

# TESTAMENTARY PROMISES, FAMILY PROVISION AND FAMILY FARMERS

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## I INTRODUCTION

It is common for a person who helps another person in a ‘caregiving situation’ to expect to be rewarded. One form this gift may take is that the person receiving the care may make a promise to their helper that they will inherit property or money.

It is appropriate to examine such promises under the theme of this special issue in this journal dealing with ‘care relationships’ as it ‘is notorious that some elderly persons of means derive enjoyment from the possession of testamentary powers and from dropping hints as to their intentions, without any question of estoppel arising’.<sup>1</sup>

In the farming context, such promises may ensure the continued development of a farm to the great advance of the promisor. Any intimation that the father would not give the farm to the son on death might mean that a son would not commit to the development of the farm and mean the farm would be run down.<sup>2</sup> It might therefore be to the advantage of the father to ‘string the son along’ with such an expectation when in reality the father might have had other inheritance plans or he might change his mind about his will.

At the same time, a person who has been looking after another and has been working on the farm for a number of years may falsely claim that they had received a promise that they would be rewarded. It is in the nature of such promises that as the testator is dead such a promise may be both difficult to prove and at the same time difficult to deny if the son has worked for a long period on the farm and made considerable improvement to the property at his own expense.

To illustrate these types of ‘testamentary promises’ in the context of the succession to family farms, I make an analysis of family provision law. This type of law is generally understood as giving a power to the courts to order that provision be made out of a deceased estate in favour of a certain class of dependants if the court is satisfied that adequate provision has not been made for an applicant.<sup>3</sup>

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<sup>1</sup> *Gillett v Holt* [2001] Ch 210, 228 (Walker LJ).

<sup>2</sup> Clive Potter and Matt Lobley, ‘Aging and Succession on Family Farms’ (1992) 32 *Sociologia Ruralis* 317.

<sup>3</sup> The various acts and ordinances are: *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW); *Family Provision Act 1970* (NT); *Succession Act 1981* (Qld); *Inheritance (Family Provision) Act 1972* (SA); *Testator’s Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1958* (Vic); *Inheritance (Family) and Dependents Provision Act 1972* (WA). Standard works include: Leonie Englefield, *Australian Family Provision Law* (Lawbook, 2011); John De Groot and Bruce Nickel, *Family Provision in Australia and New Zealand* (Butterworths, 2012); Rosalind Atherton and Prue Vines, *Australian Succession Law: Commentary and Materials* (Butterworths, 2013); Gino Dal Pont and Ken Mackie, *Family Provision in Australia* (LexisNexis, 2012).

Remedies at common law and equity as regards testamentary promises which exist outside of the family provision legislation are not my concern here.<sup>4</sup>

To make this analysis of testamentary promises, I examine the nature of rural ideology as regards families who wish to retain the farm in the family for successive family members. As regards these cases, I build on a sociological approach to rural inheritances that indicates that such promises should be seen as reciprocal understandings within the context of intergenerational exchange of labour and land.

## II THE CULTURAL BACKGROUND TO FAMILY FARMING

Two aspects of family farming are relevant to this article. Firstly, ideas of land being retained with the family over successive generations – I call these ideas values of ‘custodianship’. Secondly, the transfer process, which takes place over a series of years beginning with the designation of a successor and the final handover of title – I call this the ‘succession process’.

I start with the first factor mentioned above. The handing over of the farm is essential for the continuation of a family legacy.<sup>5</sup> In many cases, the farm property becomes a ‘living memorial’ to those generations that went before. Even young people who have left the farm at an early age may still have a commitment to the farm.<sup>6</sup>

Some family farmers support the value of keeping and perpetuating the name of the family in the district.<sup>7</sup> The patrimony a son may receive in a family within families with these views is a position of partnership or custodianship, rather than the land as such, as the lengthy process of transfer means that the farm is in a continuous form of transfer between generations. In this situation land dealings may be part of a life cycle based on reciprocity and exchange where the handing over of the farm is part of a life cycle of an exchange of labour for title deeds. ‘Property’ in these families is merely in transition between successive owners, regardless of which

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<sup>4</sup> Such remedies may exist on the grounds of constructive trust, proprietary estoppel or contract. On the difficulties of such remedies, see Ian Hardingham, Marcia Neave and Harold Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Company, 1989) 322; Martin Davey, ‘Testamentary Promises’ (1988) 8(1) *Legal Studies* 92; Audley Sheppard, ‘Contracts to Make Wills and the Family Protection Act 1955: Is the Promisee a Creditor or Beneficiary’ (1985) 15 *Victoria University of Wellington Law Review* 157. None of the Australian jurisdictions has enacted testamentary promises legislation, as has New Zealand: see *Law Reform (Testamentary Promises) Act 1949* (NZ). For recent cases in Australia, see *Giumelli and Another v Giumelli* [1999] 196 CLR 101; *Bridgewater & Others v Leahy & Others* (1998) 194 CLR 457; *Ashton v Pratt* (No 2) [2012] NSWSC 3.

<sup>5</sup> I accept that there are a variety of approaches to land holdings and this has been well recognised in rural sociology which discusses different farming styles or strategies. See Jan Van der Ploeg, ‘Styles of Farming: An Introductory Note on Concepts and Methodology’, in Jan van der Ploeg and Ann Long (eds), *Born From Within: Practice and Perspectives of Endogenous Rural Development* (van Gorcum 1995) 7; Frank Vanclay et al, ‘The Social and Intellectual Construction of Farming Styles: Testing Dutch Ideas in Australian Agriculture’ (2006), 46(1) *Sociologia Ruralis* 61. Some farming sons show strong views against taking on the family farm, especially in dairy areas: see Roger Wilkinson, ‘Leaving Farming: The Experiences of Some Northern Victorian Families’ (Unpublished Manuscript).

<sup>6</sup> Ruth Gasson and Andrew Errington, *The Farm Family Business* (CAB International, 1993) 185; Roger Wilkinson, *Population Dynamics and Succession Strategies of Rural Industry Producers* (Unpublished Doctorate, Victoria University, 2009) 13.

<sup>7</sup> See Berenice Carrington, *Pekina: An Ethnography of Memory* (Unpublished Doctorate, Australian National University, 1997) 121-123.

respective family member may hold the legal title in any one particular phase of the life cycle.<sup>8</sup> It is recognised that ideas of land and family are not static and they have been modified with the opening up of the economy as the centrality of the market is progressively involved in the construction of the self.<sup>9</sup>

As regards the succession process, the choice of a successor and the respective socialisation of children occurs very early. A child growing up on a farm may acquire a working knowledge of a farm easily and such a child has a head start on other farmers. Often socialisation takes place through the selective allocation of jobs. Typically, it may be reported that girls may be encouraged to stay inside the home and the son goes out to mind the stock. Various accounts show that interest is manifested and encouraged towards boys that may show an interest in farming. At the same time, education may also be gendered to encourage stereotypical gender roles.

The son who inherited the farm after many years of hard labour under the tutelage of the father may regard it as rightfully his. However, daughters may think otherwise, as they consider themselves as being involved in the farm in their youth and they may have looked after ageing parents. Daughters may regard the farm as ‘family property’ that should belong to all family members, especially as a sharing of the property amongst the family might be a recognition of the windfall in the increased value of a farming property.

In some cultures in medieval Europe there was a formal contractual arrangement or ‘care contract’ whereby one of the children was designated as a successor to the farm with the agreement of siblings and, in return, the chosen son would commit to looking after the parents.<sup>10</sup>

However, in Australia, evidence shows that there is no overall planning and no clear-cut decision process. The selection process may start early in school and is usually based on the idea of an implicit understanding that in the end there was only one son suitable.<sup>11</sup>

Often the handover process is underpinned by a ‘testamentary promise’ that one day the working son will receive the farm in return for working on the farm. What is of concern in this article is how such a promise has been legally considered under family provision legislation. Have these ‘undertakings’ been seen as mere empty promises or incomplete gifts and therefore not enforceable? Alternatively, have such promises been seen as valid?

The consequent question arises: have these promises been wrongly devalued or ignored? Such a line of thought may suggest that judges have not considered that these promises are a form of

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<sup>8</sup> For sentiments along these lines, see Submission of the Family Law Council to the Joint Select Committee on Certain Aspects of the Operation of the Interpretation of the Family Law Act 1975, 1992, vol 30:76-77.

<sup>9</sup> See Lisa Bryant, ‘The Detraditionalisation of Occupational Identities in Farming in South Australia’ (1999) 39 *Sociologia Ruralis* 236; Lynda Cheshire, Carla Meurk and Michael Woods, ‘Decoupling Farm, Farming and Place: Recombinant Attachments of Globally Engaged Family Farmers’ (2013) 30 *Journal of Rural Studies* 64.

<sup>10</sup> Rajendra Pradhan reports this practice in Holland while similar practices have been seen in Finland: see Rajendra Pradhan, ‘Family, Inheritance and the Care of the Aged: Contractual Relations and the Axiom of Kinship Amity’ (Unpublished Manuscript, University of Amsterdam, 1990). For instances of these types of arrangements in Finland, see Ray Abrahams, *A Place of the Own: Family Farming in Eastern Finland* (Cambridge University Press, 1991).

<sup>11</sup> Dennis Gamble et al, (1995) ‘Transfer of the Family Farm Business in a Changing Rural Society’ (RIRDC Report, Research Paper 95/8, RIRDC, 1995).

gifts based on reciprocity, in that the giving of labour for many years of work is reciprocated by a later transfer of title.<sup>12</sup>

Finally, a note on the main cases I discuss. I do not make a judgment concerning whether a particular case discussed involved particular views as regards family farming and land. In other words, my argument does not depend on establishing that the families involved in a case had custodianship views toward land.

### III THE BACKGROUND TO THE RESTRICTION OF TESTAMENTARY FREEDOM

Family provision legislation imposes a legal obligation on every testator or testatrix to make proper provision for the support and maintenance of certain defined dependants.<sup>13</sup> Should a testator or testatrix fail to make such provision in his/her will, or should intestacy provisions fail to provide for such a dependant, the aggrieved dependant may obtain an order varying the terms of the will or varying the statutory rules on intestacy.

The purpose of the Acts is not to allow an aggrieved party under a marriage who has lost his/her spouse to claim a fair and equal division of property or maintenance – application is limited to proper maintenance and support out of the deceased's estate. Thus, while family provision legislation may represent a curtailment of testamentary freedom, it does not give an equal share of an estate to expectant family members.<sup>14</sup>

Family provision legislation is neutral to the sentiment of rural farmers maintaining property in the hands of a son. The Act does not direct the formal retention in the family of one form of property (such as a farm) against another. If a farm must be sold to provide for maintenance, that is seen as unavoidable.<sup>15</sup> Thus, on a superficial level of analysis, family provision legislation does not detract from or support the strong rural sentiment that farms should not be divided and should remain as viable units.

### IV FARMING SONS<sup>16</sup>

In farming cases the work of sons may take several forms. Frequently a son will leave school early and join his father after an agricultural or trade course. Sons are subsequently trained by their fathers to be farmers. In many cases an applicant may have helped build up the assets of the farm,

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<sup>12</sup> Liam Kennedy, 'Farm Succession in Modern Ireland: Elements of a Theory of Inheritance' (1993) 69(3) *Economic History Review* 477.

<sup>13</sup> *Family Provision Act 1969* (ACT) s 8(2); *Succession Act 2006* (NSW) s 59(1)(c); *Family Provision Act 1970* (NT) s 8(1); *Succession Act 1981* (Qld) s 41(1); *Inheritance (Family Provision) Act 1972* (SA) s 7(1); *Testator's Family Maintenance Act 1912* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 91(3); *Inheritance (Family) and Dependents Provision Act 1972* (WA) s 61(1).

<sup>14</sup> *Blore v Lang* [1960] 104 CLR 124, 135.

<sup>15</sup> *Bryant v Bryant* [1986] NSWSC 1481 (24 July 1986) 8 (Needham J); *Worthington v Dickson* [1984] WASC 1928 (1 June 1984).

<sup>16</sup> For a longer treatment of the cases on farming sons, see Malcolm Voyce, 'The Impact of Testator's Family Maintenance Legislation as Law and Ideology on the Family Farm' (1993) 7 *Australian Journal of Family Law* 191.

frequently doing much of the heavy work for long hours for a low wage, while their father continues to hold the purse strings.

In earlier cases, to be an eligible person for an award under the family provision legislation, applicants had to show ‘special need’. It is now clear that there are no separate rules applicable to the different categories of applicants, including children such as adult sons. Every application must be determined according to its own circumstances and not on the basis of some category.<sup>17</sup>

No jurisdiction makes explicit mention of promises of the deceased as being relevant to whether the deceased was left with adequate provision.<sup>18</sup> However, courts are empowered under the various Acts to take into account various factors.

I mention the factors to be considered in the New South Wales *Succession Act 2006* as they provide a comprehensive list of factors that are relevant in all jurisdictions.<sup>19</sup>

There are some matters which might be relevant for a farming testamentary promise claim. Under section 60(2), courts may take into account ‘any family or other relationship between the applicant and the deceased person’,<sup>20</sup> ‘the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant’,<sup>21</sup> any contribution an applicant has made to the ‘acquisition, conservation or improvement’ of the deceased property,<sup>22</sup> any evidence of testamentary intentions of the deceased person including statements made by the deceased person,<sup>23</sup> and ‘any other matter the court considers relevant’.<sup>24</sup>

Through a consideration of the above factors, the courts have indicated that statements made by testators and expectations engendered are relevant in ascertaining whether proper provision has been made and the fact that an applicant was encouraged by the deceased to base his or her life on an understanding that certain property would be his or hers.<sup>25</sup> Courts have observed in various cases that ‘the community expects testators to make provision for those actually dependent on them at the time of their death, and to recognise the claims of those to whom they have made promises of support, particularly if those promises have been relied upon.’<sup>26</sup>

What amounts to an inducement by a deceased may be regarded as ‘conduct deserving’, as in the case of *Coates v National Trustees and Agency Co Ltd*<sup>27</sup> where the court considered the good conduct of the son where he had helped his mother build up the estate, ‘partly in expectations which she had encouraged’.<sup>28</sup>

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<sup>17</sup> *Hunter v Hunter* (1987) 8 NSWLR 537; *Gorton v Parks* (1989) 17 NSWLR 1.

<sup>18</sup> Dal Pont and Mackie, above n 3, 625.

<sup>19</sup> This is a suggestion by Englefield, above n 3, 90, which is very sensible.

<sup>20</sup> *Succession Act 2006* (NSW) s 60(2)a.

<sup>21</sup> *Ibid* s 60(2)b.

<sup>22</sup> *Ibid* s 60(2)h.

<sup>23</sup> *Ibid* s 60(2)j.

<sup>24</sup> *Ibid* s 60(2)p.

<sup>25</sup> *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 134, 148 (Gibbs J).

<sup>26</sup> *Bovaird v Frost* (2009) 3 ASTLR 155, [102] (Bereton J).

<sup>27</sup> (1956) 95 CLR 494.

<sup>28</sup> *Ibid* 523 (Fullagar J). See also *Mudford v Mudford* (1947) NZLR 837, 840; *Will of Hughes* [1930] St R Qd 329; *Anasson v Phillips* [1988] NSWSC 2900 (29 February 1988).

These cases reflect a conflict between rewarding sons who have worked on farms and providing maintenance for other children. In most cases this conflict has been resolved in favour of recognition of the farming sons'<sup>29</sup> contribution over other children's needs. Other children (ie, non-farming sons, widows and daughters) who often help on the farm in various ways and frequently attend to the nursing needs of invalid parents have received only meagre amounts given the extent of their needs in many cases.<sup>30</sup> This was the practical outcome of many years of cases despite the lack of a general principle that farming sons were to receive any preferential treatment.

Two commentators, namely De Groot and Mackie,<sup>31</sup> calculate that prior to 1985, in typical orders, non-farming applicants only received 9.9 per cent of family property. After 1985, non-farm applicants only received 8.89 per cent. While these calculations are helpful, it must be noted that it is important to look at each case to observe the actual quantum given to siblings and widow/ers and the amount given to children by way of gifts as forms of pre-inheritances.

In the case of property proceedings following dissolution of marriage under section 79(4)(d) of the *Family Law Act 1975* (Cth), there was a strong bias of the court not to make an order that would lead to the farm being sold and passing out of the family. Since 1985 and *Lee Steere v Lee Steere*,<sup>32</sup> there is no longer a consideration on dissolution of marriage that farm property is special, so if it is necessary for the farm to be sold, the court will so order.<sup>33</sup>

Many family provision cases on farms involve this problem. At the back of the judge's mind is the question that if he or she overburdens the farming son, the farm may have to be sold. Frequently this can be avoided by ordering periodical payments or payments to be made after a fixed number of years. Such an option may of course be discriminatory against the non-farming family members.

#### V THE MORAL DUTY TEST: WHAT SIGNIFICANCE SHOULD BE GIVEN TO THE 'MORAL GLOSS' IN THE EARLY CASES?

The first few cases on family provision Acts decided that the courts should place themselves in the position of the testator and consider whether he or she had been in breach of a moral duty.<sup>34</sup> As was expressed in *Allardice v Allardice*:<sup>35</sup>

It is the duty of the court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all the

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<sup>29</sup> There are few (if any) cases where a daughter has taken sole charge of a farm for a sequence of years and has bought a claim.

<sup>30</sup> *Young v Young* [1989] WASC 1139 (26 April 1989); *Wadley v Younger* [1984] VSC 5893 (10 October 1984); *McCallum v McCallum* [1986] NSWSC 4601 (2 May 1986).

<sup>31</sup> De Groot and Nickel, above n 3, 66.

<sup>32</sup> (1985) FLC 91.626.

<sup>33</sup> *Ibid.* See also Malcolm Voyce, 'The Farmer and His Wife: Divorce and the Family Farm' (1993) 18(3) *Alternative Law Journal* 121.

<sup>34</sup> See Rosalind Atherton, 'The Concept of Moral Duty in the Law of Family Provision: A Gloss or Critical understanding?' (2000) 6 *Australian Journal of Legal History* 5; Virginia Grainer, 'Is Family Protection a Question of Moral Duty?' (1994) 24 *Victoria University Law Review* 143; Barbara Hamilton, 'Vigolo v Bostin: Is the Concept of 'Moral Duty' Still Relevant to a Family Provision Application?' (2005) 26(1) *Queensland Lawyer* 22.

<sup>35</sup> [1910] 29 NZLR 959.

existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which is a just, but not a loving husband or father owes towards his wife or towards his children.<sup>36</sup>

After this classic formulation, some later judges described this moral duty approach as a ‘gloss’ which was ‘likely to obscure rather to clarify the legislation’.<sup>37</sup> Murphy J said that the gloss was unwarranted and was inconsistent with the language of the legislative scheme.<sup>38</sup> More recently, the High Court described the moral duty approach as a gloss which they considered lacked ‘any useful assistance’.<sup>39</sup> The question therefore remained open whether the legislation should be based on need rather than moral obligation.

This doubt has now been overcome by *Vigolo v Bostin*<sup>40</sup> as the High Court decided to affirm the moral duty test as:

It remains of value, and should not be discarded. Such considerations have a proper place in the exposition of the legislative purpose, and in the understanding and application of the statutory text. They are useful as a guide to the meaning of the statute. They are not meant to be a substitute for the text. They connect the general but value-laden language of the statute to the community standards which give it practical meaning. In some respects, those standards change and develop over time. There is no reason to deny to them the description ‘moral’.<sup>41</sup>

## VI THE LEADING CASES ON TESTAMENTARY PROMISES

I have indicated the factors that courts may take into account in family provision cases where a son helped in building up the assets of the estate and where there are promises made to the applicant concerning further provision.

In *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd*,<sup>42</sup> the appellant had attended school until the age of 14 years. For a few years he worked as a boilermaker, but he was told by his doctor that he should leave the construction industry as it was affecting his health. At the age of 24 in 1925, he moved onto a 75 acre block that his father had bought. His father had told him that ‘one day the property would be his’. Accordingly, he lived there and farmed the property though the income was poor and he did little to improve the farm. In 1959 the son started to cohabit with Jacqueline Hughes. Although they never formally married, they had a daughter who was injured in an accident and was left disabled.

In 1961 the appellant’s father died and left all the property to his wife. In 1972 the testatrix went to live on the farm and she stayed on the farm until 1973 when she left because she experienced hostility from Jacqueline. In 1975 the testatrix died, leaving the farm to the Bethlehem Home for the

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<sup>36</sup> Ibid.

<sup>37</sup> *Re F J McNamara* (1938) 55 WN (NSW) 180, 181.

<sup>38</sup> *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 143, 158 (Murphy J).

<sup>39</sup> *Singer v Berghouse* (No 2) (1994) 123 ALR 481, 487 (Mason, Dean and McHugh JJ).

<sup>40</sup> (2005) 221 CLR 191.

<sup>41</sup> Ibid 204 (Gleeson J), 320 (Callinan and Heydon JJ).

<sup>42</sup> (1979) 134, 143 (Gibbs J).

Aged.

Gibbs J found that it could not be assumed that the appellant, who was 54 at the time of the hearing, would readily find employment as he had not practised his trade for 30 years. The farm had provided the appellant with both a home and an occupation:

...he was allowed by his father, and later by the testatrix, to live on the farm and treat it as his own. He has since acted on the assumption that the farm would be his and was led to do so by the conduct of his parents, if not by their express promises. Wise and just parents, having allowed him to base his life on that foundation, would not years later attempt to deprive him of what had become necessary for the support of himself and his family.<sup>43</sup>

On the question of disentitling conduct, the judge found that while his conduct was not meritorious, consisting as it did 'in a failure to take positive steps to assist his mother rather than any wrongdoing',<sup>44</sup> it was nonetheless not disentitling. The judge therefore awarded the son the whole interest in the property. The case is important because it shows that there was no restriction on an able-bodied son claiming support.

In *McCallum v McCallum*,<sup>45</sup> the testator had two boys. The younger son (the plaintiff) had left home when he was 11 years old as the farm was not large enough to generate sufficient income for the whole family. The older son William continued at all times to work the farm.

Seven years later after the plaintiff had worked various jobs, he returned home to work on the farm. The testator had obtained an adjacent farm, which could be worked on a combined basis through a partnership arrangement. Eventually the family, after several years in partnership, fell out and the plaintiff left home. Because of these disagreements over the running of the farm, the partnership had been dissolved and William became the sole owner. The reason for the disagreement seems to be that the plaintiff could not stand the low pay and long hours. On the death of the testator, as the plaintiff received nothing, he brought proceedings on the basis that there was an expectation that he would receive one of the properties in the testator's will. The plaintiff claimed there was an 'understanding' in the family that he would obtain a property after the testator's death. As regards the 'understanding', Young J said:

The plaintiff says that at all times it was an understanding in the family that he would obtain a property and his brother would obtain a property after the testator had passed on. I have deliberately put that vaguely because the way in which the understanding existed varied in the various versions that were given of it. In par 32 of his affidavit [he] said 'On several occasions Dad said to me, 'it is worthwhile (meaning the unpaid work I was putting in to improve the farm) the farms will go to you and Willie when I die like I got mine from my Dad. You will have to look after Mum though after you get the farms'.<sup>46</sup>

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<sup>43</sup> Ibid 148.

<sup>44</sup> Ibid 156.

<sup>45</sup> [1986] NSWSC 4601 (2 May 1986).

<sup>46</sup> Ibid 7.



However, Young J found as a matter of fact that the evidence on the nature of the agreement did not extend beyond there being an ‘understanding’ in the family that, after the death of both the testator and his wife, the two sons would become the owners of the dairy properties then owned by the testator. This ‘understanding’ fell short of an actual promise made on expectation by the testator that the plaintiff would be left his own dairy farm.

Young J held that under family provision law there can be no basis for the view that a plaintiff will receive what he considers to be his/her legitimate expectation to inherit. He held that the question to be posed in family provision cases is:

...whether the court, being the voice of the community, considers that the community would feel that a reasonable testator, who had made promises, or who had benefited by the conduct of the applicant, would thereby owe a moral duty to make provision for the plaintiff.<sup>47</sup>

The judge made it clear that it was not the plaintiff’s expectation that was relevant; the question is always: would the court, being a voice of the community, expect a testator who had received value because he had made such promises, owe a moral duty to the plaintiff? The judge considered that the community would expect the testator to make some provision for the plaintiff as the testator had ‘engendered expectations that the plaintiff would succeed’<sup>48</sup> with his brother to the property after the death of the parents. The judge considered that a reasonable testator would have considered the younger son. The plaintiff received a legacy of \$130 000 by way of a charge on the property, payable in 10 years’ time – so as not to destroy the farm.

The conclusion from this case is that a promise to an applicant that they will inherit property is not relevant in the consideration of whether proper provision has been made. Such an expectation is only of consequence if it has been induced by the testator so that the applicant has responded to that inducement by his or her conduct.

In *Vigolo v Bostin*<sup>49</sup> the son Virginio was born in 1957. He was the eldest of five children of the parents Lino and Rosario Vigolo. In 1973, on reaching 16, Virginio left school to work on the farm while he took other jobs.

In 1978, when he was 21, when he had saved \$10,000, he told his father that he wanted to buy his own farm. His father Lino persuaded him to buy a farm with his parents on the basis that, it was alleged, when the father died the farm would belong to the son. Virginio claimed that his father made many similar promises, telling him that his wages were low as he was going to inherit the farm. The father’s exact words allegedly were: ‘at the end of the day, it will all be yours’.<sup>50</sup>

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<sup>47</sup> Ibid 7.

<sup>48</sup> Ibid 21.

<sup>49</sup> [2005] 221 CLR 191. For an account of the case at first instance, see [2001] WASC 335, and for the Full Supreme Court in Western Australia, see [2002] 27 WAR 121.

<sup>50</sup> *Vigolo v Bostin* [2002] WAR [77].

A few years later, Lino and Virginio bought another farm as equal partners, and together they operated both farms. They subsequently bought another farm and the profits generated by all three farms enabled them to buy a produce market and a service station.

In 1991, Virginio and his wife bought a hairdressing business, which his wife, Susan, ran. Lino and Susan later bought another farm, which she ran. This accumulation of personal assets was resented by Lino and consequently led to a breakup of the business relationship.

In 1993, matters came to a head and the company was formally dissolved and the assets were divided based on a market evaluation. After this settlement, the father made a new will. Virginio was left out of this will as the father believed the son had been adequately provided for, and because Virginio had already received his mother's share.

Lino died in 1997. In his will, Lino made no provision for his wife and Virginio divided the estate equally between his three daughters and one son. In June 2000, the judge, at first instance, determined that Lino and his wife owned assets worth in excess of \$2 million and the assets of the three girls and the son were worth \$202 000, \$271 000, \$216 000 and \$70 000 respectively.

At first instance,<sup>51</sup> the judge, McLure J, noted that that the opportunities he had been given were more generous than those received by his siblings. It followed that Virginio had failed to show that he was left without adequate provision and that provision ought to be made for him out of the testator's will. Accordingly, she observed that when the promise was made when Virginio was working with his father between 1978 and 1993, this promise did not give rise to a 'moral claim which would otherwise justify making provision for him'.<sup>52</sup> In other words, McLure J was not denying the validity of a testamentary promise in principle, but rather considered that it was not appropriate to support a promise in this case with further provision for the applicant as he was not in need.

The Full Supreme Court<sup>53</sup> and the High Court upheld this conclusion. The High Court did not give effect to the testamentary promise. In short, the High Court accepted that the father's promise that the farming son (Virginio) would inherit the Old Coach Road Farm was rendered ineffective by the Deed of Settlement. Furthermore, it considered that Virginio was adequately compensated by the family settlement.<sup>54</sup>

The High Court found that Virginio was an able-bodied adult son who was not in need of support. The court observed that the son had bought his claim on the basis of a moral claim for the father's bounty, arising out of previous business and family dealings. This claim failed not necessarily because moral claims were irrelevant but because he was unable to bring himself within the provisions of the Act and prove he had been inadequately provided for. As Gleeson J explained, the testator's promise must be considered in light of later events.

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<sup>51</sup> *Vigolo v Bostin* [2001] WASC 335.

<sup>52</sup> *Ibid* [132].

<sup>53</sup> *Vigolo v Bostin* (2002) 27 WAR 121.

<sup>54</sup> *Vigolo v Bostin* (2005) 221 CLR 191, 207 (Gleeson CJ), 220 (Gummow and Hayne JJ), 232 (Callinan and Heydon JJ).

## VII CONCLUSION

How have such testamentary promises, as illustrated by these cases, been construed in the courts? In other words, have such promises been regarded as giving rise to awards under family provision legislation? To answer this question it is necessary to show how a promise coincides with other requirements of the Acts, which have to be fulfilled as a basis of an award. I argue that the different judges in these cases were prepared to recognise the ‘shadow’, but not the substance, of the various testamentary promises.<sup>55</sup> Such judges would recognise the ‘shadow’ (ie, the ‘promise’) where there was a moral claim – in other words, where there was some element akin to equitable behaviour and the applicant had relied on such a promise.<sup>56</sup>

I summarise the extent of support given to testamentary promises received by sons in the above discussed cases. In *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd*, the court acknowledged that the applicant had received a promise. However, the basis of the award was not really the promise as such, but the fact the son had been allowed to live on the land and encouraged to do so. It therefore followed that ‘just and wise parents’ would not ‘deprive him of what had become necessary for himself and his family’.<sup>57</sup>

In *McCallum v McCallum*, the judge held that there was no evidence of a promise but merely an ‘understanding’. However, this understanding was such that any reasonable testator would make some provision for the son as the testator had engendered expectations that the plaintiff would receive the property.<sup>58</sup>

In *Vigolo v Bostin*, the High Court acknowledged the existence of the promise that the son would inherit property. However, the family settlement was seen to render the promise no longer relevant. In other words, the assumption was that such promises might have validity in some circumstances, but not in the present case.<sup>59</sup> As Gleeson J said, ‘the case failed not because moral claims are irrelevant but because he was unable to bring himself within the relevant provisions of the Act’.<sup>60</sup>

These cases indicate that testamentary promises may be recognised and supported by the family provision courts if the requirements of the Acts are fulfilled in all other respects and there is sufficient property available in an estate to make an award.

However, this approach may have the consequence that testamentary promises may not be enforced in the instances where land ownership rests on notions of custodianship of land.

The outcome in *Vigolo v Bostin* may be seen to sideline and ignore the nature of custodianship on Australian family farms. The legal system may be seen to have failed to recognise that such ‘domestic arrangements’ had actual moral force within rural communities.

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<sup>55</sup> In fact there was no discussion about the validity of the promises in these cases as it was merely assumed that the reliance upon such a ‘promise’ indicated that there was such a promise.

<sup>56</sup> See similar comments in *Vukic v Grbin* [2006] NSWSC 41, [38] (Brereton J).

<sup>57</sup> (1979) 143 CLR 134, 148 (Gibbs J).

<sup>58</sup> [1986] NSWSC 4601 (2 May 1986) 7 (Young J).

<sup>59</sup> *Vigolo v Bostin* (2005) 221 CLR 191, 207 (Gibbs J), 220 (Gummow and Hayne JJ), 231 (Callinan and Heydon JJ).

<sup>60</sup> *Ibid* 196 (Gleeson J).

I am not suggesting *Vigolo v Bostin* was wrongly decided under family provision law, as the High Court did not endorse the father's testamentary promise. The High Court that examined the case rightly concluded that Virginio failed not because moral claims were irrelevant but because he was unable to bring himself with the appropriate provisions of the Act and because the family settlement ended his rights.

I recognise the implications of endorsing testamentary promises in the instance of family farms that adhere to custodianship forms of ownership. Firstly, a view that testamentary promises should be endorsed in such cases runs against the statutory provisions of the various Acts, which stress the needs of the applicant and whether adequate provision has been made. Secondly, such an approach flies against *Barns v Barns*,<sup>61</sup> which reiterated that the family provision statutes have primacy over contracts. However, my point is a sociological one that such an approach ignores the nature of rural land inheritances based on reciprocity of a lifetime's work in exchange for property ownership.

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<sup>61</sup> *Barns v Barns* (2003) 214 CLR 169. See Rosalind Croucher, 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns* [2003] HCA 9' (2005) 27(2) *Sydney Law Review* 263.