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

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

CASE FOR THE 2ND RESPONDENT

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IN THE PRIVY COUNCIL — No. 7 of 1983

ON APPEAL FROM THE COURT OF APPEAL

OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

HELEN MARGARET HOGAN AND OTHERS
Appellants

AND

BRIAN ROBERT HOGAN
1st Respondent

AND — 10

MILDRED FRANCES GREEN
2nd Respondent

CASE FOR THE 2ND RESPONDENT

RECORD

1. This is an appeal from orders made by the Court of Appeal of New South Wales constituted by the Chief Justice Sir Laurence Street, Mr. Justice Glass and Mr. Justice Mahoney, dismissing an appeal from an order of 26 February, 1981 made by Mr. Justice McLelland of that Court dismissing an application made by the appellants pursuant to s. 3 of the Testator's Family Maintenance & Guardianship of Infants Act, 1916 of the State of New South Wales.

p.89 (Court of Appeal) (A sample of the order made by McLelland J. is at pp 24-25). 20

2. Final leave to appeal was granted by the Court of Appeal of the Supreme Court of New South Wales on 28 June 1982. The appeal is said to be as of right presumably because the claim is in respect of an estate of a value exceeding £500.0.0: Becker v. Marion City Corp. (1977) A.C. 271, 283-4 (see also Bosch v. Perpetual Trustee Co. Limited (1938) A.C. 463, 476.)

pp. 94-5

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3. The appellants, who were plaintiffs before Mr. Justice McLelland are eight illegitimate

p. 17

daughters of the late Bede Leo Hogan who died on 30 April 1977. The first respondent is the Executor named in Bede Leo Hogan's last will dated 1 March 1946 to whom probate was duly granted and the second respondent is the person who under that will took the whole of the testator's estate.

4. Section 3 of the Testator's Family Maintenance & Guardianship of Infants Act, 1961 of New South Wales (hereafter referred to as "the T.F.M. Act") provides so far as relevant, that "If any person ... disposes of ... his property either wholly or partly by will in such a manner that the ... children of such person ... 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 ... on application by or on behalf of such ... 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 ... children, or any or all of them."

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5. The central question in this appeal is what is meant by "children" in that section.

6. Up until the coming into force of the Children (Equality of Status) Act, 1976, No. 97 of New South Wales, which Act was assented to on 17 December 1976 and as far as the parts relevant to this appeal are concerned, commenced on 1 July 1977, it was quite clear that "children" in s. 3 of the T.F.M. Act did not embrace illegitimate children: In Re Pritchard (1940) 40 S.R. (N.S.W.) 443; Re Turnbull (1975) 2 N.S.W.L.R. 350. 360.

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7. It is the contention of the appellants that because of s. 6 of the Children (Equality of Status) Act, (hereafter referred to as "the Status Act"), they are entitled to bring a claim under s. 3 of the T.F.M. Act.

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8. Section 6 of the Status Act provides as follows: "Subject to ss. 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."

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9. The matter was dealt with by the trial judge on the basis of Agreed Facts. In the Court of Appeal, one other fact was added by consent which does not appear in the Record, that is, that probate was granted on 26 October 1977. This fact is referred to by Glass J.A.

Agreed Facts pp. 14-15
Glass J.A. p.73

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10. It can be seen from the Agreed Facts that the date of death, viz. 30 April 1977 was before the coming into force of the Status Act. As at the date of death there was no person who could make a claim under the T.F.M. Act as there was no widow and no legitimate children.

11. As at the date of grant of probate on 26 October 1977, however, the Status Act had come into force, and, of course, was in force as at the date when the application was made to the Court, namely 19 October, 1978.

p.1

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12. The second respondent submits that as at the coming into force of the Status Act on 1 July 1977, she had a vested right not to be sued under the T.F.M. Act which had accrued to the Executor and through him to her. There is direct authority for this proposition in the judgment of Zelling J. in Re Barry (1974) 9 S.A.S.R. 439, 442, but in any event follows from first principles which are dealt with subsequently in this case.

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13. The second respondent submits that it is clear law that a Statute is prima facie to be construed as not attaching new legal consequences to facts or events which occurred

before its commencement: Fisher v. Hebburn Ltd. (1960) 105 C.L.R. 188, 194, and per Kitto J. in Ogden Industries Pty. Ltd. v. Lucas (1967) 116 C.L.R. 537, 564, (although Kitto, J's judgment was criticised on appeal (1970) A.C. 113, 129, this part of his judgment was unaffected and is in conformity with the mainstream of authority). See also Maxwell v. Murphy (1957) 96 C.L.R. 261, 267, Mathieson v. Burton (1971) 124 C.L.R. 1, 12-14 Walton v. Baffsky (1975) 2 N.S.W.L.R. 565, 572-7, Geraldton Building Co. Pty. Ltd. v. May (1977) 136 C.L.R. 379, 399-402, Yew Bon Tew v. Kenderaan Bas Mara (1982) 3 W.L.R. 1026, 1029. 10

14. We submit that what appears in 13. above is clear law whether the proposition is approached from the Common Law or s. 8 of the Interpretation Act, 1897 (which provides that repeal of an Act or part thereof "shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under an enactment so repealed" unless the contrary intention appears). 20

15. With respect, we adopt what was said by the Judges in the Court below on this point.

McLelland J. p. 20
Street C.J. p. 71
Glass, J.A. p. 76
Mahoney, J.A. p. 86 30

16. We also, with respect, adopt their Honours' reasoning that it matters not the precise juristic classification of the second respondent's accrued right because it was -

(a) an interest in having the estate properly administered (and the second respondent is the sole person having that right): Vanneck v. Benham (1917) 1 Ch. 60; Commissioner of Stamp Duties v. Livingston (1965) A.C. 694; or 40

(b) an interest as well in each asset, see e.g. Re Cunliffe-Owen (1953) Ch. 545 and Perpetual Trustee Co. Ltd. v. Commissioner of Stamp Duties (Shallard's Case) (1977) 2 N.S.W.L.R. 472 at 484-5; or

(c) a statutory right given to the second respondent by s. 75 of the Wills Probate and Administration Act, 1898 of New South Wales to apply to the Court for a grant of administration of the testator's estate if the first respondent failed to apply coupled with a right to such a grant leading to the getting in of the whole beneficial estate; or 10

(d) a proprietary interest in the nature of a chose in action: In Re Leigh's Will Trusts (1970) Ch. 277 and Burns Philp Trustee Co. v. Viney (1981) 2 N.S.W.L.R. 216, 223.

Whatever it was, it was clearly a transmissible interest before the coming into effect of the Status Act.

Street, C.J. p. 70
Glass, J.A. p. 77
Mahoney, J.A. p. 86 20

17. The appellants seek to avoid this proposition by contending that the relevant date to look at rights is the date of probate not the date of death. This, in our submission is not correct because:-

(a) the scheme of the T.F.M. Act is to make provision for dependants as at the date of the testator's death: Coates v. National Trustees Agencies & Agency Co. Ltd. (1956) 95 C.L.R. 494, 508, per Dixon C.J. and Dun v. Dun (1959) A.C. 272, 292. This factor was correctly taken into account by the Court of Appeal;

Street C.J. p. 68
Glass J.A. p. 75 30

(b) By s. 4 of the T.F.M. Act an order made thereunder operates as a codicil i.e. from date of death;

(c) Untramelled by Statute, the position is that an executor takes his title and the beneficiary his property from the will of the testator and not from the grant of probate, and that probate itself is really a mere authentication of that title and property, see e.g. Meyappa Chetty v. Supramanian Chetty (1916) 1 A.C. 603, 608; Ryan v. Davies Bros. Ltd. (1921) 29 C.L.R. 527, 536. The law in New South Wales is 40

marginally but not significantly, different: Commissioner of Stamp Duties v. Bone (1977) A.C. 511, 518;

(d) Cases such as In Re Searle (1949) Ch. 73 and Re Purnell (1961) Q.W.N. 34 (a judgment of the present Chief Justice of the High Court of Australia when a Judge of the Supreme Court of Queensland) show that in T.F.M. matters, grant of probate is a formality in that an application filed before grant may be heard after grant notwithstanding that the Act provides that the application must be instituted within a certain time from the grant of probate. (cf. Burns v. Elders Trustee (1968) S.A.S.R. 297 and Re Jenner (1960) QdR 349).

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18. Before coming to the Status Act itself, there are two other indications that one should look to the date of death rather than to the date of probate:-

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(a) In cases involving legitimation by Statute it has been constantly held that the Statute only applies to persons whose father is alive at the date when it comes into force, see e.g. Re Luck (1940) Ch. 864; Thompson v. Thompson (1950) 51 S.R. (N.S.W.) 102 and Re Alice Taylor (1964-5) N.S.W.R. 695;

(b) The whole doctrine of lapse would be affected if the date of probate was the relevant date because if A leaves his property to B and A dies in January, B dies in May, and probate is granted in June, there would be a lapse if B's property only came into being as at the date of grant, whereas it is clear that in such circumstances B would take.

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(c) Allied to (b) is the fact that s. 29 of the Wills Probate and Administration Act, 1898 assumes that a beneficiary acquires a right in relation to a gift at the testator's death and that this right can be transmitted under the beneficiary's will or on intestacy before grant of probate of the original testator's will.

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RECORD

19. We then pass to the Status Act itself, and submit that the reasoning of the Judges was correct.

McLelland J. pp. 20-21
Street C.J. pp. 61-67
Glass J.A. pp. 75-77
Mahoney J.A. pp. 81-84

20. Further, s. 9(4) of the Status Act, on its true construction, must mean that neither s.9 nor s. 6 affects the intestacy of a person dying before the commencement of the Status Act. If s. 9 was not in the Act, and s. 6 was as wide as the appellants say, on an intestacy, ex-nuptial children would take no matter when the testator died, so perhaps there could be a Diplock tracing in respect of an old estate. Thus s. 9(4) had to be enacted to deal with persons dying intestate before the commencement of the Status Act.

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21. Although called the Testator's Family Maintenance Act, s.3 (1A) of the T.F.M. Act makes it perfectly plain that corresponding provisions apply if an intestate dies leaving his dependants without proper support.

22. The effect of s. 9(4) of the Status Act must be not to permit any claims by ex-nuptial children where there has been an intestacy, and the intestate has died before the commencement of the Act, and "children" in subsection 1A must mean legitimate children.

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23. Accordingly, in s. 3(1) it would be most peculiar if the word "children" had a different meaning and the Status Act applied to testacies when it could not apply to intestacies.

24. The proposition in the last paragraph is reinforced by the general rule of construction that words in the same section usually have the same meaning, see Courtauld v. Legh (1869) LR 4Ex. 126, 130; Lennon v. Gibson & Howes Ltd. (1919) A.C. 709, 711-12; Ryan v. Commissioner of Land Tax (1982) 1 N.S.W.L.R. 305, 310.

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25. It will be noted that in both subsections 1 and 1A of s. 3, the words "such children" are used and this clearly indicates that it is only those people who were children who at the date of death were left without adequate provision for their proper maintenance etc. are proper claimants. This again makes it difficult to read "children" as meaning "children as at the date of probate". Further, the word "such" must be given semantic significance: Ex parte Barnes (1896) A.C. 146, 150.

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26. The appellants below put some significance on the word "whenever" in s.6 of the Status Act and cited Boulter v. Kent Justices (1897) A.C. 556, 568. In our submission the section must be read down as was done by Glass J.A. at 75-77 (cf Mahoney J.A. both in his previous judgment in Gorey v. Griffin (1978) 1 N.S.W.L.R. 739 and at p.81 and following in this case). We would submit there is a lot to be said for the case that s.6 only applies to situations where parent and child survive the coming into operation of the Act. This would be the way in which legitimation Statutes have commonly been approached, see Re Luck and other cases cited in 18(a) above.

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27. The whole of Part 2 of the Status Act, gives the flavour of not affecting estates of persons who died before the commencement of the Status Act, see e.g. ss. 8 and 9 (4). Indeed, it is an Act to remove disabilities, not to confer rights. Section 9(4) in particular, makes it clear that apart from status, property rights were not to be affected retrospectively.

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28. The appellant's submission that the Status Act is a remedial Act really does not advance the matter at all. The label "remedial" has indeed long been discredited, see e.g. Master Retailers Association N.S.W. v. Shop Assistant's Union of N.S.W. (1905) 2 C.L.R. 94, 106. Indeed, such labels are usually more hindrance than help on questions of construction: Yew Bon Tew v. Kenderaan Bas Mara (1982) 2 W.L.R. 1026, 1033.

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29. Even accepting that there may be some special benign rules of construction with respect

to Acts labelled "remedial", all that is really meant in this area of the law when it is said that an Act is remedial is that having found jurisdiction, the Court has a wide discretion, see e.g. Re Sinnott (1948) V.L.R. 179; Holmes v. Permanent Trustee Co. of N.S.W. Ltd. (1932) 47 C.L.R. 113, 119. This does not assist the appellants here.

30. Whilst arguments about justice in the abstract may at first blush sound impressive, it must always be borne in mind that "What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested rights, justice may be overwhelmingly on the other side." per Isaacs J. in George Hudson Ltd. v. Australian Timber Workers' Union (1923) 32 C.L.R. 415, 434.

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31. The appellants have sought comfort in the statement in Dapueto v. James Wyllie & Co. (1874) L.R. 5 P.C. 482, 492, that "a Statute which is remedial should be construed liberally so as to afford the utmost relief which the fair meaning of its language will allow." However, the passage is prefaced by the words "The Statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such Statutes." The passage perfectly states the law with respect to cases where the Court's jurisdiction is extended, but is too wide for all remedial Statutes. Indeed, of the standard textbooks on Statutes only Cross refers to it in this connection at all. Maxwell on the Interpretation of Statutes, 12th Edition merely says that the fact that a section "is clearly designed to afford relief may incline the Court to construe it more benevolently than it might a less obviously remedial enactment" (12th Edition, pp. 93-94) and both Craies, 7th. Edition, p. 60 and Pearce, Statutory Interpretation in Australia, 2nd Edition (187-188) point out the problem that a Statute may be both beneficial and penal. Certainly, classification of a Statute as remedial is not the panacea for the appellant's problems.

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32. Neither classification of the Statute is remedial nor the mischief rule really assists the appellants as it is clear that status conferred by the Status Act is not universal and one has to construe the Act to see what situations come within its terms. When this is done in accordance with submissions noted earlier in this case, the conclusion must be reached that the appellant's circumstances fall outside the Statute. 10

33. Although the Status Act or its equivalent in other jurisdiction has now been in force for over five years, there is little decided authority on its meaning, and none which really assists. Apart from authorities previously referred to in this case, it should be noted that the High Court of Australia considered the ambit of the corresponding Victorian Legislation in Douglas v. Longano (1981) 55 A.L.J.R. 352 and there was referred to the Australian cases on the Act as it applies to fathers of illegitimate children being entitled to access, and in V. v. G. (1980) 2 N.S.W.L.R. 366, it was held that for a person dying after 1977, an illegitimate child is a proper applicant. 20

34. For the reasons set out above, we respectfully submit that this Appeal should be dismissed with costs.

35. Since preparing the first draft of the above we have been shown in draft the case of the first respondent. We respectfully adopt what his counsel says in addition to what has been put above. 30

DATED: 31 March 1983.

P.W. Young
P.W. YOUNG, Q.C.

A.S. Martin
A.S. MARTIN