26/83

IN THE PRIVY COUNCIL No. 7 of 1983

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL C.A. 89 - 94 of 1981

HELEN MARGARET HOGAN, ELIZABETH DOROTHY HOGAN, HEATHER MARY HOGAN

By their tutor MARRIE MAY HOGAN

MARJORY JEAN FELILA, BARBARA ANN HOGAN, JANICE MARIE HOGAN (DOWNES), LYNETTE SHARON HARRIS, PAMELA MAY MARSDEN

Appellants

BRIAN ROBERT HOGAN — 1st Respondent

MILDRED FRANCES GREEN — 2nd Respondent

IN THE MATTER OF Section 3 Testators Family Maintenance & Guardianship of Infants Act, 1916.

AND IN THE MATTER OF Section 6 of the Children (Equality of Status) Act, 1976.

CASE FOR THE APPELLANTS

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1. These are appeals from a judgment dated 4 December 1981 of the Court of Appeal of New South Wales (Street C.J., Glass and Mahoney J.J.A) dismissing appeals from a judgment dated 26th February 1981 of the Supreme Court of New South Wales (McLelland, J.,) by which the Court of Appeal ordered that: pp.89 and 90; pp.24 to 31

1. The appeals be dismissed.

2. The orders for costs made in the Equity Division on 26 February 1981 stand.

3. The costs of the appellants and of the second respondent be paid out of the estate of the testator.

4. The costs of the First Respondent be paid out of the estate of the testator on a trustee basis.

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2. The issue of these appeals depends upon the preamble and following provisions of the Children (Equality of Status) Act 1976 when applied to the provisions of the Testators Family Maintenance and Guardianship of Infants Act, 1916.

The preamble to the Children (Equality of Status) Act reads:

> "An Act to remove legal disaibilities of ex-nuptial children; to facilitate the establishment of the paternity and maternity of children; and to amend the "Registration of Birth, Deaths and Marriages Act 1973 and certain other Acts."

The relevant sections of the Act provide as follows:-

s.5 (1) This Act shall apply in respect of a person -

> (a) whether born in New South Wales or elsewhere;
>
> (b) whether born before or after the commencement of this Act;
>
> (c) whether a minor or not; and
>
> (d) whether he or his father or mother is or has ever been domiciled in New South Wales or not.

(2) Nothing in this Act shall be taken as affecting the operations of sections 35 and 36 of the Adoption of Children Act, 1965.

PART II.

STATUS OF CHILDREN AND DISPOSITIONS OF PROPERTY.

s.6 Subject to sections 7 and 8, whenever the relationship of a child with his father and mother, or with either of them, falls to be determined by or under the law of New South Wales, whether in proceedings before a court or otherwise, that relationship shall be determined irrespective of whether the father and mother of the child are or have ever been married to each other, and all other relationships of or to that child, whether of consanguinity or affinity, shall be determined accordingly.

s.7 (1) This section applies to -

(a) dispositions made inter vivos after the commencement of this Act; and

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(b) dispositions made by will or codicil executed before or after the commencement of this Act by a person who dies after that commencement.

(2) Subject to this section, in a dpsposition to which this section applies -

(a) a reference, however expressed, to the child or children of any person shall, unless the contrary intention appears, be construed as, or as including, a reference to an exnuptial child of whom that person is a parent; and

(b) a reference, however expressed, to a person or persons related to another person in a way other than that referred to in paragraph (a) shall, unless the contrary intention appears, be construed as, or as including, a reference to anyone who is so related in fact, notwithstanding that he or some other person through whom the relationship is traced is or was an exnuptial child.

(3) In construing a disposition to which this section applies, the use -

(a) with reference to the child or children of a person or to a person or persons related to another person in some other way, of the word "legitimate" or "lawful" or of any word or words having the same or a similar effect; or

(b) with reference to the parent or parents of a person, of the word "married" or "husband" or, as the case may be, "wife" or of any word or words having the same or a similar effect,

shall not of itself be an expression of contrary intention.

(4) Without limiting any other provision of this Act, any rule of law that a disposition in favour of an exnuptial child not conceived or born when the disposition takes effect is void as being contrary to public policy is, with respect to a disposition to which this section applies, abolished.

s.8 (1) Dispositions -

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(a) made inter vivos before the commencement of this Act; or

(b) made by will or codicil executed by a person who died before that commencement,

shall be construed as if this Act had not been passed.

(2) Where a disposition referred to in subsection (1) contains a special power of appointment, nothing in this Act extends the class of persons in whose favour the appointment may be made or causes the exercise of the power to be construed so as to include any person who is not a member of that class.

s.9 (1) Without limiting section 6, where any relative of an exnuptial child, including a parent of the child, dies intestate in respect of all or any of his real or personal property, the child or, if the child is dead, his issue shall be entitled to take any interest in that property which he or that issue would have been entitled to take if his parents had been married to each other when he was born.

(2) Without limiting section 6, where an exnuptial child dies intestate in respect of all or any of his real or personal property, any relative of the child (including a parent of the child) shall be entitled to take any interest in that property which he would have been entitled to take if the parents of the child had been married to each other when the child was born.

(3) Notwithstanding section 6, this section does not apply to a child to whom it would apply but for this subsection if that child is an adopted person under an adoption order made or continued in force under the Adoption of Children Act, 1965, or under an adoption recognised in New South Wales by virtue of Part V of that Act.

(4) This section does not affect any rights under the intestacy of a person dying before the commencement of this Act.

s.3(1) of the Testators Family Maintenance and Guardianship of Infants Act provides:-

> "Where no adequate provision made by testator, etc., Court may make orders, &c. (1) If any person (hereinafter called "the Testator") dying or having died since the seventh day of October One thousand nine

hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them.

Notice of such application shall be served by the applicant on the executor of the will of the deceased person.

The court may order such other persons as it may think fit to be served with notice of such application."

3. Each of the Appellants is the exnuptial daughter of Marrie May Hogan and the Testator Bede Leo Hogan (hereinafter called the Testator.) p.14, 1.24

4. The Testator published his last Will and Testament on 1 March, 1946. p.16

5. By its terms he appointed his brother (the First Respondent) to be Executor and he left the whole of his estate to Mildred Frances Hogan (Green) the Second Respondent. She is described as "my wife Mildred Francis Hogan" but they never married. p.14, 1.25

6. The Testator died on 30 April 1977. He left no widow and no legitimate children. p.14 1.15

7. The Children (Equality of Status) Act 1976. so far as the provisions thereof relied upon by the Appellants was proclaimed and came into effect on 1 July, 1977. p.14, 1.26

8. Probate of the Will of the Testator was granted to the First Respondent on 26 October 1977. p.73, 1.23

9. On 19 October 1978 proceedings were

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commenced by each of the five exnuptial children of the Testator claiming orders under Section 3 of the Testators Family Maintenance and
p.17, l.11 Guardianship of Infants Act, 1916.

10. On 20 October 1978 similar proceedings were commenced by three further exnuptial
p.17, l.15 children of the Testator.

11. All six proceedings came on to be heard
p.17, l.17 together on 25 February, 1981.

12. In each case McLelland J., ordered under Part 31 of the Supreme Court Rules that the following question be decided separately from any question, namely:

> "whether the Court has power to make an order under S. 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 in respect of the estate of the testator who died prior to the commencement of Pt. II of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator."

p.17, l.20

McLelland J. held that Section 6 effected a substantial change in the law and was not a procedural provision of the kind described by Williams J., in Maxwell v Murphy (1957) 96 C.L.R.
p.19.l.29 261 at 277.

Moreover he held that upon the death of the testator the Second Respondent acquired a vested and indefeasible interest in the estate of the testator of the kind discussed in Commissioner of Stamp Duties (Q'd) v. Livingston /1965/ A.C. 694. Immediately before the 1st July, 1977 that interest could be described as comprising accrued rights the title to which consisted in facts and
p.19,l.32; p.20,l. 3 events that had already occurred.

His Honour held that speaking generally, any beneficiary under the will of a testator who died prior to 1 July, 1977 possessed such accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate
p.20,l.3 child of the testator under s.3 of the T.F.M. Act.

McLelland J. continued by saying that there did not appear with reasonable certainty or at all any intention that such accrued rights under the Will of a testator who died prior to 1 July, 1977 should be disturbed or rendered vulnerable to defeasance by the alteration to s.3 of the T.F.M.

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Act effected by S.6 of the Children (Equality of Status) Act. p.20,l.10

McLelland J. says he found some indication to the contrary in S.9 of the Children (Equality of Status) Act. p.20,l.5

13. On 26 February 1981 in each of the six proceedings McLelland J. directed pursuant to Pt. 31 Rule 5 of the Supreme Court Rules it be recorded as a decision of the Court that the Court does not have power to make an order under S.3 of the Testators Family Maintenance and Guardianship of Infants Act 1916 in respect of the estate of a testator who died prior to the commencement of Part II of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator. p.22,l.15; p.25

14. From this decision the Appellants appealed on 13 April, 1981 to the Court of Appeal of New South Wales. p.31 et seq.

15. The appeals were heard by the Court of Appeal comprised by Street, C.J., Glass, and Mahoney, J.J.A., on the 27th day of October 1981 which Court reserved its decision.

16. On 4th December 1981 the Court of Appeal gave judgment dismissing the appeals and made the following orders:

1. The appeals be dismissed.

2. The orders for costs made in the Equity Division on 25 February, 1982 stand.

3. The costs of the Appellants and of the Second Respondent be paid out of the estate of the testator.

4. The costs of the First Respondent be paid out of the estate of the testator on a trustee basis.

p.89/90

17. The Court of Appeal delivered three separate judgments.

Street, C.J., summarised the sections quoted above and stated that s. 6 was intended to have universal operation in scope and time to legitimate exnuptial children; this being achieved by rendering it irrelevant to inquire

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whether the father or mother of any child are or have ever been married to each other. Street C.J., said that the general or universal operation of
p.64,l.16 S.6 was expressly made subject to ss.7 and 8.

Street, C.J., also stated that the broad policy was to negate all distinctions between legitimate and exnuptial children. This was achieved by rendering it irrelevant for all purposes to investigate whether the parents of a child were married whenever the question arises regarding the relationship of a child with its
p.66,l.22 parent.

Street C.J., recognised that Part II of the Children (Equality of Status) Act is a
p.69,l.23 remedial enactment.

However, Street C.J., said that the general equalisation of legitimate and exnuptial children was not to affect testate or intestate succession where the relevant death occurred before the commencement of the Act. For those reasons he held that the Testators Family Maintenance and Guardianship of Infants Act was not to be regarded as available to an exnuptial child of a
p.69, l.23 parent dying before the commencement of the Act.

Street C.J., did not seek to define the precise characterisation of the beneficiary's rights under the Will. He said that whatever those rights may be where the testator died before the commencement of the Act they are to be construed and given effect to is as if the
p.71,l.16 Act had not been passed.

In his Judgment Glass J.A., first
p.73 summarised the facts;
then he set out what he considered to be
p.74 the relevant sections.

Glass J.A., said that if s.6 stood alone its language would favour a construction contended for by the Appellants, particularly since s.5 provides that the Act applies in respect

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of a person whether born before or after the Act's commencement. p.76,l.8

He said the beneficiary under the will of the testator had a right of some kind recognised by law which was fixed by reference to a past event namely the death of the testator without having revoked his prior will in her favour. This was a right couplied with an immunity from disturbance by any T.F.M. application as the law then stood. p.77,l.4

Glass J.A., said that right and that immunity whatever their precise legal classification were such as to attract the Maxwell v Murphy (supra) principle of construction.

Glass J.A., further said that ss. 7 and 8 disclosed confirmatory evidence that s.6 should not be construed so as to enlarge the class of applicants under the T.F.M. Act with respect to the estates of persons who died before its commencement or the intestate estates of persons dying before its commencement. p.77,l.18

Glass J.A., found support for his view by the statutory context of the T.F.M. Act which ordains that the benefits it confers are linked to the date of death. p.77,l.26

Mahoney J.A., in his judgment said he did not think that if s.6 stood alone its operation would be limited to the nature of the relationship between parent and child only at times after the commencement of the Act.

He said the section was to have a wide and beneficial operation. He said that the purpose of the Act was subject to relevant exceptions - to remove completely from the law of New South Wales the status of illegitimacy. p.81,l.20; p.82 l.22 p.82,l.11

Mahoney, J.A., rejected the first argument of the respondent Executor in effect that whatever the generality of s.6 it did not operate on s.3(1) of the T.F.M. Act.

It was submitted on behalf of the Executor that the power of the Court to make an order under s.3(1) arises only if at the date of death of the testator it can be seen that he has disposed of his property in such a manner that inter alia children of such person are

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left without the relevant provision. At the time of the death of this Testator, the only persons who could fall within the term "children" were nuptial children. The present Appellants did not fall within that term. Therefore, the argument suggested, the fact that they were (or may have been) left without the relevant provision, could not empower the Court to act under the subsection.

p.84,l.22

Mahoney J.A. rejected this argument because he thought that it gave less than full effect to the generality of s.6 of the Act. He said that s. 6 operates if, after the commencement of the Act, there falls to be determined what is the relevant "relationship", whether the point in time at which the relationship existed is before or after that commencement.

p.84,l.22

With respect to the argument that the Act is to be interpreted so as not to interfere with the accrued rights, Mahoney J.A. dealt with the matter at p.85-86. He made reference to Maxwell v. Murphy (supra) and Ogden Industries Pty. Limited v. Lucas /1970/ A.C. 113 that he said that he did not think that the statement of the Privy Council in that case qualified the statement of principle by Kitto, J. in the High Court.

Mahoney, J.A., then said that that which the sole beneficiary under the testator's Will had at the date of his death was a "right" within the sense of the common law principles and that the effect of the death of the testator was that the beneficiary became entitled to such rights as a sole beneficiary under such Will would have; and those rights were subject to the possibility of variation only upon the application of such lawful children as the testator might have left.

p.86,18

He did not examine the precise rights given to such a beneficiary; he said that whatever the nature of those rights they be accrued at that point and were subject to variation only to the extent then provided by the T.F.M. Act.

p.86,l.20

18. The Appellants respectfully submit that both the Courts in New South Wales erred in holding the Appellants could not make a claim under s.3 of the Testators Family Maintenance and Guardianship of Infants Act. McLelland, J., did not analyse, or sufficiently analyse, what rights, if any, the Second Respondent acquired at the instant of death of the testator. He erred in

stating that it was of the kind discussed in Commissioner of Stamp Duties (Q'd) v. Livingston (supra) because at the date of death of the testator the Will had not been proved, or admitted to Probate, nor had administration been completed. McLelland J., is therefore in error to say that the interest could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred. Record p.19,l.32; p.20,l.2

Moreover McLelland J., erred in stating that the rights were accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under s.3 of the T.F.M. Act. p.20,l3.

On the facts no such right existed at the instant of death; or at any time prior to the grant of probate or if Commissioner of Stamp Duties (Q'd) v. Livingston (supra) be regarded as having application at any time prior to administration being completed.

Such rights if they existed (which is denied) were not substantive vested rights to which the principle of Maxwell v Murphy applied.

McLelland J., erred in stating that there does not appear with reasonable certainty or at all any intention that such accrued rights under the Will of a testator who died prior to 1 July 1977 should be disturbed and he erred in finding contrary indications in s. 9 of the Children (Equality of Status)Act rightly described by Street C.J., as a special provision the formulation of which does not cast any light upon the legislative scheme incorporated in the other provisions of Part II. p.66,l.8

19. In the Court of Appeal the three Judges admitted the universality in operation of s.6 of the Children (Equality of Status) Act. Street, C.J., said it was a remedial enactment but then failed to construe it liberally so as to afford the utmost relief which the fair meaning of its language will allow. Street C.J., and Glass J.A., suggest that it has no operation upon the estate of a testator who died before the commencement of the Act; drawing support from a construction of provisions ss.7 and 8. The Appellants respectfully submit however that the operation of ss.7 and 8 is limited by the language of those sections. In no way can an order of the Court under s. 3 of The Testator's Family

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Maintenance and Guardianship of Infants Act be regarded as a disposition made by will or codicil executed by the testator. The will making power remains unrestricted. The statute authorises the Court to interpose in appropriate circumstances and to carve out of his estate what amounts to adequate provision for the relations (as designated) of the testator. It is, and at all times remains, an order of the Court to secure on grounds of public policy that a man who dies leaving an estate which he distributes by Will shall not be permitted to leave his relations as designated inadequately provided for.

It is further respectfully submitted that Street C.J., and Glass J.A., erred in finding assistance on the construction of the Children
p.68, l.16 & (Equality of Status) Act by reference to the
p.76, l.26 date of death of the Testator.

Mahoney, J.A., was right in rejecting the submission that the power of the Court to make an order under S.3(1) arises only if at the date of the Testator's death it can be seen that he has disposed of his estate in such a manner that inter alia "children of such person are left without relevant provision" because Mahoney J.A., said he thought that such submission gives less than full effect to the generality of s. 6 of the Act and that s.6 operates if after the commencement of the Act there falls to be determined what is the relevant relationship whether the point in time at which the relation-
p.84 ship existed is before or after the commencement.

It is respectfully submitted however that Mahoney J.A., erred in stating "whatever the nature of those rights be, they accrued at that point (i.e. death) subject to variation only to
p.86, l.21 the extent then provided by the T.F.M. Act: and he moreover erred in stating that there is to be seen from the Act the Children (Equality of Status) Act an intention that the Act should
p.87,l.17 effect existing rights.

Further it is respectfully submitted that the Judicial Committee of the Privy Council in Odgen Industries v. Lucas /1970/ AC 113 at pp.128/9 did qualify and disapprove the statement by Kitto, J.,((1967) 116 CLR 537 at p.564) that "the principle is too narrowly interpreted, I think, if it is treated as referring only to rights and liabilities that are vested in the sense that the individuals against whom or in

whose favour they are to enure are finally ascertained and the amounts fixed".

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p.85, l.20;
p.86,l.2

20. On 15 March 1981 the Court of Appeal of New South Wales (Moffit P., Reynolds and Samuels, J.J.A.) granted conditional leave to appeal from the said judgment to Her Majesty in Council are and further directed the appeals be consolidated.

21. On 28 June 1982 the Court of Appeal of New South Wales (Moffit P., Hutley and Samuels, J.J.A.,) granted the Appellants final leave to appeal from the said judgment to Her Majesty in Council.

22. The Appellants respectfully submit that the judgment of the Court of Appeal of New South Wales was wrong and ought to be reversed and this appeal ought to be allowed with costs.

R E A S O N S

1. BECAUSE The Children (Equality of Status) Act is a remedial enactment and should be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow.

2. BECAUSE s.6 of the Children (Equality of Status) Act is intended to have universal operation in scope and time to legitimate exnuptial children this being achieved by rendering it irrelevant to inquire whether the father and the mother of any child are or have ever been married to each other.

3. BECAUSE the broad policy enacted in Part II of the Children (Equality of Status Act) is to negate all distinctions between legitimate and exnuptial children.

4. BECAUSE, when rightly construed, ss.7 and 8 of the Children (Equality of Status) Act cannot guide the construction and operation of s.6 of the said Act.

5. BECAUSE an order of the Court under s.3 of the Testators and Family Maintenance and Guardianship of Infants Act can in no way be regarded as a disposition made by Will or codicil executed by the testator.

6. BECAUSE in the circumstances of this case the provisions of The Children

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(Equality of Status) Act cannot be regarded as retrospective. Part of the requisites for its action are drawn from a time antecedent to its passing but application for relief under the Testators Family Maintenance and Guardianship of Infants Act can only be made upon the grant of probate (s.5) which occurred after the enactment of The Children Equality of Status Act on 1 July, 1977.

7. BECAUSE any rights obtained by the Second Respondent at the date of death of the Testator are not to be regarded (in accordance with principles discussed in Maxwell v Murphy (supra)) as vested accrued rights incapable of being depleted or diminished upon the application of an ex-nuptial child of the Testator under s. 3 of the Testator Family Maintenance and Guardianship of Infants Act.

8. BECAUSE any rights obtained by the Second Respondent at the date of death of the Testator were not vested substantive rights.

9. BECAUSE, if rights, if any, obtained by the second respondent at the date of death of the Testator are to be characterised in the language of the Privy Council in Commissioner of Stamp Duties (Q'd) v Livingston (supra), then such rights were not vested substantive rights.

10. BECAUSE, alternatively to the matters dealt with in paragraphs 7, 8 and 9 hereof, The Children (Equality of Status) Act is to be construed as having retrospective operation to permit the appellants to make a claim in the estate of the Testator pursuant to s.3 of the Testators Family Maintenance and Guardianship of Infants Act.

11. BECAUSE the intention of the legislature expressed in the Children (Equality of Status) Act having regard to the normal canons of construction is to permit the Appellants in the circumstances of this case to make a claim pursuant to s.3 of the Testators Family Maintenance & Guardianship of Infants Act 1916.

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A.C. BRIDGE

COUNSEL FOR THE APPELLANTS

No. 7 of 1983

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL C.A. 89 - 94 of 1981

HELEN MARGARET HOGAN, ELIZABETH DOROTHY HOGAN, HEATHER MARY HOGAN

By their tutor MARRIE MAY HOGAN

MARJORY JEAN FELILA, BARBARA ANN HOGAN, JANICE MARIE HOGAN (DOWNES), LYNETTE SHARON HARRIS, PAMELA MAY MARSDEN — Appellants

BRIAN ROBERT HOGAN — 1st Respondent

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IN THE MATTER OF Section 3 Testators Family Maintenance & Guardianship of Infants Act, 1916.

AND IN THE MATTER OF Section 6 of the Children (Equality of Status) Act, 1976.

CASE FOR THE APPELLANTS

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