Contracts to make wills and the Family Protection Act 1955: is the promisee a creditor or a beneficiary?

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The Court of Appeal has recently held that the Family Protection Act 1955 does not prevail over a bequest made in fulfilment of a contractual promise. The decision resolves an issue which has received conflicting judicial treatment over many years. In this article the writer examines the case law and the competing policies of contractual and testamentary freedom versus family welfare. He concludes that the law should be amended to give the courts power to balance all the competing interests and where necessary make family protection orders affecting the contractual property.

I. INTRODUCTION

By section 4 of the Family Protection Act 1955 the court is given power to make "provision out of the estate of any deceased person" in favour of a spouse or certain other designated relatives in respect of whom the deceased has failed to make proper provision.[1] But the Act does not define "the estate" that can be made subject to such a discretionary order.[2] The issue has arisen as to whether the power to vary the provisions of a will extends to interfere with a testamentary devise or bequest given by the deceased in discharge of a binding contract entered into by him in his lifetime. Or in other words, in the context of the Family Protection Act, is such contracted property part of the estate of the deceased?

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1 Section 4(1) provides as follows:

> Notwithstanding anything to the contrary in the Administration Act 1969, if any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act as aforesaid, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons.

2 Section 2(5) merely deems property which is subject to any donatio mortis causa made by the deceased to be included within his or her estate. The Administration Act 1969, section 2, which defines estate to mean "real and personal property of every kind, including things in action", is of no assistance.

Upon this point there are two decisions of the Privy Council which are directly in conflict.

In an appeal from the New Zealand Court of Appeal in 1941 in *Dillon* v. *Public Trustee of New Zealand*[3] the answer given to this question was affirmative. Thirty years later precisely the same issue came forward from New South Wales in *Schaefer* v. *Schuhmann*.[4] After comprehensively reviewing the *Dillon* decision their Lordships held that it had been wrongly decided and declined to follow it: property devised or bequeathed in performance of a contract cannot be used to satisfy family protection claims. A few years later, faced with this conflict of authority at the highest level, Wild C.J. decided in *Re Webster*[5] that he should follow the more recent of the two Privy Council decisions. The same problem confronted White J. in *Breuer* v. *Wright*[6] and he arrived at the opposite conclusion. This case was appealed and reversed in 1982.[7] Basing its decision on the doctrine of precedent, the Court of Appeal conclusively established that the meaning of "estate" as enunciated in *Schaefer* v. *Schuhmann* is the law in New Zealand.

The difference between the two Privy Council decisions is essentially one of characterisation.[8] How does one characterise the rights of a promisee under a contract to devise or bequeath property? Creditors of a deceased's estate are satisfied before family provision orders are made.[9] Family provision orders are made before beneficiaries under a will are finally satisfied. Are promisees named as beneficiaries to be regarded as creditors of the testator and his estate, or simply as beneficiaries?

The law as it stands is that promisees are creditors of the testator, and deserving claimants may be defeated because contracted property is excluded from the court's jurisdiction. It is of academic interest to consider the validity of the reasoning of each court but it is of practical importance to consider the legal and social ramifications of the later decision of the Privy Council with a view to asking whether some amendment to the Family Protection Act 1955 may be desirable. Therefore, after giving and analysing the judicial history of this statutory interpretation dilemma, it is proposed to examine the competing policy considerations: freedom of testation and sanctity of contract versus the statutory objective of adequate provision for dependants of deceased persons. The writer will conclude by suggesting an equitable solution to the controversy.

II. THE COMPETING THEORIES

A. *The Creditor Theory*

The Privy Council in *Schaefer* v. *Schuhmann* held that one who takes a benefit

3 [1941] A.C. 294.
4 [1972] A.C. 572.
5 [1976] 2 N.Z.L.R. 304.
6 (1981) Unreported, Wanganui Registry, A10/81.
7 [1982] 2 N.Z.L.R. 77.
8 See I. Hardingham "Schaefer v. Schuhmann: Promisee v. Dependant" (1971) 10 Univ. of Western Australia L.R. 115; W. A. Lee "Contracts to Make Wills" (1971) 87 L.Q.R. 358.
9 *Dillon,* supra n.1, 303; *Schaefer,* supra n.2, 585; *Breuer,* supra n.5, 78.

under a will pursuant to a contract to devise or bequeath is to be regarded as being in the position of an estate creditor. As such he or she is entitled to be satisfied ahead of ordinary beneficiaries and applicants under the family protection legislation. According to this view, called "the creditor theory", the promisee receives under the contract a right to an effectual transfer of the relevant asset or a legacy under the promisor's will. The promisee is to be treated as a person having rights to the nominated benefit arising independently of the will. The promisee is, therefore, in the position of a creditor. And the Common Law relating to contractual testamentary benefits applies.

The Common Law rules are as follows. If the promisor deals with the property in his lifetime in a manner inconsistent with the contract, the promisee can treat the promise as repudiated and sue for breach.[10] Damages will be assessed subject to a reduction for the acceleration of the benefit, and for the contingency of his failing to survive the promisor if the benefit of the contract is personal to the promisee. If he is able to intervene before the property reaches the hands of a bona fide purchaser without notice, he can, with an injunction, restrain the testator from disposing of it. The promisee has a right of specific performance against anyone who takes the property with notice, or even those who take without notice if volunteers (e.g. testamentary beneficiaries).[11] If the testator fails to leave a legacy as he has contracted to do, the promisee can claim the amount of the legacy from the estate of the promisor.[12] If the testator dies insolvent, then whether or not he has performed his promise, the other party to the contract is entitled to claim as a creditor for the amount of the legacy, in competition with other creditors of the same degree.[13] In the case of a specifically enforceable contract, the promisee is entitled to specific performance as against the trustee of the insolvent estate, and so is in a better position than a creditor having only a debt.[14] The promisee's position is much weaker if the contract is to leave a share of the residue, since residue is only ascertained after debts have been paid.[15] But even then, the testator will not be permitted fraudulently (in the sense used in equity) to render his promise nugatory by making substantial gifts inter vivos or by way of specific legacy.[16]

B. *The Beneficiary Theory*

The contrary view, termed "the beneficiary theory" and approved by the board

10 *Synge* v. *Synge* [1894] 1 Q.B. 466. For the right to cancel the contract and recover damages for breach see Contractual Remedies Act 1979 ss. 7, 8 and 10.

11 *Synge,* idem; *In re Edwards, MacAdam* v. *Wright* [1958] Ch. 168; *Nealon* v. *Public Trustee* [1949] N.Z.L.R. 148; *Reynolds* v. *Marshall and Van Sturmer* [1952] N.Z.L.R. 384.

12 *Hammersley* v. *De Biel* (1845) 12 Cl. 8 Fin. 45; 8 E.R. 1312; (H.L.). Applied in *Commissioner of Stamp Duties* v. *Loughnan* [1948] N.Z.L.R. 626 (C.A.). See also *Covendale* v. *Eastwood* (1872) L.R. 15 Eq. 121.

13 *Eyre* v. *Monro* (1857) 3 K. & J. 305, 69 E.R. 1124; *Graham* v. *Wickham* (1863) 1 De G.J. & Sm. 474, 46 E.R. 188.

14 *In re Pooley, ex p. Rabbidge* (1878) 8 Ch.D. 367; *In re Bastable, ex p. The Trustee* [1901] 2 K.B. 518.

15 *Jervis* v. *Wolferstan* (1874) L.R. 18 Eq. 18, 24.

16 *Gregor* v. *Kemp* (1722) 3 Swanst. 404; 36 E.R. 926.

in *Dillon,* is that a promisee under a contract has nothing more than a right to be named as a beneficiary in the promisor's will. Once the testator has gone through the formalities of naming the promisee as beneficiary in his will in respect of the asset, he has fulfilled his obligation.[17] The promisee, having been named as a beneficiary in the testator's will, will then be subject to the normal disabilities of one who is a donee under a will, including the jurisdiction of the court to make a family provision order.

If, during his lifetime, the promisor, having contracted to devise or bequeath a particular asset to the promisee, disposes of that asset thereby incapacitating himself from performing his promise, the promisee will have an action for damages for anticipatory breach of contract.[18] The measure of his damages — prima facie the value of the benefit he should have received under the promisor's will — will be affected by three factors: the damages will be reduced to take into account the acceleration of the benefit; secondly, if the benefit of the contract is personal to the promisee, to take into account the contingency of his failing to survive the promisor; and thirdly, to take into account the possibility of the application of the family protection legislation.[19] If the testator/promisor dies insolvent it follows from an application of the beneficiary theory that the promisee would receive nothing whether the testator had fulfilled his promise or not.[20] If the testator has fulfilled his promise and named the promisee as beneficiary in his will, the promisee will have no claim for damages; there is no breach. If the testator has not fulfilled his promise, the promisee will prima facie have a claim for damages but he will have suffered no loss: had the testator carried out his promise the promisee would have received nothing anyway.

III. THE OSCILLATING CASE LAW

A. *Re Richardson's Estate*

The question whether the promisee under a contract to make a will is to be treated for the purposes of family protection legislation as a creditor of the estate or as a mere beneficiary first arose in Australia in *Re Richardson's Estate.*[21] The testator, in pursuance of a contract with his housekeeper, left his whole estate to her. His wife (estranged 30 years earlier) and daughter brought proceedings under the Testator's Family Maintenance Act which gave the Tasmanian court the same powers as are given to the court by the New Zealand Family Protection Act.

When he heard the case at first instance Nicholls C.J., while pointing out that if the testator had broken his contract the housekeeper could have recovered

17 *In re Brookman's Trust* (1869) L.R. 5 Ch. App. 182, 192.
18 *Synge* v. *Synge,* supra n.10.
19 *Dillon,* supra n.1, 304-5.
20 This consequence of the beneficiary theory would seem to be at variance with decisions such as *Eyre* v. *Monro* and *Graham* v. *Wickham* (supra n.13) wherein it was held that promisees under contracts to devise or bequeath may prove as creditors of an insolvent estate.
21 (1934) 29 Tas. L.R. 149.

damages, accepted the submission of counsel that as he had performed it the court had jurisdiction to make an order but he dismissed the application on its merits. The widow and daughter appealed to the full court but the appeal was dismissed. But Nicholls C.J. changed his reasons for rejecting the claim: from its failing on its merits, to the court having no jurisdiction to determine such a claim. In his judgment propounding the creditor theory, he expressed himself as follows:[22]

> . . . the respondent's *rights* do not *arise* under the will. They arise contractually and exist independently of the will. If the testator had made no will, or had made a will leaving everything to his widow and daughter, he would have made a breach of his contract with the respondent. She then could have sued for damages for the breach, and the measure of her damages would have been the value of the testator's estate. Her *status* afterwards would have been that of a judgment creditor. . . .
>
> "The Testator's Family Maintenance Act" is based solely upon the supposition that a free testator has chosen to deprive his wife or children of what he was at liberty to leave them and upon which they have some moral claim for maintenance. In such a case the *Court* is given a discretion to do what the testator could and should have done, but no more.

Crisp J. avoided this issue but concurred in the dismissal of the appeal on the ground that the Chief Justice was right in exercising his discretion against the appellants (at first instance). Clark J. dissented arguing that the beneficiary theory was the proper interpretation of the legislation. The question next arose in New Zealand in *Dillon's* case, but *Re Richardson's Estate* was not referred to by counsel nor in any of the judgments in that case.

B. *Dillon* v. *Public Trustee of New Zealand*

1. *The facts*

As a compromise to litigation brought against him by his children, Henry Dillon contracted to leave, by his last will, his farm on trust for one son and two daughters, subject to an annuity in favour of a third daughter. Two years later in 1935, the testator, aged 51 and a widower, married again. He made a fresh will setting out the promised provisions,[23] leaving the residue of his estate to his second wife.

2. *Supreme Court*[24]

On an application by the widow under the New Zealand Family Protection Act 1908 (section 33(1) which is indistinguishable from section 4(1) of the 1955 Act for the purposes of the issue considered in this article), Northcroft J. held at first instance that the court was not precluded from encroaching upon the contractual devise of the farm lands should that be necessary to make adequate provision for the second wife. Accordingly he made an order in her favour. The learned judge agreed with the view of Chapman J. expressed in *Gardiner* v.

22 Ibid. 155.

23 With certain exceptions, marriage generally has the effect of revoking any will previously made by either party: s.18 Wills Act 1837 (U.K.), s.13 Wills Amendment Act 1955 (N.Z.).

24 [1938] N.Z.L.R. 693.

Boag,[25] discussed and approved by the full court in *Parish* v. *Parish*,[26] that the Act is ". . . a declaration of state policy, and that, as such, it is paramount to all contracts". Those two cases decided a wife could not surrender her statutory right to maintenance and support out of the estate of the deceased husband in a contract with her husband, before or after the marriage. His Honour, Northcroft J., reasoned ". . . a fortiori, a husband may not contract himself out of his obligations even though the contract be made before marriage".[28]

3. *Court of Appeal*[29]

The Court of Appeal (Myers C.J. and Ostler J., Smith J. dissenting) reached the opposite conclusion. The majority held that since the devise of the land was made in fulfilment of a contract for valuable consideration, the land was not available to satisfy the claim of the applicant. Myers C.J. was of the view that the learned judge below had misapplied the two authorities upon which he relied. "A contract made for valuable consideration", he said, "in what may be regarded as the ordinary course of business seems to me to be in a different category."[30] The Chief Justice then referred to the rights of the promisees under the contract to enforce their interests in the particular property (e.g. right to recover damages equal to the value of the equity of the lands if the contract is breached or unperformed), and concluded that it would be extraordinary if the law permitted them to be in a worse position if the Family Protection Act applied than if the testator had committed a breach of his contract.[31] Ostler J. enunciated similar reasoning in also approving the creditor theory.

In his dissenting judgment, Smith J. said that the farming lands were part of the estate because they passed by the exercise of the testamentary power and by nothing else. He argued that the agreement created no rights in land whatever, only rights to have the last will made in a particular way and the testator had fulfilled his contract by framing his will in that way. As a result, the court could make an order over the property.

4. *Privy Council*[32]

On a further appeal, the Judicial Committee of the Privy Council restored the order of Northcroft J., following closely the reasoning of Smith J. Viscount

25 [1923] N.Z.L.R. 739, 745. The facts of this case were that the wife covenanted with her husband post-nuptially that in the event of the death of her husband, she would not be party to any proceedings to obtain any further or other sum or sums from his estate under the Family Protection Act 1908. The Court held that this covenant was void as being contrary to the policy of the law, and did not exclude the jurisdiction to make an order in favour of the plaintiff.

26 [1924] N.Z.L.R. 307, 312, 314, 316. In an ante-nuptial contract, the testator covenanted to leave £400 to the applicant by his will, and the applicant agreed to accept this sum in full satisfaction of all her claims against the estate of the testator after his death. The Court held she was entitled to apply for further provision under the Family Protection Act 1908.

27 Supra n.24, 694.

28 Ibid. 695.

29 [1939] N.Z.L.R. 550.

30 Ibid. 556.

31 Ibid. 558-559.

32 [1941] A.C. 294; also [1941] N.Z.L.R. 557.

Simon L.C., giving the opinion of the board,[33] concluded that the testator's children were simply devisees and not creditors. The testator did what he had contracted to do, and if he had broken his contract the children's rights to damages or specific performance would have to be assessed or granted subject to the possible or actual impact of the power of the court under the Act.[34] Their Lordships reached this conclusion to give effect to the intention of the Act, as they perceived it. They opined:[35]

> The manifest purpose of the Family Protection Act, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for. . . .

Viscount Simon referred[36] to the Chief Justice's argument in the Court of Appeal[37] that the effect of applying the beneficiary theory would be that the promisee would be in a worse position if the promisor had actually performed the contract but the disposition was affected by application of the Family Protection Act, than if the promisor had committed a breach of his contract. Their Lordships did not agree that this result would follow.[38] The Lord Chancellor said that they did not question the binding authority of cases like *Hammersley* v. *De Biel*[39] and *Coverdale* v. *Eastwood*[40] (which decided that if the testator fails to leave a legacy as he has contracted to do, the promisee can claim the amount of the legacy from the estate of the promisor) but suggested that the actual result of applying such decisions in New Zealand may be affected by the provisions of the Act. The compensation due to the promisee from the testator's estate, if the latter fails to fulfil his contract to make the devise, will be the value of that which the former should have received under the will. But this value is not necessarily the whole value of the interest which the testator agreed to devise, but is the value less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act. Thus the promisee is in the same position, so far as compensation is concerned, if the testator breaks his contract as he would be if the promisor had performed it. Their Lordships admitted that there may well be instances where all this is difficult to work out, but their Lordships did not entertain any doubt that, in principle, the Family Protection Act affects the unqualified operation of a contract to make a will in a particular form, whether the contract is fulfilled or whether it is broken.

In addition, however, Viscount Simon made the following cautionary comment:[41]

> The interpretation of the court should take place, of course, only after considering all relevant circumstances, and among these circumstances may be the fact that the testator was under obligation to third parties.

Their Lordships thus acknowledged the principles of sanctity and certainty of contract and the respect which should be accorded to them. To the Privy Council which decided *Dillon* v. *Public Trustee of New Zealand,* a balancing of interests

33 Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Wright, and Lord Porter.
34 Supra n.32, 304-5.
35 Ibid. 303-304.
36 Ibid. 304-305.
37 Supra n.31.
38 Supra n.32, 304-305.
39 Supra n.12.
40 Idem.
41 Supra n.32, 301.

would always be in order, but adequate and reasonable family provision according to the circumstances was the overriding principle.

5. *Judicial and legislative responses to* Dillon

Dillon's case prompted mixed reactions, further exacerbating the inconsistent law on this subject. In *Olin* v. *Perrin*,[42] a case on all fours with *Dillon* decided in the Ontario Court of Appeal, Laidlaw J.A. thought that *Dillon* was wrongly decided. Gillanders J.A., in the same case, accepted *Dillon* as rightly decided. In another Canadian case, Egbert J. in the Supreme Court of Alberta said obiter that *Dillon* was a somewhat surprising decision,[43] but it was accepted as correct in *In re Brown (decd.)*[44] by Turner J. in the New Zealand Supreme Court. Disapproval of the Privy Council decision prompted exempting sections to be included in the family protection statutes of Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan. These sections state that where a testator bona fide and for valuable consideration contracts to leave property by will, such property shall be exempt from the statute except to the extent that the property exceeds the consideration received by the testator.[45]

The New Zealand Family Protection Act, however, was re-enacted in 1955, after *Dillon's* case, with no relevant amendments. It has been said that under well-established practices of statutory construction, a case should be regarded as having been approved and endorsed if the legislation is re-enacted in virtually the same terms. For instance, in *Maxwell on Interpretation of Statutes* the following rule of construction is stated:[46]

> In the construction of a consolidation Act, the presumption that Parliament does not intend to alter the existing law applies with particular force. For the object of the Act was merely to 'reproduce the law as it stood before'. And there is a further, perhaps less persuasive, presumption that the words used in the consolidating Act

42 [1946] 2 D.L.R. 461.

43 *In re Willan Estate* (1951) 4 W.W.R. (N.S.) 114, 134.

44 *Brown* v. *Guardian Trust and Executors Co. of N.Z. Ltd.* Unreported, 1955; quoted by Juristor "Contract to leave property by will" (1956) 32 N.Z.L.J. 332.

45 See Bale "Limitation on Testamentary Dispositions in Canada" (1964) 42 Can. Bar Review 367, 385. Also note criticisms of *Dillon* in D. M. Gordon (1941) 19 Can. Bar Rev. 603 and (1942) 20 Can. Bar Rev. 72, countered by an anonymous reply in 19 Can. Bar Rev. 756.

46 *Maxwell on the Interpretation of Statutes* (12th ed., Sweet and Maxwell, London, 1969) 21; *Craies on Statute Law* (7 ed., Sweet and Maxwell, London, 1971) 362-363. See also R. J. Sutton "Ousting the Family Protection Jurisdiction" [1977] N.Z.L.J. 57, 62.
But note the comments of Denning L.J. in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russel* [1949] 2 K.B. 417, 429: a court should be especially slow to overrule an 'interpretative decision' if the statute has been re-enacted in the same terms "but if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled". In addition, Dixon C.J. pointed out in *R.* v. *Reynhoudt* (1962) 107 C.L.R. 381, 388 that "the mechanics of law-making no longer provide the rule with the foundation in probability which the doctrine was supposed once to have possessed. I note that Lord Radcliffe describes it as 'an almost mystical method of discovering the law' *Galloway* v. *Galloway* [1965] A.C. 299, 320."
The most recent reservations have been expressed in *Lilley* v. *Public Trustee* [1981] 1 N.Z.L.R. 42, 45 per Lord Wilberforce, quoted and approved in *Breuer* v. *Wright* [1982] 2 N.Z.L.R. 77, 85; infra n. 88.

bear the same meaning as that which they had at the time the enactments consolidated were passed.

C. *Schaefer* v. *Schuhmann*

1. *The facts*

The testator, Edward Seery, engaged a housekeeper, Mrs Elizabeth Schaefer, at a weekly wage. By a codicil to his will, he left his house and land to her if she was still employed by him as a housekeeper at the date of his death. Mrs Schaefer read the document before it was executed. Because he had left her the house the testator soon stopped paying her wages. On this evidence, the Privy Council held that the testator had bound himself by an enforceable contract to leave the property to his housekeeper by his will.[47] After his death, his four adult daughters applied for further provision under the terms of the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954, the terms of section 3(1) of that Act being indistinguishable from sections 33(1) and 4(1) of the New Zealand Family Protection Acts.

2. *Supreme Court of New South Wales*[48]

In the Supreme Court of New South Wales, Street J. found no distinction between *Dillon's* case and the issue in *Schaefer's* case. He referred to *Dillon* as a powerful, and in his view, conclusive decision. The learned judge concluded that the effect of the decision of the Privy Council was but an instance of the general proposition enunciated in *In re Brookman's Trust*:[49]

> If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form, and it is not owing to any act of his that the child does not take.

He held therefore that the court had jurisdiction to interfere with the disposition to the housekeeper. Street J. found that three of the daughters had made out deserving claims for relief and ordered their legacies to be increased by charging the property given to Mrs Schaefer and reducing the residue of the estate.[50]

3. *Privy Council*[51] — *majority*

On appeal, Mrs Schaefer did not dispute that the testator had failed to make adequate provision for his three daughters or the propriety of the orders made

47 The majority and the minority of the Privy Council disagreed whether an enforceable contract existed at all: infra n.51 583-585 and 594-595. For comment on this issue, see R. D. Gilbert "The Return of Elizabeth Maddison's Ghost" (1972) 46 A.L.J. 522.

48 *Re Seery and Testator's Family Maintenance Act* [1969] 2 N.S.W.R. 290.

49 (1869) L.R. 5 Ch. App. 182, 192, per Giffard L.J.

50 The net estate remaining after payment of debts, duties and expenses was worth $68,700. By his will, Edward Seery left his house and its contents together worth $14,500 to his housekeeper, and gave each of his four daughters legacies of $2,000, and left the residue of his estate equally between his three sons. The effect of Street J.'s order so far as Mrs Schaefer was concerned was to substitute a gift of $2,000 for the gift of the house and furniture worth $14,500. Mrs Schaefer was a married woman and had looked after the testator for eight months. There was no suggestion that the relations between the testator and his housekeeper were other than those between employer and employee.

51 [1972] A.C. 572. Lord Cross of Chelsea, Lord Wilberforce, Lord Hodson, Lord Parker of Waddington; Lord Simon of Glaisdale dissenting.

by the court in their favour. Rather, she contended that the court had no jurisdiction to throw any of the burden of such orders on the property given to her but that the whole burden should come out of the residuary estate left to the three sons. She argued that an order under the Testator's Family Maintenance Act could not override or destroy equitable proprietary rights acquired by the third person under a contract in which the deceased promised to leave property to such person by will.

In a complete volte face, the majority of the Privy Council declined to follow *Dillon's* case. Lord Cross of Chelsea giving the advice of the board remarked that, were it not for the decision of the board in *Dillon,* their Lordships would have had no hesitation in preferring the view of Nicholls C.J. in *In re Richardson's Estate,* and after fully considering *Dillon* concluded:[52]

> If and so far as it is thought desirable that the courts of any country should have power to interfere with testamentary dispositions made in pursuance of bona fide contracts to make them, it is, their Lordships think, better that such a power should be given by legislation framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies, as flow from the decision in *Dillon* v. *Public Trustee of New Zealand.*

Their Lordships considered the apparent meaning of the Act to be that the court is given power to make such provision for members of the testator's family as the testator ought to have made, and could have made, but failed to make. In other words, the court is not being given power to do something which the testator could not effectively have done himself. In their opinion this interpretation receives strong support from section 4(1) of the New South Wales Act which states that a provision made under the Act is to operate and take effect as if it had been made by a codicil executed by the testator immediately before his death. The testator would not be entitled to dispose of contracted property contrary to the agreement by such a codicil, therefore their Lordships inferred that the court cannot affect such property either. There is no similar provision in the New Zealand Act but Lord Cross believed section 4(1) of the Testator's Family Maintenance Act "only emphasises and makes explicit what would be implicit in the Act if it were not there."[53] Thus, the beneficiary theory was firmly rejected in favour of the creditor theory.

The anomalies to which their Lordships referred (see quotation above) were canvassed by Myers C.J. in the Court of Appeal in *Dillon,* and brought him to the same conclusion as the majority in *Schaefer.* The latter expressly regarded the Privy Council decision in *Dillon* which overruled the New Zealand Chief Justice to be inconsistent with long established succession cases. The Common Law relating to contractual testamentary benefits has already been summarised in this article in the section titled "The Creditor Theory".[54] Briefly recapitulating the main cases: *Synge* v. *Synge*[55] decided that if the promisor deals with the property in

52 Ibid. 592.
53 Idem.
54 Text Part II(A). See also: W. A. Lee "Contract to Leave Property by Will" (1972) 46 A.L.J. 191; Sutton, supra n.46, 63; Sherrin "Contracts to Make Wills (1972) 122 N.L.J. 576.
55 [1894] 1 Q.B. 466. Supra nn.10 and 11.

his lifetime inconsistently with the contract, the promisee can treat the promise as repudiated and sue for damages, or if in time restrain the testator from disposing of it; *Hammersley* v. *De Biel*[56] decided that if the testator fails to leave a legacy as he has contracted to do, the promisee can claim the amount of the legacy from the estate of the promisor; *Graham* v. *Wickham*[57] decided that if the testator dies insolvent, then whether or not he has performed his promise, the other party to the contract is entitled to claim as a creditor for the amount of the legacy, in competition with other creditors of the same degree; *In re Pooley*[58] decided that in the case of a specifically enforceable contract, the promisee is entitled to specific performance as against the trustee of the insolvent estate.

Their Lordships considered that three anomalous results arose from the *Dillon* decision:[59]

(1) Where the promisor dies insolvent, the promisee is entitled to the property or to claim as a creditor. But if the testator dies solvent, the whole property might be given to the family protection claimants to the exclusion of the promisee.

(2) Where the testator parted with property specifically promised during his lifetime, he would have to pay damages at that date. If the contract was kept, the property might be taken from the promisee by an exercise by the court of its power under the Act. In *Dillon's* case, Viscount Simon suggested there was no anomaly because any damages which the promisor was ordered to pay would be assessed in the light of the possibility of the exercise by the court of its jurisdiction. In other words, the award of damages which will repay the loss suffered by B from A's breach of contract is the equivalent of the benefit which B would have enjoyed if the contract had been performed, but that benefit is the value of the property less the extent to which it would be reduced by a redistribution due to the application of the Family Protection Act. Lord Cross retorted:[59a]

> . . . it is difficult to see how in practice any deduction could be made for this contingency since at the date of the breach sued on it would be quite uncertain whether or not any occasion for exercise of the court's power under the Act would arise on the testator's death.

Their Lordships in *Dillon* also forgot that the promisee may have a right to specific performance.

(3) If the promise did bring about a situation where the testator was, at the date of his death, trustee for the promisee, then it is difficult to see how a family protection order could be made against the property. If this were so, *Dillon* authorises the court to interfere with property beyond its jurisdiction.

These anomalies were considered sufficiently serious by the majority in *Schaefer* to justify rejecting the decision in *Dillon*.

56 (1845) 12 Cl. & Fin. 45; 8 E.R. 1312. Supra n.12.
57 (1863) 1 De G.J. & Sm. 474; 46 E.R. 188. Supra n.13.
58 (1878) 8 Ch.D. 367. Supra n 14.
59 Supra n.51, 586-587.
59a Ibid. 587.

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4. *Privy Council — dissentient*

In his forceful dissenting judgment, Lord Simon of Glaisdale considered it more desirable to adopt a construction which accorded with the objective of the legislation and public policy. He perceived the statutory purpose to be the prevention of family dependants being thrown on to the world with inadequate provision when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance.[60] His Lordship found authorities to support his interpretation and attempted to reconcile the "anomalies" but concluded:[61]

> But even were anomalies to remain, desirable as it is to adopt a construction which does not produce anomalous results, it is still more desirable in my view to adopt a construction which accords with the ascertainable intention of the legislature and which promotes justice between conflicting interests.

In his Lordship's view, *Dillon's* case was correctly decided.

In deference to the emphasis put on the "anomalies" by the majority, Lord Simon tentatively suggested three ways of reconciling *Dillon* with the Common Law. First, he suggested damages for breach of contract might have to be modified by the impact of the family protection legislation. This idea had been previously mooted in *Dillon* but was attacked by Lord Cross as impractical (anomalous result (2) above). Secondly, the court could imply into every covenant to leave property by will a proviso: "subject to the statutory discretion vested in the court to order family protection". Lord Simon argued an implied proviso would be closely analogous to the refusal of the law to allow any contractual derogation from its discretionary power to order maintenance for an ex-wife: *Hyman* v. *Hyman.*[62] In the writer's view, *Hyman* is not authority for such a wide proposition — such a proviso can only be read into a contract entered into by the dependant. This more limited rule is already the law in New Zealand[63] but Lord Simon does not provide a logically compelling reason to extend the principle to "third-party contracts" entered into by the testator other than to effect his Lordship's preferred policy. A third alternative reconciliation is to draw a distinction between a promise to leave by will a specific sum or asset on the one hand, and a share of the residue on the other. This, however, would be unjust in some instances and is not convincing as it resolves only some of the authorities. As a final point, Lord Simon concluded with a scathing rebuke of the approach of the majority:[64]

> . . . the alleged anomalies largely disappear if ancient authorities decided in a different social context are not carried forward hypnotically to what may seem their logical conclusions regardless of the impact of a modern statute of clearly ascertainable social purpose. . . .

In the final paragraph of his opinion, Lord Simon accepts the beneficiary

60 Supra n.51, 596.
61 Ibid. 600.
62 [1929] A.C. 601, 629, per Lord Atkin.
63 *Gardiner* v. *Boag,* supra n.25; *Parish* v. *Parish,* supra n.26; also *Hooker* v. *Guardianship Trust and Executors Co. of N.Z.* [1927] G.L.R. 536 — the testator's widower covenanted with the defendant company not to make a family protection claim. The Court held the deed could not bar the plaintiff from pursuing a claim.
64 Supra n.51, 600.

theory as the interpretation which accords with his preceding social and legal analysis.

5. *Is a promisor a trustee?*

If the testator was merely a trustee of the property, it would not be part of his estate[65] and therefore outside the jurisdiction of family protection statutes. The Privy Council did not seriously consider the submission of Mrs Schaefer's counsel that where a contract is made to leave specific property by will the testator becomes a trustee for the promisee.[66]

Authority for this proposition is *In re Edwards (decd.)*.[67] A testatrix devised her home to certain people but, between the date of the will and her death, she entered into a contract to leave the property to her housekeeper. The Court of Appeal held that the gift was upset by the contract. Its effect was that at the time of her death, the testatrix had parted with the whole beneficial interest in the property[68] and was a bare trustee of the property for the promisee.[69] Likewise, Lord Parker for the Privy Council in *Central Trust and Safe Deposit Co.* v. *Snider* said:[70]

> . . . if a person agreed for valuable consideration to settle a specific estate he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow.

It is certainly the law that where there is a contract for the sale of land, when the purchaser has paid the purchase price in full and has no other obligation to perform under the contract, the vendor is a bare or mere trustee for the purchaser.[71]

In re Edwards was considered when *Schaefer* was heard at first instance but Street J. chose to follow the authoritative opposite decision of *Dillon*:[72]

> In effect the decision in *Dillon's* case brings about a situation in which the promisee under a contract to make a will in a particular form must accept that, whatever equities he may have in the property the subject of the contract . . . his rights are subject to inroads being made upon the property by a court exercising statutory jurisdiction under legislation such as the Testator's Family Maintenance Act of this State or the Family Protection Act of New Zealand.

In the present writer's opinion, the courts in *Dillon* and *Schaefer* could have legitimately found against the respective family protection claimants by saying that the testator was a bare trustee of the property for the promisee. However, the comments of Street J. just quoted reveal the fundamental difference between

65 See *Public Trustee* v. *J. A. Kidd* [1931] N.Z.L.R. 1; *Re Donkin (decd.)* [1966] Qd.R. 96; *Re McPhail (decd.)* [1971] V.R. 534.

66 Supra n.51, 575. For an analysis of this argument, see R. A. Sundberg "The Problem in Schaefer v. Schuhmann — A Simple Answer?" (1975) 49 A.L.J. 223.

67 [1958] Ch. 168.

68 Ibid. 179.

69 Ibid. 176.

70 [1916] 1 A.C. 266, 271-272, relying on *Lewin on Trusts* (12th ed., Sweet and Maxwell, London, 1911) pp. 160-161. This statement was reprinted in identical terms in the 16th ed., 1964, 152.

71 Pettit *Equity and the Law of Trusts* (4th ed., Butterworths, London, 1979) 128.

72 Supra n.48, 295.

the *Dillon* and *Schaefer* decisions. The cases are inconsistent because the philosophy and approach of the courts are different. In the latter, the Privy Council attempts to interpret and apply the legislation in a manner consistent with case law. In the former, the Privy Council's paramount concern is to effect what it perceives as the object and policy of the Family Protection Act. Thus the *Dillon* court could not have decided that case in the manner suggested at the beginning of this paragraph because defeating worthy family protection claims would be contrary to the objects of the legislation. The Privy Council in *Schaefer* having reached the conclusion that *Dillon* was wrongly decided had to find strong reasons to decline to follow that case. This would not have been achieved if it had concentrated on the fact that the subject of the contract was land and therefore the testator was a bare trustee. Their judgment had to be more sweeping. The New Zealand courts' response to that judgment will now be outlined.

D. *Re Webster*[73]

1. *The facts*

The testatrix devised and bequeathed her house to three sons in fulfilment of a contract with them: they agreed to pay all outgoings in respect of the house and renovate and maintain the same in consideration of the testatrix leaving the house to them as tenants-in-common in equal shares, subject to their paying to her other son and three daughters the sum of £1,400 to be divided equally between them. The testatrix lived for seventeen years after the will was made and at her death the house was valued at four times the value assessed in 1956. At the time the will was made the children would have shared in the assets equally and borne the liabilities equally.[74] Proceedings were brought by the deceased's daughters under the Family Protection Act 1955.

2. *The decision*

The issue in the case for Wild C.J. came down to whether the court should apply *Dillon* or *Schaefer*. The learned Chief Justice accepted the authority of *Schaefer*. He understood the ratio of the Privy Council's advice to be that the "estate" out of which provision can be made is that part of it which the testator is free to deal with. Because of the similarity in the essential terms of section 4 in the New Zealand Act and section 3(1) in the New South Wales Act, the Chief Justice concluded that the above principle must now apply in New Zealand as it does in New South Wales. Accordingly, there was no property to which a family protection order could apply. He expressed the opinion that although in *Schaefer's* case the Privy Council merely declined to follow *Dillon's* case, the effect is the same as if the board had expressly overruled it.

73 [1976] 2 N.Z.L.R. 304.

74 The value of the property at the time of the contract was £2450. £1400 was to be paid to the four non-contracting children, decreasing the net value of the three contracting brothers to £1050. £1400 divided by four equals £350. £1050 divided by three equals £350. However, the government valuation of the property as at 1 July 1974 was £21,600 — a quadrupling in value, attributable in part to the repairs and improvements effected by the brothers, but also largely from the effect of inflation on property values.

A new argument was pressed before Wild C.J. that would not have been available on appeal from New South Wales and therefore was not considered by the board in *Schaefer*. It was argued on behalf of the applicants in *Re Webster* that the Law Reform (Testamentary Promises) Act 1949 section 3(1) affected the meaning and scope of the "estate" mentioned in section 4 of the Family Protection Act 1955: the 1949 Act reveals that the legislature desires the courts to take a flexible approach to promisees' claims and for the two statutes to be consistent, contracted property should not be automatically excluded from the court's jurisdiction. The learned Chief Justice dismissed this argument.[75] His reasons and a fuller consideration of the issue of the relationship between the Family Protection Act and testamentary promises legislation will be given in Part IV of this article.

E. *Breuer* v. *Wright*

1. *High Court*[76]

The testator contracted to forgive a business debt, and this was done in a codicil to his will. After finding that a valid contract existed, White J. had to consider a claim by the widow under the Family Protection Act 1955. His Honour concluded that at first instance he should apply the ratio decidendi of the Privy Council in *Dillon's* case, that being an appeal from the New Zealand Court of Appeal,[77] but admitted favouring that decision in preference to *Schaefer* anyway. That was because it had been the law in New Zealand for many years and better accorded with the history of our legislation. In addition, the principles stated in *Dillon* are consistent with the provisions of the Law Reform (Testamentary Promises) Act 1949. His Honour further observed that the Family Protection Act 1955 was a consolidation Act to which the presumption that Parliament does not intend to alter the existing law applied.[78] Also relevant was the lack of any legislative amendment to alter the result in *Dillon*.[79] He further noted that in 1972 the board did not expressly overrule the earlier decision but simply stated that they "declined to follow it".

2. *Court of Appeal*[80]

Woodhouse P., and McMullin and Ongley JJ. reversed the decision of White J., concluding:[81]

> . . . we are satisfied that unless and until the Privy Council itself should review its advice in *Schaefer* v. *Schuhmann* that decision must be regarded as binding on the Courts of New Zealand.

75 See *Reynolds* v. *Marhall and Van Sturmer* [1952] N.Z.L.R. 384, 392-393; *Nealon* v. *Public Trustee* [1949] N.Z.L.R. 148, 166.
76 (1981) Unreported, Wanganui Registry, A10/81.
77 See 26 *Halsbury's Laws of England* (4 ed.) para. 584; *Baker* v. *The Queen* [1975] A.C. 774.
78 *Maxwell on the Interpretation of Statutes,* supra n.46.
79 Cf. some Canadian provinces. Supra text accompanying n.45.
80 [1982] 2 N.Z.L.R. 77.
81 Ibid. 86.

This followed consideration of the binding effect of Privy Council decisions in other jurisdictions. The court opined:[82]

> . . . we do not think it can be doubted that, subject only to the exceptional need to take account of the local development of some aspect of law which otherwise is common to sister Commonwealth countries, a decision of the Privy Council given in respect of an appeal from the one would be binding upon the Courts of the others.

The court was of the view that there were no indigenous social considerations that warranted distinguishing the New South Wales and New Zealand enactments.

Mention was also made of the judgment of *R.* v. *Baker*[83] in which Lord Diplock referred to the problem that might very occasionally arise "where the rationes decidendi of two decisions of the board conflict with one another and the later decision does not purport to overrule the earlier". In that event, his Lordship said, the courts "may choose which ratio decidendi they will follow and in doing so they may act on their own opinion as to which is more convincing". That statement was relied upon by counsel for the respondent as applicable in the present case on the basis that *Dillon* had not been overruled by the *Schaefer* decision. The Court of Appeal disagreed with this submission: the "plain effect" of *Schaefer* was to overrule the earlier decision. The court also noted the principle that where there is a choice to be made as to which of two conflicting decisions of the Privy Council should be followed, the question must always be which of them is likely to be adhered to by the board itself. Authority for this proportion is *Corbett* v. *Social Security Commission*[84] and *de Lasala* v. *de Lasala.*[85] In the former, the New Zealand Court of Appeal considered whether an earlier decision of the Privy Council should be followed rather than a later inconsistent decision of the House of Lords and stated that where the House of Lords has made it plain how and in what respects error arose in the earlier case so that it is wholly unlikely that there could be any reversion to the earlier decision, the New Zealand court should follow the decision of the House of Lords.

In respect to the doctrine of parliamentary endorsement of a judicial decision[86] (i.e. counsel's submission that *Dillon* was implicitly approved by the amendment and consolidation in 1955 of the earlier Family Protection Act 1908 without change to the relevant discretionary provision now under review), Woodhouse P., giving the decision of the court, referred to the Privy Council case of *Lilley* v. *Public Trustee*[87] (an appeal from New Zealand) in which Lord Wilberforce remarked that "reservations have been, and continue to be expressed as to the validity and force (preemptive and influential) of 'legislative endorsement' ". Woodhouse P. then commented:[88]

> And the present situation certainly does nothing to remove the need for such reservations. It is one thing to consider whether any inference can be drawn that a judgment has received the subsequent endorsement of Parliament in order to decide whether it

82 Ibid. 83. In this context, the Court referred to *Negro* v. *Pietro's Bread Co. Ltd.* [1933] 1 D.L.R. 490; *de Lasala* v. *de Lasala* [1980] A.C. 546, 559; *Fatuma Binti Mohamed Bin Salim Bakhshuwen* v. *Mohamed Bin Salim Bakhshuwen* [1952] A.C. 1, 14; and cited *Viro* v. *The Queen* (1978) 52 A.L.J.R. 418, 429 in support of this proposition.

83 [1975] A.C. 774, 788.

84 [1962] N.Z.L.R. 878.

85 [1980] A.C. 546, 558.

86 Supra n.46.

87 [1981] A.C. 839.

88 Supra n.80, 85.

> is to be followed in circumstances where it has stood unchallenged by other decisions of the Court. It is quite another to have recourse to the doctrine where the relevant decision has been comprehensively considered at a later date by the Privy Council itself and then held to have been wrongly decided.

The Court of Appeal also considered the argument that the Law Reform (Testamentary Promises) Act 1949 affects the meaning or scope of the "estate" mentioned in section 4 of the Family Protection Act 1955. The court concurred with Wild C.J. in *Re Webster* that the 1949 enactment does not justify a gloss being put upon the scope and effect of the Family Protection Act to distinguish the meaning of "estate" in the New Zealand legislation from the meaning of "estate" in the New South Wales legislation.

The Court of Appeal decision in *Breuer* v. *Wright* conclusively establishes that the interpretation of "estate" enunciated in *Schaefer* v. *Schuhmann* is the law of New Zealand. The creditor theory reigns! But not without reservations and an exception. The Court of Appeal concluded its judgment thus:[89]

> We recognise that there may be differences of opinion concerning policy and social questions that arise concerning the breadth of operation of the Family Protection Act. However we think that these are not matters for resolution by the Courts but, should it seem necessary, for attention by Parliament. The one comment that should perhaps be made is that the principle enunciated in the *Schaefer* case is not concerned to protect some piece of contractual window dressing, carefully designed for no other purpose than to defeat just claims under the legislation, but as the judgment makes plain with bona fide enforceable contracts made for valuable consideration.

The court would allow an exception to the general rule if the purpose of the contract was to abrogate the testator's duties towards his close relatives.[90] If such an obligation exists, perhaps it is wrong that a bona fide contract renders the provisions of the Family Protection Act completely nugatory. This can only be remedied by legislation. The writer will consider the social and policy arguments for and against extending the jurisdiction of the court to give it power to make orders over property which is the subject of a bona fide contract to make wills in Part V of this article.

IV. TESTAMENTARY PROMISES

A. *Introduction*

One commentator while detailing the history of New Zealand's testamentary promises legislation wrote:[91]

> . . . today we have comprehensive and eclectic provisions granting the Court wide discretionary powers capable of embracing nearly all conceivable situations. These powers are broad enough to permit a Court to satisfy its own sense of justice in the individual case. . . .

89 Ibid. 86.

90 Such an exception was first mooted by Myers C.J. and Ostler J. in the Court of Appeal in *Dillon* v. *Public Trustee,* supra n.29. It will be recalled that their majority decision was reversed in the Privy Council but later accepted by the Board in *Schaefer,* supra n.51, 592.

91 P. Burns "Testamentary Promises: Development of the Law" [1965] N.Z.L.J. 200 and 251. See also: B. Coote "Testamentary Promises Jurisdiction in New Zealand" *The A. G. Davis Essays in Law* (Butterworths, London, 1965) Ch. 1.

Any legislation which inspires such favourable comment deserves attention but it is particularly apposite in the present instance to compare and contrast it with the family protection legislation. It has been argued that the Law Reform (Testamentary Promises) Act 1949 affects the scope and meaning of "estate" in the Family Protection Act but this has been rejected by the courts. In the writer's opinion, however, it is a valuable indication of legislative philosophy because it derives from the same social context as the family protection legislation. Yet policy factors have persuaded Parliament to allow the courts a great deal of flexibility to determine claims. It is submitted that such a formula would ease the disquiet that the original objects of the Family Protection Act are being thwarted and would be an acceptable compromise to those who have "differences of opinion concerning policy and social questions that arise concerning the breadth of operation of the Family Protection Act."[92]

B. *Law Reform (Testamentary Promises) Act 1949*

Section 3(1) of the Law Reform (Testamentary Promises) Act 1949 provides as follows (emphasis added):

> Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, whether or not the provision was to be a specified amount or was to relate to specified real or personal property, then, subject to the provisions of this Act, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of *such amount as may be reasonable, having regard to all the circumstances of the case,* including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise.

In addition, the court is granted the discretion of awarding specific real or personal property where it forms the subject-matter of a promise as well as being able to award any part of the property and make up the balance with a reasonable sum of money (section 3(3)). The court is also empowered to award either a lump sum or a periodical or other payment as it deems fit (subsection (4)). Except where the court otherwise determines, the incidence of payment is to fall rateably on the whole estate of the deceased (subsection (5)) and the court is empowered to hear any party affected by any award and exonerate any part of the estate from such award (subsection (6)). Any order may be made upon and subject to any terms the court thinks fit (subsection (7)). The court's powers are wide.

92 Supra n.89.

C. *Development of the Law*

These provisions were first enacted in the Law Reform Act 1944.[93] Prior to that, claims based on a promise made by a testator to remunerate a person who rendered services by making a provision by will failed because of the application of the law as outlined in *Halsbury*:[94]

> A man who does work for a testator on the understanding that he is to be remunerated by a legacy has no claims against his estate if the testator fails to provide for the legacy and the executors are not entitled to satisfy such a claim.

But this rule received outspoken comment from the bench. In one case, Ostler J. said:[95]

> I do not think that the law is equitable, and in this case I feel that it will work an injustice. But it is clearly the law and my duty as a Judge is to follow the law.

In another, Fair J. said[96] that until 1944

> . . . there was no power for the court to make any such provision, unless there had been a specific contract binding in law on the deceased, and in terms so definite and certain that the court was able to give effect to them. There had been many deserving cases where that legal contract had not been made because the promises were made in vague language. They were often definite enough as to the promise, but vague or uncertain as to the kind or extent of the benefits promised.

The relevant provision in the Law Reform Act 1944 (also section 3(1)) is virtually identical to section 3(1) of the 1949 Act. The Court of Appeal first had the opportunity of examining and commenting on this revolutionary legislation in *Nealon* v. *Public Trustee*.[97] Dealing with section 3, O'Leary C.J. considered that, because of the remedial objects of the enactment, the case was one calling for a large and liberal construction and interpretation. On this basis the Court of Appeal held that section 4 of the Statute of Frauds 1677 (see now the Contracts Enforcement Act 1956) had no application in such a claim and that the word "promise" was not to be used in a technical, contractual sense, but rather understood as an assurance, undertaking, declaration, or intimation to make some testamentary provision. (It was later held in *Hawkins* v. *Public Trustee*[98] that a testamentary promise does not create an entire contract.)

The Law Reform (Testamentary Promises) Act 1949 merely re-wrote the law but did not alter any of the principles. It was enacted mainly because there had been arguments as to the meaning of some of the terms used in the legislation. Section 3(1) was amended to make it clear that the court could make orders where the promise related to "real property or to personal property other than money". The Law Reform (Testamentary Promises) Amendment Act 1961 was enacted as a result of difficulties encountered by the court in applying the parent Act. In effect,

93 For an analysis of the 1944 Act, see I. D. Campbell "Promises to Make Testamentary Provisions" (1947) 23 N.Z.L.J. 221 and 235.

94 14 *Halsbury's Laws of England* (2 ed.), 407. This statement of the law has been accepted as accurate in *Te Ira Roa* v. *Materi* [1919] N.Z.L.R. 681; *Dick* v. *Nicholson* [1920] G.L.R. 454; *Crawshaw* v. *Public Trustee* [1925] N.Z.L.R. 212; *Sutherland* v. *Towle* [1937] G.L.R. 509.

95 *Sutherland,* supra n.94, 511.

96 *Bennett* v. *Kirk* [1946] N.Z.L.R. 580, 582.

97 [1949] N.Z.L.R. 148, 154-155.

98 [1960] N.Z.L.R. 305.

it gave the court a discretion in all cases to award to successful claimants such amount as it considered reasonable, having regard to the circumstances. Previously, the court had no such discretion where there was a promise to leave a specified amount. A new section 3(1) was substituted but with only very minor amendments. Although wide discretionary powers have been granted to the court by the legislature, it does not appear that unmeritorious claims have been permitted to succeed or meritorious claims have failed, but rather the powers have been "used to implement the Judge's individual sense of justice and in so doing they have fully satisfied the remedial purposes of the Act."[99]

D. *Family Protection Act Cases*

In *Re Webster,*[100] it was first submitted on behalf of the applicants that the testamentary promises legislation affected the meaning and scope of the "estate" mentioned in section 4 of the Family Protection Act 1955. The Law Reform (Testamentary Promises) Act 1949 shows clearly that in cases to which that Act applies, the testamentary promise claimant in New Zealand is not given automatic superiority over members of the family, but must take his chances along with everyone else. Section 4 of the Family Protection Act should be interpreted to reach the same result, so that the two pieces of legislation are consistent. Wild C.J. rejected this argument. He said:[101]

> Subject to the revision in *Schaefer's* case of the view earlier expressed in *Dillon's* case the true import of that word must have remained the same throughout the history of the statute. In my view it was not altered by the Law Reform (Testamentary Promises) Act 1949 which only supplemented and did not displace remedies available in contract before the statute was enacted.

The authority for this last proposition is *Reynolds* v. *Marshall*[102] and *Nealon* v. *Public Trustee.*[103] The Common Law remedies have been canvassed earlier in this article.[104] The Chief Justice reasoned that because the right to enforce a contract remains at Common Law, the 1949 Act cannot be regarded as exemplifying a totally new approach to promises to make testamentary provisions. *Schaefer* v. *Schuhmann* decided that the Family Protection Act 1955 does not give the court jurisdiction to interfere with testamentary contracts either. The two Acts are not inconsistent!

The same argument was made again on behalf of the applicants in *Breuer* v. *Wright.* In coming to his decision to follow *Dillon,* White J. in the High Court noted as a consideration that[105]

> . . . s.3(1) of the 1949 Act states the basis on which the Court is to determine claims. The Court is required to balance the services rendered and their value alongside the claims of other persons in respect of the estate. Similar principles are stated in *Dillon's* case as applying in the case of testamentary contracts in relation to the Family Protection Act.

When *Breuer* v. *Wright* was appealed, counsel for the respondent argued that[106]

99 P. Burns, supra n.91, 251.
100 Supra n.73.
101 Ibid. 309.
102 Supra n.75.
103 Idem.
104 Supra Part II of this article.
105 Supra n.76, 18.
106 Supra n.80, 86.

> It would be anomalous for competing claims under the two statutes to be differently decided according to whether the promisee could establish a contract or according to whether a contractual promisee elected to claim under the statute or at Common Law.

The Court of Appeal did not agree, and approved the reasoning of the Chief Justice in *Re Webster*:[107]

> As Sir Richard Wild has indicated, the right to bring Common Law proceedings for breach of a contract to leave property by will has not been removed so that the provision of the new and supplementary right of action under the statute has provided a choice of remedies for those who believe they can point to a binding contract. If they claim under the Law Reform (Testamentary Promises) Act they will know that a possible bar to success related to such matters as consideration or the Statute of Frauds will have disappeared although then they must face the competing claims of relatives of the deceased that may be brought under the Family Protection Act. In the circumstances the legislative distinction that seems to have been drawn quite deliberately between the alternative remedies may not seem anomalous but justified by the underlying remedial purpose of the Law Reform (Testamentary Promises) Act. In any event it does not permit some kind of gloss to be put upon the scope and effect of the Family Protection Act when that last mentioned statute is put in contrast with the relevant New South Wales legislation.

E. *McCormack* v. *Foley*[108]

The question on appeal in *McCormack* v. *Foley* was whether a property devised by will in pursuance of an inter vivos contract made for valuable consideration forms part of the estate against which an order under the Law Reform (Testamentary Promises) Act 1949 can be made; or, in more general terms, whether the principle established in *Schaefer* v. *Schuhmann,* and held applicable in New Zealand in *Breuer* v. *Wright,* applies also to claims under the 1949 Act. Savage J. at first instance answered the former question affirmatively: contracted property does form part of the estate. The Court of Appeal upheld his decision, and accordingly answered the latter question negatively: the creditor theory does not apply. In reaching the conclusion that the estate of the deceased referred to in the Law Reform (Testamentary Promises) Act 1949 does not exclude assets made the subject of a specific devise by will to fulfil an enforceable inter vivos contract, Cooke, Richardson and McMullin JJ. gave exhaustive consideration to the family protection - testamentary promises relationship.

The three judges each considered the history of the legislation, noting that it did not displace the Common Law as to testamentary contracts but created a new discretionary jurisdiction that overcame the evidential difficulties under the Statute of Frauds and uncertainty in the terms of the promise. The court compared the testamentary promises legislation with the Family Protection Act, but highlighted several features about the former which distinguish it from the latter. They stated that the fundamental premise from which their Lordships in *Schaefer* started under the Family Protection Act does not apply to the Testamentary Promises Act. Lord Cross in that case opined:[109]

107 Idem.
108 [1983] N.Z.L.R. 57.
109 Supra n.51, 585; ibid. 65, 67-68.

> The [Family Protection] Act contains no definition of the "estate" out of which the court is empowered by section 3(1) to make provision for members of the family. It is, however, clear that it cannot mean the gross estate passing to the executor but must be confined to the net estate available to answer the dispositions made by will.

The Court of Appeal in *McCormack* v. *Foley* on the other hand believed section 3 of the Testamentary Promises Act shows that Parliament has always had in mind the gross estate passing to the executor. They gave two persuasive reasons for this view.

First, from the outset in 1944 the legislation has contained the words ". . . the claim shall . . . be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime. . . ." Had the provision for the claimant been made in the deceased's own lifetime no claim would have been necessary and in that event the gross estate from which the payment was forthcoming would have reduced in size by the amount of the provision made. It appears consistent with the spirit of section 3(1) that the provision out of the deceased's estate which he did not make in his lifetime or by will should now be made by the court "as if the promise . . . were a promise for payment by the deceased in his lifetime." That being the case, the estate to which the court has recourse should be the gross estate of the deceased.

Secondly, the circumstances to be considered by the court in fixing the quantum of an award are ". . . the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise." The Family Protection Act never contained any such words. The express reference to the nature and amounts of the claims of creditors as being persons having claims in respect of the estate is explicable only on the basis that it is all the property of the deceased which is being dealt with in the administration of the estate which is comprehended in the term "the estate". Further, there is no ground for excluding from the genus "otherwise" a person to whom the testator has promised by contract to leave property by will, and therefore contracted property is not only to be considered when making a testamentary promises award but such property can also be encroached upon in making an award.

There was no previous authority to help the court. Nowhere in the cases of *Dillon, Schaefer* and *Breuer* was the present issue directly addressed but Cooke J. refers to an observation in the majority opinion in *Schaefer* which he says is not without interest. Referring to the Testamentary Promises Act, Lord Cross said that by these Acts[110]

> . . . the New Zealand legislature has itself enacted provisions designed to protect persons who have rendered services to testators in reliance on promises on their part which have not been honoured to leave them benefits by will.

Lord Cross mentioned this in connection with the view that it is for the legislature to decide deliberately as a matter of social policy whether bona fide

110 Supra n.51, 592.

contracts should be subject to interference. The present writer agrees, but why is it that a proven testamentary promises claim justifies interference with bona fide contracts but the claim by a deserving dependant under the family protection legislation does not? McMullin J. was initially inclined to think that some help was to be derived from the seeming analogy between claims under the Family Protection Act and the Law Reform (Testamentary Promises) Act and the similarity of philosophy behind the two statutes. Each recognises moral claims as a justification for the making of an order; each imposes restrictions on the power of testamentary disposition; each involves the use of a discretionary power to deal with the failure of the deceased to make proper testamentary provision; neither contains a definition of "estate". But the learned Judge then said that further consideration brought him to the view that, these similarities notwithstanding, the "estate" of the deceased referred to in the Law Reform (Testamentary Promises) Act and against which orders may be made pursuant to section 3 does not exclude assets made the subject of a specific devise by will to fulfil an enforceable contract made in the deceased's lifetime: the opposite conclusion to that reached in *Schaefer* v. *Schuhmann* and *Breuer* v. *Wright* in respect to the Family Protection Act. The factors which persuaded the Court of Appeal to reach this result are those outlined above, reinforced by the belief that the two Acts are essentially different and are intended to achieve different objectives. But not one of the three Judges explains why they should be different except by stating the obvious superficial difference that the family protection legislation is concerned with the discharge of familial responsibilities but the obligations with which the testamentary promises legislation is concerned are of a promissory nature. They imply that the relationship with contract in the latter is important, yet in this case they are willing to interfere with a disposition made in fulfilment of a binding written contract!

Richardson J. concluded his judgment:[111]

> Viewed in terms of social policy there is I think much force in the argument that contractual obligations in relation to the disposition of property on death should not automatically override the statutory protection accorded to testamentary promises: that the interests of one should be balanced against those of the other and the competition resolved so as best to do justice to all concerned — as seems to be envisaged in s.3(1). So, if the contractual promise confers an unjustifiable bounty or if the estate is not large enough to meet both claims in full it should not be a matter for surprise or concern if the expectations of the contractual promisee are pared down.

The present writer agrees completely and suggests similar reasoning should be applied to the family protection legislation. Statutory protection is given to deserving relatives, and in this sense, the two statutes are the same in that both are concerned to ameliorate the position of those who have moral claims to share in the estate of the deceased. Neither testamentary promises claimants, nor family protection claimants, nor those who reecive property by will pursuant to a contract should have automatic superiority. There should be a balancing of the equities.

V. POLICY CONSIDERATIONS

Whether the court should have jurisdiction under the family protection legislation

111 Supra n.108, 73.

to make an order affecting property the subject of a contract to confer a benefit by will must ultimately depend upon policy considerations. What was the objective of the legislation and to what extent was it intended to reflect social and legal values?

A. *Legislative History*[112]

Relative freedom of testamentary disposition was characteristic of English law in the nineteenth century.[113] Sometimes this resulted in a testator neglecting his family in his will, leaving his wife and children with little or no support. This was ameliorated in civil systems of law by the principle of legitim, or fixed or forced shares. In Scotland and France, for instance, the surviving spouse and children of a deceased are automatically entitled to a specified proportion of the deceased's estate. Thus the deceased's testamentary power applies only to the remainder.

The spirit of social reform which was active in New Zealand at the turn of the century initiated an exception to the English norm. The Testamentary Family Maintenance Act 1900 was a unique innovation in the field of family provision legislation in the Common Law countries. It gave the court jurisdiction in certain circumstances to override a person's testamentary dispositions and to substitute provisions which the court thought more appropriate. The purpose of the legislation was evident from its title: "An Act to ensure . . . Provision for Testators' Families". This Act was twice amended[114] and then embodied in a consolidating enactment, the Family Protection Act 1908. Section 33(1) of the 1908 Act provided for the maintenance of the family of any testator who had by will not made adequate provision for them. If the court thought it proper, it could make an order for provision out of the "estate of said deceased person". That Act was in turn extensively amended[115] so as to extend the principle of the legislation to the estates of intestates and to widen the class of possible applicants. The law was again consolidated in the Family Protection Act 1955, with section 33(1) becoming section 4(1) in the new Act.

It was argued during the debate on the Testator's Family Maintenance Bill 1900 that if a man, while alive, left his wife or family destitute, they had the Destitute Persons Act 1894 under which provision might be made for their maintenance and

112 See A. C. Stephens *Family Protection in New Zealand* (2 ed., Butterworths, Wellington, 1957); R. J. Davern Wright *Testator's Family Maintenance in Australia and New Zealand* (3 ed., The Law Book Co., Sydney, 1974); M. Nyein *The Family Protection Act 1955: Its Effect and Operation in Recent Times.* LL.M. Research Paper (Victoria University of Wellington, 1981). Also J. C. Robson (ed.) *New Zealand: The Development of its Laws and Constitution* (2 ed., Stevens and Sons, London, 1967) 471-476.

113 Absolute power of testation existed from the middle of the seventeenth century until 1938 subject to minor restrictions as to perpetuity, purpose and public policy: Stephens, ibid. 112.

114 Testator's Family Maintenance Amendment Act 1903, Testator's Family Maintenance Act 1906.

115 Family Protection Amendment Act 1921-22; Statutes Amendment Act 1936, s.26; Statutes Amendment Act 1939, ss. 22 and 23; Statutes Amendment Act 1943, s.14; Statutes Amendment Act 1947, s.15; Social Security Amendment Act 1950, s.18(3); Death Duties Amendment Act 1953, s.17.

support,[116] but similar powers should be given in the event of the husband dying.[117] This reasoning found favour in the New Zealand Parliament as evidenced by the enactment of the Bill, described by one eminent commentator as ". . . unquestionably one of the great and original contributions of New Zealand to modern law."[118]

The necessity or at least the desirability in the public interest of family protection legislation is demonstrated by the way in which after originating in New Zealand it spread through the Australian states[119] and most of Canada,[120] the United States of America,[121] and was adopted in modified form in England[122] in the Inheritance (Family Provision) Act 1938.

In the writer's opinion, there were three elements in the rationale behind the pioneering family protection legislation. The first element was society's belief that the "head of the house" had an obligation to provide for his dependent family — during his life, and after it. It has been said in the Court of Appeal[123] and Privy Council[124] that the legislation was designed to enforce the moral duty of the testator as a wise and just husband or father to make proper provision, having regard to his property, for the maintenance, education and advancement of his family. This "old fashioned" attitude is no longer so persuasive as a result of the move away from a patriarchial social structure but it can still be argued that breadwinners should provide for dependants and for immediate family. The second element was articulated by Lord Simon of Glaisdale under the heading "the mischief of the statute" in his judgment in *Schaefer* v. *Schuhmann*:[125]

> Men and women necessarily have different functions to perform in the creation of new members of society and in their upbringing to independent membership. A functional division of co-operative labour generally calls for a sharing of the rewards of the

116 Section 3 of the Destitute Persons Act 1894 provided:

> Every near relative of a destitute person, if that relative is of sufficient ability, is liable for the maintenance of that destitute person in a manner hereinafter provided.

The legislation more specifically ensured maintenance of wives by their husbands, and of children under sixteen years by their parents.

117 N.Z. Parliamentary debates vol. 111, 1900: 504.

118 Joseph Laufer, Harvard University Law School, in a letter to the Hon. Mr Webb, quoted: N.Z. Parliamentary debates vol. 307, 1955: 3292.

119 For the Australian experience, see Davern Wright supra n.112.

120 See G. Bale "Limitation on Testamentary Disposition in Canada" (1964) 42 Can. Bar Rev. 367.

121 See W. F. Fratcher "Protection of the family against disinheritance in American law" (1965) 14 I.C.L.Q. 293; W. D. Macdonald *Fraud on the Widow's Share* (University of Michigan Law School, Ann Arbor, 1960); J. Laufer "Flexible Restraints on Testamentary Freedom — A Report on Decedents' Family Maintenance Legislation" (1955) 69 Harv. L.R. 277, 301.

122 See E .L. G. Tyler *Family Provision* (Butterworths, London, 1971).

123 *Re Allen (decd.), Allen* v. *Manchester* [1922] N.Z.L.R. 218, 220 per Salmond J.

124 *Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 463, 478-9; *Dun* v. *Dun* [1959] A.C. 272, 291.

125 Supra n.51, 595. See also Hon. Mr Hanan, M.P., Parliamentary debates vol. 111, 1900: 505:

> It was well known that very often wealth and property accumulated by the husband was not the result altogether of his own efforts, but was the result of the combined labour, brains, and penuriousness of the husband and wife.

> labour. . . . In consequence of this division of responsibility the man incurs an obligation to share the loaf with the woman and the woman acquires a right to a share in it.

Marriage was seen as a partnership with a requirement for the husband to "provide" for his wife when he died. Even though there is more opportunity for equal earning capacity today, the principle of sharing of property and wealth has far from lost its importance and rather has been given greater recognition by the Matrimonial Property Act 1976. The third element was expressed by the Hon. Mr McNab, M.P., when moving the second reading of the Testator's Family Maintenance Bill 1900 in these terms:[126]

> The question to be decided in regard to this Bill was, was the State to be liable for the wife and children, or was the estate to be liable? The estate of the deceased person should be responsible.

Thus the Act was passed partly to prevent dependants of the testator becoming a burden to the State. But with the growth of the welfare state, the government is even more willing to support "destitutes", e.g. the domestic purposes benefit, widow's benefit. It is the writer's conclusion that the threefold objectives of the original legislation are equally valid today.

The legislation entrusted the judiciary with the task of implementing the statutory scheme of "adequate provision for proper maintenance and support". A large number of claims have come before the courts. They have put a gloss on the legislation in the form of a "moral duty" test: to determine firstly the validity of a claim; and secondly, the quantum and extent of a claim successfully established. As has been noted above, the court has stated that the Act was designed to enforce the moral obligations of the testator to make such provisions as a just and wise father would make in the interests of his dependants had he been fully aware of all the relevant circumstances.[127] In applying this concept, "the courts became concerned not only with economic questions of necessities and substance but also with the ethical questions of morality and family justice."[128] The courts have made the legislation of avail not only to self-evidently "needy" claimants, but, whenever there is breach of a moral duty.[129] For instance in one Court of Appeal case it was said that the surviving spouse need only show that the testator had failed to make proper provision for her maintenance as would enable her to ". . . live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime. . . ."[130] But as a general observation, evidence from the plethora of cases suggests that the courts have been concerned with the economic protection of the family (matrimonial and de facto) as a unit in society, and have attempted to achieve the most equitable allocation of the testator's estate.

126 Supra n.117.

127 Supra nn.123 and 124. The moral duty test originated very early in the history of the legislation: *In re Allardice* (1910) 29 N.Z.L.R. 959, 973 per Edwards J.; approved [1911] A.C. 730. See Stephens, supra n.112, 86-99. It was recently confirmed in the Court of Appeal in *Re Sutton* [1980] 2 N.Z.L.R. 50.

128 J. L. Caldwell "Family Protection Act 1955 — Moral duty and adult children" [1982] N.Z.L.J. 215, 216.

129 Even adult children of independent means have claims for proper maintenance provided they can prove the breach of a moral duty neither fulfilled in the testator's will nor during his lifetime: idem.

130 *Re Allen,* supra n.123.

Does the policy of the Family Protection Act extend to give the court jurisdiction to intervene in contracts to devise or bequeath property? The writer submits that the decision in *Schaefer* v. *Schuhmann* thwarts the objectives of the legislation and is inconsistent with its policy because its effect is that the moral obligation of a testator cannot be enforced. There are therefore good reasons for reversing *Schaefer* and *Breuer* v.*Wright* by statutory amendment. But there are those who argue that this would be undesirable because respect should be given to the principles of freedom of testation, and sanctity and certainty of contract.

B. *Freedom of Testation*

Limitation on the freedom of testation is, in fact, a principle of greater antiquity than the principle of unrestricted testation.[131] The protection of the family as an essential unit in society has been a primary concern of most systems of law. Thus it is generally regarded that family claims are a legitimate restriction on will making power.[132] However, it has been said in the New Zealand Supreme Court that ". . . the intentions of the testator should be interfered with as little as possible having regard to the object of the statute. . . ."[133] Indeed section 11 of the Family Protection Act serves as a reminder to the court of the importance of the testator's reasons for making his will. The Privy Council has been at pains to point out that the Family Protection Act does not impose any duty to frame a will in any particular way: it merely confers upon the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains.[134] But this, in the writer's opinion, is an artificial proposition. Certainly the will stands until impeached but giving the courts power of interference implies an obligation of sorts. Although there is no legal obligation, the testator is said to have a "moral duty" to make adequate provision and the courts unmistakenly revise a will to enforce this. The courts claim they have no power to re-write the will in a way they consider just but surely they go some way towards doing just that. As Herdman J. has said:[135]

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

It is the writer's contention that the principle of freedom of testation should be ignored when considering whether the court should have jurisdiction over

131 See Stephens, supra n.112, 3-11; F. R. Jordan "Limit on the Power of Testamentary Dispositions" (1908) 5 Commonwealth L.R. 97, 98-101.

132 See Tyler, supra n.122, 1; J. Gold "Freedom of Testation: The Inheritance (Family Provision) Bill 1938" (1938) 1 M.L.R. 296, 299.

133 *In re Baker* [1962] N.Z.L.R. 758, 761, per Leicester J.

134 *In re Dillon,* supra n.32, 301. This opinion has been expressly followed in: *In re Barclay (decd.)* [1957] N.Z.L.R. 919; *In re Blakey (decd.)* [1957] N.Z.L.R. 875; *In re Strawbridge (decd.)* [1952] G.L.R. 442; *In re McDowell (decd.)* [1958] N.Z.L.R. 455.

135 *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673, 682. See also *In re Ruddell* [1944] G.L.R. 489, 490, per Fair J., and the comments of the Hon. Mr Pitt, M.P., Attorney-General, during the Second Reading of the Testator's Family Maintenance Bill, N.Z. Parliamentary debates vol. 138: 1906, 148: "One recognises that in an Act of this sort one is really altering a man's will — making his will for him as it were. . . ."

contracted property. It is the subject of judicial rhetoric and is recognised in the Act to the extent that the testator's wishes should be considered but the policy of the legislation and the determination of family protection claims reveals that Parliament and the courts consider the obligation to provide for one's family is far more important than being able to devise or bequeath property as one likes.

C. *Contractual Principles*

Sir George Jessel, M.R., declared in 1875:[136]

> . . . if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of justice.

The age of laissez-faire passed and to some extent took with it the above concepts.[137] By the middle of the twentieth century notions of inequality of bargaining power and unconscionable contracts had highlighted the fact that freedom of contract was no longer sacred.[138] But these historic foundations of the law of contract are not yet anachronisms for as Barker J. commented in 1976:[139]

> The old laws concerning the sanctity of contract have less rigid application than they did in Victorian days, however, the principle that contracts fully negotiated should be upheld by the courts is one which should be borne in mind.

Wide ranging judicial discretion has been a feature of recent New Zealand contractual reform such that sanctity and certainty of contract have become merely considerations in achieving a result which is fair and just: e.g. Minors' Contracts Act 1969; Illegal Contracts Act 1979; Credit Contracts Act 1981. If commercial contracts can be impeached on the grounds of unfairness and the court is given a direction to remedy the matters that caused the injustice, then there is no reason why the same discretion should not be exercised in respect to contracts that defeat the objectives of the family protection legislation. Admittedly the above statutes envisage injustice to one of the parties to the contract, not to a "stranger". It is a far more radical step to avoid contracts because they disadvantage dependants of one of the contracting parties. This may seriously be argued to be unjustified interference, with the judiciary imposing their personal perception of social welfare morality onto contracts entered into freely and voluntarily by persons of full age and competence. The writer agrees that there must be limitations on the extent of such interference. Injustice at the time the contract was entered into should be the only ground for such interference.

D. *Conclusion*

Sanctity and certainty of contract are no longer rigid principles but flexible

136 *Printing and Numerical Registering Company* v. *Sampson* (1875) 19 L.R. Eq. 462, 465.

137 P. S. Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979), esp. 625-6, 681-715; J. M. Keynes *The End of Laissez-Faire* (Hogarth Press, London, 1926).

138 E.g. Moneylenders Act 1900 (U.K.), which gave the court power to reopen money-lending transactions if the rate of interest was excessive and the transaction was harsh and unconscionable.

139 *Rigden* v. *Rigden* (1976) Unreported, Rotorua Registry, M27/76.

considerations. Freedom of testation is a fallacy. The courts have been given greater discretion to interfere with contracts. But still the question remains: does the policy of New Zealand's family protection legislation justify the courts interfering with contracts made by a testator to confer a benefit by will? This touches a social issue on which different people might reasonably have different opinions. It is the writer's view that legislation which attempts to ensure proper family provision by restricting freedom of testation must, if that objective is to be achieved, be supported by a restriction on the freedom to enter into contracts to leave property by will. The Family Protection Act goes beyond relief of destitution to provision in a "manner in which the dependants were accustomed". But so long as the intention is to provide support and maintenance to deserving claimants (however these terms are defined), then that objective should not be defeated by contracts to confer benefits by will. The Act is a declaration of state policy, and as such it should be paramount to all contracts.[140]

There is no automatic solution to this problem though. In many cases the applicant under the Act needs further maintenance and the person named in both the contract and the will also needs his expectations protected. Both parties being worthy of the court's indulgence, it follows that one suffers if the rights of the other are said to be exclusive. An approach which allows the court to balance the equities between the applicant on the one hand and the person named in the contract and the will on the other hand is, in this writer's view, the better approach.

It has been suggested earlier that there must be a limit to the court's discretion: that the only justification for interference is some injustice at the time the contract was made. Generally the only issue that will concern dependants is whether the value of the estate has been affected. Therefore the bottom line is whether the testator received adequate consideration from the other party. Any inequality of consideration may not have mattered to the testator but his dependants should not be disadvantaged or be left impoverished by such a lax attitude. It is recommended that the court may make an order affecting property the subject of the contract and will only to the extent that the value of the property exceeds the value to the testator at the time of the contract of the promise made by the other party to the contract. Determining whether the consideration for the contract was sufficient is not a role the courts are likely to perform enthusiastically as "[i]t has been settled for well over three hundred years that the Courts will not inquire into the adequacy of consideration".[141] The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium. The courts, however, already have the responsibility of determining the adequacy of consideration if a husband disposes of property to defeat a claim under the Matrimonial Property Act 1976.[142] But how can a court measure the value to a testator of a promise by

140 This was the rationale for the decisions in *Gardiner* v. *Boag,* supra n.25; *Parish* v. *Parish,* supra n.26. The Privy Council did not doubt that these two cases were rightly decided but the decision in *Schaefer* v. *Schuhmann* itself seems inconsistent with their Lordships' approval of this rationale.

141 Cheshire and Fifoot *The Law of Contract* (6 N.Z. ed., Butterworths, Wellington, 1984), 76.

142 Section 44.

his housekeeper, say, to look after him for the rest of his life? And often a slight inequality of consideration is quite unintentional and should not justify judicial interference. It is therefore further suggested that the court have regard to all the circumstances in which the contract was made, including the relationship between the parties and their conduct, and their financial resources. The courts' task may sometimes be difficult but not impossible..

VI. CONCLUSION

The question addressed in this article may be put in different ways according to the emphasis one wishes to give it: "Should a testator be permitted to render rights under the Family Protection Act nugatory by covenants to make bequests by will?"[143]; or: "Should contracts made by a testator in good faith and in the normal course of arranging his affairs be liable to be wholly or partially set aside by the court under the Act?"[144] But no matter how it is phrased this is a question of social policy upon which different people may reasonably take different views.

The issue is essentially one of characterisation. Are the rights of promisees those of creditors of the testator and his estate, or simply those of beneficiaries? Over the past fifty years, some courts have preferred the creditor theory and some courts have preferred the beneficiary theory. The present law in New Zealand is that promisees are creditors of the estate, and therefore deserving claims for family provision may be defeated because contracted property is excluded from the court's jurisdiction. Some legislatures[145] have chosen to ameliorate this potential for injustice by enacting provisions that give the court power to order provision out of property contracted to be left by will, and in some cases, even out of property disposed of by the deceased in his lifetime. It is submitted that the New Zealand Parliament should likewise consider enacting an amendment to the Family Protection Act to resurrect the beneficiary theory.

The scope of the court's jurisdiction must be determined on the basis of policy. The objectives of the Family Protection Act are threefold: to enforce the moral duty of the deceased to provide for the maintenance, education and advancement of his family; to ensure property of one spouse is shared with the other; and to prevent dependants of the deceased becoming a burden on the State. These objectives are achieved by restricting the deceased's freedom of testation. If the

143 Supra n.51, 593-594.

144 Ibid. 599.

145 It is beyond the scope of this article to comment on legislative reform in other countries. The most relevant reform has been in England: The Law Commission *Second Report on Family Property: Family Provision on Death* (Law Com. No. 61) 1974 paras. 222-242, its recommendations enacted in the Inheritance (Provision for Family and Dependants) Act 1975, ss. 10-13; Canada: see 1970 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada which resulted in the publication of a Draft Uniform Relief Act of which clause 16 is relevant; this was enacted in the Alberta Family Relief Act, s.12; and New South Wales: see Law Reform Commission of New South Wales, Working Paper on Testator's Family Maintenance and Guardianship of Infants Act 1916, 1974 para. 11.53, and Report, 1977, paras. 2.11.1-2.12.2. The writer considers the New South Wales Law Reform Commission's Draft Family Provision Bill, clauses 11 and 12, are the most commendable.

policy of the legislation is to be given full weight, then there must also be a restriction on the freedom to enter into contracts to make wills. It is the writer's view that the policy of the Act requires that the court should also have power to order family provision out of property disposed of by the deceased in his lifetime. However, there must be a limit to the court's jurisdiction. The court should only have power to order provision to the extent that the value of the property exceeds the value of the consideration received by the deceased. Like the discretion in the testamentary promises legislation, the court should balance the equities between the applicant for provision and the donee of the property and thereby reach a fair and just solution.