

MORAL DUTY, RELIGIOUS FAITH AND THE REGULATION OF TESTATION

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I INTRODUCTION

The principle of testamentary freedom suggests that a testator should be unfettered in deciding to whom to leave his or her property. An Australian judge recently described testamentary freedom as ‘one of the badges of a society that has graduated from primitive conditions and a notable human right’.¹ In contrast, family provision legislation (also known as testators’ family maintenance legislation) empowers a court to alter, or even extinguish, a testator’s intended dispositions of his or her property. Generally, under such legislation a court may make an order for provision from the deceased estate for the ‘maintenance, education and advancement in life’ of persons related to the testator by blood, close relationship and/or dependence.² The most recent Australian version of such legislation frames entitlement to such provision by reference to the testator’s ‘responsibility’ to make it.³ The courts have developed a guiding principle that measures the actual testator’s dispositions against those of an objective ‘wise and just testator’ who acts in accordance with generally accepted community standards (the ‘moral duty’ standard). By applying this measure, the actual testator’s wishes may be overridden. Thus, the principle of testamentary freedom suggests a testator may deal with his or her property according to his or her own values and choices, while family provision law, particularly the moral duty standard, restricts such dispositions by reference to an external value judgment.

The purpose of this article is to highlight some fundamental problems in family provision law arising from this tension by considering its application to

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1 *Grey v Harrison* [1997] 2 VR 359, 363 (Callaway JA).

2 See, eg, *Family Provision Act 1982* (NSW) s 7.

3 *Administration and Probate Act 1958* (Vic) s 91(1). The relevant amendments to the legislation were enacted in 1997.

the dispositions of testators motivated by strongly held religious beliefs. A case study of testators of strong religious faith demonstrates how legislative standards embodying community values potentially impact upon a minority group whose values may differ from those of the general community. It also raises questions regarding the justification for such a legislative scheme in a pluralist society.⁴ While family provision legislation overrides testamentary freedom whatever the motivation of a particular testator, a focussed study of the legislation's impact upon religiously motivated testators may usefully highlight the problems of family provision legislation as well as raising questions pertinent to the interaction of law and religious faith in general.

Testamentary gifts motivated by religious faith include wills in which the whole scheme of distribution is based upon the precepts of the testator's religion. For example, rights of inheritance based upon blood relationship and gender are laid down in the Qur'an and are further expounded in other sources of Islamic law.⁵ Such principles may determine the distribution of a devout Muslim's estate.⁶ How, for example, would a court decide a family provision application by the daughter of a Muslim testator who has disposed of his estate to male blood relatives? Similarly, a devout Jew may be guided by the Talmudic principles of succession.⁷

Testamentary gifts motivated by religious faith also include gifts to a religious group or individual associated with the testator's faith and gifts made to some other person or body because of the testator's religious faith. For example, in the will of a member of the Hare Krishna faith community, both a gift to the International Society for Krishna Consciousness, and a gift to a charity for the poor in India, may be motivated by the testator's religious faith.⁸ Exclusion from a testator's will due to religious beliefs is also relevant.⁹ Finally, testamentary gifts motivated by religious faith include *conditional* gifts where the condition

4 'Multiculturalism as a social policy requires a systematic examination of Australian law to consider ... whether the law could be administered so that it does not have an unintended, discriminatory impact on the members of particular ethnic minority groups': Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) [1.17].

5 The Islamic law of succession allows only one third of the testator's estate to be distributed by will, and only with the consent of those who would otherwise inherit. The remainder of the estate will be distributed according to the Islamic law of succession, with male blood relatives favoured. The rules for distribution depend upon the interpretation of Sharia law adopted by the particular Islamic group to which the testator belonged. See generally Noel J Coulson, *Succession in the Muslim Family* (1971); Jamila Hussain, *Islamic Law and Society* (1999); Lucy Carroll, 'Life Interests and Inter-Generational Transfer of Property: Avoiding the Law of Succession' (2001) 8 *Islamic Law and Society* 245; Rosalind Atherton and Prue Vines, *Succession: Families, Property and Death: Text and Cases* (2nd ed, 2003) 35.

6 Cf Carroll, above n 5, 245 concerning how Muslims may avoid the Islamic law of succession.

7 See generally Atherton and Vines, above n 5, 37.

8 Sometimes there will be mixed motivations for a testamentary gift; of particular interest here are gifts for which the dominant motivation is religious belief. Sometimes it will be difficult to ascertain the testator's motivations regarding a large gift to a religious group. See, eg, *Whalen v Byrnes* [2003] NSWSC 915 (Unreported, McLaughlin J, 9 October 2003) where the testator left his estate to 'the Carmelite Order of Catholic Nuns at Sydney', although he had had no contact with them during his lifetime, nor was he of a religious disposition.

9 See, eg, *Wenn v Howard* [1967] VR 91; *Quek v Beggs* (1990) 5 BPR 11, 761.

relates to the testator's religious faith; for example, 'to my son, on condition that he profess the Protestant faith at the date of my death'.¹⁰

Part I of this article gives a brief overview of family provision legislation in Australia and the development of the moral duty standard, concluding with a discussion of the recent High Court decision in *Vigolo v Bostin*.¹¹ Part II considers the potential impact of family provision law (particularly the moral duty standard) upon testators of strong religious faith. Part III considers the interaction of family provision law with three competing considerations; namely, testamentary freedom, freedom of religion and respect for a deceased person's beliefs. Part IV suggests three reform options for family provision law.

II FAMILY PROVISION LEGISLATION

Family provision legislation was first enacted in New Zealand in 1900 and now exists in all Australian jurisdictions, in most parts of Canada and in England.¹² Such legislation provides a scheme for the recognition of non-testamentary entitlements to the deceased's estate.¹³ The legislation was conceived in response to growing social awareness of the plight of widows and children left without adequate testamentary provision.¹⁴

To begin with, entitlement to family provision was based upon blood relationship or marriage to the deceased. In most Australian jurisdictions, this now extends to marriage-like relationships with a deceased and, in some jurisdictions, to persons dependant upon the deceased.¹⁵ Victoria has the most recently enacted family provision legislation. It allows the court to order provision 'for the proper maintenance and support of a person for whom the deceased had *responsibility* to make provision'.¹⁶

An order for family provision is appropriate if the Court considers that proper provision was not made for the applicant's financial needs either by the

10 See *Trustees of Church Property, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394.

11 (2005) 213 ALR 692.

12 *Family Protection Act 1955* (NZ); *Family Provision Act 1982* (NSW); *Administration and Probate Act 1958* (Vic) Pt IV; *Succession Act 1981* (Qld) Pt IV; *Inheritance (Family Provision) Act 1972* (SA); *Inheritance (Family and Dependants Provision) Act 1972* (WA); *Testator's Family Maintenance Act 1912* (Tas); *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). See also proposed model uniform legislation in Queensland Law Reform Commission, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General*, Report No 58 (2004); *Inheritance (Provision for Family and Dependants) Act 1975* (UK) c 63. Family provision legislation exists in all Canadian common law jurisdictions. See generally Albert H Oosterhoff, *Oosterhoff on Wills and Succession: Text, Commentary and Cases* (4th ed, 1995).

13 The Act applies also to intestate estates.

14 See generally Rosalind 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.

15 Thus, under s 6 of the *Family Provision Act 1982* (NSW) eligibility is based upon relationship with the deceased (for example, spouse, former spouse, or child) or relationship plus dependency upon the deceased (for example, a grandchild or member of the household). Queensland's family provision legislation extends to a person under 18 years of age who was 'wholly or substantially maintained or supported' by the deceased: *Succession Act 1981* (Qld) s 40(c).

16 *Administration and Probate Act 1958* (Vic) s 91(1) (emphasis added).

deceased's will or (in some jurisdictions) in light of circumstances after the death of the deceased or by the application of intestacy laws. The entitlement is generally described in terms of provision for the applicant's 'proper maintenance, education or advancement in life'.¹⁷ More recent versions of the legislation list a range of factors for the court to consider in exercising its discretion.

No matter how eligibility for family provision is framed by the particular legislation, the Australian courts have consistently applied a common law test – based upon community standards – to the statutory language to determine whether an order for provision should be made. The High Court, in 1994, described the Court's task in a family provision application as a 'two-stage process'. The two stages are overlapping. The first stage is jurisdictional, asking the Court to 'determine whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life', while the second stage is discretionary, asking what provision 'ought' to be made.¹⁸

The criterion for deciding these two questions was formulated in terms of the testator's 'moral duty' as a 'wise and just testator'. This approach was initially developed by the New Zealand courts (the first courts to consider family provision legislation) and endorsed by the Privy Council in a direct appeal from the NSW Supreme Court in *Bosch v Perpetual Trustee Co (Ltd)* ('*Bosch*')

the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father. As was truly said by Salmond J in *In re Allen (Deceased)*, *Allen v Manchester*: 'The Act is ... designed to enforce the moral obligation of a testator'.¹⁹

In deciding whether adequate provision has been made, the size of the deceased's estate is relevant; it is appropriate for the Court to be generous if the estate is large and consequently this facilitates the making of an application.²⁰ Thus, the purpose of family provision legislation is not primarily to relieve the State of the financial burden of maintaining the testator's dependants; rather, it is

17 *Family Provision Act 1982* (NSW) s 7; *Family Provision Act 1969* (ACT) s 8(2); *Inheritance (Family Provision) Act 1972* (SA) s 7(1)(b); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 6(1); *Family Provision Act 1970* (NT) s 8(1). See also 'proper maintenance and support': *Succession Act 1981* (Qld) s 41(1); *Testator's Family Maintenance Act 1912* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 91(1).

18 *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 208–11 (Mason CJ, Deane and McHugh JJ), applying NSW family provision legislation. *Vigolo v Bostin* (2005) 213 ALR 692, 721 (Callinan and Heydon JJ), doubting whether this two-stage process was appropriate for all applications.

19 [1938] AC 463, 478–9 (Lord Romer), citing *Re Allardice*; *Allardice v Allardice* (1910) 29 NZLR 959 and *Re Allen (Deceased)*; *Allen v Manchester* [1922] NZLR 218, 220 (Salmond J). Gummow and Hayne JJ in *Vigolo v Bostin* (2005) 213 ALR 692, 707 noted that because the *Bosch* litigation bypassed the High Court, and because State courts were bound by Privy Council decisions until 1986, an opportunity for the High Court to critically assess the 'moral duty' principle was delayed.

20 *Bosch* [1938] AC 463, 476 (Lord Romer).

to enforce the testator's moral duty to provide appropriately for his or her dependants.²¹

The moral duty standard has been criticised from time to time, most notably by Murphy J in the High Court. His concern is that this moral standard is an additional requirement not warranted by the language of the statute (a non-statutory 'gloss') and thus it imports non-statutory considerations.²² In *Singer v Berghouse*, the majority of the High Court, in obiter dicta, implied their support for the views of Murphy J, thereby causing great concern in lower courts who had been applying the moral duty standard ever since *Bosch*.²³

The response of lower courts to the obiter dicta in *Singer* was generally to continue to use the moral duty standard but to formulate it more explicitly by reference to current community standards. For example, in *Permanent Trustee Co Ltd v Fraser*, Handley JA elaborated on the concept of moral duty, stating that: 'The test of the hypothetical wise and just testator required the court to apply its own conception of current community standards'.²⁴ Similarly, the Victorian Court of Appeal, in a number of cases, endorsed the moral duty test as consistent with the legislative purpose of the 1997 amendments to the Victorian Act,²⁵ although several judges have noted that the detailed criteria that the court may consider in deciding an application reduce the importance of the moral duty test.²⁶

Most recently, in *Vigolo v Bostin*,²⁷ the High Court considered the moral duty standard in the context of the Western Australian family provision legislation. A majority of the Court (Gummow and Hayne JJ dissenting on this point) reaffirmed the relevance of the common law test. According to Gleeson CJ, notions of morality pervade the language of family provision legislation and it is

21 See *Vigolo v Bostin* (2005) 213 ALR 692, 696 (Gleeson CJ). This may well be contentious. For example, the anonymous referee of this article argues that the fundamental purpose of the legislation is to shift the financial burden of maintaining a testator's family from the state to where it truly belongs; that is, with the testator. The moral duty language is used simply to achieve this pragmatic goal. If this is so, then my criticisms of the moral duty standard do not go to the heart of family provision law.

22 *Hughes v National Trustees, Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 158–9 (Murphy J); *Goodman v Windeyer* (1980) 144 CLR 490, 504–5 (Murphy J).

23 'For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to 'moral duty' or 'moral obligation' may well be understood as amounting to a gloss on the statutory language': *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 209 (Mason CJ, Deane and McHugh JJ).

24 *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24, 35. Justice of Appeal Handley cited Justice Stephen's description of the Court's task in the earlier High Court decision of *White v Barron* (1980) 144 CLR 431, 440: 'to recognize and to apply prevailing community standards of what is right and appropriate since it is by those standards that the content both of the moral duty owed by a just husband and father to his wife and children and of departures from it will be measured'. Justice of Appeal Sheller in dissent also referred to community standards: *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24, 46. All members of the Court of Appeal agreed that there would be no difference in outcome whether or not one used the language of 'moral duty': 28 (Kirby P), 35 (Handley JA), 46–7 (Sheller JA).

25 *Coombes v Ward* [2004] VSCA 51 (Unreported, Winneke P, Chernov JA and Bongiorno AJA, 4 March 2004); *Blair v Blair* (2004) 10 VR 69; *Lee v Hearn* (2002) 7 VR 595.

26 *Coombes v Ward* [2004] VSCA 51, [7] (Winneke P), [12] (Chernov JA); *Blair v Blair* (2004) 10 VR 69, [13] (Chernov JA), cf [41] (Nettle JA).

27 (2005) 213 ALR 692. The majority consisted of Gleeson CJ, Callinan and Heydon JJ.

entirely consistent with the purpose of the legislation for a court to consider such questions:

Fitness and propriety are value-laden concepts. Those values must have a source external to the decision-maker. Morality is the source of many of the values that are expressed in the common law, in statutes, and in discretionary judicial decision-making.²⁸

He went on to expressly endorse the moral duty language used by the earlier cases.²⁹ Justices Gummow and Hayne, by contrast, agreed with the obiter dicta in *Singer*, asserting that moral duty language is misleading and directs attention away from the purpose of the Act.³⁰ Instead, a court should apply the language of the statute and form an opinion ‘upon the basis of its own general knowledge and experience of current social conditions and standards’.³¹

All members of the Court accepted that, in applying the legislation, a judge must make a value judgment regarding whether appropriate provision has been made, and that the content of the value judgment must be determined by prevailing community standards. Chief Justice Gleeson quoted with approval Justice McLachlin’s explanation of moral duty in a Canadian family provision case as being ‘society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards’.³² It is unfortunate that none of the Justices in *Vigolo* elaborated on *how* the court determines the content of prevailing community standards, but this was probably because the facts of the case itself were so clear-cut. The applicant was the adult son of the testator. He was financially secure and significantly wealthier than his four siblings (for whom the testator had provided in his will). He based his family provision claim, not on financial need, but on a moral claim based upon disappointed expectations arising from his working relationship with the testator over many years. The application failed because it did not meet either the purpose or the requirements of the legislation: taking into account all the circumstances, the applicant had not been left without adequate provision for his maintenance and advancement in life, and so the question of the testator’s moral duty to make provision for him did not arise. Thus there was no occasion for the Court to demonstrate how it would determine prevailing community standards in a contentious case.

Following *Vigolo*, the moral duty language may continue to be used by Australian courts, albeit with the understanding that this is determined according to prevailing community standards of what is right and appropriate, and with due respect for the purpose and wording of the legislation. With this background in mind then, how does family provision legislation affect testamentary gifts motivated by strong religious beliefs?

28 Ibid 694.

29 Ibid 698. Justices Callinan and Heydon held that consideration of the testator’s moral duty was consistent with both the language of the legislation and previous authority.

30 Ibid 710.

31 Ibid 711, quoting from *Goodman v Windeyer* (1980) 144 CLR 201, 211 (Gibbs J). The same passage was quoted with approval in *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 211 (Mason CJ, Deane and McHugh JJ).

32 *Vigolo v Bostin* (2005) 213 ALR 692, 698; *Tataryn v Tataryn* [1994] 2 SCR 807, 820–1 (McLachlin J).

III 'MORAL DUTY' AND COMMUNITY STANDARDS

A Objective Standards and Testators of Strong Religious Faith

In regulating behaviour, the law often uses objective standards based upon the 'ordinary person' and 'reasonable conduct'. For example, whether one is negligent under the law of tort is determined according to the standard of the reasonable person. Similarly, one element of the doctrine of equitable undue influence is that the impugned transaction is not explicable according to the 'ordinary motives of ordinary men'.³³ A problem with objective standards is that they can become normative (what *should* a reasonable person have done, rather than what is a reasonable person likely to have done?), idealised (in the best of all possible worlds we would like people to behave in this way) and instrumental (in negligence law, for example, the content of the relevant standard may be influenced by whether the defendant has insurance cover). For these reasons, the behaviour of an idealised, objective and hypothetical 'ordinary' person is likely to be different to unreasonable or atypical *actual* beings. Furthermore, by their very nature, such objective standards and archetypes may depart to an even greater extent from the characteristics of minority groups.

The moral duty standard as determined by community standards of what is right and appropriate is the objective standard applied in family provision law. Does it pose problems for testators of strong religious faith?³⁴ Clearly, the behaviour of a 'wise and just testator' determined by community standards is a normative and idealised standard. It is also clear that it has the potential to be used in an instrumental fashion to ensure that a financially needy applicant receives provision. And it is unlikely that the standard will be met by a person with religious convictions that dominate all aspects of his or her life, especially if he or she belonged to a minority religious group. Professor Bradney calls such persons 'obdurate believers' and refers to the 'unyielding nature of their faith'.³⁵ A testator who is an obdurate believer is likely, in making a will, to be guided solely by religious beliefs to the exclusion of other considerations (such as, for example, the financial needs of particular family members). Bradney has argued that legal tests based on community standards are unsympathetic to obdurate believers:

A failure to live by such standards frequently becomes, in the law's eyes, a failure to live in an acceptable manner. In a society such as Great Britain, dominated as it is by secular liberal mores, obdurate believers will invariably live by standards which are different from those which are general in society or take the standards

33 *Allcard v Skinner* (1887) 36 Ch D 145, 185 (Lindley LJ); *Goldsworthy v Brickell* [1987] 1 Ch 378, 401 (Nourse LJ).

34 This question is also raised in Atherton and Vines, above n 5, 482.

35 Anthony Bradney, 'Faced by Faith' in Peter Oliver, Sionadh Douglas Scott and Victor Tadros (eds), *Faith in Law: Essays in Legal Theory* (2000) 89, 90. Obdurate believers can adhere to any religion, although some faiths are more amenable to obdurate belief. See also Pauline Ridge, 'The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner* Revisited in Australia' (2003) 26 *University of New South Wales Law Journal* 66, 83.

which are general and apply them in a more rigid and unwavering manner. There is thus, at root, an incompatibility between the law and the believer.³⁶

Bradney's argument is borne out in relation to the moral duty standard in family provision law, as the 1960s Australian case of *Wenn v Howard*³⁷ demonstrates.

The testator in *Wenn v Howard* was a devout Catholic. He had 10 (adult) children and the behaviour of at least eight of them greatly displeased him. Some did not go to church at all and three had not married in the church. He therefore excluded those children from his will and, after his death, they applied for family provision. The testator in *Wenn v Howard* was an 'obdurate believer'. His religious faith was so central to his life that the fact that his children did not practice that faith totally justified their exclusion from his bounty. It was argued by the executor of the will that the children's conduct in repudiating their Catholic faith disentitled them from an award of family provision.³⁸ This argument was rejected by McInerney J who held that their conduct was not disentitling behaviour when measured against community standards. Therefore, they were able to apply for family provision.

This is not to suggest that *Wenn v Howard* was wrongly decided. Even 'sincere and reasonable people' of the Catholic community (to use the words of McInerney J) might well have disapproved of the testator's will and today there would be some community disapprobation of his conduct. Perhaps this is because the testator sought to 'punish' his non-practising Catholic children in a way that appears inconsistent with the tenets of his Catholic faith. However, in *Wenn v Howard*, McInerney J made it clear that the views of the Catholic community were not relevant at all, whether or not they supported the testator's dispositions. In response to the executor's argument that the children's conduct disentitled them because all Catholics would regard their behaviour as justifying exclusion from the will, McInerney J responded:

the matter to be resolved is whether the conduct of the applicant is such as would, in the eyes of the right thinking and reasonable members of the community, disentitle the applicant to relief ... It is not to be tested by whether the applicant's conduct would incur the disapprobation not only of the testator but also of all sincere and reasonable people of his Church.³⁹

In other words, the testator is not to be compared to a wise and just devout Catholic: 'community standards' are not those of the Catholic community, but of society as a whole. Even if the testator had acted as any wise and just Catholic would have acted in the circumstances this would not suffice if general community standards of conduct were different.

36 Bradney, above n 35, 89.

37 [1967] VR 91.

38 Under the applicable family provision legislation the Court was able to take into account 'the character and conduct of the eligible person' in determining what (if any) provision ought to be made: *Administration and Probate Act 1958* (Vic) s 96(1).

39 [1967] VR 91, 95.

B The Content of Community Standards

How, then, are community standards ascertained for the purposes of family provision law, and could the views of the testator's religious group ever be relevant? Of course, such a question presupposes that there exists within the community a shared morality of testation, whereas this is questionable in a pluralist society.⁴⁰ Assuming for the moment that it is possible to identify community standards of testation, little guidance is given in the case law regarding how this should be done and, as noted above, the High Court in *Vigolo v Bostin* offered little assistance with this question. In *Wenn v Howard*, McInerney J reasoned that as Victorian legislation did not favour any religion over any other, and allowed complete freedom of religion in relation to marriage and church attendance, then it could not be disentitling behaviour according to community standards for the testators' children to cease to be practising Catholics.⁴¹ Thus, the source of community standards in that case was found in the values upheld by legislation.

In other cases community standards appear to be a question of judicial notice and this is a matter for concern. Kylie Burns' study of recent negligence cases in the High Court found that the judges made assumptions about 'the nature of contemporary Australian society and contemporary Australian social values' that were generally unsupported by social scientific evidence and that were sometimes incorrect.⁴² In her view, it was doubtful that the assumptions made by judges in those cases necessarily reflected societal values and that furthermore, the interests of some groups in society might be ignored. Likewise, it can be hypothesised that there is a similar danger of injustice when judges applying family provision law make assumptions regarding the content of community standards without clearly articulating the bases on which these assumptions are made and without referring to supporting evidence.

There is a further danger that judicial notice of contemporary community values will reflect the beliefs and values of dominant religious groups in society and thus may disadvantage testators of minority religious groups. Professor Calabresi has argued that the 'non-religious' or 'secularised' standards of tort law in the United States were developed to accommodate the behaviour of the dominant religious group of the time and therefore, '[t]o the extent that we accept only these non-religious [standards] as reasonable, what we are doing is accepting white Anglo-Saxon and core Protestant morality and excluding all others'.⁴³

Can Calabresi's argument be applied to the moral duty standard? A family provision case that appears to support Calabresi's argument is *Hackett v Public*

40 See, eg, the results of an English empirical study in 1971 of community attitudes to testation summarised in Richard D Oughton and Edward Lawson Griffin Tyler, *Tyler's Family Provision* (2nd ed, 1984) 24–6.

41 [1967] VR 91, 94.

42 Kylie Burns, 'The Way the World Is: Social Facts in High Court Negligence Cases' (2004) 12 *Torts Law Journal* 215, 227.

43 Guido Calabresi, *Ideals, Beliefs, Attitudes and the Law: Private Law Perspectives on a Public Law Problem* (1985) 55–6. See also Keith Mason, *Constancy and Change: Moral and Religious Values in the Australian Legal System* (1990).

Trustee.⁴⁴ The (adult) child of the testator who was in clear financial need applied for provision from the estate. The testator had bequeathed a token sum to the applicant and divided the residue of his estate between the applicant's two siblings. The applicant had a troubled history of repeated thefts from his family and others, periods of imprisonment and a failed de facto relationship. His behaviour had been a source of grief and stress for his parents. It was agreed that the outcome of the application depended upon 'the application of current community standards of what is fair and just'. After reciting the facts, Higgins J noted that, 'not unnaturally, both parties were moved by way of analogy to refer to the parable of the prodigal son, see Luke 15: 11–32'.⁴⁵

And his Honour returned to the parable after discussing the relevant facts and law to find that it was apt to his decision:

[I] do not believe that community standards would support the rejection of the clear and strong claim for provision the plaintiff presently has ... The prodigal son had a prior criminal history. He had fallen on hard times as a result. He expressed remorse and sought forgiveness. Whilst not dispossessing the dutiful son, the father forgave the prodigal son and, it may be inferred, provided at least for his proper maintenance and support.⁴⁶

Thus, in *Hackett v Public Trustee* the 'forgiving father' image of the Christian God informed the content of community standards.

Although *Hackett v Public Trustee* illustrates a dominant religious group's values determining the content of community standards, it may be that Calabresi's argument is not as compelling in the family provision context as it is in relation to negligence law. Calabresi argued that, in the United States, religious values were *hidden* in seemingly secular standards of tort law, due to the historical evolution of those standards. This cannot be such a danger for the moral duty standard used in family provision law because it is *explicitly* based upon prevailing community standards; that is, the dominant religious group's values will only inhere in the moral duty standard if they indeed reflect the general community's values regarding testation. Thus, one explanation for the decision in *Hackett v Public Trustee* is that the general community upholds an ideal of parenthood that reflects Christian teaching. This explanation is supported by the fact that the courts acknowledge that community standards regarding testation may change over time in accordance with changes in society generally.⁴⁷ The testator is judged against *prevailing* community standards and these may or may not reflect the values of dominant religious groups.⁴⁸ As argued above, however, this does not remove the possibility of incorrect judicial assumptions being made regarding prevailing community standards nor the problematic assumption that a community standard regarding testation is discernible at all.

44 (1997) 138 FLR 323.

45 Ibid 332.

46 Ibid 339.

47 *White v Barron* (1980) 144 CLR 431, 438–9.

48 *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24, 46–7 (Sheller JA); *Grey v Harrison* [1997] 2 VR 359, 365 (Callaway J).

C Should the Moral Duty Standard Take Account of the Testator's Religious Beliefs?

Could the problems with the moral duty standard discussed so far be solved if the courts accepted a diversity of moralities regarding testation? Given that Australia is a multicultural society, should the testator's religious beliefs be more relevant to determining whether she or he has met the moral duty standard? In other words, can it be argued that community standards have changed in Australia since *Wenn v Howard* so that more account might be taken of the testator's religious beliefs?

As a matter of statutory interpretation, the legislation in all Australian jurisdictions permits a court to consider the testator's religious beliefs in determining whether provision should be ordered; the court's authority is couched in terms of a wide discretion. Even in New South Wales, the Australian Capital Territory and Victoria, where relevant considerations are listed in the legislation, the court may still take into account 'any other matter the court considers relevant'.⁴⁹ Thus it could be argued that, in determining whether a testator has acted in accordance with community values in a multicultural society (and thus whether family provision should be ordered), the court should take into account the cultural and religious setting of the testator and the applicant. It is conceivable that, if the testator were part of a tight knit religious and/or cultural community in which his or her scheme of testamentary disposition was commonplace, a court should be reluctant to make a family provision order if the testator has not breached the standard of moral duty as determined within his or her cultural group. But of course this begs the question: a family provision application will be made only where the applicant does *not* accept the scheme of distribution and seeks an order because of financial need.

There is one situation where the argument for taking account of the testator's religious beliefs is strong, and that is with respect to testamentary dispositions in favour of religious bodies associated with the testator. If the testator leaves a significant gift to a religious beneficiary (such as a church, synagogue or mosque) then it may be in accordance with community values for such a gift to be respected. Even here, however, a broad view of community standards may be inconsistent with the aims of family provision legislation. For example, if the testator bequeathed *all* his or her property to a religious beneficiary at the expense of family members, it is difficult to see how such a bequest could be upheld in the face of a valid family provision application.

D Judicial Religious Acculturation

Another aspect of the moral duty standard raised by *Hackett v Public Trustee* is whether the content of community standards will be unduly influenced by the particular judge's personal experience of religion and religious faith. That is, was Higgins J too ready to assume (because of his own religious upbringing) that the testator's moral duty in the circumstances was to forgive his son and leave him a

49 See, eg, *Administration and Probate Act 1958* (Vic) s 91(4)(p).

greater share of the estate? If this is so, how should judges ensure they are not overly influenced by their personal religious acculturation in determining a testator's moral duty? This question is relevant both in determining the content of the moral duty standard and, if an order for provision is made, in determining how the burden of the order is allocated. Sometimes judges make their biases for or against religion very clear.⁵⁰ More problematic is unconscious judicial bias or misunderstanding arising from a judge's personal experience of religious faith.⁵¹ Such bias cannot be eradicated; however, there are two ways in which harmful effects can be minimised.

First, judges should explicitly acknowledge the potential for bias.⁵² Greater self-awareness in this respect should lead to more clearly articulated and defensible judicial reasoning. Secondly, judges must be educated regarding religious beliefs in general, whether by expert evidence in specific litigation or through professional development courses. Professor Bradney argues that obdurate believers in England are more likely to have a favourable outcome to litigation if expert evidence is given to ensure that the court is fully informed of the particular religious beliefs.⁵³ A recent Australian example of such an approach (although not ultimately resulting in a favourable outcome for the religious group) is *Hartigan v International Society for Krishna Consciousness Inc.*⁵⁴ The issue to be decided was whether a large *inter vivos* gift of real property by a young Krishna devotee to the International Society for Krishna Consciousness ('ISKCON') should be rescinded for equitable undue influence. One argument put forward by the donor was that the Hare Krishna scriptures required her to divest herself of property and that therefore she acted under spiritual influence in making the gift. However, ISKCON gave extensive evidence to demonstrate that, in fact, the donor had misunderstood her obligations: Krishna devotees were only asked to divest themselves of material possessions later in life when they had fulfilled their familial obligations. As the donor was pregnant and had young children, she was not expected to give away valuable assets, nor had she been encouraged to do so by her spiritual counsellors. Justice Bryson of the NSW Supreme Court accepted this evidence and the argument that the donor had misinterpreted the scriptures, though he found that the gift should be overturned for other reasons. It is encouraging that a

50 See, eg, the judgment of Murphy J in *Church of the New Faith v Commissioner for Pay Roll Tax (Vic)* (1983) 154 CLR 120.

51 Acting Chief Justice Mason and Brennan J acknowledged this possibility in *Church of the New Faith v Commissioner for Pay Roll Tax (Vic)* (1983) 154 CLR 120, 133, in which the High Court held that the Church of Scientology constituted a religion: 'the acculturation of a judge in one religious environment [will] impede his understanding of others'.

52 As members of the High Court did in *Church of the New Faith v Commissioner for Pay Roll Tax (Vic)* (1983) 154 CLR 120. See also Keith Mason, 'Unconscious Judicial Prejudice' (Paper presented at the Supreme and Federal Courts Judges' Conference, Sydney, January 2001) 10.

53 Bradney, above n 35, 100.

54 [2002] NSWSC 810 (Unreported, Bryson J, 6 September 2002).

minority religious group, whose treatment in Australia had not always been favourable, was able to receive a sympathetic and informed legal audience.⁵⁵

E The Legitimate Expectations of Religious Groups or Individuals Associated with the Testator

A final question in considering the application of family provision legislation to testators of strong religious faith is whether a religious group with which a testator is associated has a legitimate expectation of benefit under the will that should not be overridden by a family provision claim. In recent family provision cases involving testamentary gifts to religious groups, the courts have noted that the religious beneficiaries had no 'moral claim' upon the testator and for this reason have overridden bequests to such groups when recognising family provision claims. For example, in *Heffernan v Poyser*, in relation to a residuary gift to the Gospel Standard Trust, it was said that:

There is evidence that the deceased received letters and correspondence from the Trust and so clearly the deceased had some interest in it. There is however no suggestion of any physical or financial benefit received from that Trust by the deceased ... It seems to me that although clearly the testatrix had an interest in the organisation she had no obligation towards them.⁵⁶

This leaves open the possibility that a religious beneficiary could establish a 'moral claim' so as to be an appropriate beneficiary of the 'wise and just testator' and, to this extent at least, the religious beliefs of the testator would be recognised.

It appears that such a moral claim would depend upon the testator having received more than simply spiritual gratification. So, for example, in *Sanders v Valtas*, the Master rejected any moral claim arising simply from the testator's spiritual benefit from her faith, declaring that: 'She had the benefit of her faith but there does not seem to be any particular thing, apart from this, which the church has provided to her. By this I mean in terms of material support and assistance'.⁵⁷

The English case of *Re C (a patient)*⁵⁸ provides a helpful analogy of how a court might evaluate a moral claim by a religious group to the deceased's estate. Section 95(1)(c) of the *Mental Health Act 1983* (UK) authorised the court on behalf of a mental patient to make a will that provided 'for other persons or purposes for whom or which the patient might be expected to provide if he or she were not mentally disordered'. The mental patient in question was incapacitated from birth by a 'severe mental disability' and resided at the same hospital for over 60 years. Her relations were unaware of her existence and the only person other than hospital staff to visit her was a member of a voluntary organisation.

55 On religious intolerance towards ISKCON in Australia, see New South Wales Anti-Discrimination Board, *Discrimination and Religious Conviction* (1984) [5.16]–[5.19].

56 [2000] NSWSC 126 (Unreported, Macready M, 23 February 2000) [43]–[45]. See also *Schultz v Goldsmith* [2000] NSWSC 94 (Unreported, Macready M, 3 February 2000) [18]; *Whalen v Byrnes* [2003] NSWSC 915 (Unreported, McLaughlin M, 9 October 2003).

57 [1999] NSWSC 1216 (Unreported, Macready M, 24 November 1999) [35].

58 [1991] 3 All ER 866.

Lord Justice Hoffmann acknowledged the difficulty of applying the statutory test in s 95(1)(c) to the patient who had never ‘enjoyed a rational mind’ but stated, however, that ‘the court must assume that she would have been a normal decent person, acting in accordance with contemporary standards of morality.’⁵⁹

In other words, the standard applied by Hoffmann LJ is the same as the moral duty standard in family provision law. Lord Justice Hoffmann decided that the patient would have felt a moral obligation both to her family (presumably this was solely due to the blood relationship) and, equally, to the community that had cared for her. He ordered immediate gifts to both the family and to mental health charities, and that on the patient’s death the remaining estate be divided equally between her family and the same charities. The volunteer visitor also received a bequest. Thus, the Court recognised – albeit on unusual facts – a moral claim by charitable groups that was equal to the moral claim of the family. Having reached this conclusion, however, it must be acknowledged that the family in *Re C* established a significant entitlement solely on the basis of blood relationship. Hence, a religious group will find it difficult to establish a moral claim based on support of the testator if the family have established even weak relationships with the testator. Furthermore, to argue that a religious group associated with the testator might have a moral claim upon the estate simply perpetuates the fundamental flaws of the moral duty approach; whereas if the legislative scheme were abolished, and freedom of testation upheld, the religious group would benefit if that were truly the testator’s intention.

IV PRINCIPLES THAT CONFLICT WITH FAMILY PROVISION LAW

The above discussion has shown that the moral duty standard of family provision law, so recently endorsed by a majority of the High Court, is flawed and that it has a potentially greater impact upon the wills of testators of strong religious faith, compared with those of testators from mainstream groups in society. It can be inferred that similar problems arise with respect to testators from any minority group and indeed *any* testator who does not provide for his or her dependants. A case study of religiously motivated testators thus provides insights about testamentary freedom in general. In this Part, three principles that appear inconsistent with family provision law’s impact upon testators of strong religious faith are considered. These are the principles of testamentary freedom, freedom of religion and respect for a deceased’s religious beliefs. Do any of these principles suggest that greater weight be given to the testamentary dispositions of a testator of strong religious faith, and more broadly, to testamentary freedom in general?

59 Ibid 870.

A Testamentary Freedom

The courts have upheld the principle of testamentary freedom in relation to religiously-motivated testamentary dispositions by holding that, in general, a testator is free to impose whatever restraints relating to religious faith he or she chooses.⁶⁰ In the High Court case of *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* ('Ebbeck'), a testator left the residue of his estate to his three sons on condition that, at the date the gift took effect, they and their wives should 'profess the Protestant faith'. All three sons were Protestant; however, two were married to Roman Catholics and the third son was engaged to a Roman Catholic. The condition was held to be contrary to public policy and void, not because of the *religious* affiliation required, but because it was apt to introduce discord in an existing marriage if either party chose not to comply with it. A condition requiring only that the *sons* (that is, the beneficiaries of the gift) be Roman Catholic would have been valid:

[The testator] may, if he wishes, provide that his property shall go only to persons of a particular religion. He may stipulate that a prospective beneficiary will be disqualified unless he renounce a particular faith ...⁶¹

Family provision legislation is often described as having radically restricted testamentary freedom (indeed, that is the view taken in the introduction to this article); however, the principle of testamentary freedom is nowhere near as unbounded and as eternal as one might assume. Absolute testamentary freedom existed in England only between 1891 and 1938 (when family provision legislation was first enacted in that jurisdiction)⁶² and, even this short period, applied only to men. Women did not gain absolute testamentary freedom until 1893.⁶³ In fact, testamentary freedom as conceptualised in the 18th and early 19th centuries was never unbounded and absolute. Rosalind Atherton has argued that testamentary freedom was always viewed within the context of a *moral* responsibility to provide for one's family, and she cites as an example the leading judgment of Cockburn CJ in *Banks v Goodfellow*:

The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. ... [T]o disregard the claims of kindred to the

60 *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, 414. Arguments favouring the principle of testamentary freedom are that it mirrors and supports the freedom to deal with assets inter vivos, it gives the testator 'bargaining power' in negotiating favours from hopeful beneficiaries, it is an incentive to wealth and industry, and the testator is best placed to ensure a fair and appropriate distribution of his estate: Oughton and Tyler, above n 40, 31–3.

61 *Trustees of Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, 414.

62 Oughton and Tyler, above n 40, 3–6. In 1891, restrictions on gifts to charities were removed by legislation in England.

63 Following the *Married Woman's Property Act 1893* (UK). See Oughton and Tyler, above n 40, 5.

inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law.⁶⁴

Family provision legislation replaced this *moral* responsibility to provide for one's family with a *legal* duty, albeit that the duty must be activated by an application for family provision.⁶⁵ Thus, in Atherton's view, the legislation upholds the principle of testamentary freedom as conceptualised in the 18th and 19th centuries, even though it may result in a specific testator's testamentary freedom being curtailed. In the context of testamentary gifts motivated by religious beliefs, this limited view of testamentary freedom is consistent with judging a testator of strong religious belief against a general community standard of morality for the testator is restricted by a moral (and, now legal) obligation to provide for his or her family according to their needs.

How then do we explain Justice Windeyer's statement in *Ebbeck* that a testator may impose on testamentary gifts whatever conditions relating to religious faith he or she chooses? The explanation lies in the distinction between inheritance and provision. The moral constraint on testamentary freedom as conceptualised in the 18th and 19th centuries concerned a duty to provide for the needs of one's family, not a duty to leave the whole of one's estate to family. In other words, family members have a moral entitlement to provision for financial needs, not to inheritance of the estate. This explains why *Wenn v Howard*, decided in the same decade as *Ebbeck*, did not uphold the testator's religiously motivated dispositions.⁶⁶ In *Wenn v Howard*, the testator disinherited his non-practising Catholic children; however, their failure to adopt their father's religious beliefs could not disentitle them to family provision. They could not challenge their disinheritance beyond whatever was necessary for their provision. Similarly, the testator in *Ebbeck* could disinherit his sons if they did not profess the Protestant faith but he could not, by the terms of his will, prevent a family provision claim from succeeding.

Thus, from an historical viewpoint, the principle of testamentary freedom can be reconciled with the objectives of family provision law. But this conclusion does not necessarily apply to contemporary society. It is strongly arguable that Justice Cockburn's statement in 1870 – that 'to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law' – would not necessarily be endorsed by the general community in Australia today. Not only are different conceptions of the morality of testation possible in a multicultural, pluralist society, but it is also arguable that the strength of entitlement based upon the family relationship alone is weakening. Perhaps the entitlement needs revisiting in a society where long term monogamous relationships and close extended families are no longer the norm, and where people seek support and

64 *Banks v Goodfellow* (1870) 5 LR QB 549, 563. 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, 25.

65 The Act does not completely replace the moral duty for it implies a right to *inheritance* whereas the Act provides for a lesser right to *provision*.

66 *Wenn v Howard* [1967] VR 91. See also *Gibson v Public Trustee* [1933] NZLR s 13.

meaningful relationships not necessarily from family, but from substitute communities (such as churches, local schools, interest groups and clubs). Indeed, the trend of amendments to Australian family provision legislation is away from entitlement based on family relationship, and towards entitlement based on responsibility for provision assumed by the testator.⁶⁷

B Freedom of Religion

A second principle that appears inconsistent with family provision law's application to testators motivated by religious beliefs is that of freedom of religion. The High Court has strongly endorsed this principle and has emphasised that such freedom is particularly important to minority religious groups.⁶⁸ Does this mean that the religious beliefs of testators should be accorded greater respect in the application of family provision law – particularly where those beliefs are of a minority religious group? Specifically, should the content of the testator's moral duty incorporate the beliefs of the testator's religious group? From the testator's perspective, the moral duty standard used in family provision law appears inconsistent with the principle of freedom of religion and this suggests that strong religious beliefs be incorporated into the standard in some way. But this is not necessarily the case; freedom of religion includes the freedom not to adhere to any religion. Consider again the plight of the children in *Wenn v Howard* who were excluded from their father's will because they did not practice the Catholic faith.⁶⁹ Their application for provision was granted by McInerney J *because* of the principle of religious freedom:

[The Act is] the product of legislative action by a community in which many religions co-exist on a footing of equality before the law, [and] cannot have had as its aim the disentitlement of applicants on ground based on considerations peculiar to one religion.⁷⁰

The children's right to freedom of religion overrode any deference to the testator's religious beliefs. Thus, the principle of religious freedom is ambivalent and unhelpful in this context; on the one hand it suggests that greater respect should be accorded to the testator's religious beliefs but, on the other hand, it restricts a testator's ability to deny a family provision claim.

67 *Administration and Probate Act 1958* (Vic); see also Family Provision Bill 2004 cl 6–7. Entitlement is based upon either family relationship or deceased's responsibility in life to make provision for the applicant. My argument here depends upon the question (alluded to above n 21) of the policy of family provision legislation. If the policy of the legislation is to shift a financial burden away from the State, rather than to uphold a moral duty of the testator, then it is harder to argue that the testator's motivation be accorded more respect. I am grateful to the anonymous referee for this insight.

68 *Church of the New Faith v Commissioner for Pay Roll Tax* (Vic) (1983) 154 CLR 120, 131–2 (Mason ACJ and Brennan J). See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, art 1, UN Doc A/36/684 (1981).

69 [1967] VR 91.

70 Ibid 94.

C Respect for the Deceased's Beliefs

Having said that the principle of freedom of religion supports respect for the religious beliefs of the deceased except to the extent that the exercise of those beliefs infringes others' freedom of religion, are there other constraints upon respect for those beliefs? There are at least two considerations apparent in the case law that militate against respect for the deceased's wishes. The first consideration is that the deceased is dead and therefore cannot suffer (emotionally or financially) from the law's disregard for his or her beliefs; the second is that the needs of the living (meaning those related to the testator by blood or dependency) are considered more pressing.

The attitude that the testator cannot be harmed by disregard of his or her religiously motivated dispositions because he or she is dead is apparent in the family provision case of *Sanders v Valtas*.⁷¹ The testator was a Christian Scientist who left her entire estate to 'the First Church of Christ Scientists, 175 Huntington Avenue, Boston, USA'. In overturning this gift, Master Macready acknowledged that '[n]o doubt her faith was important to the deceased during her lifetime'.⁷² The implication is that the testator's faith was no longer a relevant consideration after her death. Several objections can be made to this point of view. First, arguably 'people obtain pleasure by knowing that their wishes as to the destination of their property after their death will be respected'.⁷³ This argument supports a strong principle of testamentary freedom and upholds the testator's autonomy; however, the law *does* disregard a testator's wishes as to the destination of their property in several important respects, the rule against perpetuities being just one example.⁷⁴ More importantly, the view that only the testator would suffer from the court's disregard of his or her religious beliefs is overly individualistic and takes no account of the harm suffered by the testator's religious (or cultural) community.

The second factor militating against respect for the deceased's religious beliefs is that the financial needs of the 'living' are considered paramount. In *Sanders v Valtas*, the adult children had established financial need that entitled them to a family provision order.⁷⁵ Their financial need outweighed respect for the testator's religious convictions. Thus, while all other considerations are equal, there is no difficulty in according respect to the deceased's beliefs; however, when the surviving family members demonstrate financial harm, the balance begins to tip. The *Family Provision Act 1982* (NSW) supports this analysis by its very nature. The jurisdiction is needs-based (relative to the size of the estate and mode of living of the testator and applicant).

71 *Sanders v Valtas* [1999] NSWSC 1216 (Unreported, Macready M, 24 November 1999).

72 Ibid [35].

73 Oughton and Tyler, above n 40, 31, citing Henry Sidgwick, *The Elements of Politics* (3rd ed, 1908) 103.

74 See Lewis M Simes, *Public Policy and the Dead Hand* (1955); Oughton and Tyler, above n 40, 32.

75 *Sanders v Valtas* [1999] NSWSC 1216 (Unreported, Macready M, 24 November 1999) [33].

V REFORM OPTIONS

Using the case study of religiously motivated testators, I have argued that the moral duty standard in family provision law is problematic in a pluralist and multicultural society. This suggests that reform of family provision law is warranted. The principles of testamentary freedom and respect for the values of a deceased person also support legislative reform, although the principle of freedom of religion turns out to be ambivalent. Whilst a detailed consideration of such reform is beyond the scope of this article, it is appropriate to suggest some possible directions. Three reform options are outlined in this Part.⁷⁶

The first and least disruptive reform to family provision law would be to discard the language of ‘moral duty’ (contrary to the majority view in *Vigolo v Bostin*). It is inaccurate and potentially offensive to testators who do not conform to societal norms as determined by the court. Furthermore, as suggested by Gummow and Hayne JJ in *Vigolo v Bostin*, the moral duty language draws attention away from the statutory language. However, this option alone would not solve the problem of ascertaining community standards of testation.

A second reform option is to restrict current family provision entitlement to a smaller class of applicants. This was the New Zealand Law Commission’s proposed solution in 1996.⁷⁷ The Commission proposed drastically restricting the right to family provision precisely because of its discriminatory impact upon testators from minority groups:

The courts’ present powers are broad and discretionary. This might have been acceptable when people had a common (if gendered and monocultural) vision of the family. But we now accept that families are different and should not be treated all in the same way. They differ in their ethnic and cultural backgrounds ... We now believe that the value systems of a prevailing culture or a particular type of family should not be applied indiscriminately to others who do not share that system ...⁷⁸

The Commission proposed that eligibility for family provision be limited in general to spouses (or de facto partners) and children under 20 years of age. The findings of this article support the Commission’s approach; however, such reform only minimises the potential injustice of the moral duty approach to family provision; it does not remove the problem. Furthermore, it is inconsistent with the most recent Victorian legislation which bases entitlement on the testator’s responsibility for the applicant rather than on ‘classes’ of applicant.

In my view, more radical reform of family provision law is required. Thus, the third option for reform would be to remove the moral duty approach altogether and to limit entitlement to family provision to where a testator had an *inter vivos* responsibility to provide for the applicant. Such a responsibility could arise from a legal duty to provide (for example, a parent’s duty to provide for young

⁷⁶ Each of my suggestions for reform is premised on the continued existence of family provision legislation in some form; more radical reform options include the European and American schemes of fixed entitlement to a share of the estate. The advantage of such systems is that judicial discretion is removed altogether. See Oughton and Tyler, above n 40, 1–3.

⁷⁷ New Zealand Law Commission, *Succession Law: Testamentary Claims*, Preliminary Paper 24 (1996).

⁷⁸ *Ibid* 2.

children) or from the testator having assumed, *de facto*, a responsibility to provide for the applicant. This reform proposal differs from the Victorian legislation in that the *inter vivos* responsibility must be established in fact; that is, the *inter vivos* responsibility is assumed by the testator or imposed by law upon the testator. The advantage of such reform is that it removes the potential injustices of the moral duty standard and means that an order for family provision is more likely to conform to the testator's own values. It is also attractive because it is likely to mirror an applicant's reasonable expectations, thus strengthening the justification for judicial intervention.⁷⁹

VI CONCLUSION

In *Vigolo v Bostin*, a majority of the High Court confirmed that the test to be applied in deciding an application for family provision is the common law standard of a wise and just testator acting in accordance with his or her moral duty as determined by contemporary community values. This paper has argued that such an approach is fundamentally flawed in relation to testators of strong religious faith. An objective standard linked to community values has a potentially disproportionate impact upon this minority group and, by implication, upon other minority groups in society. It is questionable whether contemporary, multicultural Australian society holds a shared morality of testation at all. If a shared morality *is* discernible in principle, the High Court has not yet articulated a defensible method for determining the content of that morality. There is also the danger that the beliefs and values of mainstream religious groups will unfairly determine the content of community standards due to judicial religious acculturation. Looking outside the legislation, the principles of testamentary freedom and respect for a deceased person's beliefs support the restriction of family provision law.

I have noted some reform options, the least controversial of which is to abolish the language of morality in considering family provision applications. The case for more far-reaching reform depends upon the extent to which this article is correct in arguing that a uniform view of the morality of testation is an illusion in contemporary Australian society. This is an empirical question and deserving of further study.

79 A variation of this proposal would be to widen entitlement to where the testator by words and/or conduct created a reasonable expectation of testamentary provision in the applicant; however this may not be necessary depending as it does upon notions of estoppel and unconscionability.