Stepchildren and Succession

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In recent years, the legal disabilities faced by particular types of children in Australian law have largely been overcome by specific legislation in all States and Territories. The status of illegitimacy, for almost all purposes, has now been abolished.[1] This legislation, in respect of the law relating to succession, also overturns the general rule of construction of wills to the effect that descriptions of relationships are presumed to be legitimate.[2] Adoption legislation[3] provides that an adopted child becomes a child of the adoptive parents as if the child had been born to such parents in lawful wedlock, and ceases to be a child of the previous natural parents. Unless a will indicates to the contrary, an adopted child will thus be included in the description of children in a will of the adopting parent, and, as in the case of ex-nuptial children, may take on intestacy and make an application for family provision. Finally, in respect of artificially conceived children, such children are, by legislation,[4] regarded as the natural children of the parents—provided certain conditions are met—and for succession purposes, are placed in the same position as adopted children.

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1 *Children (Equality of Status) Act* 1976 (NSW); *Status of Children Act* 1974 (Vic); *Status of Children Act* 1978 (Qld); *Family Relationships Act* 1975 (SA); *Wills Act* 1970 (WA); *Administration Act* 1903 (WA); *Status of Children Act* 1974 (Tas); *Birth (Equality of Status) Act* 1988 (ACT); *Wills Act* 1968 (ACT); *Status of Children Act* 1978 (NT).

2 This rule was generally referred to as the rule in *Hill v Crook* (1873) LR 6 HL 265. Its continued applicability at common law was doubted in any event by Kirby P in *Harris v Ashdown* (1985) 3 NSWLR 193, a case relating to a will executed prior to the commencement of the statutory provisions noted above.

3 *Adoption of Children Act* 1965 (NSW); *Adoption Act* 1984 (Vic); *Adoption of Children Act* 1964 (Qld); *Adoption Act* 1988 (SA); *Adoption of Children Act* 1896 (WA); *Adoption Act* 1988 (Tas); *Adoption of Children Act* 1965 (ACT); *Adoption of Children Act* 1994 (NT).

4 *Artificial Conception Act* 1984 (NSW); *Status of Children Act* 1974 (Vic); *Infertility (Medical Procedures) Act* 1984 (Vic); *Status of Children Act* 1978 (Qld); *Family Relationships Act* 1975 (SA); *Artificial Conception Act* 1985 (WA); *Status of Children Act* 1974 (Tas); *Artificial Conception Act* 1985 (ACT); *Status of Children Act* 1978 (NT). See also *In the Estate of the Late K* [1996] 5 Tas R 365, noted in D Chalmers, 'Inheritance Rights of Embryos' (1996) 15 *UTLR* 137; (1996) 70 *ALJ* 972. A child conceived *in vitro* and implanted in mother's womb after death of biological father was held to have rights on father's intestacy.

Similar legislative attention has not been directed at stepchildren and in succession law this has posed problems, particularly in relation to family provision claims. As will be seen, in some States stepchildren have been denied the right to make such claims, and in other jurisdictions, even though stepchildren have been included within the general definition of eligible applicants, restrictive judicial interpretation of that definition has resulted in ineligibility.

This is disturbing for a number of reasons. In the first place, stepchildren have no entitlement under the intestacy rules of all Australian jurisdictions. Unless adopted, a stepchild is not kin,[5] and therefore should a step-parent die intestate, any stepchild may not claim on the step-parent's estate. In particular circumstances, to also deny the stepchild a family provision claim may lead to injustice and hardship. It is true that a step-parent may benefit a stepchild by will, and where there is ambiguity in language, a liberal construction of that will may result in the stepchild taking a benefit under it. This matter is more fully considered below in the section headed 'Construction of Wills'. Nonetheless, in the absence of hard empirical data, there is anecdotal evidence that a large proportion of the Australian population have not prepared a will, so that the law relating to intestacy and family provision assumes great importance.

Secondly—and here there is empirical evidence[6]—the number of divorces in modern Australian society is on the increase, and, as pointed out by Nathan J of the Supreme Court of Victoria in the recent case of *Rowe v Popple*,[7] as parties remarry, the number of stepchildren will also increase. Thirdly, as his Honour also emphasised,[8] the traditional family structure of two parents and associated progeny all living together in the one home can no longer be taken as the norm, and the modern family structure quite often includes children from other relationships, who may become stepchildren upon subsequent marriage of one or other of their biological parents. Indeed, the National Council for the International Year of the Family, reporting in 1994, adopted the following wide definition of family:

5 *Rutland v Rutland* (1698) 2 P Wms 210 at 216; 24 ER 703 at 705; *Re Leach (decd)* [1985] 2 All ER 754 at 759.

6 Australian Bureau of Statistics, *Marriages and Divorces in Australia* (AGPS, 1995).

7 Unreported, No 4234 of 1996, 14 February 1997, BC9700218. The decision in this case was later overturned by the Court of Appeal in *Popple v Rowe*, Unreported, No 4234 of 1996, 20 March 1997, BC9701125 (Winneke P, Brooking and Hayne JJA).

8 *Rowe v Popple*, note 7 above, at 7-8.

> We regard 'family' as encompassing all cross-generational nurturing systems of goodwill. The word 'family' also projects an image of inter-dependent relationship involving one or more responsible adults who have the capacity to care for themselves and each other, to include dependent persons in the caring group and to provide for their varying needs. The dependants may be children (natural, adopted, orphaned, foster, step, or of unknown parentage) and frail aged and handicapped persons unable to cope in certain areas of their lives without the wiser, stronger, more resourceful, more stable parenting entity.[9]

Given these factors it is proposed in this article to examine the current Australian law relating to stepchildren and the law of succession, both in respect of the construction of wills and the law relating to family provision. The discussion of the latter area will include a critique of the eligibility provisions, a consideration of the principles applied in determining claims, and a plea for uniformity in all jurisdictions.

Meaning of 'Stepchild'

The relationship between a stepchild and a step-parent has been considered in a number of cases, not all relating to succession law. In general, the relationship occurs when a natural parent of a child later marries a person who is not the natural parent of the child. This establishes a relationship of affinity.[10] It was once thought that a stepchild had to be the product of a former marriage, so that an ex-nuptial child whose natural parent later married did not become the stepchild of the other party to that marriage. *Irwin v Sholl*[11] is an example. Under legislation, maintenance was payable by a stepfather to a stepchild in defined circumstances. A'Beckett J denied that this legislation applied to an illegitimate child of the man's wife, tersely commenting:

> I think the word 'stepfather' ... means the husband of the mother of a child, the offspring, by a previous marriage, of the mother. In its ordinary meaning the word refers to children born in wedlock. When a man marries a widow he may be supposed to know whether she has any children, but I do not think it was intended that he should be responsible for

9 Final Report, *Creating the Links: Families and Social Responsibilities* at p 9. Quoted in R Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (Butterworths, 1996) p 94.

10 *Re Trackson (Deceased)* [1967] Qd R 124 at 125-126; *R v Cook, ex parte C* (1985) 156 CLR 249 per Deane J at 263.

11 (1897) 22 VLR 640.

> the support of his wife's illegitimate children, born before marriage, of whom he is not the father.[12]

Later decisions have taken a wider view. In *R v Frith; R v Stewart*[13] upon a charge under the then *Crimes Act* 1891 (Vic) of carnally knowing a stepdaughter, the defence was raised that as the girl in question was not born in lawful wedlock, she was not a stepdaughter. The Full Court of the Supreme Court rejected this construction. Given the purpose of the legislation, illegitimacy of the child was irrelevant. The New Zealand Supreme Court in *Lineham v Lineham*[14] declined to follow *Irwin v Sholl*,[15] in circumstances where a wife applied for a maintenance order against her husband in respect of a child born out of wedlock prior to the marriage and of whom the husband was not the father. Step-parents were obliged to provide maintenance under the relevant legislation, the *Domestic Proceedings Act* 1968 (NZ). It was held that the husband was a step-parent. Again, given the purpose of the legislation, illegitimacy of the stepchild was not an issue, and indeed, Cook J indicated that for all ordinary purposes 'the term "step-parent" is the obvious one to describe the relationship of a husband to his wife's child by a previous union, whether or not that union was a marriage'.[16] A similar statement was made by Deane J in *R v Cook, ex parte C.*[17]

In none of the above cases was the term 'stepchild' or 'step-parent' or 'stepfather' statutorily defined. As far as succession law is concerned, the only definition of stepchild is given in the family provision legislation of Queensland and Tasmania. Section 40 of the *Succession Act* 1981 (Qld) defines stepchild as 'in relation to a deceased person, a child of that person's spouse who is not a child of the deceased person'. In that State, therefore, there is no requirement, as there once was,[18] that the child be a product of a former marriage of the natural parent so that ex-nuptial stepchildren would appear to come within

12 *Irwin v Scholl* (1897) 22 VLR 640 at 641.

13 [1914] VLR 658.

14 [1974] 1 NZLR 686.

15 (1897) 22 VLR 640.

16 [1974] 1 NZLR 686 at 687.

17 (1985) 156 CLR 249 at 264. That case was concerned with the extent of the Commonwealth's marriage power, and held that stepchildren were not children of the marriage and were beyond the reach of that power. Deane J dissented. Legislation reversing the decision was passed in 1995—the *Family Law Reform Act* 1995 (Cth)—and this legislation is considered in more detail below in the section headed 'Conclusions'.

18 *Succession Act* 1867-1977 (Qld), s 89, repealed by the *Succession Act* 1981 (Qld).

the definition.[19] The *Testator's Family Maintenance Act* 1912 (Tas), on the other hand, by section 2(1) defines stepchild '(a) in relation to a male deceased person, [as] a child of that person's wife by a former marriage; or (b) in relation to a female deceased person, a child of that person's husband by a former marriage'. It would appear that an ex-nuptial stepchild would not come within this definition, an attempt to construe it more broadly being rejected by Underwood J in *Basterfield v Gay*.[20] It was argued in that case, inter alia, that the *Status of Children Act* 1974 (Tas), which abolished the status of illegitimacy, also removed the requirement in the above definition of a former marriage. Underwood J held, obiter, that the *Status of Children Act* 1974 could not override an express statutory definition.[21] In other jurisdictions, where claims by stepchildren are permitted, stepchildren are not defined for the purposes of family provision, so presumably the general common law definition, discussed above, encompassing ex-nuptial stepchildren would apply.

A stepchild may also include a child who has been adopted by a parent, and that parent later remarries. In *Re O'Malley*,[22] the applicant for family provision under the then Queensland legislation[23] was adopted by parents whose marriage was later dissolved. The mother of the adopted child married again some six years later. Her then husband died, leaving a will which made no provision for the adopted child. The child was held to be a stepchild, as the effect of the adoption order was to place the child in the same situation as if he had been born to the adopters, that is, as a natural child of them. Upon the mother's remarriage, the stepchild/step-parent relationship was created, enabling the child to apply for family provision.

Finally, in considering the meaning of stepchild, it is clear that that status may come to an end. It does not do so if the step-parent dies prior to the natural parent, at least as far as family provision is concerned, as the status of an applicant is to be decided at the time of the testator's death.[24] There are a large number of authorities to the effect, however, that the status of being a stepchild depends upon the continued existence of the marriage between the child's natural par-

19 See particularly the comments of Macrossan J in *Re Marstella* [1989] 1 Qd R 638 at 640, but compare with Shepherdson J at 646.

20 [1994] 3 Tas R 293.

21 Id at 302.

22 [1981] Qd R 202.

23 *Succession Act* 1867-1977 (Qld), repealed by *Succession Act* 1981 (Qld).

24 *Re Taylor* [1989] 1 Qd R 205.

ent and the step-parent so that if that marriage is dissolved or the natural parent should die prior to the step-parent, the relationship ceases. As most of the authorities are concerned with family provision claims, they are discussed in some detail below in the section headed 'Family Provision'.

Construction of Wills

Problems relating to construction generally occur when a will is drafted leaving a gift to 'children', where the testator has stepchildren. A recent example is provided by *In The Will of Ahchay*.[25] In that case the testator executed a will in which he left his whole estate 'to my wife ... absolutely but should she not survive me by a period of one calendar month, then to such of my children as shall be living at my death as tenants in common in equal shares'. The will was executed when the testator was aged 59. The testator's wife predeceased him. The testator's wife had seven children by a previous marriage, and in 1939 her then husband deserted her. In 1949 she married the testator, the four eldest children at that time having either married or lived independently. The three youngest lived with the testator and his wife, the testator taking responsibility for their maintenance, education, upbringing and discipline. Slicer J had no hesitation in holding that the word 'children' used in the will meant the three stepchildren who had lived with the testator and his wife.

The general principles relating to constructions of wills will normally lead to this result. The task of a court of construction is to discover the expressed intention of the testator:

> The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the 'expressed intentions' of the testator.[26]

In ascertaining this intention, the usual or ordinary meaning is to be given to words and phrases used by the testator, unless there are indications that the testator used that word or phrase in a different sense.

25 Unreported, Supreme Court of Tasmania, Slicer J, 27 February 1997, BC9700451; 8/1997.

26 *Perrin v Morgan* [1943] AC 399 per Lord Simon at 406.

It was once held, in *Hill v Crook*,[27] that the ordinary or natural meaning of the word 'children' is limited to natural, legitimate children of the testator, except where it is impossible for legitimate children to take, or where, on the face of the will, it is clear that the testator meant to include illegitimate children within the description. In *Re Jebb, deceased*[28] these exceptions were held not to be confined to illegitimate children, but should also be extended to adopted children. As pointed out above,[29] this rule has now been overturned by legislation, but in respect of stepchildren the comments of Kirby J in *Harris v Ashdown*[30] are pertinent. He stated:

> in my view it is no longer safe to approach the construction of such words as 'child' and 'children' from the starting point of Lord Cairns' dictum. Nowadays, it would be much safer to include in the expression 'child' as used in a will, legitimate and ex-nuptial, adopted and stepchildren unless, from the language of the will itself or from admissible surrounding circumstances, it is shown that a narrower meaning was intended by the testator. Such an approach acknowledges the changing nature of personal obligations in today's society.[31]

Due to the paucity of case law, this dictum has not yet been directly applied to the construction of a will involving stepchildren, but in any event the earlier decisions have shown a willingness to extend the meaning of children to include stepchildren on the traditional principles of construction.

One of these traditional principles is often called the 'dictionary' principle. In general, the usual or ordinary meaning rule may be displaced and a secondary meaning given to a word in a will if, in construing the will as a whole, the testator appears to have used that word in a different sense from its usual meaning. The words used are used in a particular sense which is not the exact sense, and the will indicates this. The testator is said to have supplied his or her own 'dictionary', as it were.

Re Davidson[32] provides an excellent example. There the testator, in 1906, married one John Davidson, the husband of her deceased sister who had died in 1902. The relationship between John Davidson and the deceased sister had produced one child, John Foster Davidson,

27 (1873) LR 6 HL 265 at 282-283 per Lord Cairns.

28 [1966] Ch 666. But compare with the case *Re Rowlands, deceased* [1973] VR 225.

29 Notes 2 and 3 above.

30 (1985) 3 NSWLR 193.

31 Id at 200. Compare with the case *Re Gibb* [1984] 1 NZLR 708.

32 [1949] Ch 670.

who was five years old on the subsequent marriage of his father to the testator. He lived with his father and the testator, who always treated him and spoke of him as her son. John Foster Davidson later married and had two children, Donald John and Nora Margaret. John Davidson predeceased the testator. The testator died in 1947 leaving a will in which specific bequests were made to 'my son, John Foster Davidson' and 'my granddaughter, Nora Margaret Davidson', creating a trust for the payment of certain income 'to my son, John Foster Davidson during his life' and devising and bequesting her residuary estate on trust for 'such of my grandchildren as shall attain the age of 21 years or previously marry and if more than one in equal shares absolutely'.

The question before the court was whether the 'grandchildren', Donald John and Nora Margaret, were entitled to the residuary estate on satisfaction of the conditions. In answering that question in the affirmative, Roxburgh J held that the use of the word 'son', in the case of John Foster Davidson, and 'grandchildren' in the case of Donald John and Nora Margaret was deliberate:

> There is to my mind, no question of any mistake in the use of language. She knew perfectly well that John Foster Davidson was not her son, but she did not call him her son by inadvertence: she called him her son because she chose to describe him by that designation and she did it, in my judgment, deliberately. Equally well she knew that Nora was not her granddaughter, but she did not use the word by inadvertence: she chose, and deliberately, to describe Nora as standing in that relationship to her ... The testatrix has, in my view, plainly used the word 'grandchildren' in a sense quite peculiar to herself but clearly indicated in her will.[33]

Thus, the testator had supplied her own dictionary which displaced the ordinary or usual meaning.[34]

Quite apart from this principle, there is also what is known as the 'armchair' principle in the construction of wills.[35] The ordinary or usual meaning of a word or phrase in a will may be displaced by a secondary meaning, if, in the light of the circumstances surrounding the making of the will and the circumstances actually known to the testator when the will was made, it is clear to the court of construction that the testator used the word or phrase in a sense other than

33 *Re Davidson* [1949] Ch 670 at 675.

34 For similar decisions see *Re Moyle* [1920] VLR 147 and *Re Fleming* [1963] VR 17.

35 For an expression of the principle see *Allgood v Blake* (1878) LR 8 Ex 160 per Blackburn J at 162. The actual phrase orginated in the judgment of James LJ in *Boyes v Cook* (1880) 14 Ch D 53 at 56.

the usual sense. The court thus puts itself in the position of the testator of that time, not to receive direct evidence of the testator's actual intentions, but rather to interpret the words used in the will, if they are ambiguous.

This evidence has been used in a number of cases involving stepchildren, where the testator has left a gift to a 'child' or 'children'. In *In The Will of Ahchay*,[36] for example, the judge took into account the fact that the testator had no other children, that he bequeathed his property to his wife who was beyond childbearing age, and he did not seek to revoke his will during the twenty years following her death. Just over 100 years before this case was decided, very similar facts arose in *Re Jeans, Upton v Jeans*.[37] There the testator, at the age of 46, married a widow, aged 47, who, at the date of the marriage, had four daughters by her former husband. These daughters took the name of the testator and were treated by him as his own children. The testator's will left his estate to his wife for life, and thereafter to 'his children'. There was no issue of the marriage between the testator and his wife. It was held that the stepchildren took under the will, North J looking at the surrounding circumstances to determine the meaning of the word 'children'. These included the fact that the testator at the date of the will had been married for 13 years to a wife who had four children by her former husband, but none by him and that he had treated the stepchildren as if they were his own.

A similar effect was achieved in the Canadian decision in *Re Connolly*.[38] The surrounding circumstances in that case were succinctly stated by Coffin J in the following terms:

> When Mr Connolly made his will in November, 1923, he had two stepchildren who had been treated with the generosity, control and discipline of a parent except that they did not actually call him 'Father'. The stepson was still living with his mother and stepfather. The stepdaughter had so lived until that year. At the time of the marriage Mr Connolly was 47 and his wife 42 so that four years later when the will was drawn up he would be 51 and she 46. Her doctor gave his opinion that she was past childbearing but did not discuss the matter with her husband. She herself had, however, discussed her condition with her husband.[39]

36 Unreported, Supreme Court of Tasmania, Slicer J, 27 February 1997, BC9700451; 8/1997.

37 (1895) 72 LT 835.

38 (1964) 47 DLR (2d) 465.

39 Id at 470-471.

In the event, the stepchildren took under the will even though the will simply referred to the 'children' of the testator.

Obviously, in all of these cases, it was not difficult on the facts to give a secondary meaning to the words in the will. In particular, in all cases, there were no natural children of the testator and spouse.[40] This may be of some importance in that it was once said that the 'armchair' principle may only be utilised where the words used in the will were 'insensible'.[41] That is, if the words in the will could have their normal meaning, extrinsic evidence of surrounding circumstances was not admissible. The ambiguity must appear from the words in the will itself, and not from consideration of the surrounding circumstances.[42] On this strict approach, if there was a mixture of natural children and stepchildren, and the gift was 'to my children', the words are not insensible, extrinsic evidence of surrounding circumstances to show that the testator meant all children, both natural and stepchildren, would not be admissible, and the gift would thus go to the natural children only.[43]

Two points may be made about this. First, it is doubtful whether the inflexible principle in *Higgins v Dawson*[44] is in any event still applicable law. Certainly, in a number of cases involving the meaning of the word 'wife' used in a will, extrinsic evidence of the surrounding circumstances was admitted to show that the testator meant a person other than the lawful wife who was still living at the testator's death.[45] The effect of these decisions is that extrinsic evidence may be admitted to show an ambiguity even if the words used in the will are clear and capable of taking effect according to their ordinary meaning. There is a strong presumption that the description in the will shall prevail, but that may still be overcome by evidence of surrounding circumstances. Secondly, it is more probable than not that modern

40 In *Re Jeans, Upton v Jeans* (1895) 72 LT 835, the testator did have three illegitimate children at the time of his marriage, but they declined to make any claim on a share of his estate.

41 See for example *Higgins v Dawson* [1902] AC 1.

42 See the discussion in Hardingham, Neave and Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company, 1989) pp 276-287, and Mackie and Burton, *Outline of Succession* (Butterworths, 1994) pp 122-125.

43 For an application of this principle, see *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207 1.

44 [1902] AC 1.

45 *Re Smalley* [1929] 2 Ch 112; *Day v Collins* [1925] NZLR 280; *Layer v Burns Philp Trustee Co* (1986) 6 NSWLR 60.

courts would be inclined to follow the approach taken by Kirby P in *Harris v Ashdown*.[46] The effect of that dictum, as already noted, is to raise a presumption that all children, including stepchildren, are included in a general description of children in a will, unless the will itself or the surrounding circumstances indicate to the contrary. This effectively reverses the traditional approach, and allows in extrinsic evidence not to show that the testator intended to include stepchildren in the gift to 'children', but rather to show that he or she intended a more restrictive meaning.

In conclusion, the traditional approaches to construction will usually result in stepchildren being encompassed within the meaning of 'children', where that term has been used in a will, and where there are difficulties in application, the more literal approach, discussed above, may also have that result.

It should also be noted that in three jurisdictions, statutory modification has been made to the admissibility of extrinsic evidence in the construction of wills generally which may be applicable in the case of stepchildren. In Tasmania and the Australian Capital Territory, the legislation[47] provides that evidence of the testator's intention is admissible where the language used in the will renders the will, or part of it, meaningless, ambiguous on its face or ambiguous in the light of the surrounding circumstances. Direct evidence of the testator's intention is not, however, available to establish the surrounding circumstances. In Victoria, the legislation[48] allows the admission of the testator's circumstances in all cases, so even if the words used in the will are clear, an examination of those circumstances may lead to ambiguity. This ambiguity may then be resolved by the extrinsic evidence, although the admission of direct evidence of the testator's actual intentions is excluded, except where already allowed under general principles.[49]

Family Provision

There are two issues which need discussion here. The first relates to eligibility. In some jurisdictions, as already noted, stepchildren are denied a right to claim, and in others, although given such a right, a

46 (1985) 3 NSWLR 183.

47 *Wills Act* 1992 (Tas), s 43; *Wills Act* 1968 (ACT), s 12B. These provisions are based upon s 81 of the *Administration of Justice Act* 1982 (UK).

48 *Wills Act* 1958 (Vic), s 22A.

49 Direct evidence of the testator's actual intentions is admissible only in the case of equivocations.

restrictive definition of 'stepchild' has resulted in ineligibility. The second issue relates to the principles to be applied in determining eligible claims.

Eligibility

In Victoria and Western Australia the family provision legislation[50] provides that children are eligible applicants, but does not specifically include stepchildren in the definition of children. Most commentators have accordingly assumed that stepchildren have no standing to bring a claim.[51] This assumption was recently challenged by Nathan J in *Rowe v Popple*.[52] In a wide-ranging and innovative judgment, his Honour held that the word 'children' in the legislation was to be given a liberal interpretation, in light of the purposes of the legislation, the advances in reproductive technology, the treatment of ex-nuptial and adoptive children, and the recent amendments to the *Family Law Act* 1975 (Cth)[53] which did not distinguish between natural and stepchildren for the purposes of that Act. He accordingly held that the word 'children' in the legislation included stepchildren, and therefore such children were eligible to initiate proceedings for family provision. The facts of the case were that the testator died in 1995, left a will, executed shortly before his death, in which his estate was left to his nephews and nieces and one of their spouses. The testator's wife had died in 1982. There were no children of the marriage but the wife had three children of a previous marriage who were treated as members of the family of the testator and his wife. The will made no reference to these stepchildren, who brought proceedings for family provision.

The decision of Nathan J was, however, reversed by the Court of Appeal in *Popple v Rowe*,[54] the Court holding that 'children' in the legislation meant natural children. In the words of Brooking JA:

50 *Administration and Probate Act* 1958 (Vic), s 91; *Inheritance (Family and Dependants Provision) Act* 1972 (WA), ss 4 and 7.

51 Davern Wright, *Testator's Family Maintenance in Australia and New Zealand* (3rd ed, Law Book Company, 1974) p 13; Dickey, *Family Provision After Death* (Law Book Company, 1992) pp 36-37; de Groot and Nickel, *Family Provision in Australia and New Zealand* (Butterworths, 1993) p 90.

52 Unreported, Supreme Court of Victoria, No 4234 of 1996, 14 February 1997, BC9700218.

53 *Family Law Reform Act* 1995 (Cth).

54 Unreported, Supreme Court of Victoria, Court of Appeal, No 4234 of 1996, 20 March 1997, BC9701125 (Winneke P, Brooking and Hayne JJA).

> History shows that when Parliament wishes to increase the categories of eligible applicants, or to enlarge an existing category, or to create a limited category, it does so by appropriate and express legislation ... In my opinion it is clear that 'children' in s 91 does not include stepchildren. Remedial the legislation no doubt is, but with all the interpretative benevolence in the world one cannot arrive at the contrary result. I do not derive any real assistance from the notion of a liberal interpretation in considering whether a category of person is intended by Parliament to have any rights at all under the legislation. 'Children' in s 91 is not an expression like, say, 'wireless telegraphy', to be interpreted, as his Honour thought in this case, in the light of modern scientific advances or changing practices in the community.[55]

There is thus presently no doubt about the ineligibility of stepchildren in Victoria, and presumably in Western Australia.

In New South Wales,[56] South Australia,[57] the Australian Capital Territory[58] and the Northern Territory,[59] stepchildren are not denied claims, but must show either dependency or maintenance. In New South Wales, there is no specific reference to stepchildren, but 'eligible' persons may apply if they have been, at any particular time—and not necessarily at the testator's death—wholly or partly dependent upon the deceased, and a member of the householder of which the deceased was a member, and the court is satisfied that there are factors warranting the making of the application. Stepchildren have been held to have satisfied these criteria in a number of cases.[60] The legislation of the Territories and South Australia requires stepchildren to have been maintained by the deceased person immediately before that person's death, or even if not so maintained, that they were legally entitled to be maintained.

Dependency is not a requirement in Queensland[61] and Tasmania.[62] As noted above in the section headed 'Meaning of "Stepchild"', step-

55 Ureported, Supreme Court of Victoria, Court of Appeal, No 4234 of 1996, 20 March 1997, BC9701125.

56 *Family Provision Act* 1982 (NSW), ss 6(1) and 9(1).

57 *Inheritance (Family Provision) Act* 1972 (SA), s 6(g).

58 *Family Provision Act* 1969 (ACT), s 7(2).

59 *Family Provision Act* 1970 (NT), s 72. The New Zealand approach is similar: *Family Protection Act* 1955 (NZ), s 3(1)(d). In the United Kingdom, a stepchild must be a person who was treated as a child of the family before being eligible: *Inheritance (Provision for Family and Dependants) Act* 1975 (UK), s1(1)(d) and see *Re Leach* [1985] 2 All ER 754 and *Re Callaghan* [1984] 3 All ER 790.

60 See for example *Re Fulop* (1987) 8 NSWLR 679 and *Churton v Christian* (1988) 13 NSWLR 241.

61 *Succession Act* 1981 (Qld), s 40.

children are specifically defined and made eligible applicants. Nevertheless, in both States the meaning of stepchild has been severely restricted by judicial decisions. In effect, there are decisions in both jurisdictions which have held that the relationship between a stepchild and step-parent ceases if the marriage between the natural parent and the step-parent is either dissolved or the natural parent predeceases the step-parent.

This was not always the position. In *Re Trackson*,[63] for example, it was held that once the relationship of stepchild is established, a stepchild had the right to apply for family provision out of the step-parent's estate, irrespective of whether the natural parent was alive or not. A similar decision was reached in *Re Nielsen*.[64] As de Groot and Nickel comment, the position taken in these cases was 'once a stepchild always a stepchild'. [65] These cases were overruled in *Re Burt*[66] by the Queensland Full Court. There the testator had died in 1980, having been married three times. None of the marriages had produced children, but her second marriage was to a man who had two children from a previous marriage. These children were the applicants for provision. Her second husband died in 1951 and the testator subsequently remarried. The applicants were held to have no standing to bring a claim for family provision, as they were not stepchildren. It was held that the relationship of stepchild and step-parent does not subsist after the termination of the marriage that created it. The effect of the decision is to limit claims by stepchildren against the step-parent's estate to cases where the natural parent has survived the step-parent and the marriage still subsists at death.

As *Re Burt*[67] was decided under previous legislation,[68] an attempt was made to challenge that decision in *Re Marstella*,[69] a case decided under the current provisions.[70] The Full Court held, however, that there was no significant difference between the wording of the previous and current legislation, and upheld the decision in *Re Burt*.[71] That

62 *Testator's Family Maintenance Act* 1912 (Tas), s 2(1).
63 [1967] Qd R 124.
64 [1968] Qd R 221.
65 *Family Provision in Australia and New Zealand* (Butterworths, 1993) p 91.
66 [1988] 1 Qd R 23.
67 Ibid.
68 *Succession Act* 1867-1977 (Qld), ss 89 and 90.
69 [1989] 1 Qd R 639.
70 *Succession Act* 1981 (Qld), s 40.
71 [1988] 1 Qd R 23.

case was also followed in Tasmania in *Basterfield v Gay*,[72] Underwood J of the Supreme Court holding that there was nothing to distinguish the definition of stepchild in the Tasmanian Act from that considered on the two occasions by the Full Court of Queensland. The Queensland Court of Appeal, in the more recent decision of *Re Monckton*,[73] has confirmed the continued validity of *Re Burt*[74] and *Re Marstella*.[75]

One possible exception to this strict approach was raised in *Re Burt*.[76] This was to the effect that the relationship of stepchild and step-parent may survive termination of the marriage between the natural parent and the step-parent, either by dissolution or death, where there is also a natural child of that marriage. This could create the relationship of consanguinity between that child and the stepchild. To similar effects are the comments made by Deane J in *R v Cook; ex parte C*[77] in his dissenting judgment in that case. This slightly opened door has, however, been firmly closed both in Queensland and Tasmania. In *Re Danes*,[78] Williams J, in a short judgment, rejected any such exception, and Zeeman J, of the Tasmanian Supreme Court, in *Connors v Tasmanian Trustees Ltd*,[79] construed the statutory definition of 'stepchild' in the Tasmanian legislation[80] as not relying on any concept of affinity in a general sense, and similarly denied any exception to the general rule.

In summary, the general principles relating to eligibility throughout the eight jurisdiction are unnecessarily inconsistent and require legislative intervention of a uniform nature. This matter is more fully addressed below in the section headed 'Conclusions'.

72 [1994] 3 Tas R 293. Earlier Tasmanian cases had not adopted this strict approach, but the point was not argued: see for example *Re Lockwood* [1960] Tas SR 46; and *Hoggett v Perpetual Trustees* 14 March 1989, Unreported 14/1989.

73 [1996] 2 Qd R 174.

74 [1988] 1 Qd R 23.

75 [1989] 1 Qd R 638. Special leave to appeal to the High Court of Australia from this decision was refused. See Editor's note in *Re Monckton* [1996] 2 Qd R 174 at 176. It should be noted that a stepchild who is ineligible in Queensland due to this interpretation may nevertheless claim as a dependant under the general provision contained in s 40 of the *Succession Act* 1981, provided the child is under the age of 18 years and was wholly or substantially maintained or supported (otherwise than for full valuable consideration) by the deceased at the time of the deceased's death.

76 [1988] 1 Qd R 23.

77 (1985) 156 CLR 249 at 263.

78 [1989] 2 Qd R 236.

79 Unreported 31 October 1996, A69/1996.

80 *Testator's Family Maintenance Act* 1912 (Tas), s 2(1).

Principles to be Applied in Determining Claims

If eligible, the question which arises is whether the claims of stepchildren in respect to family provision should be treated differently to those of natural children. In general, the answer given by the courts has been in the negative: 'All things being equal except the actual relationship which exists, I think it would be very difficult to justify a substantially different provision being made in the case of a stepchild on the one hand, and a natural child on the other'.[81] Of course, as was pointed out by Crisp J in another Tasmanian case, *Re Lockwood*,[82] in some cases all things will not be equal, and the step relationship is a factor to be taken into account:

> Hypothetically, it may justify differential provision both by the testator and the Court between classes of children, though of course whether this should be done in any given case will depend on such matters as the respective ages at which the relationship was assumed, the extent of other existing provision for stepchildren, the actual degree of dependence, the extent to which responsibility for maintenance and advancement has been assumed by a step-parent, and a host of other factors.[83]

Certainly, the decided cases have indicated a willingness by the courts to apply ordinary principles in determining claims. In *Hoggett v Perpetual Trustees and National Executors of Tasmania Ltd*,[84] for example, the testator in her will left her entire estate to her natural daughter, no provision being made for either of her two stepdaughters. One of the stepdaughters made application for provision. The judge found on the evidence that the applicant maintained a friendly relationship with the testator until her death—a 'good adult' relationship. When the applicant's father and the testator married, the applicant was aged 24 and living away from the family home. His Honour held that merely because the development of the relationship of stepmother and stepchild occurs late in life and at a time when they will not share a home or pursuits which cause them to form a close-knit bond, did not provide a sound basis for the refusal of relief in appropriate cases. As was pointed out,[85] by its very nature, the step relationship may differ in nature from that in respect of a natural child, but different principles of law do not apply depending upon whether the child in

81 Per Wright J in *Hoggett v Perpetual Trustees and National Executors of Tasmania Ltd*, Tas Unreported, 14 March 1989, No 14/1989.

82 [1960] Tas SR 46. See also *Hinchen v Public Trustee* [1978] Tas SR (NC 11) 221.

83 [1960] Tas SR 46 at 48.

84 Tas Unreported, 14 March 1989, No 14/1989.

85 Id at 14.

question is a natural child or stepchild. In the event, and in all the circumstances the judge found that the applicant was left by the testator without adequate provision for her proper maintenance and support, and awarded the applicant a lump sum payment from the estate.[86]

Other recent cases have not specifically made an issue as to the fact that the applicant has been a stepchild. One factor which has consistently emerged in these cases is that the natural parent has died, and either by will or the law relating to intestacy, the step-parent takes the entire estate of the natural parent. The step-parent then either makes a will which excludes the stepchild or if there is an intestacy, the stepchild has no rights thereunder. This was the case in *Hoggett v Perpetual Trustees and National Executors of Tasmania Ltd*,[87] discussed above, and in the English cases of *Re Callaghan*[88] and *Re Leach*.[89]

In *Callaghan*, for example, the plaintiff applicant was born in 1937 to John and Mary Eland. John was killed on active service, and Mary and the plaintiff lived in a house gifted to Mary by the plaintiff's paternal grandfather. Mary subsequently formed a relationship with Callaghan and the plaintiff lived with them for a considerable time as part of the family. Callaghan and Mary were eventually married. Mary predeceased Callaghan, who himself died intestate some four months later. Under the intestacy rules the deceased's three married sisters were entitled to the whole of the estate. The plaintiff was successful in a claim for family provision, one factor taken into account being the origin of the assets of the deceased. As Booth J commented:

> One further factor must not be overlooked. The origin of the assets comprising the estate itself clearly derived from the plaintiff's mother, Mary, and from the property which was the gift to her of the plaintiff's paternal grandfather. It was in effect Mary's inheritance following on the death of her first husband, the plaintiff's father.[90]

Similar circumstances existed in the New South Wales case of *Re Fulop*,[91] McLelland J pointing out that the only substantial asset in the deceased's estate was acquired from funds derived to a substantial extent from moneys earned by the stepchild's natural father.[92]

86 Similar principles were applied in *Re Trackson* [1967] Qd R 124.

87 Tas Unreported, 14 March 1989; No 14/1989.

88 [1984] 3 All ER 790.

89 [1985] 2 All ER 754.

90 [1984] 3 All ER 790 at 794.

91 (1987) 8 NSWLR 679. See also *Churton v Christian* (1988) 13 NSWLR 241.

92 (1987) 8 NSWLR 679 at 683.

Apart from this factor, applications have proceeded on normal considerations. As de Groot and Nickel state:

> It would seem that differential provision would still be relevant today where there are special circumstances. However, in the general run of cases an applicant who was a stepchild would be treated like any other child and the usual tests of need, moral claim, competing claim, conduct dissenting and other circumstances would be taken into account in determining what is adequate provision.[93]

Conclusions

In respect of the construction of wills, where the testator has employed the word 'children', it is clear from the decided cases that the courts have demonstrated a willingness to construe that word to include stepchildren by the use of either the 'dictionary' or 'armchair' principles. In most of the cases discussed above under the heading 'Construction of Wills', there was little doubt that the testator intended the stepchildren to benefit, and the traditional principles of construction, even if regarded as an artificial means of ascertaining intention, have generally resulted in the testator's intentions being given effect to. Even in less obvious cases, the court of construction has the means available to truly ascertain the expressed intention of the testator. Given the modern attitude to the so-called 'rules' of construction, whereby the emphasis is placed not so much on rigid principles of construction, but rather on establishing the true meaning of words used by the testator,[94] there seems little doubt that a liberal interpretation will continue to be given to the word 'children' so as to include stepchildren, unless the testator indicates to the contrary.

One cannot, however, be in any way so positive about the law relating to family provision with respect to stepchildren, which, on an Australia-wide basis, may only be described as unnecessarily complex, restrictive and badly in need of reform. All Australian Law Reform Commissions have recently been considering uniform succession laws, one aspect of which has been family provision.[95]

93 *Family Provision in Australia and New Zealand* (Butterworths, 1993) p 93.

94 For the modern approach to construction see particularly the judgments of the House of Lords in *Perrin v Morgan* [1943] AC 399, and the High Court of Australia in *Brennan v Permanent Trustee Co of New South Wales* (1945) 73 CLR 404.

95 Noted in (1996) 70 *ALJ* 436. The author is a consultant to the Tasmanian Law Reform Commission on this project, but the views expressed here are those of the author, and not necessarily of the Commission.

It is suggested that a number of issues need close attention by the Commissions. It may be strongly argued that stepchildren should be eligible applicants in all jurisdictions, thus reversing the current ineligibility provisions in Victoria and Western Australia. The reasoning of Nathan J in *Rowe v Popple*[96] is convincing, and though the decision in that case was overturned by the Court of Appeal, this was only on the basis that legislative, rather than judicial, intervention was necessary. In particular, Nathan J pointed out in that case that it is indeed a curious result that a step-parent is required to maintain a stepchild under the provisions of the *Family Law Act* 1975 (Cth) during its lifetime, but the law extinguishes the obligation to provide maintenance out of the estate following death.[97]

The status of a stepchild should not cease on the death of the natural parent or the dissolution of the marriage between the natural parent and the step-parent, as currently is the case in Queensland and Tasmania. This may require clear legislative intent. As Macrossan J stated in *Re Marstella*:

> I find it difficult to accept that [the draftsman] intended the arbitrary result that, whatever the length of the relevant marriage, however long or however short, a stepchild might have a claim if his parent dies a short time after but not if the parent dies a short time before the day on which the testator, the spouse of the parent, dies.[98]

Moreover, where stepchildren have been eligible applicants, as pointed out above in the section headed 'Family Provision', in many cases the assets of the step-parent come from the former spouse, the natural parent. Unable to claim on any intestacy of the step-parent, or under the will if the step-parent leaves the benefit elsewhere, leads to an unjust result in those circumstances.

Consideration should also be given to the case of ex-nuptial stepchildren in Tasmania, so removing the status of illegitimacy and allowing claims by such children in all jurisdictions.

Most, if not all, of these issues could be resolved by the passage of uniform legislation based upon the provision of the *Family Law Act* 1975 (Cth).[99] Under amendments to that Act in 1995, parental re-

96 Unreported, Supreme Court of Victoria, No 4234 of 1996, 14 February 1997, BC9700218.

97 Id at 14-15.

98 [1989] 1 Qd R 638 at 642.

99 It is notable that the United Kingdom provisions relating to claims by children are based upon the then *Matrimonial Causes Act* 1973 (UK). See the discussion in

sponsibility quite clearly now extends to members of the family, and members of the family include stepchildren of a marriage or de-facto relationship.[100] As Nathan J commented in *Rowe v Popple*:

> Parental responsibility is vested in both parents, an assumption which admits of two parents, and plan for the welfare and maintenance of children can be registered with the Family Court. The Court has power to enforce these plans, and they can relate to a 'child'. Such children include those who have become 'members of the family'. Plainly, such children can include stepchildren.[101]

Under these provisions there is no discrimination between different types of children, and these provisions could form a useful basis to determine future family provision claims. The notion of being a 'member of the family' could thus also replace the requirement of dependency, which is currently a prerequisite to family provision claims in some jurisdictions.

Oughton and Tyler, *Tyler's Family Provision* (2nd ed, Professional Books Ltd, 1984) pp 57-63.

100 *Family Law Reform Act* 1995 (Cth). Note particularly s 60D(2) and s 60F.

101 Unreported, Supreme Court of Victoria, No 4234 of 1996, 14 February 1996, BC900218 at 14.