DISINHERITING SPOUSES OR CHILDREN - CHARITY BEGINS AT HOME

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Contents

1. Preliminary

1. There are two main aspects to this paper.
2. The first concerns the pitfalls that exist when a testator wishes to benefit a charity, or someone else, in preference to looking after the interests of a surviving spouse, children or other dependants.
3. The second concern touches on the issues that may arise when setting up a charitable trust.
4. Both aspects are concerned with will making although in the latter case there is overlap with *inter vivos* dispositions.

2. Family Provision by Statute

5. Before legislative intervention occurred, a testator was at liberty to dispose of his or her estate in an unconfined manner.[1]

6. *Banks v Goodfellow*[2] discussed the concepts of testamentary freedom and that a will-maker was free to do as he or she wished. However, it was also noted that if a testator had not followed the *"instincts, affections, and common sentiments of mankind*", then that may provide additional evidence of absence of testamentary capacity.[3]

7. The public policy interest in legislating arose out of the heartlessness of male testators who were unconcerned to ensure that their widows were provided for out of their estates.[4]

8. The legislation which changed that position did so by giving effect to a moral duty owed by will-makers to their vulnerable dependants, such as spouses and children. New Zealand lead the field with the enactment of the *Testator's Family Maintenance Act 1900* (NZ).

9. In Queensland, the family provision laws were introduced using New Zealand's model, and the *Testator's Family Maintenance Act 1914* (Qld) was assented to on 17 December 1914 .[5] The various States' acts were interpreted by the High Court so as to assist uniformity of application in *Coates v National Trustees Executors & Agency Co Ltd.*[6] In that case, Dixon CJ said:

> "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."[7]

10. There are differences in wording between some of the States and it is not all together clear that ordinary canons of statutory construction would lead to the result that "*refined distinctions*" can be avoided.

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1 There was an exception in the case of dower, discussed by Rosalind Atkinson *in New Zealand's Testator's Family Maintenance Act of 1900*, Otago Law Review (1990) Vol 7 No 2 at pp 202-3.

2 (1870) LR 5 QB 549.

3 At 570.

4 *Shaefer v Schuhmann* [1972] A.C. 572, 584-585.

5 See also the *Testator's Family Maintenance Act 1912* (Tas), *Administration and Probate Act 1915* (Vic), *Testator's Maintenance and Guardianship of Infants Act 1916* (Nsw), *Testator's Family Management Act 1918* (Sa), *Guardianship of Infants Act 1920* (Wa), *Administration and Probate Ordinance 1929* (Act), *Testator's Family Maintenance Order 1929* (Nt).

6 (1956) 95 CLR 494.

7 Ibid at 507.

11. In Queensland, the Court's power is now found in ss 40 to 44 of the *Succession Act 1981*.

12. Section 41(1) is in the following terms:

> **41 Estate of deceased person liable for maintenance**
>
> (1) If any person (the ***deceased person***) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependent.

13. The expression "*proper maintenance and support*" used in s 41 of the Queensland Act differs from the expression which is used in the current New South Wales analogue.[8] There the "*family provision order*" that the Court is empowered to make is intended to provide "*for the maintenance, education or advancement in life*" of an eligible applicant.[9] Given the extensive case law which has developed in New South Wales and elsewhere as to the extent of the concept "*advancement in life*",[10] it seems unlikely that the two provisions have exactly the same meaning. Having noted that, conventionally at least, the urging of Dixon CJ set out above has generally been applied.[11]

14. In England, the legislative response came in 1975 in the *Inheritance (Provision for Family Independents) Act 1975*.

15. Interestingly, in the UK Act, a distinction is made as to the financial provision which can be ordered in favour of a child, as compared to a spouse or civil partner. A child is limited to receiving such financial provision as it would be reasonable to receive "*for his maintenance*".[12]

16. In the case of a spouse or civil partner, the provision which can be made is such amount as would be "*reasonable in all the circumstances of the case for a husband or wife [or civil partner] to receive, whether or not that provision is required for his or her maintenance*".[13]

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8 *Succession Act* 2006 (NSW).
9 Sections 3 and 59.
10 See the cases and texts collected by Hellen J in *Baird v Harris* [2015] NSWSC 803 at [70]-[102].
11 See e.g. *Darveniza (dec'd)* [2014] QSC 37 at [14]-[16].
12 *Inheritance (Provision for Family Independents) Act 1975* (UK) s 1(2)(b).
13 Ibid s 1(2)(a), (aa).

17. That legislation was recently considered by the UK Court of Appeal in *Ilott v Mitson.*[14] Lady Justice Arden delivered the leading judgment in which Ryder LJ and Sir Colin Rimer each agreed. One point which emerges is that the standard of living which an applicant had earlier experienced is not a significant consideration.

18. This same consideration emerges very clearly in the approach to s 41(1) of the *Succession Act* (Qld).[15]

3. Compromises and a Prohibition

(a) No assignment is possible

19. It is also important to note that the right of an applicant to seek provision out of a deceased's estate cannot be contracted away in advance of the death of the deceased or after the death of the deceased, unless the court gives its permission. That emerges from s 41(11) of the *Succession Act 1981* which provides as follows:

> **41 Estate of deceased person liable for maintenance**
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> …
>
> (11) No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the court.

20. The precursor of that section, s 3(1) of the 1914 Act, which was in identical terms, was construed by the Full Court of the Supreme Court of Queensland in 1943 in the decision of *Re Hatte*.[16] In that case, which concerned inter alia, an issue as to the making of a compromise of a claim for provision, each of the members of the Full Court delivered separate reasons. Macrossan SPJ held that:

> "Whatever the agreement was, it cannot preclude the respondent from applying to the court to make an order in his favour under the *Testator's Family Maintenance Act 1914*, nor can it oust the jurisdiction of the court to make such an order."[17]

His Honour then went on to discuss s 3(10) of that Act.

21. E.A. Douglas J held:[18]

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14 [2015] EWCA Civ 797.
15 See *Darveniza (dec'd)* [2014] QSC 37 at [74].
16 (1943) St R Qd 1.
17 At p 13.
18 At p 21.

> "The appellants first relied on the compromise of the applicant's claim. I think, however, that as an assignment of the applicant's right made before an order is granted is of no force, validity or effect (s 3(10), the executors could not purchase such right and obtain an assignment thereof. By the compromise this is what they have in effect done. In my opinion, such an agreement cannot be enforced. I agree with the decision in *Hooker v Guardian Trust and Executors Company of New Zealand* ([1927] N.Z. Gaz. L.R. 536)."

22. Philp J discussed the point as follows:[19]

> "I have said nothing as to the evidence regarding the settlement alleged to have been arrived at. I think we should follow and extend the principles set out in *Parish v Parish* ([1923] N.Z. Gaz. L.R. 712) and *Hooker v Guardian Trust and Executors Company of New Zealand* ([1927] N.Z. Gaz. L.R. 536), and having come to the conclusion that the policy of the law is to secure to an applicant the abitrament of the court despite any settlement he may attempt to make, I think we should hold that the judge in this case was entitled to give little weight as against Frederick to the *quantum* for which he was prepared to settle."

23. It is clear, that a compromise was considered to be within the section as it then stood and, as it has not changed, a judge at first instance will be bound to follow that conclusion and it seems unlikely that the Court of Appeal would depart from it.[20]

(b) Current Practice when a Compromise is made

24. The way that the Court currently approaches compromises is to, in effect, engage in an attenuated hearing to see if the compromise appears to be within range and made in circumstances where the Court has jurisdiction to entertain such an application.

25. The relevant principles as to approaching a compromise were set out by Mason P in *Bartlett v Coomber*.[21] The decision was cited with approval by Dalton J in *Affoo v Public Trustee of Queensland*.[22] See also *Abrahams (by his litigation guardian The Public Trustee of Queensland) v Abrahams*[23] where the observations in *Watts v the Public Trustee of Queensland*[24] were expressly approved by the Court of Appeal.

26. In *Bartlett v Coomber* (supra) Mason P, Hodgson JJA and Bryson AJA each delivered separate judgments in proceedings which were brought seeking a

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19 At p 25.

20 *Husher v Husher* BC9804102, Supreme Court of Queensland Court of Appeal, (21 August 1998). "(The Court) should (only depart from a previous decision of the Court of Appeal) cautiously and only when compelled to the conclusion that the earlier decision is wrong"

21 [2008] NSWCA 100 at [56] – [65]. In addition Hodgson JA and Bryson AJA further addressed the topic at [68] – [77] and [84] – [91] respectively.

22 [2012] 1 Qd R 408.

23 [2015] QCA 286 at [30], [35], and [44].

24 [2010] QSC 410 at [15].

declaration that a binding agreement to compromise a claim had been reached an ought to be specifically performed. The trial judge approved the compromise. On appeal, the appellant, who had sought to withdraw from the compromise, argued that the trial judge lacked the power to order the enforcement of the agreement, or alternatively, that His Honour in approving the agreement approached the exercise of the power in a way that involved relevant matters not being taken into account and irrelevant matters being taken into account. The specific complaint was that the primary judge failed to take into account the windfall that the compromise agreement gave to the first respondent which resulted in injustice to the beneficiaries under the deceased's widow's will.

27. The family circumstances were that the deceased was the father of the first respondent, who was his only child, but had had no contact with her from her birth in February 1994 to February 2004, although he did provide for her by way of child support payments. He died on 16 May 2005 having made a will on 2 September 2000 under which he left his entire estate to his mother, of whom he was the only child. His mother died 35 days after the deceased and left a will appointing a nephew, who was the first appellant, as her executor, and leaving $1/5^{th}$ of her estate to each of the appellant and three other nephews, and divided the remaining $1/5^{th}$ share in favour of two friends. The first respondent, after being advised by solicitors, had a tutor (litigation guardian), and reached a compromise with the solicitors representing the executors of both estates, settling the matter in her favour for 50% of the estate plus costs. The executor of the mother's estate then sought to withdraw from the agreement. The first respondent commenced proceedings, which approved the compromise as noted above.

28. Mason P held as follows:

> [32] Fourthly, and of direct relevance to this appeal, it was argued before the Judge that, since the agreement called to be translated into an order under the Act, it was subject to approval by the court. The argument advanced before Macready AsJ was that the compromise should be set aside and no order made as sought having regard to the "character and quantum of the relief claimed by the plaintiff and the nature of the interests represented by" the appellant (J9, 36).
>
> …
>
> [37] In the context of claims under the Act, one often encounters references to the court's "jurisdiction" to make a particular order in a particular estate. Thus, to give an

example of present relevance, de Groot & Nickel, Family Provision in Australia 3rd ed, Lexis Nexis Butterworths, Chatswood, 2007 at §8.7 states that:

> The court's jurisdiction depends not upon the agreement of the parties but upon the court's view of the question whether the deceased has made adequate provision for the applicant.

The learned authors cite three authorities which support this proposition and do so in the language of "jurisdiction" (Mudford v Mudford [1947] NZLR 837 at 838; R Archibald [1950] QWN 3; Re Julso [1975] 2 NZLR 536 at 538).

[38] In my opinion, "jurisdiction" and "power" are concepts that should not be blurred or subjected to ecthlipsis in the present context (see, Harris v Caladine (1991) 172 CLR 84 at 136). Macready AsJ had undoubted jurisdiction to entertain the application before him. The critical question in the appeal relates to the scope of his Honour's power to reject the settlement.

[39] In McMahon v McMahon (New South Wales Supreme Court, Young J, 2 August 1985, Young J said:

> An order [under the relevant NSW Family Provision Act] does not follow just because all the parties to the proceedings have agreed between themselves that such an order should be made. Whilst in general if a Court is asked by consent of all parties to make an order it will make an order, as I said in my judgment in Kalyk v Whelan 31 July 1985 where the legislature casts on the Court the duty of seeing that an order is only made in appropriate circumstances the Court is not bound to make any order tendered by all the parties by consent.
>
> Because of this it is necessary for me to look into the facts and circumstances of the plaintiffs and the defendant so far as they are relevant to a possible claim under the Family Provision Act.

[40] As the child of the deceased, the plaintiff was an eligible person by reason of para (b) of the definition of "eligible person" in s 6(1) of the Act.

[41] It followed that the Supreme Court's power to make an order in her favour stemmed from s 7 which provides that the Court:

> ... may order that such provision be made out of the estate ... of the deceased person as, in the opinion of the court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

[42] No one suggests that the deceased had made adequate provision in favour of the plaintiff during his lifetime or out of his estate. Accordingly, the requirements of s 9(2) may be passed over. Section 9(3) sets out the matters that the court may take into consideration in determining what provision (if any) ought to be made in favour of the eligible person. Of present relevance, the factors include:

> (c) circumstances existing before and after the death of the deceased person, and
>
> (d) any other matter which [the court] considers relevant in the circumstances.

29. His Honour then went on as follows:

> [56] I accept that the court's power to reject a compromise reached in proceedings under the Act is available both where the sum to be provided is too low or too high.

> Either extreme might indicate, for example, that the proceedings were being conducted through to completion for a purpose foreign to that of the Act and/or that some fundamental mistake vitiated the settlement process.
>
> [57] But it must be borne in mind that litigation under the Act takes place in an adversary context in which the active parties to the particular litigation are usually expected to be the best judges of what is in their own interests. The policy of Australian law encourages the settlement of disputes (see eg Baltic Shipping Co v Dillon (1991) 22 NSWLR 1 at 9 per Gleeson CJ and Uniform Civil Procedure Rules 2005, Part 20). Our legal system would collapse were it not for the fact that most disputes are resolved by agreement.
>
> [58] One of the principles giving effect to this policy is the principle that a valid compromise gives effect to an agreement that effectively supersedes the antecedent rights of the parties. The possibility of greater success and the risk of greater failure is transposed into an arrangement that frees the litigants and witnesses of the risks, costs and toils of further disputation. This principle is not displaced in the context of proceedings under the Act, although for reasons already outlined, the court may decline to give effect to a settlement if doing so failed to effectuate the specific policies of the Act, amounted to an abuse of process or otherwise offended public policy in a demonstrable way.

30. Hodgson JA, agreed substantially with the reasons of Mason P and Bryson AJA, and held:

> [68] The order made by the primary judge was made pursuant to s 7 of the Family Provision Act 1982 (the Act). It thus had to be justified as being "for such provision ... as, in the opinion of the Court, ought, having regard to the circumstances at the time of the order is made, to be made for the maintenance, education or advancement in life of" Ms Coomber.
>
> [69] It was also necessary that the Court be satisfied, in terms of s 9(2) of the Act, that "the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate ... is, at the time the court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person." Also relevant was s 9(3), which is in the following terms:
>
> > (3) In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration:
> >
> > (a) any contribution made by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to:
> >
> > (i) the acquisition, conservation or improvement of property of the deceased person, or
> >
> > (ii) the welfare of the deceased person, including a contribution as a homemaker,
> >
> > (b) the character and conduct of the eligible person before and after the death of the deceased person,

(c) circumstances existing before and after the death of the deceased person, and

(d) any other matter which it considers relevant in the circumstances.

[70] The parties to proceedings for such an order are generally just the applicant for the order and the legal personal representative of the deceased person: Re Lansear (1940) 57 WN(NSW) 181; Re S J Hall [1959] SR(NSW) 219; Vasiljev v Public Trustee [1974] 2 NSWLR 497. These cases were decided under the legislation that preceded the Act, but are still applicable.

[71] According to these authorities, the duty of the legal personal representative is either to compromise the claim or to contest it and to seek to uphold the provisions of the will (or the distribution on intestacy); and to that end, to put before the court evidence made available by beneficiaries that is relevant to the issues. The beneficiaries may be joined as parties, but generally only if it appears that the legal personal representative is not fulfilling this duty to represent their interests, or there is some other reason justifying this unusual course.

[72] As with other types of proceedings, agreements to compromise are possible, and indeed are to be encouraged. Such an agreement may be made by the parties to the proceedings, and the court will generally give effect to it. However, the court will need to be satisfied that the pre-condition in s 9(2) of the Act is fulfilled, and that the order agreed on is one which ought to be made in terms of s 7 of the Act. Because of the agreement, the court will generally be satisfied of these things without the need for any significant investigation of the evidence.

31. Bryson JA held as follows:

[84] The agreement could only be given effect by an order made by the Court, and the Court could only act in exercise of the power in s 7 of the Family Provision Act 1982. If claimants and executors agree to settle a Family Provision claim their agreement cannot have effect unless the Court exercises its power under s 7 and orders provision in accordance with the agreement. Whatever their agreement says, obtaining an order of the Court is impliedly a condition of its effectiveness.

[85] If the Court simply accepted the agreement of the parties and ordered the provision for which the agreement provides without considering exercise of its power under s 7 the Court would act in error; it would in substance fail to exercise its power.

[86] An order for provision always adversely affects property rights in estate assets which somebody would otherwise have. Alterations of property rights of this kind are authorised by law only if the Court makes a decision under s 7; not otherwise.

[87] Three different discretionary powers of the Court had relation to the decision of Macready AsJ to give effect to the agreement. One was the power in Civil Procedure Act 2005 s 76(3) and 76(4) relating to approval of an agreement made on behalf of the person under legal incapacity; the minority of Katherine Coomber. The exercise of this discretion was not challenged. The second is the power under s 7 of the Family Provision Act 1982.

[88] The third is the power of the Court to decline to make orders giving effect to a compromise where it is unjust to enforce the compromise or it is in the interests of justice that the matter proceed to trial. This power is associated with and illustrated by

> Harvey v Phillips (1956) 95 CLR 235 and Lewis v Combell Constructions Pty Ltd (1989) 18 NSWLR 528. Exercise of this power is often associated with the existence or the manner of exercise of the authority of counsel in making a compromise; there is no such question here. The Trial Judge considered this power and did not act on it. Although this power is mentioned in written submissions on behalf of the appellant, oral submissions do not rely on it. I do not think that it is involved in the appeal. The facts of this case could not be seen as presenting an enormity of the kind which leads the Court to act.
>
> [89] If the attacks which were made by counsel for the appellant on the decision of the Trial Judge are to succeed they must succeed as attacks on exercise of the power under s 7.
>
> [90] The appellant's counsel observed correctly that the agreement of the parties does not compel the Court to make an order under s 7, but the agreement can be taken into account. I regard this as correct because the agreement is within the wide range of circumstances which may be taken into account under s 9(3).
>
> [91] The circumstances to which the Court may have regard are wide and an agreement to settle a claim is part of them. There may be exceptions, but in almost every case an agreement which an executor has made in exercise of the statutory power to make compromises, with an understanding of the assets in the estate and the interests of the persons otherwise entitled to them, and with legal advice will ordinarily have an extremely strong claim for attention among the relevant circumstances. It is not simply pacta sunt servanda, because such agreements are made subject to the necessity of obtaining the Court's approval. Nonetheless the importance of such agreements is high.

32. In *Affoo v Public Trustee of Queensland*[25] Dalton J was concerned with a question as to whether a compromise of an application for family provision was conditional upon the court sanction and whether the court would sanction it. Her Honour held that the former was the case and that the final disposition of a family provision application calls for the exercise of the court's discretion and cannot be achieved by agreement or deed. The agreement was also subject to the sanction of the court because of s 59 of the *Public Trustee Act 1978* as a result of the applicant's disability. Her Honour held:

> [24] The final disposition of a family provision application calls for the exercise of the Court's discretion, it cannot be achieved by agreement or deed.[26] The rule has its origins in the policy that a person cannot by contract exclude the jurisdiction of the Court to make a family provision order. When parties to a family provision application make an agreement as to the final orders they believe ought to be made in the proceeding, a court will have regard to that agreement as a factor, usually a significant

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25 [2012] 1 Qd R 408.

26 *Lieberman v Morris* (1944) 69 CLR 69; *Smith v Smith* (1986) 161 CLR 217, 235, 249; *Bartlett v Coomber* [2008] NSWCA 100, [84]; *McKenzie v Lucas* [2010] NSWSC 1083. If para 7.18 of *Family Provision in Australia*, de Groot and Nickel (3rd ed) is to the contrary it is wrong, cf para 8.7 of the same edition.

> factor, in deciding what order to make in the exercise of its discretion.[27] Accordingly, whatever the terms of the agreement reached at mediation in this case, it could not dispose of the family provision application made by Mr Blair; an order of this Court was required to do that.
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> …
>
> [28] The approach taken by the Public Trustee on this application is that, like the agreement reached in Bartlett v Coomber, the agreement reached at the mediation was subject to the sanction of the Court pursuant to s 59 because of Mr Blair's disability, but also that the Court needed to consider whether or not to make an order finally disposing of the family provision application in terms of the agreement reached at mediation. In view of my discussion of the law, above, that position is plainly correct.

4. Ways Around the Prohibition

(a) Inter Vivos Gift

33. The only sure way that a testator who wishes to provide for a charity, rather than a person who is an eligible applicant for family provision can ensure that the gift to the charity holds, is to dispose of his or her estate *inter vivos*,

(b) Court Permission

34. The power of the Court to give permission is expressed in a negative sense in terms that any assignment is invalid unless made with the permission of the Court. Section 41(11) is essentially set out in two parts. The first concerns an assignment over a provision made before the order is made and the section goes on to say that that shall not be of any force, validity. The second case, where an assignment is made after the order is made, denies validity or effect unless made with the permission of the Court.

35. It is possible to regard the expression "*unless made with the permission of the Court*" as governing all that precedes so that permission can be given both before and after an order is made but there are two considerations that tell against that. The first is that the provision is very wordy, and unnecessarily so if that was the intention. That result could have been achieved simply by adding the words "*before or after an order is made*" in lieu of all that appears on the second and third line up to the word "*made*" on the third line, or deleting all those words absolutely.

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[27] *Bartlett v Coomber*, above, [57]-[58], [72], [90]-[91]. This case helpfully discusses the type of inquiry which a court will make when a "consent order" is brought before it on a family provision application.

36. Secondly, there is no comma before the expression "*unless made with the permission of the Court*". While it is possible to read punctuation into a legislative provision as occurred in the case of *Sir Roger Casement*[28] who was reputed to have been "*hanged by a comma"* which was not there,[29] the context here is very different and such a result would be unlikely. That construction is also consistent with the underlying public policy that proper maintenance, education or advancement of the family should not become a charge on the community where a deceased was able to provide for such persons. This was the view of the plurality in *Lieberman v Morris.*[30]

37. The same approach was adopted in *In Re Willert*[31] where Graham AJ held that a compromise, where part of the consideration was that the deceased's daughter agreed not to make a claim against the estate for provision, did not bar her application. Similarly, a wife's covenants in deeds of separation to the same effect have been held not bar a claim for maintenance out of the husband's estate.[32]

(c) Conditional Compromise

38. One possible approach is to get the court's permission to a compromise on the basis that the statutory right has been conditionally waived. That would entail reaching an accommodation with all eligible applicants. The agreement would only be operative in the event that an order was made after the death of the deceased. That would involve a case of a condition precedent being drafted. Such mechanisms are successful in relation to legislation prohibiting transfers of interests in property without a minister's consent[33] but the difficulty may be in the assessment of the considerations which will affect the granting of permission. Whether the court would give permission to an assignment made conditionally is as yet not decided.

39. The section does not, in terms, create a prohibition against making agreements but rather appears to address a legal change in status. Thus, the agreement could be drawn

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28 [1917] 1 K.B. 98.
29 The Treason Act 1351.
30 (1994) 69 CLR 69.
31 [1937] QWN 35.
32 *In Re Found; Found v Semmens* [1924] SASR 236.
33 See e.g. *Butts v O'Dwyer* (1952) 87 CLR 267.

so as to bind the parties to support making an application to court for permission in the event that any successful application for family provision was ever made.

40. In a circumstance where both parties were separately legally advised, where proper consideration passed between the parties, which appeared to be commensurate to their interests at the time, then *prima facie* it would appear logical that permission be given. However, that must be seen against the underlying public interest served by such applications, which includes keeping eligible applications properly maintained.

(d) Disentitling Conduct

41. Another approach could be to set up a basis for the operation of s 41(2)(c). Section 41(2) provides as follows:

> **41 Estate of deceased person liable for maintenance**
>
> …
>
> (2) The court may –
>
> (a) attach such conditions to the order as it thinks fit; or
>
> (b) if it thinks fit – by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or
>
> (c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

42. Attention must be given to the conduct which may be regarded as disentitling a person to the benefit of an order. The principles as to such conduct have been considered in a number of contexts. It is clear that the onus of proving disentitling conduct rests upon the person alleging it.[34]

43. In *Delacour v Waddington*[35] it was held by Dixon CJ, Kitto and Taylor JJ:

> "No doubt the wife's conduct in such a case may well constitute a material factor in considering whether an order should be made, but her conduct should not be regarded as disentitling her to an order unless it has been of such a character as to induce a court to hold that, in the circumstances, there was no moral obligation upon the deceased to make any testamentary provision for her. Indeed unless this be so, it is difficult to understand the basis upon which a husband or adult child may claim relief on the ground that they have been left, in the words of s 3, without adequate provision for their proper maintenance or advancement in life."

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34 See e.g. *In Re Paulin* [1950] VLR 462 at 473.

35 (1953) 89 CLR 117 at 127.

44. In *Lathwell As Executrix of the Estate of Gilbert Thorley Lathwell (Dec) v Lathwell*,[36] Pullin J, with whose reasons Buss JJA and Le Miere AJA agreed, held:

> "Conduct amounting to disentitling conduct must refer to character or conduct of such a nature as to entitle the court to say that the applicant has forfeited or abandoned his or her moral claims on the testator."

45. In *Daniels v Hall (as administrator of the estate of Daniels)*[37] E M Heenan J did not regard wasteful conduct as amounting to disentitling conduct.

46. While a number of older decisions have held that chronic drunkenness, desertion and adultery amount to disentitling conduct, the current position is quite different.

47. Hallen J in *Baird v Harris*[38] discussed the nature of the Court's jurisdiction in a manner which, it can be seem, gives some content to the concept of disentitling conduct, as follows:

> **[102]** Bryson J noted, in *Gorton v Parks* (1989) 17 NSWLR 1, at 6, that it is not appropriate to endeavour to achieve "an overall fair" disposition of the deceased's estate. It is not part of the court's function to achieve some kind of equity between the various claimants. The court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity. Nor is the purpose of the jurisdiction conferred by the Act to correct the hurt feelings, or sense of wrong, felt by an applicant. Rather, the court's role is of a specific type and goes no further than the making of "adequate" provision in all the circumstances for the "proper" maintenance, education and advancement in life of an applicant.
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> **[103]** The court's discretion is not untrammelled, or to be exercised according to idiosyncratic notions of what is thought to be fair, or in such a way as to transgress, unnecessarily, upon the deceased's freedom of testation: *Pontifical Society for the Propagation of the Faith v Scales* [1962] HCA 19 ; (1962) 107 CLR 9 ; (1962) ALR 775 ; (1962) 36 ALJR 1, at 19 (Dixon CJ); *McKenzie v Topp* [2004] VSC 90, at [63].
>
> **[104]** As Pembroke J said in *Wilcox v Wilcox* [2012] NSWSC 1138 at [23]:
>
> > "The court does not simply ride roughshod over the testator's intentions. The court's power to make an award is limited. The purpose of the discretionary power under Section 59(1) is to redress circumstances where "adequate provision" has not been made for the "proper maintenance, education or advancement in life" of the claimant. The adjectives "adequate" and "proper" are words of circumspection. They imply no more than is necessary. I should ensure that "adequate provision", rather than generous provision, is made, having regard to the burden on the defendant."

48. It is interesting that the decisions referred to above approach this question in terms of conduct entitling the Court to conclude that the applicant has abandoned or

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36 [2008] WASCA 256.
37 [2014] WASC 152.
38 [2015] NSWSC 803.

forfeited a moral claim on the testator. The concept of a moral claim harks back to the essential underpinning of the legislation discussed earlier in this paper. At the same time, there is some tension with the rather more prosaic formulation of the entitlement of an applicant for "*proper maintenance and support*". Thus, a gambler or drug-addict who has repeatedly approached a parent for support and receives such support may be thought to be in the category of a person who might exhaust parental goodwill or moral responsibility by repeatedly breaching promises not to gamble or take drugs of addiction again.

49. However, the difficulty with that is that these activities are conventionally now regarded as a manifestation of the underlying addiction, being part of the congenital weakness of the applicant. An illustration can be seen in *Pizzino v Pizzino*[39] where an applicant with gambling and substance-abuse problems was awarded a very substantial part of his mother's estate. It is also difficult to obtain a court imposed protective trust over such awards where such applicants are involved.[40]

50. Where business decisions go bad, or a potential applicant is simply ineffectual at conducting business, and at the date of the testator's death is impecunious, *prima facie*, that person will be eligible to make application. However, if that person has made representations to the testator which the testator has acted on to his or her detriment and to the detriment of third parties, before becoming impecunious, then it is at least arguable that the representations may amount to disentitling conduct.

51. Where a testator is faced with competing moral claims and, while alive, reaches an accommodation with one of those claimants and then proceeds to deal with his or her estate on the basis of that agreement on the express representation of the claimant that that is what should happen, then there would appear to be a great deal of force for the view that the testator has discharged all moral obligations to that claimant. The position may occur in the context of the death of one of two parents where there isn't enough to go around all of the children and, by a family agreement, one child is to receive the majority component of the deceased parent's estate, and the others are to receive the estate of the remaining spouse on his or her death. As people's

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39 [2010] QSC 35.

40 See e.g. *Stewart v Stewart* [2015] QSC 38 at [43] – [46].

circumstances change and vary, it is anticipated that such agreements may become relatively more popular. However, any such agreement will have to be drawn with a view to the above considerations.

5. Applicants v Charities

52. Failure to successfully adopt one of these courses will effectively, in many cases, result in the failure of a charitable gift.

53. An assessment of the case law in Queensland reveals that where a claim is made for provision out of the estate of a deceased, the claim almost variably succeeds in circumstances where the deceased has favoured a charity at the expense of a person who is eligible to make a claim as an applicant under s 41(1) of the *Succession Act 1981*.

54. The following examples may be given – *Powell v Monteath*;[41] *Goold v Field*;[42] *Re Reid;*[43] *Ellaway v Lawson*;[44] *Re Will of Wright (deceased)*.[45]

55. At appellate level, the question of the competing moral claim of a charity was discussed at length in *Hughes v National Trustees Executors & Agency Co of Australasia Ltd*;[46] *Vigolo v Bostin*[47] and *Coates v National Trustees Executors & Agency Co Ltd*.[48]

56. Obviously, every case will depend upon its own facts and circumstances. There is also the prospect that there may be a moral or legal duty owed by the testator to a charity by embarking upon a scheme of gifting to the charity upon which the charity then budgets. If that is done with the knowledge of all the eligible applicants who have been party to an agreement whereby they represent that no application will be made by then for provision or, if one is made and it is successful, the fruits of any such application will be provided to the charity, then the charity's position will be

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41 [2006] QSC 24 at [46].
42 [2005] QSC 310 at [36].
43 (9 July 1985), BC8521087.
44 [2006] QSC 170.
45 Douglas J (10 September 1999), BC9906087 at [14].
46 (1979) 143 CLR 134.
47 (2005) 221 CLR 191 at [13].
48 (1956) 95 CLR 494 at 510.

improved. It is next necessary to turn to the essential requirements for making a charitable request.

6. Fundamentals for creating a charitable trust

57. One of the distinctions between a conventional trust and a charitable trust is that a charitable trust has no objects but rather is a trust for purposes. Allied with this distinction is that there is no separation as to the interests held in property which is the subject of a charitable trust. There can be no separate owner of the beneficial interest in that property because the trustee simply holds it for the purposes of the trust.

58. Buckley J in *Re Vernon's Will Trusts* held:[49]

> Every bequest to an unincorporated charity by name without more must take effect as a gift for a charitable purpose. No individual or aggregate of individuals could claim to take such a bequest beneficially. If the gift is to be permitted to take effect at all, it must be as a bequest for a purpose, viz., that charitable purpose which the named charity exists to serve. A bequest which is in terms made for a charitable purpose will not fail for lack of a trustee but will be carried into effect either under the Sign Manual or by means of a scheme.

59. That is a statement which embodies the policy of the law that where monies are given to an unincorporated charity, a trust is impressed as a means of ensuring that the members of the association cannot take any part of the funds for themselves. Further, as was held by Kitto J in *Sydney Homoeopathic Hospital v Turner*[50] while the nature of the objects of a body which has been established for limited objects, may provide a donor with the motive for the gift, yet the gift may be a beneficial gift entitling the body to apply the property as it sees fit within the scope of its powers as they exist from time to time. It depends on the intention of the donor.

60. Another distinction is that the Attorney-General is ultimately the proper complainant in relation to maladministration of a charitable trust. This is consistent with the further complication which stems from Sir William Grant's seminal statement in *Morice v The Bishop Durham.*[51]

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49 [1972] Ch 300n at 303.

50 (1959) 102 CLR 188 at 221.

51 (1804) 9 Ves 399 at 405; 32 ER 656 at 658. His Honour excepted from the doctrine trusts for charity but required that every other trust must have a definite object. See also *Bowmen v Secular Society Ltd* [1917] AC 406 at 441; *Re Astor's Settlement* [1952] Ch 534 at 542 per Roxburgh J.

61. The statement was cited by Wilson J, in *Prosper v Wojtowicz*[52] who, at [23], held as follows:

> Equity will not uphold the validity of a trust unless it can enforce and control it. In the case of a fixed trust, unless all the beneficiaries can be identified, it is impossible for the trustee to identify the size of an individual share and to execute the trust, and impossible for the Court to enforce and control the trust. The principle was expressed by Lord Eldon in *Morice v Bishop of Durham* (1805) 10 Ves Jun 521 at 539; 32 ER 947 at 954 in these terms —
>
> > As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust; a trust therefore which, in cases of maladministration, could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the court can neither reform mal-administration, nor direct a due administration.

62. The underlying principle is that there can be no trust over the exercise of which the Court will not assume a control, because an uncontrolled power of disposition would be ownership and not a trust.

63. In *Korda v Australian Executor Trustees (SA) Ltd (ACN 007 870 644),*[53] French CJ also cited *Morice v Bishop of Durham* in canvassing the necessary elements of an express trust as follows:

> **[7]** The appellants did not dispute that the trust in contention, if it existed, would be an express trust. Given the need for AET to show an intention to create such a trust, it was not in the appellants' interests to dispute its classification. Certainty of intention is one of the three certainties necessary to an express trust -- the others being certainty of subject matter[54] and certainty of object.[55] The necessary intention is imputed when made manifest by an explicit declaration as in *Byrnes*.[56] In the case of a written text an "express trust" depends upon the construction of the written instrument. It does not arise from any inference of the law imposing a trust upon the conscience.[57]

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52 [2005] QSC 177.

53 (2015) 317 ALR 225

54 *Federal Commissioner of Taxation v Clarke* (1927) 40 CLR 246 at 283-4 and 286 ; [1927] HCA 49 per Higgins J; *Kauter v Hilton* (1953) 90 CLR 86 at 97 ; [1953] HCA 95 per Dixon CJ, Williams and Fullagar JJ; *Associated Alloys*at [29] per Gaudron, McHugh, Gummow and Hayne JJ; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 ; 300 ALR 430 ; [2013] HCA 35 at [116] (*Gillespie-Jones*) per Bell, Gageler and Keane JJ.

55 *Morice v Bishop of Durham* (1804) 9 Ves Jun 399 at 404-5 ; 32 ER 656 at 658; *Kinsela v Caldwell* (1975) 132 CLR 458 at 461 ; 5 ALR 337 at 339 ; [1975] HCA 10; *Gillespie-Jones*at [117] per Bell, Gageler and Keane JJ. Charitable trusts are not held void for uncertainty of objects if there is a clear indication of a general purpose of charity: see Heydon and Leeming, 7th ed, 2006, p 190 at [1061].

56 (2011) 243 CLR 253 ; 279 ALR 212 ; [2011] HCA 26.

57 *Cunningham v Foot* (1878) 3 App Cas 974 at 984 per Lord Cairns LC.

64. Underhill and Hayton in "*Law of Trusts and Trustees*"[58] described a trust in a particular way which is discussed by Pettit in "*Equity and the Law of Trusts*":[59]

> A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) *either* for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation, or *for a charitable purpose, which may be enforced at the instance of the Attorney General, or for some other purpose permitted by law though unenforceable*.

65. Jacob's "*Law of Trusts in Australia*"[60] makes the point that a trust is a fiduciary relation, but every fiduciary relation is not a trust. The learned authors cite Jordan CJ in *Erwin v Shannon's Brick, Tile and Pottery Co Ltd*[61] as follows:

> A person is not necessarily a trustee, whether express, implied or constructive, by reason merely of the fact that he owes fiduciary duties to others,[62]

66. The learned authors go on,[63] to identify that one reason why a fiduciary is not properly described as a trustee is that there is generally no property vested in the fiduciary which can be described as trust property and they instance the situation of a company and a director and a partnership.

67. The point is later made by the learned authors that a person may hold property which is not only charged with a payment to a third party but also on condition, creating an equitable personal obligation that such person pay that sum to a third party. They state that:

> However, there will still be no trust because the equitable personal obligation and the charge are quite separate and it cannot be said that the personal obligation of A to pay the money is annexed to the property BlackAcre.

68. In the text "*On Equity*", by Young, Croft and Smith,[64] in comparing trusts with other legal and equitable relationships and concepts, the learned authors observe that a trust relationship brings with it various proprietary remedies albeit that there are a number of equitable rights that fall short of those of a beneficiary against a trustee but which have some of the characterises of the trust, citing *Re Australian Elizabethan Trust*[65].

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58 (14th ed) at p 3.
59 (7th ed) at p 23.
60 (7th ed) LexisNexis Butterworths, 2006.
61 (1938) SR (NSW) 555 at 563.
62 At [202]; Approved in *Clay v Clay* (2001) 202 CLR 410 at [35].
63 At p 208.
64 Lawbook Co., 2009.
65 (1991) 30 FCR 491 at 502-503.

69. The learned authors go on to state:

> The significant difference between a trust and other fiduciary relationships is the existence of property upon which a trust is imposed. Fiduciary relationships can, and usually do, arise independently of property.[66]

70. The learned authors make essentially the same observation in relation to trusts and conditions and trusts and equitable personal obligations in terms of stating that conditions and equitable personal obligations are not annexed to any property.[67]

71. In s 106 of the *Trusts Act* the expression "*charitable trust*" is defined as meaning "*any property held in trust for a charitable purpose*". Part 8 of the *Trusts Act* proceeds on the basis that the administration of funds for charitable purposes is carried out through a structure described as a "*charitable trust*".[68]

72. Section 5 of the *Trusts Act* defines the expressions "*trust"* and "*trustee"* as follows:

> Trust does not include the duties incidental to an estate conveyed by way of mortgage, but with that exception trust extends to implied, resulting, bare and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative.
>
> Trustee includes—
>
> (a) a trustee corporation; and
>
> (b) any other corporation in which property subject to a trust is vested; and
>
> (c) any person who immediately before the commencement of this Act was a trustee of the settlement or in any way a trustee under the Settled Land Act 1886 and who, if that Act had not been repealed, would be such a trustee; and
>
> (d) a personal representative; and
>
> (e) a statutory trustee within the meaning of this Act.

73. Section 5 also defines the expression "*trust property*" as follows:

> Trust property includes—
>
> (a) property settled on any trust, whether express, implied, resulting, bare, or constructive; and
>
> (b) property subject to a trust or direction for sale, however arising; and
>
> (c) land which is lawfully vested in any person for an estate for the person's own or any other life, or for a term of years determinable on life not being a mere lease at rent, or for any greater estate not being a fee simple absolute; and

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66 At p 473.

67 At p 474.

68 Anomalously, s 105 also refers to "*Charitable Trusts*" is not the subject of the definition, that being limited to s 106.

> (d) land in respect of which any person has, by virtue of any will, a personal licence to reside for the person's own life, or for the life of any other person or persons, or for any lesser period.

74. In this context, it can be noted that s 106 of the *Trusts Act* contains an expansive definition of the expression "*charitable trust*". Once there is property held in trust, the property will be held for a charitable purpose and thus the Court is empowered by s 106 with a number of remedies for enforcement.

7. The Dove Trust

75. In a recent case, *Charity Commission for England and Wales v Framjee*[69] Henderson J was concerned to address issues arising concerning an unincorporated charity called the Dove Trust, which had failed. It operated through a website for charitable giving, which invited members of the public to make donations to the Dove Trust for the benefit of other charities or good causes of their choice. The Dove Trust benefitted by charging an administration fee of 3.99% on such donations, which was taken from "gift aid", a government benefit, which it claimed on eligible donations. An issue in the case concerned the status of the remaining funds held to the credit of the Dove Trust after it experienced financial difficulties and donations made through the website did not reach intended beneficiaries. The ultimate issue was whether the arrangements gave rise to a trust relationship with each of the donors.

76. Henderson J summarised a number of general principles as follows:[70]

> [28] Mr Akkouh prefaced his submissions by referring to a number of general principles, none of which I think is controversial. Slightly modified by me, they are as follows:
>
> (a) In order for a trust to be established, it is not necessary for a settlor to use the word "trust" or any other formal language, or to have any knowledge of trust law, so long as the traditional "three certainties" (of words, subject matter and objects) are satisfied: see generally *Lewin on Trusts*, 18th ed (2008), paras 4-01–4–18, and cases such as Paul v Constance [1977] 1 WLR 527 .
>
> (b) Where money is transferred to a recipient to be paid to a third party, and that money is not intended to be at the free disposal of the recipient, it is likely that a trust will arise: see Twinsectra Ltd v Yardley [2002] 2 AC 164, paras 68, 73–74,

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69 [2015] 1 WRL 16.

70 At [28].

per Lord Millett, and the discussion in *Lewin on Trusts*, paras 8-38–8–57, of Quistclose trusts (Quistclose Investments Ltd v Rolls Razor Ltd [1970] AC 567).

(c) Although not a pre-requisite, if there is a requirement for the money to be held by the recipient in a separate account, that will be a strong pointer in favour of the existence of a trust: see the Twinsectra case, at para 95, where Lord Millett referred to "the evidential significance of a requirement that the money should be kept in a separate account", and *Snell's Equity*, 32nd ed (2010), paras 22-015 and 25–034.

(d) The court is more likely to find that a trust was intended in a charitable context than in a commercial context. So, for example, in Jones v Attorney General (unreported) 9 November 1976 , Brightman J said, at p 3 of the transcript of his judgment:

> "a person who solicits money for a charity is a trustee of the money for the purpose of handing it to the charity. A member of the public who puts money in the box is a donor of his contribution, not distinguishable in principle from any other donor or settlor of trust funds."

(e) Whether the trust is an express trust for the third party, or a Quistclose trust in favour of the transferor with a power to apply the money in accordance with the stated purpose, will depend in particular on whether it was contemplated that there was a real risk that the purpose for which the money was paid might fail: see *Lewin on Trusts*, at paras 8-52 and 8–55.

77. Henderson J went on to cite from *Twinsectra Ltd v Yardley*[71] at [76] as follows:

> [29] It is worth quoting in this context what Lord Millett said in the Twinsectra case [2002] 2 AC 164, para 76:
>
> "It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in Gibert v Gonard (1884) 54 LJ Ch 439 , 440: 'It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose.' The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties … and it binds third parties as in the Quistclose case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust."[72]

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71 [2002] 2 AC 164.

72 Underlining added for emphasis. While Lord Millett was a dissentient, in the result, because of the view he took of accessorial liability, the above statements were apparently endorsed by a majority of the Court.

78. In addition, reference was made by Henderson J to the decision in *Re Church Army,*[73] which Cross J, in *Neville Estates Ltd v Madden*[74] at [860], cited as authority for the proposition:

> … That a donor does not direct a special application of his gift unless he subjects it to a trust which prevents the governing body of the charity from using it for its general purposes. The fact that he expects it to be used—and that it is in fact used—for a special purpose is not enough.[75]

79. Henderson J discussed the particular circumstances under which the donations in that case were solicited. His Honour went on at [37]-[40]:

> [37] In the course of the hearing, I suggested to counsel that another way of looking at the matter might be to view the establishment and operation of the website as giving rise to a sub-trust within the Dove Trust itself. In other words, the "charity giving" programme should be seen as a way in which the trustees decided to exercise the general charitable purposes of the Dove Trust. The attraction of such an analysis, it seems to me, is that it makes due allowance for the important fact that the Dove Trust was an established charitable trust with general objects when the website was established, and the fact that it was the Dove Trust to which donations were made. Against that background, an analysis which posits the creation of a multitude of separate trusts, each of which has a separate settlor and is wholly divorced from the terms of the trust deed, strikes me as unnecessarily complex.
>
> [38] On the other hand, it seems equally clear to me that the donations, once received by the Dove Trust, were subject to a trust, and were not merely the subject of contractual obligations. At this point I find the observations of Lord Millett in the Twinsectra case [2002] 2 AC 164 , para 76, quoted at para 29 above, compelling. The trustees came under a fiduciary duty to ensure that each donation would be used only for the purpose specified by the donor, because those were the terms on which the donation had been solicited. Furthermore, the trusts on which the donations were held were in my view clearly separate from the general charitable objects of the Dove Trust. The obligations were, in short, to ensure that the donations were passed on to the nominated recipients, together with gift aid where applicable, and without deduction of any charges apart from 3·99% of the net gift where gift aid could be claimed but not otherwise.
>
> [39] The idea that the trustees should retain any general discretion as to the destination of the donations would in my view be wholly contrary to the way in which the scheme was presented to intending donors. The need to ensure no breach of the Dove Trust's own charitable objectives was largely catered for by the requirement that donors should either choose from a list of charities provided by the Dove Trust or provide the name and registration number of any other chosen charity. To the extent that the trustees had any discretion at all, it can in my view only have been in relation to the relatively rare cases where the chosen recipient was not in fact a charity under English

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73 (1906) 94 LT 559.

74 [1962] Ch 832

75 The context of that decision concerned whether the Charity Trustees required approval in order to sell property which in turn depended upon whether the property was held in trust for a charity or for all or any of the objects or purposes thereof in terms of being an endowment within s 62 of the *Charity Trusts Act 1853*.

> law, or where there was good reason to question the credentials of the recipient. It may be that specific directions will be needed in due course to deal with exceptional cases of this nature, but at this stage I am concerned only with the question of principle whether the arrangements gave rise to a trust.
>
> [40] Taking all the circumstances into account, I feel no real doubt that the donations were impressed with a trust of the general nature which I have described. Although it may not make much practical difference, I prefer to view that trust as a global sub-trust established by the trustees under the aegis of the Dove Trust itself, and not as an arrangement which gave rise to literally thousands of wholly separate trusts. On any view, however, each donor was a separate settlor in relation to the funds which originated from him, and <u>those funds had to be dealt with by the trustees in a way that ensured they reached their specified destination,</u> subject only to a possible residual discretion where for one reason or another that could not be achieved. In the last resort, therefore, the difference between my preferred analysis and that advanced by Mr Akkouh may involve little more than a difference of emphasis, and a recognition that the donations could properly be kept by the trustees in a single fund, provided its component parts remained clearly identifiable within it. In this regard, I find the analogy of a solicitor's client account to be helpful.[76]

80. Finally, His Honour observed that there was no reason in principle why a single transaction could not give rise to both a trust and a contract, giving rise to the coexistence of legal and equitable rights and remedies, citing *Quistclose Investments Ltd v Rolls Razor Ltd.*[77] His Honour observed that that contract could give rise to third party rights, enforceable pursuant to the UK provision equivalent to s 55 of the *Property Law Act 1974*.

81. Reference should next be made to *Henry v Hammond*[78]where Channell J, with whose reasons Bray J agreed, was concerned with a limitations defence and the question of whether funds received by the defendant were held on trust. In that case, the point was made that where the recipient of a fund was not bound to keep the money separate, either in a bank or elsewhere, but was entitled to mix it with his own money and deal with it as he pleases, and when called upon, to hand over an equivalent sum of money, then that person was not a trustee, but merely a debtor.[79]

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76 Underlining added for emphasis.
77 [1970] AC 567 at 581G.
78 [1913] 2 KB 515.
79 At p 521, citing *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374.

8. Variation of Trusts

82. In *Law of Charity* by Dal Pont[80] the learned author suggests that a charitable trust can be varied pursuant to its own express terms, or pursuant to s 94 of the *Trust Acts*. Authority as to the former power relied upon by the learned author included *Soldier's, Sailor's And Airmen's Families Association v Attorney-General.*[81] The learned author suggests that the scope of the power is determined by a process of construction.[82]

83. In *Re Jewish Orphanage Endowment Trusts*[83] Cross J relied upon *Re Holloway's Trusts*[84]and applied ordinary principles of construction in determining whether the power of alteration, modification and variation set out there was transgressed.

84. Hubert Picarda QC, in *The Law and Practice Relating to Charities* (4th ed), expresses the view that charitable trusts can be revoked, varied or added to pursuant to a valid power of appointment or revocation contained within the trust deed.[85] He cites *Re Holloway's Trusts*[86] and *Re Harrison*[87] in support of the power to vary. So far as the power to revoke was concerned, he cited *Re Sir Robert Peel's School at Tamworth*[88] for the principle that a charity is no less a charity because its endowment is not perpetual but is subject to revocation, at least where the power, which included power to declare new non-charitable trusts, had not been exercised.

85. In contrast, in *Re Watson's Settlement Trusts*[89] it was held that a power of revocation which was not limited to the perpetuity period, and permitted a non-charitable trust to be declared, was void *ab initio.*

86. A well-drawn trust in favour of a charity should include clear powers of variation.

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80 LexisNexis Butterworths 2010.
81 [1968] 1 WLR 313.
82 At p.354; fn 96.
83 [1960] 1 WLR 344.
84 (1909) 26 TLR 62.
85 At pp 379-380.
86 (1909) 26 TLR 62.
87 (1915) 85 LJ Ch 77.
88 (1868) 3 Ch App 543.
89 [1959] 1 WLR 732.

9. The Rule against Perpetuities

87. The rule against perpetuities provides that an executory devise or other future limitation to be valid must vest, if at all, within a life or lives in being in 21 years and a possible for period for gestation after. The rule requires that there be more than a possibility, and the vesting must be good in its creation. The period is the life of a person or the survivor of any number of persons in being at the time of the creation of the future interest or estate and is described as "*the perpetuity period."* The rule applies to personal property as well as real property. In the case of a power, an objection made on the grounds that the person who may exercise the power or the time fixed by the terms of the power for its exercise may possibly not be ascertained within the perpetuity period will prevent the power from ever being effectively exercised.

88. However, once a charitable trust has come into operation, the rule against perpetuities is said not to be applicable and the charitable trust might be made to last for any period whether perpetual, indefinite or limited.[90] A gift may be made to charity by means of a power of appointment.[91] Where, however, the power to appoint is a power to appoint to charitable and non-charitable indefinite objects, that power is invalid just a gift to such objects is invalid and the subject matter of the gift is divided equally amongst those objects.[92]

89. In Queensland, the rule against perpetuities is ameliorated by the *Property Law Act 1974* (**PLA**). Specific reference can be made to ss 210, 219, 220 and 221 of the PLA.

90. The lesson here is that the charitable purpose should preferably be immediate and, in particular, not deferred beyond the perpetuity period.

10. Further Statutory Regulation

91. Reference should also be made to legislation enacted in England prior to the establishment of Queensland as potentially having application here.

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90 See *Chamberlayne v Brockett* (1872) 8 Ch App 206 at 211, *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531 at 581, 582.

91 *Cook v Duckenfield* (1743) 2 Atk 562 at 567.

92 *Re Clarke Bracey v Royal National Life Boat Institution* (1923) 2 Ch 407.

92. In 1736 the *Mortmain Act* was passed in England. The title of that Act was as follows:

> *An act to restrain the disposition of lands, whereby the same become unalienable*.

93. Section 1 of the *Mortmain Act* provided relevantly as follows:

> …. no manors, lands, tenements, rents, advowsons, nor other hereditaments, corporeal or incorporeal, whatsoever, … shall be given, ... or settled to or upon any person or persons … for the benefit of any charitable uses whatsoever; unless such gift ... or settlement ... be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) ... and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

94. However, while the general principles as to the reception of English law into the Australian colonies would result in that Act being applied, as overlaid by the New South Wales legislation, as at the date of separation on 10 December 1859,[93] this Act has been specifically concluded not to have application to the Australian colonies as appears by the decision of the Privy Council in the *Mayor, Alderman and Citizens of Canterbury v Wyburn.*[94]

95. The requirements of the *Mortmain Act* may be safely concluded not to have application in Queensland.

11. Conclusion

96. As can be seen, there are a number of difficulties facing a testator who wishes to set up a charitable trust. The first is that he or she should take care to ensure that those of his family who are potential applicants for family provision under s 41 *Succession Act 1981* are adequately provided for. The subtleties of the ways in which they can be done have been touched on in the paper. There is a significant difficulty because of s 41(11) of the *Succession Act 1981* which precludes a compromise being made both before or after the death of the testator, so as to prevent an applicant making application for family provision. I have discussed briefly the ways in which that difficulty may be approached.

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93 See *Ban v the Public Trustee of Queensland* (supra) at [40].

94 [1895] AC 89.

97. When it comes to setting up the charitable disposition itself and a separate charitable trust is sought to be created, care needs to be taken to ensure that it does not infringe the rule against perpetuities and further, that its terms are sufficiently certain so as to be enforced. While essentially all that is required is a general charitable intent, because the law will provide the means if the precise mechanism identified fails, it is still necessary to ensure that the purposes identified are charitable purposes.

98. Alternatively, a gift may be made to an existing charity in which the testator is interested and that is usually sufficient in itself. If the testator wants that charity to apply the funds for a particular purpose then that will have to be specified because administration of the charity is an integral part of conducting its own charitable purposes.

Don Fraser QC

22 December 2015