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IN THE PRIVY COUNCIL No. 7 of 1983

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES
(COURT OF APPEAL)
IN MATTERS 89 - 94 (INCLUSIVE) of 1981

BETWEEN:

HELEN MARGARET HOGAN AND OTHERS — Appellants (Appellants)

- and -

BRIAN ROBERT HOGAN — First Respondent (First Respondent)

- and -

MILDRED FRANCES GREEN — Second Respondent (Second Respondent)

CASE FOR FIRST RESPONDENT

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The Circumstances out of which the Appeals arise

(1) These are appeals brought as of right from a decision of the Supreme Court of New South Wales (Court of Appeal Division). The reasons for judgment of the members of the Court of Appeal (Street CJ, Glass, Mahoney JJA) were delivered on 4th December 1981. The Court of Appeal dismissed appeals by the present appellants against the decision of McLelland J. (delivered 26th February 1981) wherein it was ordered that the summonses filed by each appellant as plaintiff be dismissed. Six summonses had been filed, each seeking an order under Section 3 of the Testators' Family Maintenance and Guardianship of Infants Act 1916 (NSW) ("the TFM Act"). The proceedings in the Supreme Court were heard together, as were the appeals to the Court of Appeal. On 15th March 1982 the Court of Appeal ordered that the present appeals to Your Lordships' Board be consolidated.

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Facts

(2) The material facts are not in dispute. The testator Bede Leo Hogan died 30th April 1977. He never married. The first respondent is executor of the testator's last Will dated 1st
p. 16 March 1946; the executor received a grant of probate on 26th October 1977. The second respondent is the woman described in the Will as "my wife Mildred Frances Hogan" and thus the sole beneficiary thereunder. Despite the description in the Will the testator and the second respondent were never married. The appellants are the natural children of Marrie May
p. 1 Hogan (the tutor in matter No.3454 of 1978 in the Supreme Court). The testator and Marrie May Hogan were never married. The appellants contend that the interest of the second respondent in the estate of the testator has become subject to claims for provision thereout in their favour under family provision legislation, namely the TFM Act. This is contended to be the result of new legislation, giving illegitimate children the same status as legitimate children, which came into operation after the death of the testator. The Supreme Court and the Court of Appeal held that the new legislation did not have any operation upon pre-existing rights of the second respondent. The appeal thus turns upon questions of statutory interpretation and of the applicability of the principles recently restated by Your Lordships' Board in Yew Bon Tew v. Kenderaan Bas Mara /1982/ 3 WLR 1026.

The Legislative Setting

(3) Copies of the TFM Act and the Children (Equality of Status) Act 1976 are respectively Appendices I and II to this Case. The central provision in the TFM Act is Section 3. It provides as follows :

> "3. (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 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.

(1A) If any person (hereinafter called 'the intestate') dies wholly intestate after the commencement of the Conveyancing, Trustee, and Probate (Amendment) Act, 1938, and, in consequence of the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of his estate as on intestacy, his widow, or children, 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, upon application made by or on behalf of such widow, 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 such person.

Notice of such application shall be served by the applicant on such persons as the court may direct.

In this subsection 'children' includes children (being under the age of twenty-one years at the death of the intestate) of any child of the intestate who died before the intestate.

(2) The court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of

any person whose character or conduct is such as to disentitle him to the benefit of such an order.

(3) In making an order the court may, if it thinks fit, order that the provision may consist of a lump sum, or periodical, or other payments."

(4) The Court's jurisdiction to make an order hinges upon circumstances as they existed at the date of death: Coates v. National Trustees Executors and Agency Co.Ltd. (1956) 95 CLR 494, Dun v. Dun /1959/ AC 272. Any order made under Section 3(1) takes effect as if made by codicil executed immediately before the testator's death: Section 4.

(5) The Supreme Court has held (and no challenge was made to the decision in the present proceedings) that only legitimate children satisfied the description "children" in Section 3: re Turnbull /1975/ 2 NSWLR 360. If there were nothing else in the case, the appellants would have stood outside Section 3. The issue on the appeals arises from the circumstance, relied upon by the appellants, that there is now in force Section 6 of the Children (Equality of Status) Act 1976. This provides :

"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, the 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."

(6) It has been decided by the Supreme Court, that on its proper construction, Section 6 requires Section 3 of the TFM Act now to be read as not confined to legitimate children and as embracing ex-nuptial children: V v. G /1980/ 2 NSWLR 366. However, that case did not raise the issue presented upon the present appeal because the father of the ex-nuptial child in question died after, not before, Section 6 came into operation.

(7) The testator Bede Leo Hogan died on 30th April 1977; Section 6 came into operation on 1st July

1977; probate was granted on 26th October 1977; the present proceedings were commenced on 19th October 1978.

(8) In New South Wales (unlike England) both the real and personal estate of a deceased person, who has died testate, vests, pending a grant of representation, in the Public Trustee: Andrews v. Hogan (1952) 86 CLR 223 at 250-251. The executor's title when derived from the grant relates back to the date of death. This follows from Sections 44 and 61 of the Wills Probate and Administration Act, 1898. These are in the following terms :

> "44. Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all his estate and interest therein in the manner following, that is to say :
>
> (a) On testacy in the executor or administrator with the will annexed.
>
> (b) On intestacy in the administrator.
>
> (c) On partial intestacy in the executor or administrator with the will annexed."
>
> "61. From and after the decease of any person dying testate or intestate, and until probate, or administration, or an order to collect is granted in respect of his estate, the real and personal estate of such deceased person shall be deemed to be vested in the Public Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England."

In Commissioner of Stamp Duties v. Bone /1977/ AC 511 at 518, Your Lordships' Board held that even under the New South Wales system the appointment of a debtor as executor extinguished the liability of the debtor as such, granted the

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executor proves the will, with effect from death.

(9) Where the executor neglects or refuses to prove the will, Section 75(1) empowers the Supreme Court, upon application by one of a class of persons, including a beneficiary as a person interested in the estate, to grant to that applicant administration with the will annexed. Section 75 is in the following terms:

"75. (1) In any case where the executor named in a will -

(a) neglects or refuses to prove the same or to renounce probate thereof within three months from the death of the testator or from the time of such executor attaining the age of eighteen years; or

(b) is unknown or cannot be found;

the Court, may upon the application of -

(i) any person interested in the estate; or

(ii) the Public Trustee; or

(iii) any creditor of the testator,

order that probate of the said will be granted to such executor or order that administration with such will annexed be granted to the applicant or make such other order for the administration of the estate as appears just."

The Issue on the Appeals

(10) The Supreme Court and the Court of Appeal held that the coming into operation (on 1st July 1977) of Section 6 of the Children (Equality of Status) Act after the death of the testator did not impair the existing rights of the second respondent in respect of the estate of the testator, of which she is sole beneficiary, by subjecting it to new claims for provision thereout in favour of the appellants. The second respondent, at 1st July 1977, had rights fixed by reference to a past event, namely the death of the testator leaving unrevoked his last Will

selecting her as sole beneficiary; those rights were coupled with an immunity from disturbance under the TFM Act because the testator left no widow and no legitimate issue.

(11) The question is thus whether the Children (Equality of Status) Act is to be read as impairing the rights of the second respondent. The Supreme Court and the Court of Appeal held that the Children (Equality of Status) Act was not to be so construed and that the applications by the appellants under the TFM Act, which depended upon the correctness of the contrary view, were incompetent.

Contentions to be urged in support of the First Respondent's Case

(12) Section 8 of the Interpretation Act 1897 (NSW) provides as follows :

> "8. Where an Act repeals in the whole or in part a former Act, then, unless the contrary intention appears, the repeal shall not -
>
> (a) affect the previous operation of an enactment so repealed, or anything duly suffered, done, or commenced to be done under an enactment so repealed; or
>
> (b) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under an enactment so repealed; or
>
> (c) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against an enactment so repealed; or
>
> (d) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;
>
> and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed and enforced, as if the repealing Act had not been passed."

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(13) The rights of the second respondent involved in the present case arose essentially under the common law (in its fullest sense) rather than purely from any statute; the TFM Act, as it stood at the death of the testator, trenched upon those rights and the statute which then came into operation, if the appellants be correct, did so even more. So the case may be seen as one of alleged effect of legislation upon legal pre-existing rights. Accordingly, the case below was put and decided not on Section 8 of the 1897 statute, but rather on the basis that in construing Section 6 of the Children (Equality of Status) Act one applied the common law prima facie principle of construction that a statute should not be interpreted as impairing existing rights defined by reference to past events, or as attaching new disabilities or other legal consequences to facts or events already past, unless the result is unavoidable on the language used. This is not to deny that other cases may arise where there is scope for both the common law principle and the interpretation legislation: Mathieson v. Burton (1971) 124 CLR 1.

(14) The common law principle recently has been considered by Your Lordships' Board in Yew Bon Tew v. Kenderaan Bas Mara /1982/ 3 WLR 1026. It also has been expounded and applied by the High Court of Australia, notably in Maxwell v. Murphy (1957) 96 CLR 261, Fisher v. Hebburn Ltd. (1960) 105 CLR 188 at 194, Ogden Industries Pty. Ltd. v. Lucas (1967) 116 CLR 537 at 556-557, 564, 578, 582, 604 (on appeal to Your Lordships' Board /1970/ AC 113), Mathieson v. Burton (1971) 124 CLR 1 at 14, 22, Yrttiaho v. Public Curator (Qld) (1971) 125 CLR 228 at 239-242, Geraldton Building Co. Pty. Ltd. v. May (1977) 136 CLR 379 at 399-400, 401-402, and Carr v. Finance Corporation of Australia Ltd. (1982) 42 ALR 29 at 35, 43.

(15) The first respondent turns to the terms of the Children (Equality of Status) Act and submits that it itself displays a number of indicia, which when taken with the operation of orders under the TFM Act as conferring benefits as if by codicil, suggest that the prima facie principle of construction is supported rather than displaced, and that the scheme of the new statute is not to affect testate or intestate succession where the relevant death occurred before the commencement of the statute.

(16) It is first to be observed that :

(a) Section 6, the source of the appellants' alleged rights, is expressed to be subject to Sections 7 and 8.

(b) These stipulate that the new legislation does not affect either settlements made before its commencement, or dispositions by will or codicil executed by testators who died before that commencement.

(c) Section 9 is to be construed as meaning that the Act does not affect any rights under the intestacy of a person who died before the commencement of the Act.

(17) Further, the second respondent takes under a disposition made by a will executed by a person who died before 1st July 1977; by dint of Section 8(1)(a) this is to be construed as if the Act (including Section 6) had not been passed. Section 6 is expressed to be subject to Section 8, but this subordination will not be observed if Section 6 operates upon the TFM Act to render the interest of the second respondent liable to displacement by a statutory codicil in favour of the appellants.

(18) Finally, the operation of Section 3(1A) of the TFM Act is such that when read with Sections 6 and 9 of the new Act, there could be no doubt but that, if the deceased had died intestate, the appellants would have had no claim under the TFM Act. Section 3(1a) posits an intestate whose widow or children are (in consequence of the operation of rules as to intestate succession contained in the Wills Probate and Administration Act 1897) left without adequate provision; the reference to the 1897 Act must be to its provisions as they operated at the death of the intestate. Section 9(4) of the Children (Equality of Status) Act makes it plain that the amendment to the rules of intestate distribution effected by that statute would not apply to the estate of an intestate who had died at the same time as the testator Mr. Hogan. Thus, the legislation would not disturb an intestate succession on the facts of the present case, and it would be an odd result if it were nevertheless construed so as to disturb the testate succession that has in fact taken place. Further, such a conclusion would involve giving the expression "children" a

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different meaning in different parts of the same section.

Responses to the Appellants' Contentions

(19) The appellants both below and in their case urged a number of propositions of a general character as supporting the inapplicability to this case of the prima facie principle of construction. The first respondent responds as set out below, and also contends that, in addition to the indications to be drawn from the Children (Equality of Status) Act itself (as described in paragraphs (15), (16), (17) and (18) of this Case), support for the respondents' case is supplied by those responses :

(i) In a number of the authorities cited in paragraph (14) of this Case a distinction is drawn between statutes having procedural rather than substantive operations, the former being more readily seen as "retrospective".

(ii) But, as Your Lordships explained in Yew Bon Tew v. Kenderaan Bas Mara [1982] 3 WLR 1026 at 1029, the classification of a statute as procedural or substantive, as if the two were discrete categories, does not always safely determine an issue as to retrospective effect.

(iii) And in any event, the statute involved in the present case is, by application of the reasoning of Dixon CJ and of Williams J in Maxwell v. Murphy (1957) 96 CLR 261 at 267 and 277-278, plainly substantive in character.

(iv) It is not necessary in order for the prima facie principle of construction to apply that the existing rights which are defined by reference to past events also be proprietary in character; the decision of Your Lordships' Board cited in paragraph (14) of this Case and many of the decisions of the High Court of Australia (also cited in paragraph (14)) involved the impact of legislation upon rights of recovery (particularly under laws as to workmen's compensation) that were essentially personal rather than proprietary.

(v) The appellants both below and in their Case filed on the present appeals here sought to analyse the rights of the second respondent at 1st July 1977, in terms showing them not to be "proprietary" or "substantive" or "vested" in character and thus, it is urged, beyond the scope of the prima facie principle of construction.

(vi) In response to this, two submissions are made. The first is that in Maxwell v. Murphy (1957) 96 CLR 261 at 267, Dixon CJ spoke simply of "liabilities fixed" and "rights obtained". The same attitude is manifest in the judgment of Kitto J in Ogden Industries Pty.Ltd. v. Lucas (1967) 116 CLR 537 at 564, where it is said :

> "The general principle of construction . . . is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events which have already occurred in such a way as to confirm or impose or otherwise affect rights or liabilities which the law had defined by reference to past events; Maxwell v. Murphy (1957) 96 CLR 261 at 267; Chang Jeeng v. Nuffield (Aust) Pty.Ltd. (1959) 101 CLR 629 at 637, 638; Fisher v. Hebburn Ltd. (1960) 105 CLR 188 at 202. This principle is too narrowly interpreted, I think, if it is treated as referring only to rights or liabilities which 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. The sense of it is that which Fullagar J expressed succinctly in Fisher v. Hebburn Ltd (1960) 105 CLR 188 at 194, by saying that an amending enactment, or for that matter any enactment, is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement."

The force of these observations is not diminished by anything said on further appeal in that case, reported /1970/ AC 113. In this field the courts should (as Windeyer J observed in Mathieson v. Burton (1971) 124 CLR 1 at 12) eschew too rigorous exercises in analytical jurisprudence and Hohfeldian analysis, with, the first respondent submits, refinements of the type urged by the appellants.

(vii) The second submission is that, in any event, the second respondent at 1st July 1977 did have "proprietary", "substantive" and "vested" rights. If the second respondent had died at any time in the period between the death of the testator and the grant of probate to the first respondent, plainly, in the first respondent's submission, she would have left an interest in the estate of the testator which passed to her estate; it has never been the law that a gift by will to a beneficiary vests only if the beneficiary not only survives the testator but also is living at the date of a grant of probate or administration.

(viii) The appellants' proposition as to the slight nature of the second respondent's rights before a grant of probate may further be tested by assuming the following :

(i) A in his last will devises Blackacre to his child B,

(ii) B dies leaving issue who survive both A and B,

(iii) A dies,

(iv) Probate is granted to the executor named in the will.

In such a case, the devise is saved because whilst B predeceased A, B left issue surviving. This is the result of Section 29 of the Wills Probate and Administration Act (the descendant in New South Wales of Section 33 of the Wills Act 1837). It provides as follows:

"Where any person being a child or other issue of the testator to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person dies in the lifetime of the testator, leaving issue, and any such issue of such person is living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the Will."

(ix) A consequence of the appellants' proposition is that those who drafted the 1837 legislation and all who have acted upon it since (eg Blyth's Case 62 SR (NSW) 108) have been proceeding on a false premise. This is that the mischief of lapse in gifts to issue of a testator caused by the devisee or legatee in question predeceasing the testator will be met by treating the death as occurring immediately after that of the testator. If the appellants be correct, Section 29 cannot achieve its object unless the death be deemed to occur at a later stage, namely after a grant of representation. On the appellants' reasoning, if, in the words of the section, the death of the devisee or legatee be treated as happening immediately after the death of the testator, the devise or bequest will still not take effect other than in the unlikely event that immediately after the death of the testator there is on foot a grant of representation in his estate.

(x) The appellants refer to Livingston's Case /1965/ AC 694 as containing support for their submissions as to the nature of the rights of the second respondent. The first respondent submits that that decision contains nothing adverse to the position of the

respondents on these appeals, and, to the contrary, supports it. Livingston's Case deals with the question of the situs of a one third interest in residue of an unadministered estate; clearly, that interest was "proprietary" in a sense because the occasion for the litigation was provided by the death of the beneficiary Mrs. Coulson and the question was whether the succession to that interest consequent upon her death attracted Queensland succession duty, by reason of a situs in that State; it was not contended that her interest was personal to and so died with her. The effect of the decision is, in the first respondent's respectful submission, correctly formulated in re Leigh's Will Trusts /1970/ Ch 277 at 281-282, and Burns Philp Trustee Co.Ltd. v. Viney /1981/ 2 NSWLR 216 at 223-225.

(xi) The appellants also urged that it was significant that at the coming into operation of Section 6 of the Children (Equality of Status) Act no application might have been made under the TFM Act even if there had been legitimate children because there was then no grant of probate. The first respondent submits this to be beside the point in debate, the holding of the Courts below which is set out at paragraph (10) of this Case.

(xii) Finally, in answer to the appellants' submissions, it is not determinative of the issue on the appeals to describe the Children (Equality of Status) Act as remedial and as deserving a beneficial construction; many of the authorities cited earlier in this Case (at paragraph (14)) involved legislation of which the same might have been said, but the prima facie rule of construction as to retrospective operation was still held applicable; to say of a law that it confers a benefit on class X is not to answer the proposition that it should not readily be construed as doing so at the expense of class Y by impairing existing rights of that class defined by reference to past events. It is (as Mahoney JA pointed out in the

Court of Appeal) not inconsistent with the attainment of the objection of removal of the disabilities of illegitimacy to do so by respecting the existing rights of others.

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Reasons of Appeal

(20) The first respondent respectfully submits that the appeals should be dismissed with costs because :

(i) The Judgments appealed from are correct.

(ii) Section 6 of the Children (Equality of Status) Act does not have an operation upon Section 3 of the TFM Act such as to render competent the applications purportedly made under Section 3 by the appellants.

(iii) Section 6 is not to be construed so as to enlarge the class of applicants under the TFM Act with respect to the estates of persons who died testate before the commencement of Section 6.

WILLIAM GUMMOW

No. 7 of 1983

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)
IN MATTERS 89 - 94 (INCLUSIVE) of 1981

B E T W E E N :

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- and -	
BRIAN ROBERT HOGAN	First Respondent (First Respondent)
- and -	
MILDRED FRANCES GREEN	Second Respondent (Second Respondent)

CASE FOR FIRST RESPONDENT

RADCLIFFES & CO.
10 Little College Street,
Westminster, SW1P 3SJ
United Kingdom

Solicitors for the
First Respondent