How free is free? Testamentary Freedom and the Battle between 'Family' and 'Property'

PROFESSOR ROSALIND F CROUCHER[†]

I. Testamentary freedom in the common law

In the late 17th century, the great English philosopher John Locke thought about freedom and what it meant in the context of ideas of property. He mused that:

> Freedom is not, as we are told, a liberty for every man to do what he lists ... but a Liberty to dispose and order, as he lists, his person, Actions, Possessions and his whole Property, within the Allowance of those laws under which he is; and therein not subject to the arbitrary will of another, but freely to follow his own.[1]

Locke's idea of freedom was one within a particular context – 'within the allowance' of laws. So what, then, was this 'allowance' within the testamentary domain? And how far did Locke, and his successors in legal philosophy, guide our present thinking? In this article I seek to provide some answers to these questions.

My interest in such issues is a long-standing one. It informed the subject of my doctoral thesis where I grappled with the idea of testamentary freedom as essentially reflecting a balance – between ideas of family and

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† President, Australian Law Reform Commission, Professor of Law Macquarie University (on leave for the duration of my appointment as Commissioner). This paper draws upon my doctoral work (PhD, UNSW, 1994), a number of articles in which testamentary freedom has been a recurring theme (some written under my former name of 'Atherton'), and a presentation I gave at Macquarie Law school in November 2008 in the series, 'Limiting Leviathan: Law and Liberty' and at the TC Beirne Faculty of Law, University of Queensland in February 2009. The views in this article are my own and not the views of the Australian Law Reform Commission.

1 P Laslett (ed), *John Locke – Two Treatises of Government*, (2nd ed, 1967), ch VI [57].

ideas of property.[2] What I found was that the degree of 'freedom' depended on how much weight was on either side of the scales; and that the scales have never reached a point of equilibrium, often swinging wildly as different forces and tensions are brought into play.

To see this in its barest of philosophical bones, we need to go back to Locke's time and the origins of contemporary thinking about property – and wills.[3] Freedom in will making embodied a particular way of thinking about property in the common law and was bound up in a shift, identified by Professor Ronald Chester, 'from feudal to individual conceptions of property in Western society'.[4] Locke marked one point on this intellectual journey. The earlier medieval rules were quite a way away from the hearty individual imagined by Locke and allowed only limited testamentary powers. Inheritance of land was instead constrained by primogeniture – the law of descent of realty to the heir – and personalty was distributed according to schemes of fixed shares – 'reasonable parts' – for the widow and children, a system that is still reflected in civilian tradition.[5]

The concept of 'testamentary freedom' or 'liberty of testation' was propelled by the same philosophical discourse that led to the ascendancy of concepts of freedom of contract and laissez-faire economics and was part of the 'liberty to dispose ... as he lists' in Locke's thinking. Each expressed the idea of freedom *from* state control in favour of the power and choice of the individual.[6] Locke was the English champion of the shift towards individual rights of property away from control of the King and feudal property structures. His arguments were a justification of the victory of

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2 R Atherton, '"Family" and "Property": A History of Testamentary Freedom in New South Wales with particular reference to Widows and Children' (PhD Thesis, University of New South Wales, 1994).

3 Locke (1632–1704) was an adherent of the natural law view of property. His justification of property lay in the principle of labour, that a person who 'removed something from the state of Nature' and 'mixed it with his labour' was justified in retaining it: Locke, above n 1, ch V, 'Of Property' [27].

4 R Chester, *Inheritance, Wealth and Society* (1982) 11.

5 See, eg, G Gross, 'The Medieval Law of Intestacy' (1904–6) 18 *Harvard Law Review* 120; Sir W Holdsworth, *History of English Law* vol III, 550–63.

6 The doctrine of economic freedom, encapsulated in the concepts of laissez-faire and 'freedom of contract', is seen best in the writings of the English Classical economists, such as Adam Smith (1723–1790) and David Ricardo (1772–1823): see, eg, the excellent discussion in PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979). This period in the development of liberal ideas is considered, for example, by R Bellamy, 'TH Green and the Morality of Victorian Liberalism' in R Bellamy (ed), *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (1990).

parliamentary supremacy over absolute monarchy in the 'Glorious Revolution' of 1688 that ousted the Roman Catholic James II in favour of his Protestant daughter, Mary, and her husband, the Dutch King William of Orange. And it was Locke's advocacy for the protection of citizens in their 'lives, liberties and estates',[7] in this context, that has formed the basis of modern discussions of freedom of property and individual rights.[8] 'The end of Law', he stated, was 'not to abolish or restrain, but to preserve and enlarge Freedom'.[9] But the idea of enlarging freedom, or liberty, was not, however, an unlimited concept, it sat within 'the allowance of laws'.

Testamentary freedom was a child of this intellectual tradition, and it reflected different aspects depending on the particular lens of the viewer. When viewed through a property lens, the power of testation was seen as a natural extension of the rights of disposition of property *inter vivos*. John Stuart Mill, for example, considered that testamentary powers were 'one of the attributes of property' and that 'the ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure',[10] or 'as he lists' in Lockeian terms. It was an incentive to industry and the accumulation of wealth,[11] but it was also preferable to a system of fixed inheritance rights, which held no incentive to heirs to work and, therefore, could reduce the total wealth of a nation.[12] Subject only to rules that governed the validity of trusts (and various qualifications developed ostensibly on 'public policy' grounds), the owner's post-mortem powers could reach down generations through the power of the 'dead hand'.[13] It was not, however, an unlimited power. It sat, after all, within 'the Allowance of those laws under which he [the testator] is', as Locke said.

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7 W Hamilton, 'Property – According to Locke' (1932) 41 *Yale Law Journal* 864, 868 n 6 notes the various forms in which this phrase appeared in Locke's work.

8 CB Macpherson analyses Locke's debt to the work of Thomas Hobbes (1588–1679): CB Macpherson, *The Political Theory of Possessive Individualism – Hobbes to Locke* (1962).

9 Locke, above n 1, ch VI, 'Of Paternal Power' [57].

10 JS Mill, *Principles of Political Economy* (1848), Bk II, ch 2 [4].

11 H Sidgwick, *The Elements of Politics* (1897), ch VII, 'Inheritance'; J Wedgwood, *The Economics of Inheritance* (1939) (first published 1929), 200–201.

12 Wedgwood, above n 11, 194; HJ Laski, *The Grammar of Politics* (1925), 528; H Dalton, *Some Aspects of The Inequality of Incomes in Modern Communities* (1929) ch VII, 'Effects of the Non-Fiscal Law', especially s 4, 301.

13 See, eg, LM Simes, *Public Policy and the Dead Hand* (1955); Jill E Martin (ed), *Hanbury & Martin—Modern Equity* (17th ed, 2005) ch 13.

However, when viewed through a family lens, testamentary freedom reflected other manifestations of the discourse on liberty. Locke, for example, located the power of testation as 'a part of Paternal Jurisdiction'.[14] This was not a new idea. Even in the *Statute of Wills* 1540 (32 H VIII c 1), the power of devise was described as a power for making provision 'to and for the advauncement of his wife, preferment of his children, and payment of his debtes, or otherwise at his will and pleasure'. 'Preferring', or choosing, among his children, provided, as Locke later argued, 'a tye on the Obedience of his Children' – a power men had 'to bestow their Estates on those, who please them best'.[15] Even though the father's estate was considered as 'the Expectation and Inheritance of the Children ordinarily in certain proportions' (like the approach in civil law systems), it was the father's power 'to bestow it with a more sparing or liberal hand according as the Behaviour of this or that child hath comported with his Will and Humour'.[16] 'At his will and pleasure', as the *Statute of Wills* put it; 'as he lists', to Locke. Through the 'hopes of an Estate' the father secured their obedience to his will.[17]

In the late 18th–early 19th century, Jeremy Bentham, like Locke, saw the father's testamentary power as providing an incentive to children. Bentham described it as a power to reward 'dutiful and meritorious conduct' and as 'an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of their families'.[18] In other words, it was a power to reward or punish. In this way the power of testation was conceptualised both as an aspect of individual fulfilment (to the property owner) – 'for the good of him who commands';[19] and an instrument of social control (by the property owner) – 'the preferment of his children'; 'to do as he lists'. So, as William Blackstone had written in the century before Bentham, testamentary freedom was valued as a 'principle of liberty' and as a power of 'peculiar propriety',[20] won by the gradual stripping away of the medieval restraints on a man's testamentary powers. After the French Revolution of 1789 these views, if

14 Locke, above n 1, ch VI, 'Of Paternal Power' [72].

15 Ibid.

16 Id.

17 Id.

18 J Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham – Published under the supervision of his executor John Bowring* (1843).

19 Ibid Pt II, ch 5, 337. Although Bentham expressed some concern that 'in making the father a magistrate we must take care not to make him a tyrant' (ibid), he considered that fathers needed such a power not only for their own good, but for the good of the community in preserving social order.

20 W Blackstone, *Commentaries on the Laws of England* (1765–69), vol I, 437–8.

anything, hardened in defence of the common law's freedom, over the civilian system of 'forced' shares.

The freedom of testation thus established was confirmed as the rule in succession law by section 3 of the *Wills Act 1837* (UK) which formed the basis of the Wills Acts throughout Australia and remains the foundation of the modern law. Behind this expansion of liberty was a belief that it would achieve a better balance among family members and others than could be achieved through fixed rules of law. The value of that freedom is seen in one of the classic statements on testamentary capacity – that defining prerequisite for the exercise of testamentary powers – in the judgment of Cockburn CJ in *Banks v Goodfellow* (1870) 5 LR QB 549:

> Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given ... The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.[21]

A power to give by will was allowed; but it was not without consequence. It was circumscribed by the 'moral responsibility' referred to by Cockburn CJ in *Banks v Goodfellow*: to provide for the maintenance, education and advancement in life of children; and to adjudicate among family members according to their virtue, or vice. Freedom, in this context, was not to exist in the abstract. It was located, philosophically, in a framework of moral responsibility, duty and obligation – 'for the advauncement of his wife' and 'the preferment of his children' in *Statute of Wills* terms. But the judgement of the 'worthiness' of the individual's claim, or 'moral right', was entrusted to the testator, on the basis that his judgement was more reliable overall than the concept of fixed shares of the civilian model. It was, in essence, an endorsement of the father's power to give, or to withhold, judging those around him worthy or unworthy, as the

21 *Banks v Goodfellow* (1870) 5 LR QB 549, 563-565.

case may be. In this way, Cockburn CJ's statement is a natural summary of the liberal intellectual tradition of over two hundred years previously. As JJ Park, the author of a major treatise on the *Law of Dower,* wrote in 1819,

> Independence of mind, as well as the finer sensibilities, revolt from the idea of a stated compulsory appropriation of property in a case where moral duty, and the domestic affections, afford a surer pledge among the virtuous than positive institutions.[22]

Children may have *expected* something from their father's estate, but they were only entitled, in Mill's view, to expect maintenance and education to the extent of making them independent and self-reliant, to 'enable them to start with a fair chance of achieving by their own exertions a successful life',[23] but no more. This was the extent of the 'moral claim' of a child to any provision from a parent; and conversely, the 'moral duty' of the parent to satisfy it. However, if parents *wanted* to leave their children more than this, Mill considered that 'the means are afforded by the liberty of bequest':

> that they should have the power of showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness.[24]

Should, however, the law go further and *limit* testamentary power, either to tip the balance more strongly on the family side of the scales, or for some other reason? Mill considered this 'an ulterior question of great importance'.[25] He saw property as 'only a means to an end, not itself the end', and recognised that the 'power of bequest may be so exercised as to conflict with the permanent interests of the human race', such as 'the mischiefs to society of ... perpetuities'.[26] Mill therefore acknowledged that the right of bequest was 'among the privileges which might be limited or varied according to views of expediency'.[27] Hence, he supported the rule against perpetuities as an expedient qualification in the interests of encouraging the utilisation of property. While this was an example of the 'allowance of laws' imagined by Locke, it was 'the mischief' of perpetuities and not any entitlement of family that was in mind.

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22 JJ Park, *A Treatise on the Law of Dower* (1819) 3.

23 Mill, above n 10, ch 2, [3].

24 Id.

25 Ibid [4].

26 Id.

27 Ibid.

The power of testation – and the freedom inherent in it – was not seen therefore as an absolute power. The problem for theorists from Mill's time onwards, however, was to tackle the question of how far that power could, or should, be limited: where should the balance between 'family' and 'property' lie? But questions of curtailing the power of testation were thenceforth characterised as doing precisely that – 'impinging' upon the liberty of the testator. In the 18th and 19th century there were also significant inherent limitations on testamentary freedom – particularly in relation to married women.

II. Married women

The principle of liberty of which Blackstone wrote in the 18th century was largely the province of men; and the position of married women was circumscribed by an interlocking mesh of doctrine that accorded them little free action. A woman's husband incorporated her legal personality, and her status was defined by reference to her marriage to him. Such rules were constructed for her 'protection and benefit',[28] but amounted to a significant contradiction of the principle of liberty articulated by Blackstone and the liberal tradition of which he played a part. While testamentary freedom was a vindication of the liberty of property, the law regarding married women's property *denied* her liberty in the interests of the property itself.

In prior work I have looked, amongst other things, at aspects of the so-called liberty of testation and their impact, particularly with respect to women.[29] For example, the scope of testamentary power was expanded through the movement that led to the abolition of dower – the right of the widow to a life interest in one-third of the realty of her husband that her children might inherit.[30] As dower limited in a significant respect the efficacy of wills, moves to abolish or limit the operation of it were moves which simultaneously facilitated testamentary freedom. Debate on dower was therefore also debate on the underlying issue of the liberty of an individual in regard to the disposition of property on death.

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28 Blackstone, above n 20, vol 1, 433.

29 Including: R Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11(1) *University of New South Wales Law Journal* 133; R Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202; R Atherton, 'The Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW): Husband's Power v Widow's Right' (1991) 6 *Australian Journal of Law and Society* 97.

30 The detail of dower is described in RE Megarry and HWR Wade, *The Law of Real Property* (5th ed, 1984) 544–546.

Through a series of moves during the 19th century, dower was eventually abolished.[31] Although its abolition was a necessary part of achieving the security of the purchaser's interest in conveyancing – particularly in the shift to bringing land under Torrens title in Australia – it was at the cost of the interest of married women through which the widow's right of old was transformed into a mere expectation, that her husband would make provision for her in his will.

But a desire to abolish dower did not amount to an overt attack on the position of wives. There is a tacit acknowledgment of a duty to provide for her – as in the preamble to the *Statute of Wills* and the definition of capacity by Cockburn CJ in *Banks v Goodfellow* set out above. In debates at various stages on legislation that formally abolished dower, a consciousness of this obligation was also expressed. 'A man's wife is his first creditor', is how one summed it up.[32] Dower, however, was no longer the means for settling that debt. It may have been *expected* that he would 'give her preference over all others',[33] but it was an expectation without right. If that expectation were unfulfilled, a widow's only 'right' was defined by the difficult, costly and totally unpredictable prospect of a challenge to her husband's testamentary capacity.[34]

However, the end of the 19th century witnessed significant changes in thinking about women and, in turn, women's property rights. A movement gained strength in England, the United States, New Zealand and Australia that sought to reform the law regarding women and gave testamentary freedom a new characterisation – as a power to disinherit wives. Generated by the women's movement, this characterisation lay behind the introduction of Testator's Family Maintenance legislation – that permitted a court to override a will – starting first in New Zealand in 1900.[35]

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31 The story of the abolition of dower in New South Wales is told in R Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11(1) *University of New South Wales Law Journal* 133; and AR Buck, '"A Blot on the Certificate": Dower and Women's Property rights in Colonial New South Wales', (1987) 4 *Australian Journal of Law and Society* 87.

32 Edmund Burton, Examiner of Titles, in evidence given to the Royal Commission appointed to inquire into the working of the Real Property Act in New South Wales in 1879: (1879–80), *V & P,* Legislative Assembly NSW, vol 5, 1021 at 1074, No 973.

33 Id.

34 R Atherton, 'Expectation Without Right: Testamentary Freedom and the Position of Women in 19th Century NSW' (1988) 11(1) *University of New South Wales Law Journal* 133.

35 R Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 –

III. Testator's Family Maintenance & Family Provision

The story of the introduction of this legislation, an interesting one of the power of personalities and the pragmatism of politics, is a significant site for a study of testamentary freedom. In the very public arena of Parliament, and the antecedent public debate, a campaign for the introduction of a law that in its substance overrode liberty reveals much of the rhetoric of testamentary freedom as a balance of juxtaposed ideas.

Testator's Family Maintenance legislation enabled a court to override a will – and, later, entitlements on intestacy – in favour of a defined group of family members. It created an avenue of challenge, principally for wives and children who had been omitted from, or poorly considered, in the wills of their husbands and fathers. Where the pattern of preceding centuries had been to increase the domain of testamentary freedom, this legislation sent a different message; but it was a limited one, intended as a modest inroad into the testamentary arena.[36] All the Australian jurisdictions adopted it in the early years of the 20th century, followed, in time, by the UK in 1938.[37]

The legislation included a two-stage process for evaluating applications of eligible persons: the 'jurisdictional stage' – an assessment of whether the applicant had been left without adequate provision for his or her proper maintenance, education and advancement in life; and the 'discretionary stage' – a determination of what provision ought to be made out of the estate for the applicant.[38] Orders under the Act were constrained by the discretion and interpreted within a fairly tight compass. The Court did not have power to re-write the will of the testator;[39] nor to provide simply for equal division amongst children.[40] It was to provide only for 'proper maintenance, education and advancement in life'. But the emphasis was, principally, upon 'maintenance' and its very language reflected the

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the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202.

36 See R Atherton, 'The Concept of Moral Duty in the Law of Family provision – A Gloss or Critical Understanding?' (1999) 5(1) *Australian Journal of Legal History* 5.

37 See R Croucher and P Vines, *Succession – Families, Property and Death – Text and Cases* (3rd ed, 2009) [15.1].

38 An affirmation of this approach can be found in *Singer v Berghouse [No 2]* (1994) 181 CLR 201, 208; *Vigolo v Bostin* (2005) 213 ALR 692 [5], [74]-[75], [112].

39 See, eg, *Pontifical Society for the Propagation of the Faith v Scales* (1961-62) 107 CLR 1, 19, (Dixon CJ).

40 See, eg, *Cooper v Dungan* (1976) 50 ALJR 539, 540, (Gibbs J).

intellectual tradition from which it grew. So, even though it acted as a counterweight upon the exercise of testamentary powers, its very language expressed the same concepts as Locke and Bentham, and summarised by Cockburn CJ in *Banks v Goodfellow.*

In the 1970s a major review of the legislation was undertaken by the New South Wales Law Reform Commission.[41] While the initial trigger may have been concern among the Attorneys-General as to the lack of uniformity among the States in regard to legislation in this area,[42] this was a time of attention to family issues more generally. It was, for example, the period when legislation giving equal rights to illegitimate children was introduced, in the form of *Children (Equality of Status) Acts*;[43] and it was a highpoint of reform of family law, signified principally in the introduction of the *Family Law Act 1975* (Cth). Testator's Family Maintenance legislation was a natural extension of law reform work that was looking at laws affecting property within families. Although outside the frontline of debate, the rhetoric reveals again the polarised conceptualisation – of family on the one hand, and property on the other – displayed in the earlier discourse on testamentary freedom. The definition of eligible persons and the property reach of the Act were to be intense points of engagement for the protagonists in the reform process.

The 'defenders of liberty' in this arena, if I may call them such, objected to both extensions as encroaching upon testamentary freedom. It had some serious champions – such as Professor R A Woodman of the University of Sydney and Justice F Hutley of the Supreme Court of New South Wales, both leading exponents of succession law, and household names for their expertise in the field.[44] They were approached by the Attorney General for specific comment on the proposals.[45] Their responses

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41 For a study on this work see R Croucher, 'Law Reform as Personalities, Politics and Pragmatics – The *Family Provision Act* 1982 (NSW): A Case Study' (2007) 11(1) *Legal History* 1.

42 Id.

43 Such as the *Children (Equality of Status) Act 1976* (NSW).

44 Hutley J had lectured at Sydney University Law School for many years prior to his appointment to the Supreme Court in 1972, specialising in Succession and Probate. He also published, together with Woodman, the first Australian Casebook on Succession in 1967, as well as writing many articles in the field and the book of *Australian Wills Precedents* in 1970. Details are noted in brief in *Who's Who in Australia* (1977). Woodman also wrote the text *Administration of Assets*, first published by the Law Book Co in 1964.

45 The responses are found in Attorney General, *Special Bundle of Papers – 'Family Provision'* (83/8585): the Hon Mr Justice Hutley, Court of Appeal, New South Wales to FJ Walker, Attorney General, 1 November 1978;

were not included in the Law Reform Commission's Report, as they were sought after its publication,[46] but their negative viewpoints on the Commission's proposals set an important context for the Attorney General in relation to the problem of implementing those proposals. They provide an off-stage voice, as it were – available only to the curious legal historian – but one clearly imbued with the idea of liberty.

Woodman remarked, despairingly, that 'it would be much simpler to abolish altogether the right to make a will and leave all the estate to be distributed on intestacy'.[47] He wanted the eligible applicants confined to spouse, children and grandchildren (including adopted and illegitimate), and those persons in regard to whom the deceased stood *in loco parentis.* Neither he nor Justice Hutley wanted to see the class of applicants enlarged,[48] fearing a significant increase in litigation – reflected in the preface to the third edition of Hutley J's co-authored *Cases and Materials on Succession*, published after the passage of the *Family Provision Act*:[49]

> The most radical complications [in the law of succession by the extension of claims against the estate] have been introduced in New South Wales. George Orwell's Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, 'The Family Provision Act 1982'. The Act might have been more properly entitled 'The Act to Promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982'.

Professor RA Woodman, University of Sydney, Faculty of Law to FJ Walker, Attorney General, 3 October 1978.

46 Woodman to Attorney General, ibid.

47 Id.

48 Hutley to Attorney General, ibid. He commented, however, that the decision as whether to include applicants outside the 'legal family' was 'ultimately a political decision', and he was prepared to concede a small enlargement to include: (i) a mother or father of the deceased's ex-nuptial children; (ii) an applicant who had lived in a de facto relationship for at least five years, which relationship continued until death: p 2. The basis for including these categories he stated was that: 'in both these cases it could truly be said that the applicant could have a genuine expectation defeated by the failure of the deceased to provide for him or her in the will. They are also both cases in which those responsible for administering the deceased estate would have a real opportunity to check the relevant facts': p 3.

49 FC Hutley, RA Woodman and O Wood, *Cases and Materials on Succession* (3rd ed, 1984) O Wood and N Hutley (eds), v.

Hutley J's overriding objection was that the proposals were dealing with questions of 'abstract justice', without real consideration as to the effect on the administration of the estate.[50]

In defending the Law Reform Commission's work against such criticism, the Commissioner in charge of the reference, Denis Gressier, expressed another view of the 'balancing act':

> The fallacy in Professor Woodman's [argument] is that it fails to recognise what the [Law Reform Commission] have understood, namely that our society prizes both the power of the individual to dispose of what is his on his death, and a fair deal for those who were dependent on him. Neither is, nor is perceived to be absolute, so that it is absurd to suggest that if you widen the class you may as well abolish will-making. Widening the class would simply bring the law into greater (though never perfect) accord with social reality, which is messy in so far as people's relationships do not always coincide with the legal stamps put on them.[51]

The real argument was about the *degree* of interference in will-making. On the one hand, commentators like Woodman and Hutley were not prepared to accept further interference – they wanted the legislation defined to limited relationships. On the other hand, there were those, like Gressier and his fellow Commissioners, who were so prepared. Both groups, however, argued from the same starting point: that testamentary freedom should not, as the Law Reform Commission itself put it, be 'plundered'.[52] Both therefore agreed that the basis of family provision was the discretion of the willmaker, subject to the discretion of the court on application by designated family members. Although to the protagonists their points of divergence seemed considerable, in fact they were fundamentally in agreement as to the philosophical approach to the 'rights' of a willmaker and of family members in relation to property on death.

Similar tensions are evident in the context of considering when property which was not in the estate at all, because of some *inter vivos*

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50 Hutley to Attorney General, Attorney General, *Special Bundle of Papers – 'Family Provision'* (83/8585), 1.

51 'Memorandum: LRC's draft Family Provision Bill', New South Wales Law Reform Commission, *Testator's Family Maintenance Papers*, 5.

52 New South Wales Law Reform Commission, *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974), [6.72] 68.

action of the deceased (including a contract to dispose of property by will), could be clawed-back for purposes of a family provision order. As the Commission recognised:

> The rights involved are fundamental: on the one hand, the right of a person to arrange his affairs in his way and the right of a transferee of property to a secure title and, on the other hand, the right of a family not to be disinherited.[53]

This went much further in terms of the balancing of the scales than had been imagined previously and, conceptually, posed a much greater potential inroad upon notions of the rights of property. It had been suggested before – in 1922,[54] in the 1930s,[55]and again in 1951[56] – this time, however, it was tackled more thoroughly and the Commission's proposals led to the inclusion of 'notional estate' provisions in the *Family Provision Act 1982*.

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53 Ibid [11.3].

54 *Testator's Family Maintenance and Guardianship of Infants (Amendment) Bill 1920.* A copy of the Bill is contained in Attorney General, *Special Bundles – Testator's Family Maintenance*, Bundle 1.

55 Id.

56 'Fifty Years of Equity in New South Wales – a Short Survey', delivered 16 August, 1951 and reprinted in (1951) 25 *Australian Law Journal* 344, 345. McLelland was appointed to the Supreme Court of New South Wales in 1952 and to the Court of Appeal in 1966. He suggested including gifts made *inter vivos* within the reach of the provisions of the Act, based upon an analogy of notional assets for death duty and estate duty. It was such a model that was eventually included in the Act. Although the context in which McLelland's comments were made and his later position on the Court of Appeal gave his remarks added weight, and therefore could support an argument that he was influential in the adoption of the 'notional estate' model in the 1982 Act, this model was an obvious and readily-available precedent in New South Wales at the time and would have been considered whether McLelland suggested it or not.

The objectors were strident in their views. For example, the minority of the General Legal Committee of the Law Society warned that it was 'simply to put another nail in the testator's coffin' and to make the concept of testamentary freedom 'an absolute myth'.[57] Professor Woodman was of similar mind, that 'it represents a savage attack on the rights of a person'.[58]

In response, Gressier thought such views reflected 'a somewhat emotional commitment to individualistic rights of disposition, without any underlying analysis of objectives'. It 'beg[ged] the question'

> ... of how to achieve fairness in the operation of an agreed (given we have had [Testator's Family Maintenance] legislation since 1916) legal rule that some interference with people's discretionary rights is socially and morally justifiable.[59]

Notwithstanding the resistance, the *Family Provision Act* was passed – and with a considerably expanded group of eligible applicants as well as claw-back provisions for property transactions. From the point of view of the deceased whose will and *inter vivos* transactions could now be affected by the 1982 Act – where they could *not* have been similarly affected under the 1916 Act – the changes in the 1982 Act could be described as 'sweeping', as the Attorney General remarked in introducing it.[60] But from the point of view of the family that was the apparent object of the '*Family* Provision Act', while the membership of the family was somewhat wider, the position of the family members was, in fact, little different from that under the 1916 Act.

The abolition of dower and the introduction and expansion of Family Provision legislation were two significant points of engagement for the idea of freedom in the succession context, both reflecting the juxtaposition of ideas of family and ideas of property. The later 20th and now 21st century

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57 Law Society of New South Wales, General Legal Committee, Submission, 18 December 1975, [17] 3. There was 'uniform agreement', however, about including in the deceased's estate the amount of any property given away by the deceased with the intention of evading the Act, if such gift was made within three years prior to the date of death, although it was recognised that subjective proof of intention would be difficult: ibid, [13]. Another view was that the provisions did not go far enough: ibid.

58 Woodman made one exception: he considered that a *donatio mortis causa* could be the subject matter of an application. A marginal note was made to Woodman's comments about property: 'OK for duty but not for family provision.'

59 Ibid.

60 NSWPD, vol 172, 3rd Series, Legislative Assembly, 2769.

have continued this story of tension, and similar rhetoric is displayed whenever shifts in the balance are considered.

IV. The pull of different forces

In the current narrative of the succession story we still see the dynamic of *'family versus property'*, but its expression is being played out not, simply, as an increase on the family side of the scales. On the other side, there is a pull towards greater liberty of the willmaker. It is seen in the loosening of formalities through the introduction of 'dispensing powers' in all jurisdictions in Australia, to overcome deficiencies in compliance with wills formalities; and in the introduction of provisions to 'fix' wills through rectification powers, to get closer to what the testator really wants to happen with his or her property on death.[61] Through such means there is greater scope for the operation of the traditional notion of 'testamentary freedom', by giving to the individual a broader power to express his or her views through wills, or things that are near enough to be good enough, through an expansion of the operation of testamentary instruments into what was formerly an impenetrable domain of highly technical rules as to validity – the 'foot or end of the will' itself filled chapters of textbooks. And, if the testator's intention is not wonderfully clear, there is an increasing role for powers of rectification to correct, or fathom, the testator's real intention.[62] All of this allows more freedom to the testator. But, in doing so, we see the continuing clash between 'individual' and 'family' in succession law. It is expressed *philosophically* through conflicting narratives on the purpose of, for instance, family provision legislation; it is expressed *practically* through legislation which expands powers to intrude upon testamentary territory for entirely opposite reasons.

Dispensing powers have transformed probate litigation. The principles are pretty well mapped out now – the putative testator must 'intend the document to constitute his or her will'. This is more than having testamentary intentions in general; more than knowing what you want in a will, and that a particular document (eg, instructions) is a record of it. It is wanting *the very document* to constitute a will. This has been the stumbling block in much litigation. Many cases have brought up documents in which it was very clear that what was written there represented plans for

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61 For a consideration of the varying provisions see Croucher and Vines, above n 37, [8.13]ff.

62 *Wills Act 1968* (ACT) s 12A(1); *Succession Act 2006* (NSW) s 27 (formerly *Wills, Probate and Administration Act 1898* (NSW) s 29A); *Wills Act 1936* (SA) s 25AA; *Wills Act 1992* (Tas) s 47; *Wills Act 1997* (Vic) s 31; *Wills Act 2000* (NT) s 31; *Succession Act 1981* (Qld) s 31. See Croucher and Vines, ibid, [10.13]ff.

testamentary disposition, but did not pass the statutory threshold. Why? Because without that *extra* level of certainty, that the person 'intended the document to constitute his or her will', the general intentions could remain precisely there, part of an ongoing *draft* of plans. People can be remarkably fickle in their will-making – and wills, after all, are the one last great act of control over one's children, the right to be respected and honoured in one's dotage through the power that testamentary freedom gives us. This sounds harsh, but it is the reality of the lives of many seniors. Such feelings are alive and living and well in contemporary probate practice as they were at the time people like Locke, Bentham and Mill wrote.[63]

V. How free is free?

The discussion and caselaw on the dispensing power and family provision show the tensions that remain in succession law today. And it is still very much a dialogue – or an argument – between two strongly competing ideas. It is expressed in a variety of ways: as 'family versus property'; as 'giving' or 'taking away'; even as saying that succession law is 'an attempt to express the family in terms of property'.[64] Throughout all the philosophical discussion about powers of testation and limits on them, as well as the practical manifestation of laws through cases in court, the standpoint is the same – the freedom of the testator, as property owner, to make decisions with respect to property both during lifetime and on death, sitting within an overall framework of moral obligation towards family, but to a large extent within his or her own domain. In contrast, the standpoint in the civil law was one in which the testator's power was framed – and limited – by legal obligation.

The civilian testator's family obligations – to a spouse and to children – qualified and defined the freedom of testamentary disposition.[65] The pivotal points were the same: 'family' and 'property'. But the balance between them, as expressed in the succession laws of the common law and civil law traditions, reflected different jurisprudential and philosophical developments. The language captured this in a very real sense. From the common law point of view the language was that of 'freedom': 'freedom of property', 'testamentary freedom'. From the civilian point of view the

63 The children usually don't see it that way – hence family provision practice. From their side of the family equation there is a gut sense of 'entitlement', an almost dynastic assertion of right.

64 TFT Plucknett, *A Concise History of the Common Law* (5th ed, 1956) 711.

65 For this section of the paper I have drawn on my discussion on the comparison of common law and civil law ideas in this regard in R Croucher, 'Freedom of disposition versus forced heirship – property versus family' in A Kaplon (ed) *Trusts in Prime Jurisdictions* (2nd ed, 2006) 443.

language expressed obligation: 'community of property', 'forced heirship' – although the latter concept should perhaps be better described, as Professor Michael McAuley has commented, as 'lawful', rather than 'forced' heirship.[66] Indeed, even the language of 'forced' heirship was a common law viewpoint upon the civil law provision of *legitim*, or, in the French, *la réserve héréditaire* (*réserve*).

The English, and by extension the common law, tradition is one in which individualism has reigned. The civilian tradition, in contrast, may be described as one in which family reigns. Hence, from the viewpoint of a civil lawyer, rather than saying that the law of succession is 'an attempt to express the family in terms of property', it may be seen as 'an attempt to express property in terms of family'. Both traditions share the necessity for the juxtaposition of the two concepts or forces in relation to inheritance: the rights of an owner of property to designate its recipient, and the rights or claims of family members to receive the property of another family member.

As outlined in the first part of this article, the dominance of the individual in the inheritance decision-making arena in the common law was part of an intellectual tradition which, in common with the French, began in the shared abandonment of feudal traditions,[67] but, in *rejection* of French notions, the common law went much further down the pathway of the power of the individual as distinct from the family in English law. The 'freedom of testation', which became the hallmark of the law of succession in the common law, was an assertive concept. It embodied an implicit assumption that the freedom was an achievement; and that anything detracting from that freedom was, pejoratively, 'interference' with, or 'restriction' of, that freedom. Testamentary freedom was, in the inheritance context, the defining precept of the maxim that 'the Englishman's home is his castle'.[68] It marked the definition between the public and private spheres, setting the boundaries between those who were 'within' and those who were 'without' the castle walls. It also defined the extent of the 'Englishman's' sovereignty within his private territory. Testamentary freedom was at once a political as much as a social and economic expression.

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66 M McAuley, '*Pro Portione Legitima* – A Polemic in Defence of Children as Heirs-at-Law', in: *Papers of the International Academy of Estate and Trust Law – 2001* (2002) 249, 251.

67 Chester, above n 4, 11.

68 A proverbial, late sixteenth century saying: *Oxford Dictionary of Phrase and Fable* (2000) 337.

However underlying any reform or change of succession law, the recurring theme is the proper place of family provision in its wider context: namely, separate property or family property; and its relationship to provisions on dissolution of marriage. The common law expresses individualised ideas of property law, not a law of family property. Civilian systems start from the opposite position. Understanding this, and confronting the challenges and tensions in the existing law, provides the foundation upon which a proper evaluation of a system based on separate property and discretion as opposed to one based on fixed shares can be made. Ideas of 'testamentary freedom' and 'forced heirship' are in counterpoint. They are, indeed, expressions of property *versus* family.

There is also an important balancing between autonomy and dynasty – and this is played out most clearly in the family provision arena. Dynastic expectations are one thing; increasing longevity is another. If we live into our 90s – and many of *us* will – then dynastic expectations are really those of another century. The inheritance of our children is their early childhood – their education (from long day care, through to private school, for many; and then to university) – they get 'their inheritance' as part of their 'maintenance, education and advancement in life'. Parents don't die now in a way that produces an orderly fulfilment of dynastic expectations of children.

I once flippantly wrote about the assurance of old age being the ability to command the respect of our children through the power of the money that we had maintained into our elderly years.[69] This was written as a debating posture, from a quaintly 'feminist' viewpoint, but this is becoming the reality. If we earn our way into a comfortable middle age, and then do not quietly fade away within a decade or so of retiring, we will need our own savings to support our old age – and to enjoy it. The esteemed American academic, Professor John Langbein, has spoken of the fact that children now 'get their inheritance early' – largely through an investment by parents in their education. The liberal philosophers lauded the self-reliant individual and the value in the sweat of the brow as the true justification of property. The expression of that in our law is the right to some ease in our dotage and to let, indeed encourage, our children along their own road in life.[70] It is, indeed, the age of the self-funded retiree.

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69 'Testamentary Freedom: A Motherhood Statement', in *Papers of the International Academy of Estate and Trust Law—2001* (2002), 273–281.

70 Expressed for example by Reg Ansett and Andrew Lloyd Webber: *Ansett and Ansett v Moss* [2007] VSC 92; A Ramachandran, *Fortune's a phantom for Lloyd Webber's children* (2008) <http://www.smh.com.au/news/entertainment/people/composer-wont-give-

Succession law is one of the slower moving waterways of jurisprudence – but also one of the most fundamental and most significant philosophically in relation to property in families. In the 1970s the New South Wales Law Reform Commission raised the question whether some concept of fixed shares should be reintroduced. The Commission recognised that there was a broad choice to be made with respect to property in family on death – between discretionary powers as included in Family Provision legislation and fixed rights – as a basis for dealing with family property. They asked the simple question: 'What, in 1974, is the best way for the law to assure to the family of a deceased person adequate provision out of his estate?'[71] While it put the question squarely in the spotlight, it didn't remain there. In the 1977 Report it was dropped altogether. Why? 'We think that the time for proposing fundamental changes in [the laws of succession] has not yet come'.

That 'the time ... has not yet come', expresses an adherence to testamentary freedom at least as a conceptual framework for ideas of family and ideas of property. Family provision legislation does not express the 'expectation' of inheritance of which Mill wrote, but it does give a place for it to be heard. And the 'allowance of laws' still has some role to play, but more as a counterweight. So, how free is free, in this context? Pretty much, but not absolutely so.

his-kids-the-lot/2008
/10/07/1223145321219.html> at 7 October 2008.

71 New South Wales Law Reform Commission, *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974), [2.1, 19]; and see [3.14]–[3.15], [29]–[30].