status, the number and age of dependants, the age, health and earning capacity of the applicants is often described in detail although the duty is said not to be based on material need.³² A lengthy description of these factors is only necessary if establishing the deserving nature of the applicant is relevant. Being able to show a special need, such as one associated with disability, is highly relevant.³³

The moral duty is affected by past standards of living in as much as they result in expectations for current and future standards of living.³⁴ It is also affected by the claimants' future prospects.³⁵

Some cases show that the genealogical link is important. Sometimes determinations appear to be made for little reason other than the fact there is a familial relationship.³⁶ Although it is recognised that testators may owe moral duties to people other than family members, the duty to family is often considered to override duty to non-family members, de facto partners³⁷ (to whom the testator may well owe a moral duty), or charities³⁸ (which may be beneficiaries). The moral duty towards marriage partners is paramount.³⁹

Sometimes there is an element of compensation apparent in the awards made; testators are duty bound to make amends for their abuse, neglect or disinterest in the

31 See further WM Patterson *Family Protection and Testamentary Promises in New Zealand* (Butterworths, Wellington, 1985) chs 2 and 4; IJ Hardingham, MA Neave and HAJ Ford *Wills and Intestacy in Australia and New Zealand* (2 ed, The Law Book Company, Sydney, 1989) 490-496; *Butterworths Family Law Service Commentary* (Butterworths, Wellington, 1993) 7.903 for further discussion.

32 *In Re Harrison (dec'd)* (1962) NZLR 6, 14.

33 *Fraser-Jones v The New Zealand Insurance Company Limited* Unreported, 7 August 1990, High Court, Rotorua Registry, M 164/88, 5.

34 *Welsh v Mulcock* [1924] NZLR 673; *Re Z (dec'd)* [1979] 2 NZLR 495, 506.

35 *Cook, Webb, and Johnston v Walker and Boyd* Unreported, 29 August 1990, High Court, Auckland Registry, CP 1522/87, 8.

36 *Harrington v The Public Trustee of New Zealand and Harrington* Unreported, 21 August 1992, High Court, Dunedin Registry, CP 49/91; *Wright and MacDonald v Wright, MacDonald and Wright* Unreported, 13 February 1992, High Court, Rotorua Registry, M 100/88, 8.

37 *Owen v Bradley and Boyer* Unreported, 20 March 1990, High Court, Blenheim Registry, CP 33/88.

38 *Ormsby v Ormsby and the New Zealand Guardian Trust Company Limited* Unreported, 4 July 1990, High Court, Auckland Registry, M 1416/89; *Tonge v Tonge* Unreported, 13 March 1990, High Court, Whangarei Registry, M 23/86.

39 *Beedham, Beedham v Beedham* Unreported, 27 February 1990, High Court, Dunedin Registry, CP A3/83.

claimants during their childhoods,⁴⁰ or indeed even their adult years.⁴¹ There may also be an element of reward for past services to the testators,⁴² or conversely, punishment for neglect of the testators.⁴³

Past contributions to the testators' estates by the applicants or assistance by the applicants to maintain the testators' estates may also be considered material.⁴⁴ Past contributions by the testators to the claimants are also relevant.⁴⁵

In cases where there is a conflict between disposition to a second partner and the children of a first marriage, it is sometimes considered relevant that the testator's property was established or maintained by the testator's first partner.⁴⁶ In other cases it is considered relevant that part of the testator's estate has been bequeathed to the testator by other family members; that is, it is "grandfather money".⁴⁷ That the moral duty may not only be to the claimants, but may extend to the children of the claimants who are not party to the Family Protection Act 1955 proceedings, is also evidence of the "family" element of the duty.⁴⁸

The court is required to establish the content of the duties of "a just but not a loving" testator.⁴⁹ This formulation denies that love plays any part in the creation of this duty. Instead the duty is characterised as being based on justice. Testators can be forced to act justly but not lovingly. However, this requirement to make proper provision, sometimes based purely on the familial relationship, appears to have some causal connection to partisan idealised family sentiment (love?) rather than any objective view of justice. The content of justice in this context is not clear from the cases.

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- 40 *Ten Broeke v White and White* Unreported, 19 March 1992, High Court, Whangarei Registry, M 87/90; *Guzzardi and Grainger v Glenn, Glenn and Orr* Unreported, 14 July 1992, High Court, Auckland Registry M 1810/90.
- 41 *Currie-Robson v Everest, Corder and Robson* Unreported, 8 October 1992, High Court, Christchurch Registry, M630/91, 6.
- 42 *Le Prou v Gordon and Another* Unreported, 19 and 20 September 1990, High Court, Hamilton Registry, M 79/88, 9.
- 43 *Re Airey* [1990] 1 NZLR 593, 598.
- 44 *Re Price (dec'd)* (1989) 6 FRNZ 517, 522.
- 45 *Fraser-Jones v The New Zealand Insurance Company Limited*, above n 33, 9.
- 46 *Re Triggs (dec'd); Triggs v Bramley* [1992] NZFLR 774, 777.
- 47 *In Re Harrison (Deceased)* above n 32, 14. See also *Owen v Bradley and Boyer* Unreported, 20 March 1990, High Court, Blenheim Registry, CP 33/88, 20, where the court noted that the fact that "a significant part of the foundation of the estate came from Mrs Owen by way of inheritance from her own family" was a consideration that needed to be taken into account.
- 48 See *Baker and Laurie v Baker* Unreported, 2 March 1992, Court of Appeal, CA 222/90 where Hardie Boys J stated that some additional emphasis may be given to the testator's failure of his moral duty to the respondent by the fact that it was only through the respondent that the respondent's children would inherit anything from their grandparents.
- 49 *Allardice*, above n 19, 973; see also *Re Johnson* High Court, 16 June 1992, Auckland Registry M 815/90, 4.

Although it is stated repeatedly that justice is not necessarily equated with equality the findings in some cases suggest that it is.

V THE ARGUMENT AGAINST THE USE OF THE CONCEPT OF MORAL DUTY

A *The Subjectivity of the Moral Duty*

The moral duties that the Family Protection Act 1955 enforces are subjective and unique to each individual. It is difficult to assess these moral duties for anyone else. Difficulties with evidence and understanding the complex relationships and situations within individual families exacerbate this problem. As ascertaining the contents and extent of testators' moral duties is problematic, it is inappropriate for the court to "second guess" the testators' moral duties and enforce the court's assessment of these moral duties legally.

1 *The moral duty as a value judgment*

The moral duties that the court enforces under the Family Protection Act 1955 can be identified broadly. The content of the duties can be ascertained to the extent that it is socially determined. However, deciding the exact content and extent of these moral duties in any particular case is a judgment call.

As McMullin J stated in *Re Leonard*, "[e]ach case in a sense calls for the making of a value judgment".⁵⁰ Very often the family protection regime results in the substitution of the testators' value judgment with the value judgment of one or more members of the judiciary. To the extent that determination of testators' moral duties is personal to those involved, moral duties owed by testators cannot be assessed by anyone other than those directly involved. People's views on the concept of family and the moral duties between family members can be affected by many variables⁵¹ including the social class, gender,⁵² sexual orientation, age,⁵³ longevity, geographic location and mobility, mortality and divorce rates, economic conditions, life experience and ethnicity⁵⁴ and the "culture" of their particular family.⁵⁵

50 [1985] 2 NZLR 88, 93.

51 See generally J Finch *Family Obligations and Social Change* (Polity Press, Cambridge, 1989).

52 See numerous feminist writings such as EJ Porter *Women and Moral Identity* (Allen & Unwin, Sydney, 1991).

53 See generally B Heenan "Older New Zealanders; Population Patterns and Trends" in P Koopman-Boyden *New Zealand's Ageing Society* (Daphne Brasell Associates Press, Wellington, 1993) 29.

54 See generally A Cortese *Ethnic Ethics* (State University of New York Press, Albany, 1990).

55 A survey of concepts of family and moral duties as revealed in New Zealand literature, both sociological and fictional, would usefully inform this discussion but is beyond the scope of this article.

Under the family protection legislation, attempts have been made to establish objective tests for moral duties. The court is required "to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and circumstances, the testator has been guilty of a breach of [that] moral duty",⁵⁶ a difficult task given that the testators are unavailable to present evidence concerning the circumstances within the family as they experienced them.

2 *The moral duty as the product of negotiation*

A recent English study by Finch and Mason⁵⁷ concluded that there is no clear consensus among English people as to the responsibilities that people should acknowledge towards their relatives. Finch and Mason concluded that it is inappropriate to think about family life in terms of duty. They also rejected the corollary of the "right" to claim assistance from the family.⁵⁸ They maintained that there are no externally imposed rules of obligation between family members, but rather that people negotiate commitments over time and that the family provides a ready-made context within which to carry out these negotiations.⁵⁹

While there are no substantive rules as to what people should do, there are procedural rules to help people with the negotiation of their responsibilities; rules that identify as significant the deserving nature of a recipient of assistance, the time span over which help is required, the balance between dependence and independence and the concept of reciprocity.

Giving and receiving within the family, according to Finch and Mason, is not only to do with the exchange of goods and services, but is also the establishment of people's moral identities.⁶⁰ The procedural rules apply to the circumstances in each family to produce what may be a unique set of responsibilities for each individual that are intimately connected with each individual's moral identity.

In the context of testamentary dispositions, Finch and Mason's findings suggest that people's understanding of their responsibilities as expressed in their testamentary dispositions will be the result of a lifetime of negotiations.⁶¹ They will be unique to each individual and integral to that person's moral identity. If this is so, it is inappropriate to attempt to determine a Family Protection Act 1955 claim on the basis of "a moral duty" that can be established objectively by the court.

56 *Allardice*, above n 19, 973.

57 See generally J Finch and J Mason *Negotiating Family Responsibilities* (Tavistock/Routledge, London, 1993).

58 Above n 57, 166.

59 Above n 57, 169.

60 Above n 57, 149.

61 The concept of reciprocity is of limited application in succession because parents tend to give more materially to their children than they receive from their children. This has been described as "chronological unfairness" A Herzen cited in J Rawls *A Theory of Justice* (Harvard University Press, Cambridge, Massachusetts, 1971) 291.

3 *Problems of evidence*

The court relies upon the evidence of the parties involved in the application. Sometimes the only evidence available is the uncorroborated evidence of one of the parties.⁶² Section 11 of the Family Protection Act 1955 relieves the court of the requirement to observe the usual rules of evidence.⁶³ In doing so it removes some of the safeguards, making the court's task of ascertaining the validity of the information even more difficult.

4 *Testators' explanations*

In most cases the testators were considerably more aware of the circumstances within their own family than are the judges who are required to second guess the testators' decisions. In family protection cases understanding the intention of testators and *why* they arrived at their decisions are both vital. Problems arise as testators often give no explanation as to their reasons for the choices they make in their wills. When a testator does leave an explanation in the form of a written memorandum or a verbal explanation this is frequently disregarded or discredited by the judge in coming to a decision on the family protection application.⁶⁴

B *Moral Duties to Non Family Members*

The Family Protection Act 1955 concept of moral duty that privileges the family above deserving others is only one of a number of possible views of moral duty. It is not necessarily any more valid a basis for determinations under the Family Protection Act 1955 than any other view of moral duty that the testator may have had.

1 *Privileging family over others*

The Family Protection Act 1955 concept of moral duty privileges the family over and above other people. It reflects the belief that people's first responsibility is to their families rather than to strangers, even if the strangers' needs are more pressing.⁶⁵ Accordingly, in the family protection context when there is competition for provision between a claimant and a beneficiary charity, the claimant (whether or not in any demonstrable need) often receives an award at the expense of the beneficiary charity.⁶⁶

The enforcement of the Family Protection Act 1955 concept is at the expense of upholding other views of moral duty which may be held by testators, and which may be of increasing significance given economic and social trends. Many charitable

62 *Re Greenfield* [1985] 2 NZLR 662, 670.

63 Hearsay evidence, for example, is permissible.

64 *Tonge*, above n 38, 7; *Harrington*, above n 36.

65 See discussion of family selfishness, exclusion and pursuit of private interest in contrast to community interest and the pursuit of public good in M Barrett and M Mackintosh *The Anti Social Family* (2 ed, Verso, London, 1992).

66 *Tonge*, above n 38; *Ormsby*, above n 38.

organisations receive a significant amount of their funding from bequests. This funding of charities may be becoming more vital as more people turn to charitable organisations to assist them with even the basic necessities of daily survival,⁶⁷ and charitable organisations spearhead world-wide movements to alleviate poverty and suffering and to encourage international environmental protection. More than ever before people may wish to leave all or some of their wealth to charities for redistribution for the good of the community, rather than leave it to their families who may well be coping adequately on their own resources.

C *Comparison with the Duties During Lifetime Expressed in Other Legislation*

The Family Protection Act 1955 concept of moral duty is unsatisfactory in that the duties it enforces are inconsistent with the duties legally enforceable during people's lifetimes.

1 *Legally enforceable duties in life and in death*

Although most legislation characterises the family as an interdependent economic unit consisting of mother, father and dependent minor children,⁶⁸ people generally enjoy considerable freedom to deal with their own property as they please during their lifetime. The provisions that, for the benefit of family members, restrict people's dealings with their own property,⁶⁹ are limited and few. On the other hand, the fetters imposed on the testators' testamentary freedom by the Family Protection Act 1955, the Matrimonial Property Act 1963, the Law Reform (Testamentary Promises) Act 1949 and domestic constructive trusts, are extensive.

2 *Matrimonial property regime*

The situation under the Family Protection Act 1955 is inconsistent with that at the end of a marriage by separation. The deferred property regime under the Matrimonial Property Act 1976 puts important limits on the extent to which marriage partners are required to share their property with each other. In most situations at the end of a marriage each person only receives half of the joint property.

On the other hand, when a marriage ends because of death, the surviving spouse may be entitled to a share of the property under the Matrimonial Property Act 1963 as well as the Administration Act 1969 and the Family Protection Act 1955. Because of

67 See for example report on increased use of food banks *The Evening Post*, Wellington, New Zealand, 4 January 1994, 3.

68 Matrimonial Property Act 1976; Family Proceedings Act 1980; Guardianship Act 1968; Joint Family Homes Act 1964 etc.

69 For example the provisions for the restraint or setting aside of dispositions. See ss 200 and 201 of the Child Support Act 1991 which provide for dispositions to be restrained or set aside if they are made to defeat rights under the Act and ss 43 and 44 of the Matrimonial Property Act 1976 which also provide for dispositions to be restrained or set aside if they are made to defeat the rights under that Act.

differences between the Matrimonial Property Act 1963 and the Matrimonial Property Act 1976, surviving spouses need to be "topped up" to enable them to be in the same position as they would be in under the later act, a position which presumably better reflects the current understanding of partners' duties to each other as regards property.⁷⁰

3 *Reform?*

The Testators Family Maintenance Act 1900 initially provided a way of ensuring that surviving partners received their share of what is now characterised as matrimonial property. However, now that the Matrimonial Property Act 1963 applies on death the need for this is lessened. The need would be removed altogether if the property division on death was altered to become a division under the Matrimonial Act 1976. It would then no longer be necessary to find a breach of moral duty to enable a "top up" under the Family Protection Act 1955 to achieve a property allocation in line with current thought on this matter. Property ownership would be dealt with under the Matrimonial Property Act 1976 and the family protection legislation would only be needed to provide the surviving partner with the necessary support as outlined above.

4 *Partners' support duties*

Current lifetime support duties between partners are limited.⁷¹ There is no duty on either party to provide the other party with more than a basic standard of living either during the marriage or after it has ended. When the marriage ceases, the parties are expected to be self-supporting unless one party cannot meet his or her reasonable needs because of one or more of the identified circumstances.⁷² This is a limited provision and cuts out when that party can support him or herself, even if that person can only provide his or her own support at a meagre level compared with the standard of living the couple shared during their partnership.⁷³ The emphasis is on the independence of the parties once the partnership has ended.

The moral duty under the Family Protection Act 1955 is inconsistent with this concept of support duty. It has the potential to prolong the dependence of the surviving party on the testator and, in the name of "proper support", enables awards to be made which provide substantial amounts to allow the surviving party to live in a manner indexed to the standard of living the parties were accustomed to during the course of their marriage.

5 *Children's entitlement to property*

Children have no legal entitlement to any of their parents' property at any time before their parents' death, apart from what is required to meet their parents' support

70 See the Report of the Working Group on Matrimonial Property and Family Protection (Department of Justice, Wellington, 1988).

71 The Family Proceedings Act 1980, s 63(1).

72 Above n 71, s 64.

73 Above n 71, s 65(2).

obligations. Under the Matrimonial Property Act 1976, the children of the marriage have no entitlement to any of the matrimonial property in their own right, although property can be settled on the children of the marriage⁷⁴ and the housing of the children can be one of the factors considered in the distribution of the property between the parents. However, following the death of their parents, children can receive awards of part or all of their parents' estates under the Family Protection Act 1955.

6 *Parents' support duties towards children*

Under the Child Support Act 1991 parents have support obligations to their unmarried children under 19 years of age who are not financially independent.⁷⁵ The Child Support Act 1991 provides a formula for assessing the amount payable. Under this Act there is a limit on the amount parents can be required to pay towards the support of their children. Conversely, under the Family Protection Act 1955, there is no assessment formula or limit on the amount payable. The level of the award for the support of children is left to the discretion of the court, with the emphasis on the testators' moral rather than legal duty to provide for their children.

Unlike the duty under the Child Support Act 1991, the moral duty in the Family Protection Act 1955 is not limited to a support obligation for minor children. Under the Family Protection Act 1955 there is no age specified at which the moral duty of parents to make provision for their children ends. It can extend to the twilight of the children's lives.⁷⁶

7 *Children's support duties towards parents*

Although the family has traditionally been expected to provide care and support for elderly family members in need of such assistance,⁷⁷ there are no provisions requiring people to support their parents. Any moral duty people have towards their parents during their lifetime is enforced informally. The Family Protection Act 1955, however, allows for awards to be made for provision to parents from their children's estates.⁷⁸

8 *Financial duties of the extended family*

The extended family is of considerable significance to some ethnic groups within New Zealand.⁷⁹ There have been calls for the extended family to once again take some

74 Matrimonial Act 1976, s 26.

75 Child Support Act 1991, s 5.

76 *Harrington*, above n 36.

77 R Bonita "Older Women: A Growing Force" in PG Koopman-Boyden *New Zealand's Ageing Society*, above n 53, 189, 198;

78 Family Protection Act 1955, s 3(e).

79 C Macpherson "The Polynesian Family: A Polynesian Case Study" in PG Koopman-Boyden *Families in New Zealand Society* (Methuen, Wellington, 1978).

financial responsibility for its members,⁸⁰ but currently no legislation requires any family member while alive to bear any financial responsibility for the extended family. Under the Family Protection Act 1955, however, grand-children can, in certain circumstances, apply for an award from testators' estates.

9 *Other legally enforceable family duties*

The Children Young Persons and their Families Act 1989 and the Education Act 1989 are two of the few instances when the law enforces moral duties other than duties of property and support, between family members.

The Children Young Persons and their Families Act 1989 enforces moral duties of families to their minor children. It does so in a negative way by providing mechanisms for dealing with children in need of care and protection.⁸¹ The effect of the duties being negatively implied rather than positively stated is that a reasonably high threshold of "harm" has to be reached before the Act comes into play. Consequently families' responsibilities towards their minor children are set at a subsistence level. The Children Young Persons and their Families Act 1989 reflected a change in policy away from the responsibility for children and young people falling solely on the nuclear family, to a sharing of the responsibility by the whanau, hapu, iwi and family group.

The Education Act 1989 requires parents to ensure that their children attend school.⁸² But again, it is a limited responsibility that does not extend to requiring parents to facilitate their children's learning.

D *Informal Enforcement of Moral Duties*

Moral duties are often not legally enforceable but are controlled effectively by informal mechanisms which allow for variation according to individual circumstances. Regulation of disposition of property at death is more appropriately dealt with by these informal mechanisms.

1 *Social pressure*

The absence of laws to enforce moral duties between family members, such as the duty of adult children to take some responsibility for their ageing and/or ailing parents,

80 See for example F Donnelly *The World Upside Down* (Penguin Books, Auckland, 1988) 105.

81 The Children Young Persons and their Families Act 1989, s14 ie those who are likely to be harmed, ill-treated or abused; those whose development or physical, mental or emotional well-being is being or is likely to be impaired or neglected and those whose parents or guardians or other people having the care of the child or young person are unable or unwilling to care for them.

82 See Education Act 1989, ss 20 and 24. Unlike the Children Young Persons and their Families Act 1989 it does not place this responsibility on the wider family group.

or to force custodial parents to exercise access in respect of their children,⁸³ is notable. These moral duties continue to be satisfactorily performed because people are constrained not only by laws. People are influenced also by pressure from family members⁸⁴ and the wider community.

Social pressure is an informal mechanism for enforcing moral obligations both in life and after death. It can influence people's testamentary disposition decisions even though these decisions may not be revealed until after their death. The desire to be well thought of after death can act as a constraint on a person's testamentary freedom.⁸⁵ If people fail to respond to social pressure in their lifetimes, family members generally have no legal recourse. However, under the family protection regime after those people's deaths, family members can take legal action. If informal mechanisms are sufficient during life, they should also be sufficient after death.

Informal mechanisms do not always produce predictable results, but they provide flexibility, important in an area such as testamentary dispositions, where decisions are based not on legally defined or explicit rights but on socially and subjectively defined notions of moral duty.

2 Gifting

During their lifetimes people respond to their moral duties to financially assist, reward, compensate or indulge their families by gifting to them. Measuring the dimensions of inter vivos wealth transmission is an overwhelming task that as yet has not been accomplished. Accordingly, the extent and nature of this gifting is not known.⁸⁶ It is common knowledge that immigrants sometimes provide financial assistance to relatives remaining in their countries of origin, that parents sometimes assist adult children by providing gifts for their grandchildren, help with buying a house or car or establishing a business and, as discussed above, that adult children are increasingly required to assist elderly parents. No effort is made to enforce such inter vivos exchanges.

The interventionist provisions of the Family Protection Act 1955 that come into play after death contrast markedly with this freedom to respond to one's perceived familial duties during life which are only enforced by informal mechanisms.

83 This is despite the fact that access to one's parents is a child's legal right: see *Family Law in New Zealand* (Butterworths, Wellington, 1992) 6; *Cunliffe v Cunliffe* (1990) 9 FRNZ 537.

84 Finch and Mason, above n 57, 160 concluded from their data that most people mind what their relatives think of them because families are sets of social relationships people cannot exchange, they are lifelong relationships, they are important elements in peoples' definitions of self and are a group that can be turned to for assistance if need be.

85 Finch and Mason, above n 57, 160 found that most people mind what their relatives think of them even when their relatives are fairly peripheral to their everyday lives.

86 OL Browder Jr "Recent Patterns of Testate Succession in the United States and England" (1969) 67 Michigan Law Review 1303.

E The Prevailing Social, Economic and Political Climate

The concept of moral duty is unsatisfactory and inappropriate as a basis for determinations under the Family Protection Act 1955 in the prevailing social, economic and political climate.

1 Changes in the balance of responsibility between the family and the state

When the family protection legislation was first introduced those in need depended on support extracted from family members under the Destitute Persons Act 1894 or on charity. The family protection legislation was a mechanism for providing familial assistance from beyond the grave to those in need.

In the welfare state those in need receive welfare benefits. The recent changes in the funding of the education and health systems, however, indicate a movement towards greater familial responsibility. The current level of government support for people in need is lower than it has been in the past.⁸⁷ But despite the retraction of the welfare state, the prevailing ethos still places the ultimate responsibility for support for those who would otherwise be destitute on the state. Given this ethos, family protection legislation should not require testators' estates to assume responsibility for needy relatives, beyond any responsibility that the testators had for those needy people during their lifetimes.⁸⁸

Sussman, Gates and Smith⁸⁹ claim there is a high correlation between the increased exercise of testamentary freedom and the rise of societal complexity, paralleled by the development of institutionalised means of inter-generational economic transfers such as welfare provision. However, other writers have noted that in times of economic stringency there is a tendency for boundaries to be redrawn by the state, placing more responsibility on the family.⁹⁰

Finch and Mason's survey data revealed that people see the family as the first line of assistance for people in deserving cases, and/or when the help required is limited, or when the relationship is that of parent and child. They found, however, "no evidence at all of a general feeling that the family should normally be the first port of call for most people."⁹¹

87 See J Kelsey *Rolling Back the State: privatisation of power in Aotearoa* (Bridget Williams Books, Wellington, 1993).

88 In reality, people in real need are seldom likely to have relatives who leave estates of sufficient substance to make applying for provision under the Family Protection Act 1955 a viable option.

89 MB Sussman, J Gates and D Smith *The Family and Inheritance* (Russell Sage Foundation, New York, 1970) 7.

90 MA Crowther "Family responsibility and state responsibility in Britain before the Welfare State" (1982) 25 *Historical Journal* 131-145.

91 Finch and Mason, above n 57, 18.

2 *Changes to the status of women*

The current interpretation of the family protection concept of moral duty, that allows able bodied adult children to receive awards under the Act, has evolved in the following way. Originally an important aspect of the concept was the moral duty to meet the needs of dependent women. However, women's financial position has gradually changed. Women, married or single, are now likely to be self-supporting, or capable of being so if necessary. It has become "politically incorrect" to expect married women to be dependent on their husband's income. Furthermore, now that marriage is treated as a partnership the need to leave married daughters provision in case their marriages end and they are left destitute, has disappeared.⁹² Therefore nowadays no distinction is drawn between the provision made for married or unmarried daughters - the same moral duty applies to both. Furthermore, as it is also now unacceptable to discriminate between men and women, so consequently the same moral duty applies to men and women.

3 *Increased longevity*

Increased longevity has had four major consequences for the family protection regime. First, as a result of increased longevity people are older when they receive an inheritance from their parents. Generally they are well passed the child bearing and rearing stage and are, to varying extents, financially secure. Accordingly, it is usually difficult to construe any requirement on the part of the testators to make provision in their wills for their children to assist them with their family responsibilities. In this climate a duty to provide in one's will for one's grandchildren to assist them through the user-pays education system may be more appropriate.

Secondly, because of increased longevity, there is a longer period after retirement in which to spend one's savings. This depletion of resources that could otherwise be bequeathed at death is further compounded by the moves toward self-sufficiency in retirement, user-pays health services and geriatric care. The necessity to provide for oneself in retirement is in direct conflict with the moral duty to pass one's wealth on to one's family.

Thirdly, the longer people live the more chance there is that their marriages will end by dissolution rather than by death; increased longevity is related to a higher incidence of second and third marriages. Testators often leave behind them a web of relationships which can involve spouses, ex-spouses, de facto partners, natural and step-children. Complicated family configurations result in complicated moral duties. Many family protection claims are made by family members in these situations.⁹³ Difficulties with objectively ascertaining testators' moral obligations to family members is compounded when reconstituted families are involved. In these situations it seems particularly

92 *Knill and Bray v Bray, Bray and Bray* Unreported, 1 May 1990, High Court, Wellington Registry, A 484/85, 8.

93 *Re Wotton* [1982] 2 NZLR 691; *In Re Wylie* Unreported, 22 June 1990, High Court, Auckland Registry, M758/87 and 1811/1990; *In Re McMillan* Unreported, 9 April 1991, High Court, Rotorua Registry, M 6/90.

important that the testator's own judgment of their moral obligations as expressed in their wills is left to stand.

Fourthly, increased longevity means longer time spent with one's partner(s) which, along with the development of the companionate marriage, has resulted in a change in loyalties within the family. Increasingly the reality is that testators leave all or by far the largest portion of their estates to their partners.⁹⁴ This is somewhat out of step with the family protection concept of moral duty to one's children. Although from very early on it has been recognised under the family protection legislation that widows' or widowers' claims are paramount,⁹⁵ the understanding that testators also have moral duties to their children means in effect that often testators' desires to leave all their property to their partner is defeated by family protection claims by the testators' (frequently adult) children, very often from previous relationships.⁹⁶

Because of the moves towards self-sufficiency in old age and user-pays in the health system, it may be important for testators to leave their entire estates to their partners to secure some quality of life for the surviving partners. During their lifetimes the testators and the testators' partners will have established a standard of living for themselves. Generally the needs or desires of other adult family members cannot interfere with this standard of living during the testators' lifetimes. If testators leave their entire estates to their partners to enable them to live out their lives in the manner to which they are accustomed there is no justification for changing this situation by making an award under the Family Protection Act 1955 in favour of an independent adult child.

4 *Changes in needs and concepts of wealth*

Central to the concept of moral duty under the Family Protection Act 1955 are the inter-related concepts of need and wealth. Consequently changes to the concepts of need and wealth affect the moral duty. At times because of the direct connection between family property, either family farms or businesses, and people's means of earning a livelihood, real property was the major form of wealth and provided the main way of meeting people's needs. Although today real property in the form of people's homes is still generally their major asset, people are rarely dependent on family property for their survival. Tangible wealth is now commonly held in other forms such as share portfolios, insurance and superannuation schemes. Fortunes can be earned and lost overnight.

Although there are a number of historical precedents for limitations to testamentary freedom, often the restrictions have served purposes integral to the social economic and political organisation of the times, and accordingly the precedent value of these examples is diminished by the extent that they are context-bound.

94 OL Browder Jr, above n 86, 1307.

95 *In re Russell, Russell v Dunn and Others* (1907) 9 GLR 509, 510.

96 See above n 93.

It is possible that today one's education and resultant earning capacity is one's most valuable asset. If this is so, the crucial wealth transfer within the family is no longer occurring at death but is happening when parents invest in their children's education. The current moral duty on parents may, therefore, be concerned with the educational opportunities with which parents provide their children rather than the assets they provide on their death.

F *Testamentary Freedom*

Enforcement of moral duty under the Family Protection Act 1955 enforces principles of family inheritance while restricting testamentary freedom. This is unsatisfactory given the disadvantages of family inheritance and the advantages of testamentary freedom.

Testamentary freedom is regarded by some as an "important civil right".⁹⁷ There is some acknowledgement of this in the family protection regime to the extent that the court frequently reiterates that it is not the court's duty to rewrite the wills of testators. It is often said that "the Court must be very careful not to trespass on freedom of testamentary disposition"⁹⁸ and will only interfere as much as is necessary to remedy the breach of moral duty "as judged by the standards of a wise and just testator or testatrix".⁹⁹ Furthermore, the Family Protection Act 1955 provides that the court may have regard to testators' reasons for the dispositions in the testators' wills.¹⁰⁰ The Act, however, severely curtails individuals' testamentary freedom.

Testamentary freedom may be inconsistent with the notions of continuity of the family and the maintenance of social systems.¹⁰¹ However, it may also support the family and the social order by providing testators with the opportunity to maintain, reward or punish certain people, right a wrong or to bribe. While the anticipation of a guaranteed inheritance may provide an incentive to people to care for their family members it may be that there is more incentive to care for family members in the hope of earning an inheritance in a situation where there is no automatic entitlement.

Testamentary freedom allows people to make a contribution to someone or some organisation of their choice whether or not they have shown an interest in that person or organisation during their lifetime. Bequests made to charitable organisations by testators who have shown no interest in those organisations during their lifetimes are often overturned in family protection cases. In some cases it is impossible for the judiciary to know why testators have made such bequests. It may be because the testators were interested in particular organisations but for various reasons did not make those interests known during their lifetimes. Doing so at death may be the testators' way of

97 *Hunter v Hunter* (1987) 8 NSWLR 573, 576 per Kirby J.

98 *Re Wilson* Unreported, 5 November 1990, High Court, Christchurch Registry, M 19/90.

99 *Little v Angus* [1981] 1 NZLR 126, 127 per Cooke J.

100 Family Protection Act 1955, s 11.

101 See generally Sussman, Gates and Smith, above n 89, ch 1.

compensating for lack of attention during their lifetimes. Charitable bequests may simply be acts of altruism. Testamentary freedom makes such acts of altruism possible.

Testamentary freedom in facilitating the funding of charitable organisations from bequests is an effective form of wealth redistribution. The operation of the concept of moral duty in the Family Protection Act 1955 works against this wealth redistribution, perpetuating the status quo by entrenching inequality¹⁰² and concentrating the wealth within certain families.¹⁰³ Whereas family inheritance was appropriate in earlier times when an individual's livelihood was frequently centred around the family, it is increasingly inappropriate in a world where a more global perspective is required.

The inheritance of family wealth is not always in the interests of the beneficiaries. The knowledge that a person will receive an inheritance may weaken that person's incentive to work and the receipt of that wealth may corrupt the recipient.¹⁰⁴ That inheritance advantages heirs through no effort on their part is considered unfair by some.¹⁰⁵

VI CONCLUSION

Some determinations currently being made under the Family Protection Act 1955 are of a very different nature from those envisaged by the instigators of the original family protection legislation whose concern was to ensure the needs of families were met. Early on the court adopted moral duty as its basis for determinations under the Act. The use of the concept of moral duty as a basis for determinations now results in testators' wishes being marginalised.

The author is not denying that there may be a moral duty on testators that extends beyond the grave, to meet the needs of dependants where possible. Nor is the author denying that promises to leave bequests to family members in return for goods and services in their lifetimes create obligations that must be enforceable after death. In this regard the author is in agreement with the 1988 recommendations of the Working Group on Matrimonial Property and Family Protection¹⁰⁶ that family protection legislation should be revised to provide for interference with testamentary wishes only where it is necessary to do so to meet the financial needs of eligible claimants or to compensate claimants for contributions made to the testator's welfare or assets. The author is not

102 JA Brittain *The Inheritance of Economic Status* (The Brookings Institution, Washington DC, 1977) 4; M Barrett and M Macintosh *The Anti Social Family*, above n 65, 136.

103 Sussman, Gates and Smith, above n 89, 8, maintain that "severe restrictions on testamentary freedom in France have not been conducive to the development of charitable foundations and agencies having the functions of public service and research"; R Chester *Inheritance, Wealth and Society* (Indiana University Press, Bloomington, 1982) 1.

104 See generally RJ Kirkland Jr "Should You Leave It All to the Children?" *Fortune* 29 September 1986, 18-26.

105 JA Brittain, above n 102, 7.

106 Above n 70.

denying that families are important to most people¹⁰⁷ and that testators should be free to make bequests to family members, along with anyone else, as they see fit and according to their understandings of their moral responsibilities.

Rather, it is the concept of a generalised "moral duty" to one's family that applies irrespective of need as the basis for determinations under the family protection legislation that the author rejects. Given the current social, philosophical, political and economic climate and people's understanding of the family, the use of such a concept is now unsatisfactory and inappropriate.

¹⁰⁷ Finch and Mason's study, above n 57, confirmed the findings of earlier researchers that the family is important to most people.