

## Testamentary Claims by Adult Children – The Agony of the “Wise and Just Testator”

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In a recent essay, Professor John Eekelaar of the University of Oxford and a well known specialist in family law, offers some helpful views on social obligations encountered in the community.<sup>1</sup> He points out that, even though a law-maker may wish to support a particular social obligation and encourage its observance, it does not always follow that the obligation should be enacted as law. For example, social obligations may be so strongly and uniformly observed that there is no need to legislate for their observance. Sometimes, again, it is better to let conflicting views be resolved outside the legal arena and so avoid “excessive intrusion into private and intimate behaviour”. And sometimes enactment of the obligation “would reveal and require express resolution of deep-seated political and social dilemmas”, a resolution that the law-maker would rather defer.<sup>2</sup>

Professor Eekelaar’s analysis can be applied with particular force to adult children’s claims under the Family Protection Act 1955. The recognition of these claims is a vexed matter. The legislature asks the courts to decide whether the will-maker has made “adequate provision ... for the proper maintenance and support” of the adult child. The courts, applying these words, determine the extent to which conventional social values are applied by law to errant will-makers. The touchstone for decision, say the courts, is the “moral duty” of the will-maker.<sup>3</sup> The rhetorical vehicle by which the courts introduce social values is the idea of a supposedly “wise” will-maker, who is a “just” but not a “loving” or “generous” person.<sup>4</sup> But is it all a good idea?

In this article, we will explore the results of the courts’ work, with particular reference to two recent decisions of the Court of Appeal, *Williams v Aucutt*<sup>5</sup> and *Auckland City Mission v Brown*.<sup>6</sup> We emphasise a contrary theme, which is also repeated in the cases. It is typically said that “the Family Protection is not a general equity vehicle”.<sup>7</sup> The Court is not to “refashion the will according to broad conceptions of overall fairness”.<sup>8</sup> The intentions behind the two rhetoric images are inconsistent. Our thesis is that the image of the “wise and just” will-maker is placed in the rack by these inconsistent intentions. As a result, the courts’ practices are incoherent. The Court of Appeal’s decisions have not

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<sup>1</sup> J Eekelaar, “Uncovering Social Obligations: Family Law and the Responsible Citizen”, in *Making Law for Families* (M Maclean ed, Hart Publishing, Oxford 2000), 9. He refers specifically to testamentary claims at 10.

<sup>2</sup> At 16-18.

<sup>3</sup> Subsequently acknowledged by the legislature in a subsidiary provision: s3(2).

<sup>4</sup> *Allardice v Allardice* (1910) 29 NZLR 959.

<sup>5</sup> [2000] 2 NZLR 479; [2000] NZFLR 532.

<sup>6</sup> [2002] 2 NZLR 650.

<sup>7</sup> Eg *Re Green* [1995] 330, 335.

<sup>8</sup> Eg *Re Wilson*, HC Christchurch, M 19/90, 5 November 1990, 13.

eliminated that incoherency. They have, by implication, reduced its ambit. Perhaps that is the best that can be done, and even that could only be achieved by narrowing the scope for the direct application of community morality.

We begin by raising some essential theoretical questions. Then we will look at the Law Commission's radical proposal to limit adult children's claims under the Act, within very narrow confines. Finally, we will look at the Court of Appeal's response to that proposal, and consider its implications.

Those who have read our Dean's Guest Memorial Lecture, printed earlier in this issue of the review, will realise that this article, like his, is designed to expose the weakness of family law, when it relies on unrefined versions of conventional morality. We offer this article as a tribute to Professor Henaghan's pioneering work in family law, and follow in his footsteps as we explore the same theme in a different context.

## 1 The legislator's calculations

### (a) *A little history*

Some of the difficulties the courts experience in their application of the Family Protection Act can be traced to the Act's origins. The first Act was the Testator's Family Maintenance Act 1900. It was the result of a compromise between two different proposals for dealing with testamentary abuse. The first proposal, the Limitation of Power of Disposition by Will Bill initiated by Sir Robert Stout in 1896, was derived from the Scottish system. As its name suggests, it limited the power of testation to 1/3 of the estate and guaranteed to the surviving spouse 1/3 and to the children a further 1/3 of the estate. If the testator was survived by either a spouse or children but not both, up to 1/2 of the estate was freely disposable.<sup>9</sup>

This proposal met with strong opposition. The interference with testamentary freedom was too great and it would reward the undeserving. A second Bill reducing the reserved portions failed for the same reasons.<sup>10</sup> Concerns about testamentary abuse remained, however, particularly when it rendered family members destitute and dependent on the State.

This latter concern prompted a proposal of a very different nature. The Testator's Family Provision out of Estate Bill 1898 retained testamentary freedom, but gave the courts the power to override wills of testators who had not made "due provision for the maintenance and support" of their spouse or child.<sup>11</sup> This proposal received general support. Now the debate centred on what was "due provision" and thus on the point at which judicial intervention should be permitted.

McNab was responsible for the draft legislation at this time and had supported Stout's fixed shares proposals. He favoured a liberal approach, not limited to the provision of bare necessities. Some MPs were of the view, further, that family property should pass down the family line. But these were both minority views. The majority preferred a bare maintenance provision, an extension of the

<sup>9</sup> 1896 NZPD vol 92 col 586.

<sup>10</sup> Limitation of the Powers of Disposition by Will Bill, 1897 NZPD vol 98 cols 546-8.

<sup>11</sup> 1898 NZPD vol 101 col 563.

Destitute Persons Act, aimed at ensuring that the burden of providing the necessities of life fell upon the family rather than the State.<sup>12</sup>

It was in those very narrow terms that McNab introduced his last Bill in 1900. He renamed it the Testator's Family Maintenance Bill and expressly linked it to the Destitute Person's Act.<sup>13</sup> However, during the committee stage, McNab inserted the word "proper" before "maintenance and support", thus paving the way for the much broader approach which the courts ultimately adopted.

The Testator's Family Maintenance Act 1900 thus started life meaning different things to different people, and it was left to the courts to determine which direction it should take. Not surprisingly, the judges were as torn as the parliamentarians had been. Initially they followed the majority view, holding that adult children could succeed only if they came within the provisions of the Destitute Person's Act.<sup>14</sup> There were some, however, who regretted this very conservative approach and wanted to intervene when children were unfairly disinherited.<sup>15</sup>

Among these dissentients was Stout, who by then had become the Chief Justice. He got his way, to a certain extent at least, in *Allardice v Allardice* in 1909. In that case the Court of Appeal held that destitution was no longer a pre-requisite for adult children's claims. The child's and the family's station in life, the testator's means and any other circumstances had to be considered.<sup>16</sup> This was the turning point in the Act's interpretation. The Act's very narrow origins, based on financial need and predicated on the desire to avoid dependence on the State, were abandoned and the broader view, supported by McNab and others, prevailed.

We have every respect for the participants in this early debate, one of whom we are proud to acknowledge as the founding lecturer of our own law school. But it shows that the legislation evolved from politics and personalities, rather than from any clear view of the role of the courts as interpreters and appliers of conventional morality.

If the legislature were reviewing the same question today, one would hope that government officials would ask some searching questions before allowing the legislation to proceed. First, what evidence is there that most people do recognise a duty to provide for their adult children in their wills? Second, what reason does the legislature have for taking notice of these values? Finally, is there an assurance that these values can be fashioned, either in the statute itself or by the courts, so the law will work in a defensible and predictable way?

(b) *Finding out what the conventional morality is*

But for one circumstance, this question would not have detained us long. For the purpose of this article we are prepared to assume that most people feel some sense of moral obligation to their adult children when making their wills.

<sup>12</sup> Compare the social policy nowadays, identified by the NZLC discussion paper, [92].

<sup>13</sup> 1900 NZPD vol 111 cols 503-4.

<sup>14</sup> *Re Rush* (1901) 20 NZLR 249, 253-4; *Handley v Walker* (1903) 22 NZLR 933; *Re Cameron* (1905) 25 NZLR 907.

<sup>15</sup> *Munt v Findlay* (1905) 25 NZLR 488.

<sup>16</sup> (1909) 29 NZLR 959, 969-70.

However, it is necessary to spend a little time with the way that the question is dealt with in *Williams v Aucutt*.

The principal judgment<sup>17</sup> seeks out evidence of community opinion about will-making. It rightly acknowledges that “there are difficulties for the Courts in making their own unaided assessment of current community attitudes in a complex and changing social environment”.<sup>18</sup> The judgment appears to suggest that the Court must do the best it can with published surveys and the like, so that community values will contribute to the administration of the jurisdiction.

However, the question it did ask, and apparently found the answer to, was only tangentially related to whether the community believes will-makers should provide for their adult children. The concern the Court of Appeal felt was that “some [court] orders in recent years may have been out of line with current social attitudes to testamentary freedom”.<sup>19</sup> Now that is an interesting and useful thing to know, and one might look for evidence of it in, for example, public complaints to MPs or to bodies responsible for law reform. But, when the question is addressed as the court framed it, public anxiety may reflect, not what members of the public believe about their own moral duties, but rather a dislike of the way the courts are enforcing those duties, or indeed an objection to the courts enforcing them at all. So the Court had twisted the question around to make it almost a political one.

Even allowing that this may be the best that can be done without survey evidence, one finds curious features in the judgment. The Court refused to place weight on the Report of the Law Commission, which commented that in its own recent public consultation, 90% of the responses received accepted the Commission’s criticisms of the present system.<sup>20</sup> It preferred instead<sup>21</sup> the much earlier Report of the Working Group on Matrimonial Property and Family

<sup>17</sup> That of Richardson P, and Gault, Keith and Tipping JJ. Blanchard J wrote a concurring judgment.

<sup>18</sup> *Williams v Aucutt* [2000] 2 NZLR 479, [44].

<sup>19</sup> At [45].

<sup>20</sup> NZLC Report, [35]. One of the present writers was a signatory to the discussion paper which led to the Report, and was (until January 1997) in charge of the processes which followed it. He would cheerfully concede that the public consultation undertaken by the Commission was not the equivalent of survey of uninformed and independent community practice and belief. Nor was it a statistical sample; much of the earlier consultation had taken place with lawyers and other professionals, and these people were more likely to respond to the paper than the public would be (though every effort was made to widen the response). The subsequent Report (which was prepared after the writer left the Commission) made no attempt to separate out “lay” from “professional” opinion in making its assessment. On the other hand, the responses provided the sort of information that politicians and judges rely on every day, as regards the issue that the Court of Appeal chose to address.

<sup>21</sup> The Court (after doubting whether the Law Commission Report was an “adequate barometer of community opinion” [45]) offers this substitute evidence, admittedly, only as one of several “pointers”. But the other “pointers” are (a) an article by one of the present authors which surveys the outcomes of High Court decisions; and (b) a decision of the Court of Appeal itself, cited only for the legal proposition it establishes. By a process of elimination, this leaves the Working Group’s Report as the only possible pointer to “social attitudes”.

Protection.<sup>22</sup> That body received no public submissions at all. Apparently the qualifications of its members, which were solemnly recited,<sup>23</sup> provided an adequate substitute.

Those qualifications were indeed impeccable, and they became even more impressive as members gained further distinctions in life. But it is not clear to us why being a law professor, or subsequently becoming a Judge or a Chief Justice or an Attorney-General, made the members of the Working Group better able to divine community opinion. Certainly one of the members of that group (Margaret Wilson) had considerable political experience at that time – quite independently of her membership of the Law Commission – and she rose to even higher political eminence later. But it appears that the members of the Working Group were not selected for their knowledge of community opinion, nor were they expected to bring that knowledge to bear as their primary qualification for taking part in the Working Group’s deliberations.

But let us assume for the moment that the Working Group did in fact offer an assessment of community opinion which was reliable at the time, and 12 years later it is to be preferred to that of the Law Commission. Then there is an even more curious thing. What the Court of Appeal did was diametrically opposed to what the Working Group had to say. The Working Party recommended (as is indicated by an extract quoted by the Court<sup>24</sup>) that claims should not be open to those who perceive they have a “right” to inherit a proportion of the estate, based on a “blood relationship regardless of the need for support”. Such claims are objectionable because, especially in small estates, they crowd out the rights of those family members, such as spouses, who have genuine needs claims on the estate. Yet, as we will see, the claim based on relationship alone (which we will term, the “belonging” claim), is the one that the Court of Appeal chose to emphasise and support.

This is, to our minds, an object lesson in the fragility of a system in which judges directly ascertain and assess the raw state of community opinion. The members of the Court who joined in this judgment had, between them, an enormous pool both of legal skill, and widely varied professional experience. At least two of their number had held major positions involving social inquiry and public consultation. Yet the evidence available to them was insufficient to allow them to form any judgment at all. So they addressed a different question, assessed conflicting social evidence as they would have assessed the personal credibility of a witness, and then proceeded to a conclusion that went contrary to what their own preferred evidence was telling them. The evidence of community opinion did not point in that direction, and we say (with respect), that it should not have been relied on as implicit support for what was done.

(c) *What to do with community values*

Assuming the legislator has reliable information about what the community expects of will-makers, what is the next step? What further assumptions must

<sup>22</sup> *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988).

<sup>23</sup> *Williams v Aucutt* [2000] 2 NZLR 479, [46].

<sup>24</sup> *Idem*.

be made, before the legislator takes them into account in furthering legislative proposals? Are these assumptions justifiable? We can only offer the most tentative and general of conclusions, particularly to the last of these questions. But we need to know the possibilities, so that we can put arguments that we meet in a wider context.

Let us begin with the information we have about community values, couched in the form of a hypothetical example.

Mother leaves three-quarters of her property to her two children. But, without apparent reason, she leaves one child half of her estate, while the other child gets only a quarter. And she leaves the remaining quarter of her estate to the Association for Anglican Women. This is an organisation to which she has never belonged, and understandably so, because she is a Presbyterian. But she is taken by the Association's advertisement for funds in her local newspaper.

Has Mother acted unfairly to one of her children by leaving the property to them unequally? Has she acted unfairly to both of them by including the Association in her will? Probably most people would say, yes, there is at first sight an element of unfairness here. Perhaps it can be cured if Mother could have offered reasons for the difference, which the children would understand in the context of their own particular relationship with their mother. The gift to the Association might be explained if, for example, she had an old deceased friend who had belonged to it for many years. The larger gift to the one child might be explained if there was a family tradition of giving more to an elder child. Perhaps, in this family, the elder child is expected to continue to offer assistance to a younger sibling, or another family member.

So we can accept without too much difficulty that there is a conventional morality, concerning the making of wills, though of course it is difficult to see where that morality points when these additional facts are taken into account. We can probably assume also that the mother is aware of that morality, and feels its pull along with everyone else.

But it does not follow, from the fact that such a conventional morality exists, that it should become law. What reasons might the legislator offer – or, more likely, what unarticulated assumptions are likely to be made – when enacting legislation based on these values? Are they good ones? We will follow Professor Eekelaar's analysis of the various assumptions that may be made about the enactment of conventional morality.<sup>25</sup>

*Predictive assumptions.* The first type of assumption occurs where the law-maker, knowing that these obligations exist, assumes that the law can be framed relying on their performance. The law itself is designed to bring about some larger end. Thus, in Mother's case, the law-maker responds, for example:

Yes, how interesting. Now how can I use the fact that people generally want to leave their property to their children, to the advantage of the New Zealand economy? If I can, should I legislate to ensure that the few recalcitrants like Mother are brought into line, or would the resulting improvement to the economy be so marginal that it doesn't really matter?

<sup>25</sup>

Supra note 1, 10-12.

This way of handling family law problems appears cynical, and creates obvious problems of calculation. Perhaps it is better confined to family purposes. Assume Mother's heart lies where her money is. Reconciled to the fact that the law imposes an Ultimate Obligation on her to pass her property on to her children, she will become sweeter-tempered towards them in her lifetime, and this will improve both her children's upbringing, and the support she receives from her children in her old age. Well perhaps she will or perhaps not, but it may be worth a try anyway.

Even assuming such reasoning is plausible, there is an underlying technical difficulty which makes the assumption – and many others like it – dubious. Most people will act in the desired way whether or not there is a legal obligation. The only people who act differently because of the law will be those who know of it. Yet the general public's state of knowledge about their will-making obligations appears to be very low (and has not been helped by a series of advertisements by one organisation, which suggests that one's will is one's law). Unless there is much better general knowledge of the likely consequences of the Family Protection Act on one's own estate, it is unlikely to have much impact on people's daily lives.

It is readily understandable why not many people rely on this type of argument when arguing for the retention of the jurisdiction to deal with adult children's claims against their parents' wills.

*Normative assumptions.* The law-maker approves of the social obligations as a fact, and assumes that they should be observed, without actually endorsing them as part of a personal or legal code of conduct. Such a law-maker would say, in Mother's case, for example:

Yes, I know that people do generally feel obliged to leave their property to their children equally, and the children feel upset if they don't. I don't need to agree with them, to be able to feel for them in their distress. Now it's my job as a law-maker to alleviate distress if I can, and to meet reasonably felt needs in society. So let's have an Act which allows Mother's children to make a claim against her estate, and gives the courts power to put things right.

It is understandable that a legislator might adopt such an attitude, when dealing with social conventions which vary a great deal across societies and cultures. But it is odd to test the need for a law, not by reference to the *injustice* it causes, but instead by the *sense* of injustice and loss it creates. If a thing is unjust (as independently ascertained), then the victim's sense of injustice is supernumerary. If it is not unjust, the victim's sense that it is unjust is mistaken and irrelevant.

Nevertheless such reasoning does appear from time to time. Indeed, it can be discerned in the principal judgment of the Court of Appeal in *Williams v Aucutt*. The judgment says that children left out of their parent's will experienced a sense of distress based on "a justifiable sense of exclusion from participation in the family estate".<sup>26</sup> The judgment conveys the court's emotional detachment

<sup>26</sup> *Williams v Aucutt* [2000] 2 NZLR 479, [52].

from that sense of distress. The distress can be remedied, without the court having to adopt a strong tone about rights and wrongs. A similarly detached view will be found in the Court's judgment in *Auckland City Mission v Brown*.

*"Value" assumptions.* The law-maker assumes the social values are correct, and adopts them as the lawmaker's own standard for law-making. In Mother's case the law-maker might say, for example:

Yes, I entirely agree that people should not be able to make such wilful dispositions, even though it's called their 'will'. Mother's been beastly to her children before, and now, at the last opportunity she had to put things right, she's messed it up yet again. It shouldn't be allowed at all. Mother's estate will be divided equally between the two children.

In other words, you do not leave the matter at the level of social preference. You must actually espouse the view you are putting forward, and support it by reference to criteria of justice on which most or all reasonable people can agree.

Despite the fact that, as we will see, such a justification is not readily available, this type of stance (if not the roughness and lack of urbanity in its expression) is frequently found in judgments of the High Court when it disposes of Family Protection claims by adult children.<sup>27</sup> We venture the thought that, when you are in the front line, you have to know the difference between right and wrong, and to believe that it is plain for all to see. It is only when you are removed to a higher plane, as were the Law Commission and the Court of Appeal, that you have the luxury of a more detached attitude. But then you can see how partial and relative are the moral assumptions made in the front line.

We leave these questions, then, with the impression that, no matter what purpose a legislator may have in requiring will-makers to conform with conventional moral standards of will-making, the case for doing so is far from persuasive.

*(d) Incorporating conventional values into legal rules*

Now we come to the principal question we want to address in this article. Is the conventional morality we have described capable of being focussed in a satisfactory way? If not, then the balance will tilt, perhaps decisively, against having a jurisdiction which allows adult children to make claims against their parents' wills.

<sup>27</sup> For example, in *Re Miller, Brown v Harrop* [2001] NZFLR 352 the High Court referred at some length to the deceased's "irascibility and meanness of spirit" towards his family members.[36-44] He had "never fully discharged his duty as a parent" to his daughter and he "denied himself the opportunity of making up for the neglect of a lifetime". [44] A random selection of other cases revealed a similar stance, eg "I am sure the deceased knew exactly why Lorna, Harvey and Valmai were angry with him. I am sure he understood that the seriousness of his comments required more than an oblique invitation. They required a direct and fulsome apology ... There is no doubt in my mind that the deceased failed in his duty to Lorna. The reasons will be self-evident." *In re McKenzie, Thomas v McKenzie* [2002] NZFLR 782, [49]-[50].

Some may argue that, because we are dealing with family law, we have to expect something less than the law's normal standards of clarity and predictability. Professor Eekelaar, in the article we have mentioned, opposes that view. He considers that family law is, or should be, robust enough to meet ordinary standards of law-making. He concludes his own article thus:

If, as seems likely, the bulk of the material of family law is reducible to a net-work of personal rights and obligations, and these powers and obligations need not necessarily be seen as emanating from an entity designated as "the family", would it not be better to re-characterise the domain of family law as that of "personal rights and obligations"? And if these rights and obligations were to include social and legal ones, what a rich field would be opened up.<sup>28</sup>

We concur with this aspiration, though we would add that the end product may look different from family law as it is now. We intend no disparagement of the subject or of those who practice it. What we say is that all law, whether it be family law or the general law of obligations, should meet appropriate quality standards. There should be no exceptions. We will call these standards the "criteria of legality".

Conventional morality does not often attain that degree of precision. To illustrate this point, we return to our hypothetical example. Mother's dispositions may well be frowned upon in general terms. But how might conventional morality apply if the other facts we mentioned, by way of defence, turned out to be true? The position becomes complex and the general public gives up, saying to the judges, "that's your job, you decide". And then the lawyers, judges and academics have to go to work to create a system of symbols, principles, internal logic and rules which we call the general law. Suppose we draw an idea from conventional morality, such as "parents should leave their property to their children", and find that the system cannot elaborate and define it in any coherent way. Then we may have to discard the idea, and possibly even abandon the whole enterprise of submitting this particular form of activity to the rule of law.

No doubt the criteria of legality to be applied to the practice in the family protection jurisdiction could be disputed. But we are prepared to suggest the following as a standard on which, we believe, most would agree as a minimum. The principles on which the courts act must be stated clearly, and applied consistently. When applied, they will lead to a determination not only of the estate's liability to meet a claim, but also of the size of the claim (consider, for example, the "tort" and "contract" measures of damages). That is not to say there may not be difficulties in applying the criteria to particular cases, or that the law in every matter can be worked out in advance. But at the beginning, there must be at least the promise that the task can be performed; and at the end, it should be possible to trace the determinative principle through the trail that has been followed.

These proffered criteria owe a great deal to the work of Professor Weinrib, who has explored the issue in general terms and without reference to the present problem.<sup>29</sup> He has been working on the idea of "corrective justice" for more

<sup>28</sup> At 27.

<sup>29</sup> E Weinrib, *The Idea of Private Law* (Harvard UP, Cambridge, Mass, 1995).

than 20 years. His studies are based on a category developed by Aristotle, who distinguished between "corrective" and "distributive" justice.<sup>30</sup> This distinction is still important today, and is useful to our own inquiry.

Corrective justice is a matter of subtraction and addition. P (the plaintiff) has suffered a subtraction, because of a wrong that D (the defendant) has done P. Corrective justice subtracts from D's wealth, and gives to P, enough to compensate for the original wrong. Distributive justice, on the other hand, is a matter of proportion. Something beneficial (like money), or something detrimental (like a poll tax) has to be distributed amongst a class of people. If one gets more, then the others will get less.

For the purpose of the present enquiry, we need not go deeply into Weinrib's theory, though we will return to him presently. It is sufficient to know that Aristotle's view of justice is still alive as a means of studying and understanding the limits of law and legislation.

The art of the legislator, whether working with corrective or distributive justice, is to locate the principle on which justice is being done, and see to it that it can be applied consistently. For example, in corrective justice, the principle might be "D must make good losses that D wrongfully causes P". In the case of distributive justice, it might be "P1, P2 and P3 will draw from D's fund in the proportions to which each has contributed to it". By applying these principles, a judge can proceed directly and logically to ascertain, in any given case, whether P should recover at all, and if so, what amount should be recovered.

The distinction between corrective and distributive justice becomes important when we look at the respective roles of will-makers and the courts. The will-maker who chooses to be just must engage in a type of *distributive* justice. He or she will want to make testamentary gifts, for example, according to the closeness of the donees as members of the family; or how they have helped his or her old age; or, perhaps, the extent to which they have been lights unto the outside world. All of such distributions are formally just, if correctly carried through in the will provisions. And they are conventionally just, in the sense that they are not absurd things for a morally minded will-maker to want to take into account in selecting objects of his or her bounty. They may not represent the best way of distributing a large estate, or the way that you and I would have distributed it if we owned it, but it is difficult to say that the will maker is actually wrong.

There are perils for a court that attempts to follow the will-maker down the path of distributive justice. The possible starting points for a system of distributive justice are too numerous, and the arguments for and against each one are far from conclusive. Should will-makers choose to distribute their wealth according to the economic needs of their children? According to their deserts? According to how often they see the will-maker? Equally amongst all? All of these criteria can be good criteria, or they can be bad. To get a sufficiently clear set of rules, the court must give one of the criteria priority over the others, even though all are good. Or else it must painstakingly indicate the situations where each of the "good" criteria will be preferred over the others.

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<sup>30</sup> Aristotle, *Nicomachean Ethics*, Bk V, ch 3 (Justice in distribution) and ch 4 (Rectificatory justice) in R McKeon ed, *The Basic Works of Aristotle* (Random House, New York 1941) 1006-1010.

Courts instinctively sense the impossibility of that task, when they say it is not their function to remake the provisions of the will that has been complained about. If anything is to be done, it is more likely to be justifiable as an exercise in *corrective* justice. Despite the divergent trends in rhetoric, on this at least all statements of the scope of the family protection jurisdiction are agreed.<sup>31</sup>

Why, then, are awards often calculated as a percentage of the estate? Surely that is a form distributive justice? That does not necessarily follow. Suppose, for example, I promise to leave you half my estate, and I fail to do that. Your award still lies in corrective justice. Or suppose that a child of a will-maker can claim a “substantial” sum by way of recognition of their relationship (assuming that children can make such a claim). The size of the award might legitimately be calculated as a percentage, because what is “substantial” in this context depends on the size of the estate.

The point is that, in both cases, there is a legitimate link between the duty which has been broken and the method of calculating the size of the award. In the first case, the link is the effect of the promise; in the second, the meaning of “substantial” is tied to its particular context. Further, the people who stand to gain or suffer, depending on whether the award is small or large, have no standing to have their personal claims weighed as part of the same exercise in justice. The dispute is between the claimant and the estate, not (contrary to the impression created by the elaborate procedure now adopted in such cases) between all the claimants and all the beneficiaries amongst themselves.

Compare, then, a claim which is based on “my needs”. The quantum of the award in corrective justice has little to do with the size of the estate. If the will-maker is obliged to look after my needs, those needs are constant no matter what the size of the estate. The question then is, “what is the appropriate standard of comfort, which the claimant can properly seek from his or her parent’s will, having regard to the claimant’s other resources?” If that requires an award of (say) \$10,000, then the award must be \$10,000 whether the testator’s estate is \$20,000 or \$2 million.

The award of a percentage of the estate, in such a case, does several things which are not good in terms of the criteria of legality. First, the size of the award is no longer related to the nature of the claim. Secondly, the jurisdiction is pushed, contrary to all the judicial rhetoric, in the direction of distributive justice. The exercise becomes one of distributing the estate according to the needs of all of the competing claimants and beneficiaries, even though the will-maker may have acted legitimately in choosing a different basis of distribution. Thirdly, these bad things are masked by saying that what is an appropriate standard of comfort depends on the size of the estate. This blurring spares the court the hard question, which is, to what standard is a child entitled to be maintained, and why should that standard amount differ just because the estate is large?

What we have said, then, is that a family protection jurisdiction that aspires to meet criteria of legality will have one principle that operates universally, or several, each of which operates in a defined class of case. The awards will be of a size which is commensurate with the principle being applied. In practice, this

<sup>31</sup> See eg *Little v Angus* [1981] 1 NZLR 126; *Re Green* [1995] NZFLR 330; *Re Wilson* HC Christchurch, M19/90, 5 November 1990.

means that the award will be an exercise in “corrective” justice, that is to say, each claim is made by a single claimant and determined without regard to the claims of the others. Percentage awards may be made, but they must be justified by the principled basis of the claim.

Some will say that we are setting too high a standard for what is, after all, a discretionary jurisdiction. Our answer is that, for all the complaints academics make, these conditions still largely hold for the law of torts and contracts, even if there are discretionary elements. Why should we be satisfied with anything less for errant will-makers?

## 2. The Law Commission’s razor

Ninety years after the first version of Family Protection Act was passed, the issue of principle returned to the law reform table. The process began with a paper from a Justice Department’s Working Group in 1988, as we have seen.<sup>32</sup> Then the Law Commission grappled with the issue in the mid 1990s.<sup>33</sup> Both made recommendations. The Report of the Law Commission is of particular interest here, since its recommendations would have severely reduced adult children’s claims, without removing them entirely. But the New Zealand legislature, or at least the Government of the day, appears to have concluded that it is not timely to attempt to resolve the issue of adult children’s claims. It has left the statute, for present purposes, virtually as it stood in 1955.<sup>34</sup>

### (a) *The social background*

The Law Commission’s efforts were sparked by judicial developments in the 1960s and 1970s. During that period, the High Court<sup>35</sup> assumed a jurisdiction to deal with adult children’s claims against deceased estates in a wide-ranging way. Since the 1980s Mother’s estate would have been dealt with entirely as a matter of judicial discretion. The courts receive and act upon a variety of complaints about a parent’s standard of will-making, and about their general standard of parenting too. Such complaints are of course made only after the parent has died, and so the parent cannot meet the charges personally. The Law Commission found that the criteria of legality, as we have defined them, are very far from being met.<sup>36</sup>

<sup>32</sup> *Report of the Working Group on Matrimonial Property and Family Protection* (1988).

<sup>33</sup> The Law Commission first published a discussion paper: *Succession Law: Testamentary Claims* (NZLC PP24, 1996) (NZLC discussion paper), followed by a Report: *Succession Law: A Succession (Adjustment) Act* (NZLC R39, 1997) (NZLC Report).

<sup>34</sup> The only substantive change is the expansion of the pool of eligible claimants, most recently by the inclusion of de facto partners and stepchildren of de facto partners in the Family Protection Amendment Act 2001. The Working Group on Matrimonial Property and Family Protection would have expanded the pool of claimants even further: *Report* at 52-3.

<sup>35</sup> The Family Court has had concurrent jurisdiction since 1 July 1992 when s3A was inserted into the Family Protection Act by s3 Family Protection Amendment Act 1991. But by that time the High Court had already set the tone.

<sup>36</sup> NZLC discussion paper, [200-224].

Protecting adult children from their parents' will-making is no new thing in the law. Most Western legal systems, at some time or another in their history, provided for a specified share of the estate – usually one third – to be set aside for the children, whether minors or adults. This was the result of a fortuitous amalgam between Roman law, and the old Germanic system of “forced heirship”. The system still operates in a number of civilian jurisdictions. The well-known “third share” was originally part of a wider whole. Another third was set aside for the wife, and the last third (in Roman Law) for the paterfamilias (ie, the grandfather who headed the deceased husband's family unit). That system had a simplicity and consistency which we seem to have lost in modern law.

The authors of a recent study have shown how this rule made social and economic sense in earlier history.<sup>37</sup> It had to do, they say, with the incentives offered to wives to marry and invest in developing the human capital of their children. The conditions in which this explanation held good included: (1) a world in which women had little opportunity to make a career for themselves, other than housekeeping and child rearing; (2) a world in which many people died while still in the process of child-rearing; (3) a world in which there were strong economic and other bonds between what we now know as the nuclear family and the extended family (represented by the paterfamilias).

This is not a world that Western society knows today. In England, that form of protection was abandoned in the reign of Edward I, though a system of “dower” protected the wife for a long time after that. The children of propertied parents were protected, to a degree, by various restrictions on testamentary freedom. The practice of holding family land under strict settlements was also important. Most of these protections had gone, however, by the early nineteenth century. There was then a gap, until the Testator's Family Maintenance Act was passed in 1900. Even then, while the adult child had nominal protection, in practice the protection was very limited until the judicial developments of the 1960s and 1970s.<sup>38</sup>

The Law Commission, when it undertook to report on the law of succession in 1993, had to consider how children should be protected in a very different world from that which had existed up until 1950. Statistical data showed that only 11% of the population would die under 50, and 76% would live to 65 and beyond. So succession disputes were now most likely to arise between grown children, not minors. Furthermore, spouses and (increasingly) unmarried partners would often have an income-earning ability of their own. Their contributions to the family justified, both conventionally and (latterly) by law, a legitimate claim to 50% of the family property, together with a right (of uncertain dimension) to continued support. This left little for the testator to fulfil moral duties to the children, assuming such duties existed.

This situation was exacerbated by the increase in divorce rates, and hence in the number of “blended families”, that is to say, families including children who were the child of one adult, and the step-child of the other. Depending of course on the circumstances, an adult's “moral duty” might be seen to extend to the

<sup>37</sup> R Geddes and P Zak, “The Rule of One-Third” (2002) 31 *Jo Leg Studs* 119.

<sup>38</sup> Financial need remained an essential prerequisite until the Court of Appeal's decision in *Re Harrison* [1962] NZLR 6.

step-children as well as to his or her own children. There were also likely to be deep rifts between the blended families of the two divorced families. Parents who had been separated from their children were liable, rightly or wrongly, to perceive those children with a distrust which could last well into the child's adulthood, if not for ever. This antipathy was bound to increase the number of family protection claims, and their intensity, as long as the existing law remained. Without a clear system of priorities, such disputes would be difficult to handle.

Equally significant were wide divergences in the values and testamentary practices, between the different cultural and ethnic groups established in New Zealand. Maori already had different rights in relation to their ancestral property. In the liberal atmosphere that had developed, the prospect of finding a single "right way" to distribute property had appreciably diminished.

So it is understandable that, while the Commission approached the existing law with good will, it had considerable doubts about whether a system of family protection for adult children could be maintained. It found that the contemporary practice of the courts reflected no very coherent idea of what they or the legislature were trying to achieve.<sup>39</sup> But it worked hard to establish effective criteria on which the existing practices could be re-framed. If more than one such criterion existed and could be supported, then it would also be necessary to determine a system of priorities.

(b) *The Commission's proposals*

The Commission considered the following possibilities as candidate principles for determining whether the will-maker has deprived the family protection claimant of something to which he is entitled.

- *The will-maker should acknowledge the family relationship.* This will ensure that each child has a recognised and automatic claim to a (limited) part of the estate. *Rejected*, on the ground that it takes no account of the respective needs and contributions of the children, and could exclude more deserving claims.<sup>40</sup> Not infrequently, in cases which came before the courts, the supposed relationship had, in factual terms, become limited or non-existent by the time the parent died.
- *The will-maker should reward the child's good conduct and mark their bad conduct.* *Rejected*, on the grounds that the courts have rightly discouraged (in all but the most extreme cases) attempts to blacken the character or conduct of claimants.<sup>41</sup> As for contributions to the will-maker's well-being, these would usually be no more than the ordinary day-to-day services involved in living nearby an older person. Such services would not justify an award unless they were significantly greater than one would expect in such a relationship. And then it is difficult to see why the child should have a larger or different right to claim than anyone else who has helped the testator out.<sup>42</sup>

<sup>39</sup> NZLC discussion paper, [222].

<sup>40</sup> *Ibid* at [204].

<sup>41</sup> *Ibid* at [213].

<sup>42</sup> *Ibid* at [215].

- *The will-maker who has been guilty of bad conduct towards the child should make compensation.* That includes for example the case of neglect (in earlier or later life), though not abuse or physical harm for which there are already legal remedies.<sup>43</sup> *Rejected*, on the grounds that (beyond those legal remedies) there are no sufficiently clear grounds on which it can be said that parental conduct is sufficiently bad to justify a monetary award against them.
- *The will maker must support his or her children if they are in need.* Left open in the Preliminary Paper, though adverse comments were made on the width of the court's current practice in recognising "need" of a non-economic character.<sup>44</sup> The Commission offered a narrower "needs" claim provision as a possible option,<sup>45</sup> and in its Report a majority of the Commission grudgingly *accepted* a different version of the provision.<sup>46</sup>

The Commission, in its Preliminary Paper, was not in a position to advance any of these criteria as the basis for making awards in favour of adult, independent children.<sup>47</sup> But as we have said, it left open the possibility of a claim based on financial need, a possibility which is picked up in the Report. Still, the Report recommended that the financial needs claim be severely curtailed. All other grounds for making a claim would be removed.<sup>48</sup>

The Commission's recommendation was much less supportive of adult children than that of the 1988 Working Group, which would have allowed generous financial needs claims and would have extended the range of people who could apply. The Court of Appeal, whose own solutions we have already foreshadowed, appears to have preferred the Working Group's assessment to that of the Commission. The latter represented, said the Court, a "rather extreme position" and a "radical change in the approach to the exercise of the s 4 jurisdiction".<sup>49</sup> But in fact it adopted neither, for reasons we will presently discuss.

For our part we wonder whether the Law Commission was extreme enough, if "extremity" means getting rid of a clutter of unsustainable criteria for the exercise of the jurisdiction. The "financial needs" criterion may be no better than any of the others. It is worth asking the question, why should a parent be obliged to maintain, by will, her needy adult children if no such duty exists during the parent's lifetime? We return here to the example of Mother, and to Professor Weinrib's writings.

Suppose that Mother's children were making a claim based on their financial need. Weinrib would look at Mother's situation in this way. There is a disparity between Mother's wealth, and the children's financial position. The children

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<sup>43</sup> Ibid at [216].

<sup>44</sup> Ibid at [219].

<sup>45</sup> Ibid at [234].

<sup>46</sup> NZLC Report [77] and Draft Act s29.

<sup>47</sup> Children under the age of 25, and older children with a disability which had endured since childhood, had a separate claim for support.

<sup>48</sup> With the exception of a "memento" claim for chattels sought as a keepsake of a parent: NZLC Report, [77] and Draft Act s30.

<sup>49</sup> *Williams v Aucutt* [2000] 2 NZLR 479 at [68], [45] and [28].

might even argue that Mother has caused the disparity during her lifetime. For example, she has not brought them up to become doctors, accountants or lawyers. If she had, they could have made their own way in the world and not had to rely on her estate for their financial security. Mother could have rectified the disparity by leaving them all of her property in her will but she has not done so.

But that, argues Weinrib, is not what you say when you invoke a principle of corrective justice. The statement the children have made relates to the facts of the matter, not to the normative system you are purporting to invoke.<sup>50</sup>

The two aspects reflect different conceptions of the baseline for the characterization of gain and loss. The baseline for factual gains and losses is the pre-existing condition of one's holdings: a transacting party [Mother] whose holdings have increased or improved as a result of the transaction [the children's upbringing] has realized a factual gain; a party [the children] whose holdings have decreased or deteriorated has suffered a factual loss. The baseline for normative gains and losses is one's due under the justifications that obtain with corrective justice; a gain is an excess over, and a loss a shortfall from, one's due.

In more straightforward language, to say that Mother is rich and the children are poor is not enough. You have to say also "I am prepared to assert – and justify – the following proposition. Whenever a parent is rich, and a child poor, the parent's retention of their wealth is normatively unacceptable and that wealth should be given to the children by will." The parent's failure to make such a will is then remediable through corrective justice.

The Law Commission is not prepared to make or justify any such statement.<sup>51</sup> In Chapter 2 of its Report ("Problems of the Present Law") there is a passage which is distinctly hostile to all adult children's claims, without qualification.<sup>52</sup> Then in Chapter 3 ("Overview") we are told that there are times when "logic should yield to compassion". An award should be made only "where [adult children] are genuinely in need and it is possible, without unfairness to those otherwise entitled to the estate of the deceased, to provide periodic payments sufficient to alleviate their need".<sup>53</sup> The draft provision itself (Cl 29) surrounds the jurisdiction with further limitations, including one which limits the award to the purpose of providing the necessities of life; and another which allows the court to refuse relief if the needs are the result of the child's own acts or omissions.<sup>54</sup> The crowning glory is the provision that the award must come from the residue of the estate. So the will-maker can avoid liability, it seems, by exhausting the estate through general and specific legacies.

Now, whatever the Law Commission is asserting, it is not the proposition that a rich parent's wealth must be made over by will to their poor child. The difficulties of supporting and legislating for any general proposition along those lines are set out in the Law Commission's Preliminary Paper.<sup>55</sup> It is debatable

<sup>50</sup> E Weinrib, *The Idea of Private Law* (Harvard UP, Cambridge, Mass, 1995), 116.

<sup>51</sup> NZLC Report.

<sup>52</sup> *Ibid* at [30-35].

<sup>53</sup> *Ibid* at [77].

<sup>54</sup> A less parsimonious provision is discussed in NZLC discussion paper, [234].

<sup>55</sup> *Ibid* at [235-240].

whether, by supporting an artificially limited provision which had no better justification, the Commission did not weaken its own case by irresolution. Be that as it may, we can conclude that a “needs-based” system of protecting adult children is highly problematic. While it may sometimes conform with raw, conventional morality, it appears to be beyond known justification. Yet, first instance courts continue to accept the validity of the adult child’s financial needs claim without question and without definition. As we will see, the Court of Appeal has passed over the matters of justification and definition in silence, though possibly for different reasons.

### 3. The Court of Appeal’s expedient

#### (a) *A nice dilemma*

The reform process left matters in an unsatisfactory state. The Law Commission had exposed severe difficulties in the way in which the current law was being administered, without being able to offer a remedy that commanded legislative approval. But courts of first instance were continuing to labour under the flawed system, and could point to legislative silence as at least tacit approval of the previous practice, with all its disadvantages and excesses.

Unsure of what was expected of them, the courts adopted a cautious approach to adult children’s claims. Some acknowledged that the courts had “indulged in estate engineering under the guise of deciding ‘what a just and wise testator would have done’” and that there was a need to “lessen the embellishment that the words have received over a number of years”.<sup>56</sup> But how were the courts to do that? Some declined applicants, where they probably would not have done so before, whilst others looked for some evidence of financial need where previously the family relationship alone would have sufficed.<sup>57</sup> Parental neglect, a common reason for intervention in the past, remained relevant, but now because of a perceived link to current financial need.<sup>58</sup> Some judges seemed to respond merely by making more modest awards. None made any attempt to respond in a principled manner to the Law Commission Report.

This haphazard response to the Law Commission Report continued until the Court of Appeal tried, in two decisions in 2000 and 2002, to bring a sense of order to the present situation. It is as yet unclear what impact the Court of Appeal’s decisions will have.<sup>59</sup>

<sup>56</sup> *Re Walker* [1998] NZFLR 726 at 731 and 732; *Re Baker* HC Auckland, M836/96, 26 March 1998.

<sup>57</sup> The number of unsuccessful claimants between 1997 and 2000 doubled in comparison to an earlier survey and those who succeeded solely by virtue of their family relationship declined from 27.6% in the previous survey to 16.8% in a survey of cases decided between 1997 and 2000 (NS Peart & A Borkowski, “Provision for adult children on death – the lesson from New Zealand” (2000) 12 (4) *Child and Family Law Quarterly* 333 at 340.

<sup>58</sup> In *Re AHR* HC Auckland, M458/98, 4 February 1999, for instance, the court intervened primarily because the claimant had been cruelly mistreated by his father and stepmother during his childhood, but also because he was unemployed and suffered from ill health, allegedly as a result of the deprivation he had experienced as a child.

<sup>59</sup> This might seem a curious statement, in view of the Court of Appeal’s position in

The Court of Appeal took a new tack. As we have seen, it felt unable to support a direct attack on “needs” claims, to make them narrow and minimalist. This was perhaps understandable. Though logical in “corrective justice” terms, and in keeping with the origins of the jurisdiction, the courts lost sight of those origins several decades ago. Perhaps the lower courts had gone too far, but to read the statutory words “adequate provision for the proper maintenance and support” as meaning “grudging release of sufficient funds to meet the necessities of life” might seem altogether too mean.

So the Court took up a stone that the Law Commission had rejected, namely the idea that, irrespective of financial position, adult children are entitled to a modest, but not minimal, sum by way of recognising that they “belong” to the family. It will be recalled that the Law Commission rejected that idea, because it tended to over-ride other more genuine claims to the testator’s bounty, such as need and contribution. This consequence of the “belonging” claim, however, may be the thing that made it attractive to the Court of Appeal in its predicament, as we will see.

We will look first at the two decisions in which the transformation was made. Then we will look at the implications of the delphic announcements of principle that the Court has left with us. Though some things are clear, significant questions have been left unanswered. This suggests that the Court of Appeal’s first priority was to try and clear up a difficult and unfortunate collision between the High Court’s practice and the Law Commission’s assessment of the situation.

(b) *Williams v Aucutt*<sup>60</sup>

A dispute arose between two daughters. Their mother had an estate of \$920,000. One daughter, Christine, received assets from the estate worth \$870,000; the other, Susan, assets worth only \$50,000. The mother gave a clear and well-substantiated reason for the difference. Christine was financially much worse off than Susan. Indeed, Susan and her husband together were wealthier than the mother herself.

Susan was dissatisfied with the provision her mother had made for her. So she brought proceedings under the Family Protection Act. Voluminous affidavits passed between the daughters, criticising each other’s conduct. The trial judge was unmoved by this display. He congratulated both daughters on the efforts they had made to meet the mother’s wish to stay on in her own home. He went on to hold that the mother was in “serious breach of moral duty” because she had not realised the “position of Susan in the overall life of the deceased and the

the judicial hierarchy. So it should be noted that the Court’s decision in *Re Shirley* CA155/85, 6 July 1987, which it advanced as an “important” statement of principle in *Williams v Aucutt* [2000] 2 NZLR 479 at [48], was not even reported. A LEXIS search indicates that between 1987 and 2000, the case was cited by the High Court five times: twice in Christchurch, twice in Wellington, once in Hamilton, and not at all in Auckland. *Williams v Aucutt* was itself cited, six months after it was decided, to the first instance judge in *Re Miller, Brown v Harrop* [2001] NZFLR 352. (This later became the second of the two recent Court of Appeal cases under the name of *Auckland City Mission v Brown*.) The judge (incorrectly) did not think it made any difference to what he had to decide.

<sup>60</sup>

[2000] 2 NZLR 479 (CA).

contribution that she made in that respect".<sup>61</sup> He awarded Susan sufficient to bring her share up to \$230,000, or 25% of the estate.

Christine was dissatisfied with the provision that the judge had made out of her share in the estate and took the matter to the Court of Appeal. That Court held that the judge had misdirected himself by focussing on the will-maker's reasons for differentiating between Christine and Susan. It was for Susan to show that her mother had not given her enough.<sup>62</sup> This is to be welcomed as a long-awaited injection of sanity in a jurisdiction which was out of control.

However, the Court then held that Susan's wealth did not disqualify her from claiming. If the testatrix left Susan "a provision so small as to leave a justifiable sense of exclusion from participation in the family estate", that "might not amount to proper support for a family member".<sup>63</sup> The recognition of such a family "belonging" claim incorporates a system of forced heirship into the Family Protection Act. Yet there appears to be no justification for adopting such a system. It was rejected by Parliament in 1900 and, as we have seen, there is no evidence that it is publicly supported today. No attempt was made to justify such a claim as "proper" in terms of the Act, or to define "belonging" in a way which did, or did not, include children who had no factual relationship with their parent during the parent's last years.

Even if one accepts the appropriateness of a family belonging claim, the judgment provides no clarity as regards the quantum of such an award. It ventured only the following comment:<sup>64</sup>

Just what provision will constitute proper support ... is a matter of judgment in all the circumstances of the particular case. It may take the form of lifetime gifts or a bequest of family possessions precious to its members and often part of the family history. And where there is no economic need it may also be met by a legacy of a moderate amount.

Was the legacy of \$50,000 insufficient provision, in the event, for Susan? The majority judgment commented on the care the testatrix had taken in assessing what her daughters should have. But it appeared that the will-maker "was probably unaware of the full extent of her estate", and must have assessed parts of her estate at a considerably lower value than they were worth when she died, nearly four years after she made the will.<sup>65</sup> Had she realised the extent of her net worth she would have re-appraised her testamentary provision so far as Susan was concerned, the Court concluded.<sup>66</sup> The provision made for Susan was a breach of the moral duty owed to her, but the judge's award was nevertheless excessive. The Court of Appeal reduced it so that Susan received a total amount of \$100,000, which was just over 10% of the estate.<sup>67</sup>

<sup>61</sup> Ibid at [25].

<sup>62</sup> Ibid at [48, 50-51].

<sup>63</sup> Ibid at [52].

<sup>64</sup> At [52].

<sup>65</sup> Ibid at [54] and [74].

<sup>66</sup> Ibid at [75].

<sup>67</sup> The award was not specifically fixed by reference to a percentage, but two passages in the majority judgment at [47] and [50] and in Blanchard J's judgment at [76] suggested that the Court was conscious of the percentage amount.

This is a discretionary version of forced heirship. We think that, in terms of principle, there is a lot to be said against it. It entitles children to provision from their parent's estate, but does not provide a workable formula for determining that entitlement. Nor does it set a limit on the proportion of the estate that should be reserved collectively for the children. One will search the judgment in vain for a normative justification, or an attempt to relate such a justification to the quantum of the award. If forced heirship were thought to be appropriate, then that should have been decided by Parliament, not the courts.

(b) *Auckland City Mission v Brown*<sup>68</sup>

This was a claim by a daughter, Inge, against her father's estate. The estate was worth \$4.5 million. The father provided a trust fund of \$1 million for Inge's three children, and had also intended to leave assets worth \$190,000 to his daughter. Again, there was a clear and undisputed reason for this apparent (though relative) parsimony. The testator had assisted Inge's husband Shane in a business, but Shane had not made a go of it. The father attributed this to Shane being a "nine to five guy". He did not want his own money to end up in Shane's hands, and his purpose was to assist Inge "by removing the need for her to support [her children] financially".<sup>69</sup> He left nearly all the rest of his estate to charity.

From Inge's point of view, matters were made worse because of various changes in the deceased's asset holdings, which meant she in fact got only \$30,000. So she took proceedings under the Family Protection Act. Her affidavits ran to 230 pages and "appear from the judgment to have led to an inquest into the detail of family life and consideration of a host of incidents" relating to her father's conduct and character.<sup>70</sup> The first instance judge considered the father had "never fully discharged his duty as a parent, either in childhood or adulthood". He had, by his will, "denied himself the opportunity for making up for the neglect of a lifetime".<sup>71</sup> It was "common ground", even before the High Court hearing, that there had been a breach of the testator's moral duty to Inge<sup>72</sup>, so the only question was what should be the size of the award.

Fortified by the "inquest" he had conducted, the trial judge embarked on what has to be regarded as one of the more outspoken accounts of what may be done under the Family Protection Act. He considered that the disposition to the children was not enough to meet Inge's claim that there was a breach of moral duty. She had "an independent right to be freed from the shackles of economic necessity".<sup>73</sup> The judge had regard not only to what she had put up with from the hands of her father and what she and her husband had done for him, but also her continuing moral obligation to support her mother – who was divorced from her father – during her mother's old age. The judge was unmoved by any claims that the charities may have had to the father's beneficence, and awarded

<sup>68</sup> [2002] 2 NZLR 650.

<sup>69</sup> *Ibid* at [14].

<sup>70</sup> *Ibid* at [15].

<sup>71</sup> *Ibid* at [22].

<sup>72</sup> *Ibid* at [15].

<sup>73</sup> *Ibid* at [43].

the daughter \$1.6 million, none of which was to be charged against the provision for the children. This represented 35% of the estate.<sup>74</sup>

The case of *Williams v Aucutt* was cited to the judge, but it had little impact on the way he decided the case. He accepted Inge's counsel's contention that the Court of Appeal's judgment was not authority for saying that adult children's claims should be dealt with more conservatively than they had in the past. "Rather, the Court was emphasising that the need for further provision should not turn on abstract notions of fairness or the ideal of equality but on principles laid down in cases of enduring authority."<sup>75</sup>

When the case went to the Court of Appeal, it refuted the limited view that the judge had attributed to *Williams v Aucutt*.<sup>76</sup> It also took exception to the Judge's general approach to the case. "...[T]he order had to be limited to the amount required to repair the breach of moral duty to Inge."<sup>77</sup> The trial judge here had transgressed that injunction, and in doing so had made a "very high" award.<sup>78</sup> He had also appeared to have "overlooked that it is not for the beneficiary to have to justify the share which has been given".<sup>79</sup> The Court of Appeal emphasised the beneficial work done by charities, and encouraged them to take a more active role in defending claims of this nature.<sup>80</sup>

The Court observed that Inge and her family were "in good health and have no special needs". Their income was "modest" (\$37,000 a year) – "leaving aside the education<sup>81</sup> expenses of the children provided for under the will".<sup>82</sup>

It is here that the judgment of the Court becomes difficult to support. Having delivered a stinging rebuke to the trial judge about his re-writing of the will, the Court now reaches the following conclusion. "We consider a wise and just testator would have ensured that [Inge and her family] ... had the means to acquire a more substantial house for the family debt free and to clear the loan [on the existing house], ... together with a sum to supplement their business income and provide a reasonably substantial contingency fund." This amount was fixed at \$1,022,000, again with reference being made to the percentage of the award.<sup>83</sup> No attempt was made to explain why this standard of comfort, and no other, was decreed.

<sup>74</sup> An award of 35% was not unusual for an only child. The absence of competing moral claimants did not enhance testamentary freedom, but rather increased the testator's moral duty to provide for that only child: N S Peart "Awards for children under the Family Protection Act" (1995) *Butterworths Family Law Journal* 224, 226. <sup>75</sup> [2002] 2 NZLR 650 at [17], paraphrasing the High Court's statement at [2001] NZFLR 352, [30].

<sup>76</sup> *Ibid* at [33].

<sup>77</sup> *Ibid* at [36].

<sup>78</sup> *Ibid* at [37].

<sup>79</sup> *Ibid* at [39].

<sup>80</sup> *Ibid* at [42].

<sup>81</sup> This is disingenuous. The provision in the will provided for the children's "maintenance, education, advancement or other benefit": see [5]. It is difficult to see why that income could not be used to supplement the family income more generally, during the costly years of bringing up the children, as was the testator's intention. See [14].

<sup>82</sup> At [45].

<sup>83</sup> *Idem*.

There are marked similarities to, and differences from, the previous case. There Susan, the deprived sister, has nothing but a “belonging” claim. She gets 10% or so. In *Brown*, on the other hand, the claimant Inge is not well off, at least by comparison with her father, but she is hardly struggling for the “necessities of life” either. She gets in excess of 20% without too many questions being asked about the nature and validity of her claim.

In the earlier case, Blanchard J made the following enigmatic statement:

In some cases a mere acknowledgment of the relationship may be the most that can be expected. And in others the competing claims on the testator ... may negate any moral duty towards a wealthy claimant.<sup>84</sup>

A Court which was concerned to develop the principles of the jurisdiction would have found in the second case, we suggest, an ideal opportunity to expand on that statement, and to explain the effects of its new strategy. Answers to the following questions would have been illuminating:

- Did Inge have a financial needs claim in addition to her belonging claim, and if so, why was the needs claim “proper” in her case?
- Was the financial needs claim conceived as a fixed sum, or would it vary with the size of the estate?
- Were the financial needs and belongings claims, or either of them, larger simply because (unlike Susan in *Williams v Aucutt*) Inge was an only child?

(c) *A Closer Look at the Court of Appeal’s Reasoning*

So the governing principles have not yet been fully spelt out. The way the Court dealt with the appellant’s argument in *Williams v Aucutt*<sup>85</sup> provides a starting point for enquiry. From that and other parts of the principal judgment, we can discern three significant points of principle. But these operate at the highest level of generality, and have little to tell us about the questions we have just asked.

*Consideration on an individual basis.* Each claimant has “to establish ... that the provision made for him by the will was not in the context of his own means and obligations and all other relevant circumstances adequate...”.<sup>86</sup> Questions of competition only arise in the case of so-called “small” estates, where there is not enough to go around all the people to whom a moral duty is owed.<sup>87</sup> Children cannot complain just because they want a bigger *share*. They must show they

<sup>84</sup> *Williams v Aucutt* [2000] 2 NZLR 479, [69].

<sup>85</sup> At [27].

<sup>86</sup> At [48] and cf Blanchard J at [70]. This was already established by *Re Shirley* (Court of Appeal, CA 155/85, 6 July 1987).

<sup>87</sup> The distinction between small and large estates still exists, though it is relative to the nature of the claims on each estate. The scope of the testator’s moral duty in relation to small and large estates was established in *Allen v Manchester* [1922] NZLR 218 and referred to in *Williams v Aucutt* [2000] 2 NZLR 479, [40, 41].

haven't been given an appropriate *amount* to meet their own individual claim.<sup>88</sup> This takes the pattern of the claim out of "distributive" justice and into "corrective" justice – which, as we have seen, is an easier pattern to keep control of.

Where do awards based on a percentage of the estate fit in? There is a hint of a suggestion that these should no longer be regarded as normal.<sup>89</sup> We would support a refusal to make percentage awards because it symbolises the corrective justice approach, when so many other symbols in this jurisdiction stand for the contrary. However, as we have already observed, the fact that an award is expressed as a percentage does not necessarily imply that it is the outcome of a process of distributive justice.

*Need does not necessarily imply that support is "proper"*. Need, at least in the financial sense, is not the governing criterion. The statutory formula makes no reference to "need", but simply to "proper maintenance and support". "A child's path through life is supported not simply by financial provision to meet economic needs and contingencies but also by recognition of belonging to a family and having been an important part of the overall life of the deceased."<sup>90</sup>

This is an important point which works as much against financial needs claims, as it does in favour of "emotional" needs. Once attention is drawn to the word "proper", it becomes apparent that each type of claim must be justified independently of the words of the statute. The "belonging" claim will apply to most if not all adult children. If one is a child, one "belongs" and (within undisclosed limits) one has no need to justify one's right further. It is different with a "financial needs" claim. Such a claimant must establish not only the need, but also that it is "proper" that the will-maker alleviate that need. Many will-makers, we suspect, may take the view that their property should be divided equally between their children, without regard to their individual financial needs. If a needy child were to be given more, it is more likely to be as a result of family agreement to make a concession, not as a matter of right.

So it is by no means self-evident that children should have a claim just because they are in financial need; still less so, if "financial need" means merely "having less than ample comfort and financial security". There is a vast range of family stories that will tug on the heart strings to different degrees. The child who is struck down by a crippling illness in mid-life is one thing; the child who has wasted his money on drink and gambling is another. The child who has amassed wealth during her lifetime, but then lost it through a business reverse towards the end of her career, is another again. For those courts inclined to that sort of thing, the room for sermonising is endless. It seems undesirable to expose families to that.

<sup>88</sup> This is in keeping with the Court's comment in *Williams v Aucutt*, *ibid* at [55], that it is more appropriate to award a legacy than a share of residue.

<sup>89</sup> In *Williams v Aucutt* the Court said that it was inappropriate to award a share of the residue as such. Rather, it should award a legacy for the limited purpose of supplementing the recognition of Susan's family belonging: *ibid* at [55]; and Blanchard J refers to the sum of \$50,000 as being more than many New Zealanders possess: *ibid* at [74]. However, both the majority and the minority judgments refer to the size of Susan's legacy relative to the size of the estate.

<sup>90</sup> *Ibid* at [52].

A robust appellate court stance might well have followed the Law Commission's lead, and said that need claims should be both rare, and not of a very large amount. Alternatively, it might have said that need claims should be virtually automatic, they should make sure the child is "comfortably off", and that if needs be they can exhaust the estate. The choice between these two possibilities seems to us to be a matter which goes beyond the minutiae of day to day practice, and what is decided will have a major impact on the exercise of the jurisdiction. So it was Court of Appeal material.

*The will-maker's processes of thought are important.* In both *Williams v Aucutt* and *Brown*<sup>91</sup>, the Court of Appeal regards it as important that the testator or testatrix gave informed and responsible thought to how the claimant should be treated. This is most apparent in *Williams v Aucutt*.

The testatrix took considerable care in determining how the particular family possessions should be distributed and which of these possessions Susan should receive. We cannot see any basis for the Court, acting under s 4, to differ from that assessment of what is adequate provision for proper support for Susan in that regard.<sup>92</sup>

The Court went on, though, to point out that, as regards the bequest of investments, the testatrix appeared not to have properly calculated the full value of her property. This helps the Court conclude there was, in that respect, a breach of moral duty on the testator's part. In his concurring judgment, Blanchard J goes even further – "but for one factor, [the provision the testatrix made for Susan] ... would have been sufficient to discharge her moral duty to Susan ... That one factor is [the testatrix's] apparent misunderstanding about the size of her estate."<sup>93</sup>

From a traditional perspective, this emphasis on the testatrix's mistake is out of place. Either the provision made for Susan was adequate or it was not. The decision requires the imposition of an objective standard of what is "adequate" and "proper". Whether or not the testator was herself mistaken about her assets – rather than indifferent to the claimant's needs and the proper priorities in her estate – is neither here nor there.

But that view now looks too simplistic. The Court's lengthy experience with judicial review has spilled over into the family protection area. The testator is to be regarded as one would a public official, who has a legitimate territory of choice which is to be respected. Social values are complex and the court must always be aware of the danger of imposing the cultural preference of one family group on the honest decisions of another. This is a particular risk in a culturally diverse society, or one in which there are known differences in wealth and social perspective. The Law Commission foreshadowed this approach in its Preliminary Paper.<sup>94</sup>

<sup>91</sup> *Williams v Aucutt* *ibid* at [54 & 73]; *Auckland City Mission v Brown* [2002] 2 NZLR 650, [14 & 38].

<sup>92</sup> *Williams v Aucutt* *ibid* at [54].

<sup>93</sup> *Williams v Aucutt* *ibid* at [74].

<sup>94</sup> NZLC discussion paper, [241-262].

The idea is beneficial. Courts are being encouraged not to respond too rapidly to their initial feelings of surprise and distaste at what is complained about in a family protection case. Suppose the testator or testatrix has given serious thought to the requirements of the claimant, has a correct appreciation of all the facts, and has then made a will which is reasonably applicable to the situation at his or her death. In such a case, courts should be slow to come to a different conclusion. Where, to the contrary, the testator or testatrix has been wrong-headed, revengeful or simply mistaken, the testamentary disposition calls for much closer scrutiny, and the court should more readily substitute its own provisions for those found in the will.

Clearly, then, there are some useful observations in these statements of general principle. But they fall short of achieving the standards of clarity and predictability we are looking for.

*(e) The paramountcy of the "belonging" claim*

The fact that the Court of Appeal did not address issues arising at the next level of generality downwards, suggests one of two things. Either it doubted its own ability to define the necessary principles. Or else it believed that further rationalisation would not help the situation. How then has it managed to resolve the problems we have noted? One can of course only speculate about the Court of Appeal's intentions, and how the jurisdiction will develop in the future. But if we see the Court as having searched for an expedient rather than a principled solution, then a more sanguine picture begins to appear.

On the one hand, the primary, and virtually automatic claim from now on will be the "belonging" claim, through which a disappointed child can obtain an award of around 10% of the estate.<sup>95</sup> This has the advantage that moral considerations need never intrude on the judge's mind, at least in the ordinary run of cases. There is little room to argue the merits. If special considerations arise, claimants can be mollified by what appear to be major fluctuations when expressed as a percentage of a 10% award, but these adjustments are likely to have little significance when the estate is viewed as a whole.

On the other hand, claims which are neither "belonging" claims nor "financial needs" claims (for example, claims based on alleged parent wrongdoing) are now seriously weakened. They have to be justified as "proper" both generally, and in the particular circumstances of the case. The experience of the Law Commission will show just how difficult that undertaking is. By and large awards are likely to be small, and can be rolled up unobtrusively into the "belonging" claim. Any residual logical issues are unlikely to be noticed.

All this would make the law reasonably "clear and predictable", so that any remaining problems are confined to the "financial needs" claim. It too has been implicitly weakened by the same reasoning. We may expect to see counsel increasingly challenging "needs" claims. But they are too deeply entrenched to go away quickly. Over time, though, we may see these claims being satisfied by modest sums wrapped up in the claimant's "belonging" award. No-one will

<sup>95</sup> Blanchard J indicates that a wealthy child's belonging claim may be further reduced or negated in the light of competing claims of less fortunately placed siblings: *Williams v Aucutt* [2000] 2 NZLR 479, [69].

inquire too closely about how much of the award comprises the “financial needs” element. For all our criticism, we have to acknowledge that *Auckland City Mission v Brown* is a template for that kind of award. It implies, of course, that the whole thing can be done for each claimant, within 20% or so of the estate.

So the disaster management plan (if we can call it that) appears to be a combination of reducing individual awards, and packaging them so that judicial moralisation is reduced and logical defects in reasoning will not be glaringly obvious.

#### 4. Conclusion

We began this article with a discussion of the place of conventional moral sentiment in the law. We raised concerns about whether the importation of this morality into family estate claims was desirable, and we questioned whether, by doing so, the courts may have compromised their ability to deliver justice with an appropriate degree of legality. Now that we have considered the law reform work that has been done, and the Court of Appeal’s efforts to restore order, we are prepared to argue that our doubts were justified. The situation has had to be retrieved by an expedient. Further attempts at rationalisation are likely to be fruitless.

There is so much moralisation in this area already that comment from us about principle and expedient would add unnecessarily to the surplus. Moreover, we are conscious that the line we have chosen may, to some minds, be open to attack, following William Blake’s couplet:

The errors of a wise man make your rule  
Rather than the perfections of a fool.

But we have a few concluding words for those who practice in this jurisdiction. You cannot assume that an adult child’s claim, even if it appears deserving, will be met with an award much beyond the 10% mark. There is now a considerable body of writing that can be drawn upon to offer a vigorous defence. The Court of Appeal has signalled that most awards will be small, and anything going beyond a modest “belonging” claim will be seriously scrutinized. It has also encouraged charities to take part in trying to block awards, especially if an adequate defence might not otherwise be mounted.

There is, moreover, the ever present possibility that the legislature, despairing of judicial efforts, will at last confront the problem, drawing on the recommendations of the Law Commission. Perhaps the best way of avoiding such an outcome, is for practitioners to be aware of the difficulties we have described. They must insist that courts give credence to the will-maker’s purposes, and offer proper reasoning for departing from will-makers’ views of their testamentary responsibility. They must also try to restrain judges from inappropriate moralising. That way, they may yet be able to bring to the law of family protection that consistency and clarity which pertains in other parts of the law of obligations – surely not a big ask. Properly confined, we think that the jurisdiction might still be useful to modify the results of the occasional irrational or frail exercise of will-making power.