

IN THE PRIVY COUNCIL

No. 7 of 1983

26  
83

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

## RECORD OF PROCEEDINGS

### SOLICITORS FOR THE APPELLANTS

Kearns & Garside,  
31 Bong Bong Street,  
KIAMA. N.S.W. 2533

By their Agents:

Turner Whelan,  
39 Hunter Street,  
SYDNEY. N.S.W. 2000

By their Agents:

Ingladwe, Brown, Bennison &  
Garrett,  
International House,  
26 Creechurch Lane,  
LONDON. EC3A 5AL U.K.

### SOLICITORS FOR THE 1ST RESPONDENT

R.M. McKinnon & Co.,  
18 Manning Street,  
KIAMA. N.S.W. 2533

By their Agents:

Turner Whelan,  
39 Hunter Street,  
SYDNEY. N.S.W. 2000

By their Agents:

Radcliffes & Co.,  
10 Little College Street,  
WEST MINSTER. SW1P 35 J U.K.

### SOLICITORS FOR THE 2ND RESPONDENT

Staunton & Thompson,  
147 Castlereagh Street,  
SYDNEY. N.S.W. 2000

By their Agents:

Reynolds, Porter, Chamberlain & Co.,  
Chichester House,  
278-282 High Holborn,  
LONDON. WC1 U.K.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES  
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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES  
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HELEN MARGARET HOGAN  
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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

RECORD OF PROCEEDINGS

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IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

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)  
) No. 3474 of 1978  
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)

HELEN MARGARET HOGAN  
ELIZABETH DOROTHY HOGAN  
HEATHER MARY HOGAN

By their Tutor MARRIE MAY HOGAN

Plaintiff

BRIAN ROBERT HOGAN

First Defendant

10

MILDRED FRANCIS GREEN

Second Defendant

THE ESTATE OF BEDE LEO HOGAN Late of Jamberoo, Contractor,  
Deceased and the Testator's Family Maintenance etc. Act  
1916

SUMMONS

Amended pursuant to Leave granted by  
McLelland, J. 25 February, 1981

Filed: 19/10/78

The plaintiffs claims:

20

1. An order making provision for her maintenance, education, and advancement in life pursuant to s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, out of the estate of Bede Leo Hogan late of Jamberoo, Contractor, deceased.

2. An order that the costs of these proceedings may be provided for.

To the defendant, Brian Robert Hogan of 60 Allowrie Street, Jamberoo.

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below,

30

1. Summons, 3474 of 1978

the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must enter an appearance in the Registry.

Time: 22 November 1978, 10 a.m. (L.S.)

Place: Before the Master in the Equity Division,  
Court 7D, Supreme Court of New South Wales,  
Supreme Court House, Queen's Square, Sydney,  
N.S.W. 2000.

10

Plaintiff: Heather Mary Hogan of "Woodgrove",  
Jerrara, N.S.W. 2533. A minor.

Tutor: Marrie May Hogan of "Woodgrove",  
Jerrara, N.S.W. 2533. Married Woman.

Solicitor: Rex L. Garside of Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533  
Tel: (042) 321188. DX 5188 Wollongong.

Solicitor's  
Agent: Bryan G. Turner Esq., Solicitor,  
39 Hunter Street, Sydney, N.S.W. 2000  
Tel: 232-1466. DX 452 Sydney.

20

Plaintiff's  
Address for  
Service: c/- Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533.

The plaintiff may be served at the following exchange box in  
Sydney of Australian Document Exchange Pty. Limited:

Bryan G. Turner Esq., Solicitor, DX 452, Sydney.

Summons, 3474 of 1978

Address of  
Registry: Supreme Court House, Queen's Square,  
Sydney, N.S.W. 2000.

R.L. Garside

Plaintiff's Solicitor  
R.L. Garside

Filed: 19/10/1978.

(Signed)  
For the Registrar

Filed pursuant to Legal Practitioners (Legal Aid) Act 1970

10

(L.S.)

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

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No. 3454 of 1978

MARJORY JEAN FELILA

Plaintiff

BRIAN ROBERT HOGAN

First Defendant

MILDRED FRANCES GREEN

Second Defendant

THE ESTATE OF BEDE LEO HOGAN of Jamberoo, Contractor,  
deceased, and the Testator's Family Maintenance etc. Act  
1916

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SUMMONS

Amended pursuant to leave granted by  
McLelland, J. 25 February 1981

Filed: 19 OCT 1978

The plaintiff claims:-

1. An order making provision for her maintenance, education, and advancement in life pursuant to s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, out of the estate of Bede Leo Hogan late of Jamberoo, Contractor, deceased.

20

2. An order that the costs of these proceedings may be provided for.

To the defendant, Brian Robert Hogan of 60 Allowrie Street, Jamberoo.

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

30

Summons, 3454 of 1978

Before any attendance at that time you must enter an appearance in the Registry.

Time: 22nd November, 1978, 10 a.m. (L.S.)  
Place: Before the Master in the Equity Division,  
Court 7D, Supreme Court of New South Wales,  
Supreme Court House, Queen's Square, Sydney,  
N.S.W. 2000.

Plaintiff: Marjory Jean Felila of 9/9 Jones Street,  
Croydon, N.S.W. 2132. Married Woman. 10

Solicitor: Rex L. Garside of Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533.  
Tel: (042) 321188. DX 5188 Wollongong.

Solicitor's  
Agent: Bryan G. Turner Esq., Solicitor,  
39 Hunter Street, Sydney. N.S.W. 2000  
Tel: 232-1466. DX 452 Sydney.

Plaintiff's  
Address for  
Service: c/- Messrs. Kearns & Garside, 20  
31 Bong Bong Street, Kiama, N.S.W. 2533.

The plaintiff may be served at the following exchange box in  
Sydney of Australian Document Exchange Pty. Limited:  
Bryan G. Turner Esq., Solicitor, DX 452, Sydney.

Address of  
Registry: Supreme Court House, Queen's Square,  
Sydney, N.S.W. 2000.

R.L. Garside  
Plaintiff's Solicitor

Filed: 19 OCT 1978 (Signed) 30  
For the Registrar (L.S.)  
Filed pursuant to Legal Practitioners (Legal Aid) Act 1970.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

)  
)  
) No. 3457 of 1978  
)  
)

BARBARA ANN HOGAN

Plaintiff

BRIAN ROBERT HOGAN

First Defendant

MILDRED FRANCES GREEN

Second Defendant

THE ESTATE OF BEDE LEO HOGAN, late of Jamberoo, Contractor, 10  
Deceased, and the Testator's Family Maintenance etc.  
Act 1916

SUMMONS

Amended pursuant to leave granted by  
McLelland, J. 25 February 1981

Filed: 19 OCT 1978

The plaintiff claims:-

1. An order making provision for her maintenance, education,  
and advancement in life pursuant to s.3 of the Testator's  
Family Maintenance and Guardianship of Infants Act, 1916, out  
of the estate of Bede Leo Hogan late of Jamberoo, Contractor,  
deceased.

20

2. An order that the costs of these proceedings may be  
provided for.

To the defendant, Brian Robert Hogan of 60 Allowrie  
Street, Jamberoo.

If there is no attendance before the Court by you or by your  
Counsel or Solicitor at the time and place specified below,  
the proceedings may be heard and you will be liable to suffer  
judgment or an order against you in your absence.

30

Before any attendance at that time you must enter an appearance in the Registry.

Time: 22nd November 1978, 10 a.m. (L.S.)

Place: Before the Master in the Equity Division,  
Court 7D, Supreme Court of New South Wales,  
Supreme Court House, Queen's Square, Sydney,  
N.S.W. 2000.

Plaintiff: Barbara Ann Hogan of 13 Heath Road, Blakehurst,  
N.S.W. 2221. Spinster. 10

Solicitor: Rex L. Garside of Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533.  
Tel: (042) 321188. DX 5188 Wollongong.

Solicitor's Agent: Bryan G. Turner Esq., Solicitor,  
39 Hunter Street, Sydney, N.S.W. 2000  
Tel: 232-1466. DX 452 Sydney.

Plaintiff's Address for Service: c/- Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533. 20

The plaintiff may be served at the following exchange box in Sydney of Australian Document Exchange Pty. Limited:

Bryan G. Turner Esq., Solicitor, DX 452, Sydney.

Address of Registry: Supreme Court House, Queen's Square,  
Sydney, N.S.W. 2000.

R.L. Garside,  
Plaintiff's Solicitor

Filed: 19 OCT 1978

(Signed)  
For the Registrar (L.S.) 30

Filed pursuant to Legal Practitioners (Legal Aid) Act 1970.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

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No. 3458 of 1978

JANICE MARIE HOGAN

Plaintiff

BRIAN ROBERT HOGAN

First Defendant

MILDRED FRANCES GREEN

Second Defendant

THE ESTATE OF BEDE LEO HOGAN late of Jamberoo,  
Contractor, deceased and the Testator's Family  
Maintenance etc. Act 1916

10

SUMMONS

Amended pursuant to Leave granted by  
McLelland, J. 25 February 1981

FILED: 19 OCT 1978

The plaintiff claims:-

1. An order making provision for her maintenance, education,  
and advancement in life pursuant to s.3 of the Testator's  
Family Maintenance and Guardianship of Infants Act, 1916, out  
of the estate of Bede Leo Hogan late of Jamberoo, Contractor,  
deceased.

20

2. An order that the costs of these proceedings may be  
provided for.

To the defendant, Brian Robert Hogan of 60 Allowrie  
Street, Jamberoo.

If there is no attendance before the Court by you or by your  
Counsel or Solicitor at the time and place specified below,  
the proceedings may be heard and you will be liable to  
suffer judgment or an order against you in your absence.

30



Before any attendance at that time you must enter an appearance in the Registry.

Time: 22nd November 1978, 10 a.m. (L.S.)

Place: Before the Master in the Equity Division,  
Court 7D, Supreme Court of New South Wales,  
Supreme Court House, Queen's Square, Sydney,  
N.S.W. 2000.

Plaintiff: Janice Marie Hogan of 12/4 Morwick Street,  
Strathfield, N.S.W. 2135 Spinster 10

Solicitor: Rex L. Garside of Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533.  
Tel: (042) 321188. DX 5188 Wollongong.

Solicitor's Agent: Bryan G. Turner Esq., Solicitor,  
39 Hunter Street, Sydney, N.S.W. 2000  
Tel: 232-1466. DX 452 Sydney.

Plaintiff's Address for Service: c/- Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533. 20

The plaintiff may be served at the following exchange box in Sydney of Australian Document Exchange Pty. Limited:

Bryan G. Turner Esq., Solicitor, DX 452, Sydney.

Address of Registry: Supreme Court House, Queen's Square,  
Sydney, N.S.W. 2000.

R.L. Garside,  
Plaintiff's Solicitor

Filed: 19 OCT 1978

(Signed)  
For the Registrar (L.S.) 30

Filed pursuant to Legal Practitioners (Legal Aid) Act 1970.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

)  
)  
) No. 3455 of 1978  
)  
)

LYNETTE SHARON HARRIS

Plaintiff

BRIAN ROBERT HOGAN

First Defendant

MILDRED FRANCES GREEN

Second Defendant

THE ESTATE OF BEDE LEO HOGAN Late of Jamberoo, Contractor 10  
Deceased, and the Testator's Family Maintenance etc. Act  
1916

SUMMONS

Amended pursuant to leave granted by  
McLelland J, 25 February 1981

Filed: 19 OCT 1978

The plaintiff claims:-

1. An order making provision for her maintenance, education, and advancement in life pursuant to s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, out of the 20  
estate of Bede Leo Hogan late of Jamberoo, Contractor, deceased.
2. An order that the costs of these proceedings may be provided for.

To the defendant, Brian Robert Hogan of 60 Allowrie Street, Jamberoo.

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must enter an appearance in the Registry.

Time: 22nd November 1978, 10 a.m. (L.S.)

Place: Before the Master in the Equity Division,  
Court 7D, Supreme Court of New South Wales,  
Supreme Court House, Queen's Square, Sydney,  
N.S.W. 2000.

Plaintiff: Lynette Sharon Harris of Wyalla Road, Jamberoo,  
N.S.W. 2533. Married Woman. 10

Solicitor: Rex L. Garside of Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533.  
Tel: (042) 321188. DX 5188 Wollongong.

Solicitor's Agent: Bryan G. Turner Esq., Solicitor,  
39 Hunter Street, Sydney. N.S.W. 2000  
Tel: 232-1466. DX 452 Sydney.

Plaintiff's Address for Service: c/- Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533. 20

The plaintiff may be served at the following exchange box in  
Sydney of Australian Document Exchange Pty. Limited:

Bryan G. Turner Esq., Solicitor, DX 452, Sydney:

Address of Registry: Supreme Court House, Queen's Square,  
Sydney, N.S.W. 2000.

R.L. Garside  
Plaintiff's Solicitor

Filed: 19 OCT 1978

(Signed)  
For the Registrar (L.S.) 30  
Filed pursuant to Legal Practitioners (Legal Aid) Act 1970.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

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No. 3456 of 1978

PAMELA MAY MARSDEN

Plaintiff

BRIAN ROBERT HOGAN

First Defendant

MILDRED FRANCES GREEN

Second Defendant

THE ESTATE OF BEDE LEO HOGAN late of Jamberoo, Contractor, 10  
Deceased, and the Testator's Family Maintenance etc.  
Act 1916

SUMMONS

Amended pursuant to leave granted by  
McLelland, J. 25 February 1981

Filed: 19 OCT 1978

The plaintiff claims:-

1. An order making provision for her maintenance, education, and advancement in life pursuant to S.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, out of the 20  
estate of Bede Leo Hogan late of Jamberoo, Contractor, deceased.

2. An order that the costs of these proceedings may be provided for.

To the defendant, Brian Robert Hogan of 60 Allowrie Street, Jamberoo.

If there is no attendance before the Court by you or by your Counsel or Solicitor at the time and place specified below, the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absence.

Before any attendance at that time you must enter an appearance in the Registry.

Time: 22nd November 1978, 10 a.m. (L.S.)

Place: Before the Master in the Equity Division,  
Court 7D, Supreme Court of New South Wales,  
Supreme Court House, Queen's Square, Sydney,  
N.S.W. 2000.

Plaintiff: Pamela May Marsden of 137 Shoalhaven Street,  
Kiama, N.S.W. 2533. Married Woman 10

Solicitor: Rex L. Garside of Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533.  
Tel: (042) 321188. DX 5188 Wollongong.

Solicitor's Agent: Bryan G. Turner Esq., Solicitor,  
39 Hunter Street, Sydney, N.S.W. 2000  
Tel: 232-1466. DX 452 Sydney.

Plaintiff's Address for Service: c/- Messrs. Kearns & Garside,  
31 Bong Bong Street, Kiama, N.S.W. 2533. 20

The plaintiff may be served at the following exchange box in Sydney of Australian Document Exchange Pty. Limited:

Bryan G. Turner Esq., Solicitor, DX 452, Sydney.

Address of Registry: Supreme Court House, Queen's Square,  
Sydney, N.S.W. 2000.

R.L. Garside  
Plaintiff's Solicitor

Filed: 19 OCT 1978

(Signed)

For the Registrar (L.S.) 30

Filed pursuant to Legal Practitioners (Legal Aid) Act 1970.

IN THE SUPREME COURT OF NEW SOUTH WALES

EQUITY DIVISION

SYDNEY REGISTRY

Nos. 3454 of 1978  
3455 of 1978  
3456 of 1978  
3457 of 1978  
3458 of 1978  
3474 of 1978

ESTATE OF BEDE LEO HOGAN  
Deceased and the Testator's  
Family Maintenance etc Act 1916

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STATEMENT OF AGREED FACTS AND QUESTION FOR DECISION

FILED: 25/2/81

It is agreed that:

1. The testator died on 30th April 1977. The testator left no widow and no legitimate children.

2. The Defendant in each proceeding is the executor of the Will of the testator a copy of which is annexed hereto and marked with the letter "A".

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3. The testator was survived by the woman described in the Will as "my wife Mildred Frances Hogan", but they never married.

4. The plaintiffs are the natural children of Marrie May Hogan (the tutor in matter No. 3474 of 1978) and the testator.

5. The testator and Marrie May Hogan were never married.

6. The Children (Equality of Status) Act 1976, so far as the provisions thereof relied on by the plaintiffs, were proclaimed and came into effect on 1st July 1977.

7. The proceedings were commenced by Summonses filed 19th October 1978.

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QUESTION FOR DECISION: Whether the Court has power to make an

Statement of Agreed Facts

order under s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 in respect of the estate of a 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.

"A"

THIS IS THE LAST WILL AND TESTAMENT of me BEDE LEO HOGAN of Jamberoo in the State of New South Wales, Farmer, I REVOKE all former Wills and other testamentary writings previously executed by me SUBJECT to the payment of all my just debts funeral and testamentary expenses State Death Duty and Commonwealth Estate Duty I GIVE DEVISE AND BEQUEATH all my property real and personal of whatsoever nature and kind and wheresoever situate of which I shall be seised possessed of or entitled to at the time of my death or over which I may have any general or special power of appointment unto my wife MILDRED FRANCES HOGAN absolutely AND I APPOINT my brother BRIAN ROBERT HOGAN as the Sole Executor hereof IN WITNESS whereof I have to this my last Will and Testament set my hand at Kiama this First day of March in the year of our Lord One thousand nine hundred and forty six. 10

B.L. Hogan

SIGNED AND ACKNOWLEDGED by the said BEDE LEO HOGAN as and for his last Will and Testament in the presence of us the undersigned both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses. 20

M.R. Ryan Sol. Kiama

J. Popplewell Clerk Kiama



IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

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No. 3474 of 1978

CORAM: McLELLAND, J.

THURSDAY, 26TH FEBRUARY, 1981.

HOGAN v. HOGAN

JUDGMENT

HIS HONOUR: Bede Leo Hogan (the testator) died on 30th April, 1977. By his last will, which is dated 1st March, 1946, he appointed his brother, the first defendant, as executor thereof and left the whole of his estate to the second defendant. On 19th October, 1978 proceedings were commenced by each of five ex-nuptial children of the Testator claiming orders under s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 (the T.F.M. Act). On 20th October, 1978 similar proceedings were commenced by three further ex-nuptial children of the Testator. All six proceedings came on to be heard together on 25th February, 1981 and in each case I ordered under Pt. 31 of the Supreme Court Rules that the following question be decided separately from any other question, namely whether the Court has power to make an order under s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 in respect of the estate of a 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. It is this question with which I will deal now.

Part II of the Children (Equality of Status) Act, 1976,

Reasons for Judgment of his  
17. Honour, Mr. Justice McLelland

commenced on 1st July, 1977. It includes s.6 which is in the following terms:

"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." 10

Section 3(1) of the T.F.M. Act is in the following terms:

"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 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." 20 30

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."

It is clear that before the commencement of s. 6 of the Children (Equality of Status) Act the expression "children" in s.3 of the T.F.M. Act was confined to legitimate children (see Re Turnbull (1975) 2 N.S.W.L.R. 360). It is equally clear that since the commencement of that section the expression "children" in s.3 of the T.F.M. Act is not so confined and includes ex-nuptial children (see V. v. G. (1980) 2 N.S.W.L.R. 366). In 40

substance, s.6 of the Children (Equality of Status) Act amends s.3 of the T.F.M. Act by enlarging the denotation of the expression "children" therein so as to include ex-nuptial children.

The relevant principle to be applied has been authoritatively stated as follows:-

"The presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred.

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In other words, liabilities that are fixed or rights that have been obtained by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends, appears with reasonable certainty. But, when the alteration in the law relates to the mode in which rights and liabilities are to be enforced or realised, there is no reason to presume that it was not intended to apply to rights and liabilities already existing and its application in reference to them will depend rather upon its particular character and the substantial effect that such an operation would produce."

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(Maxwell v. Murphy 96 C.L.R., 261 at 277 per Williams, J. quoting Kralievich v. Lake View & Star Ltd., 70 C.L.R. 647 at 652 per Dixon, J.)

Section 6 clearly effects a substantial change in the law and is not a procedural provision of the kind described in the last sentence of the passage just quoted.

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Upon the death of the Testator, the second defendant acquired a vested and indefeasible interest in the estate of the Testator of the kind discussed in Commissioner of Stamp Duties v. Livingston (1965) A.C. 694. Immediately before 1st July, 1977 that interest could be properly described as comprising

accrued rights the title to which consisted in facts and events that had already occurred.

Speaking generally any beneficiary under the will of a testator who had died prior to 1st July, 1977 possessed such 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.

There does not appear with reasonable certainty or at all 10  
any intention that any such accrued rights under the will of a testator who died prior to 1st July, 1977 should be disturbed or rendered vulnerable to defeasance by the alteration to s. 3 of the T.F.M. Act effected by s. 6 of the Children (Equality of Status) Act.

Indeed, there is some indication to the contrary. Section 9 of the Children (Equality of Status) Act, also included in Pt. II of that Act, makes specific provision with respect to intestate succession involving an ex-nuptial child, a matter 20  
which would in any event have been covered by the general words of s. 6 in their application to the provisions of the Wills, Probate and Administration Act 1898, governing distributions on intestacy.

Section 9 is not, however, intended in any relevant way to qualify or be inconsistent with s. 6 as appears from the words "Without limiting section 6" appearing at the commencement of the principal operative sub-sections of s. 9.

Sub-section 4 of s. 9 provides: "This section does not

affect any rights under the intestacy of a person dying before the commencement of this Act." It would be incongruous to so provide if it were contemplated that the general provisions of s. 6 might affect such rights, which they would do unless limited in their application to the existence of the relationship of parent and child after the commencement of Pt. II of the Act.

Reference was made in argument to the decisions of the Court of Appeal in Gorey v. Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh v. Williams (1979) 2 N.S.W.L.R. 543. I do not think it necessary to deal at length with these cases, neither of which involved a decision as to the point presently before me. It may, however, be desirable to point out that an erroneous date appears to have crept into the judgment of Hutley, J.A. in Gorey v. Griffin at p.741E. His Honour is reported as giving the date of the decision of the Children's Court there under consideration as 28th March, 1977, i.e. prior to the commencement of s. 6 of the Children (Equality of Status) Act. Reference to the Court papers in the case shows that the date was, in fact, 21st November, 1977 i.e. after the commencement of that section, the application to the Children's Court having been lodged on 30th September, 1977.

This correction is, of course, consistent with his Honour's later statement at p. 744E: "As from 1st July, 1977 fathers and mothers of ex-nuptial children can invoke the

jurisdiction given to magistrates under the Infants' Custody and Settlements Act 1899."

It is perhaps also desirable in relation to McIntosh v. Williams to draw attention to the fact that the order of the Court of Appeal that the illegitimate child then in question be included as a person upon whose behalf the proceedings were brought was made on 11th November, 1976, before the Children (Equality of Status) Act had been enacted, no doubt on the basis that the expression "child" in the Compensation to Relatives Act, 1897 was defined in that Act to include any person to whom another stands in loco parentis.

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In each of the six proceedings I direct that pursuant to Pt. 31 r.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 Testator's Family Maintenance and Guardianship of Infants Act 1916 in respect of the estate of a 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.

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It would necessarily follow that the summonses should be dismissed. In each of the six proceedings I order that the summons be dismissed. As to costs my inclination, subject to any submission that might be made, would be to order that the costs of the first defendant on the trustee basis be paid out of the estate of the Testator and to make no order as to the costs of the respective plaintiffs or as to the costs of the second defendant. Does anyone wish to speak against such an order?

COUNSEL: No.

HIS HONOUR: In each of the six proceedings I order that the costs of the first defendant on the trustee basis be paid out of the estate of the Testator and I make no order as to the costs of the plaintiff or plaintiffs as the case may be or as to the costs of the second defendant.

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I certify that this and the preceding 6 pages are a true copy of the reasons for judgment herein of His Honour Mr. Justice McLelland.

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Jean V. Elder  
ASSOCIATE.

Date 11.3.81.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
EQUITY DIVISION

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3454 of 1978

MARJORY JEAN FELILA

Plaintiff

3455 of 1978

LYNETTE SHARON HARRIS

Plaintiff

3456 of 1978

PAMELA MAY MARSDEN

Plaintiff

3457 of 1978

BARBARA ANN HOGAN

Plaintiff

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3458 of 1978

JANICE MARIE HOGAN

Plaintiff

3474 of 1978

HELEN MARGARET HOGAN  
ELIZABETH DOROTHY HOGAN and  
HEATHER MARY HOGAN by their Tutor  
MARRIE MAY HOGAN

Plaintiffs

BRIAN ROBERT HOGAN  
MILDRED FRANCES GREEN

Defendants

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ESTATE of BEDE LEO HOGAN deceased.

TESTATORS FAMILY MAINTENANCE etc. ACT, 1916

O R D E R

THE COURT DIRECTS that -

1. Pursuant to Part 31 Rule 5 of the Supreme Court Rules 1970 it be recorded as a decision of the Court that the Court does not have power to make an Order under Section 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 2 of the Children (Equality of Status)

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Act 1976 on the application of an illegitimate child of the testator.

THE COURT ORDERS that -

2. Each summons be dismissed.

3. The costs of the defendant Brian Robert Hogan on the trustee basis be paid out of the estate of the testator.

4. There be no order as to the costs of any plaintiff or plaintiffs or as to the costs of the defendant Mildred Frances Green.

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ORDERED 26 February, 1981

AND ENTERED 6 JUL 1981

By the Court

(Sgd) A.G. Nevill (L.S.)  
REGISTRAR IN EQUITY

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
EQUITY DIVISION

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No. 3454 of 1978

MARJORY JEAN FELILA

Plaintiff

BRIAN ROBERT HOGAN

1st Defendant

MILDRED FRANCES GREEN

2nd Defendant

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ORDERS.

THE COURT DIRECTS THAT:-

1. Pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an Order under Section 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 2 of the Children (Equality of Status) Act 1976 on the application of an illegitimate child of the testator.

THE COURT ORDERS that:-

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2. The Summons be dismissed.
3. The costs of the first Defendant on the trustee basis be paid out of the estate of the testator.
4. There be no order as to the costs of the Plaintiff or Plaintiffs as the case may be or as to the costs of the second Defendant.

ORDERED: 26 February, 1981.  
ENTERED: 9 April 1981

By the Court  
(Sgd.) J. RODDEN (L.S.)  
DEPUTY REGISTRAR

Minutes of Order,  
26. 3454 of 1978

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
EQUITY DIVISION

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No. 3457 of 1978

BARBARA ANN HOGAN

Plaintiff

BRIAN ROBERT HOGAN

1st Defendant

MILDRED FRANCES GREEN

2nd Defendant

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ORDERS.

THE COURT DIRECTS THAT:-

1. Pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an Order under Section 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 2 of the Children (Equality of Status) Act 1976 on the application of an illegitimate child of the testator.

THE COURT ORDERS that:-

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2. The Summons be dismissed.

3. The costs of the first Defendant on the trustee basis be paid out of the estate of the testator.

4. There be no order as to the costs of the Plaintiff or Plaintiffs as the case may be or as to the costs of the second Defendant.

ORDERED: 26 February, 1981.  
ENTERED: 9 April 1981

By the Court  
(Sgd.) J. RODDEN (L.S.)  
DEPUTY REGISTRAR

Minutes of Order,  
27. 3457 of 1978

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
EQUITY DIVISION

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No. 3458 of 1978

JANICE MARY HOGAN

Plaintiff

BRIAN ROBERT HOGAN

1st Defendant

MILDRED FRANCES GREEN

2nd Defendant

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ORDERS.

THE COURT DIRECTS THAT:-

1. Pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an Order under Section 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 2 of the Children (Equality of Status) Act 1976 on the application of an illegitimate child of the testator.

THE COURT ORDERS that:-

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2. The Summons be dismissed.
3. The costs of the first Defendant on the trustee basis be paid out of the estate of the testator.
4. There be no order as to the costs of the Plaintiff or Plaintiffs as the case may be or as to the costs of the second Defendant.

ORDERED: 26 February, 1981.  
ENTERED: 9 April 1981

By the Court  
(Sgd.) J. RODDEN (L.S.)  
DEPUTY REGISTRAR

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
EQUITY DIVISION

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No. 3455 of 1978

LYNETTE SHARON HARRIS

Plaintiff

BRIAN ROBERT HOGAN

1st Defendant

MILDRED FRANCES GREEN

2nd Defendant

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ORDERS.

THE COURT DIRECTS THAT:-

1. Pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an Order under Section 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 2 of the Children (Equality of Status) Act 1976 on the application of an illegitimate child of the testator.

THE COURT ORDERS that:-

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2. The Summons be dismissed.
3. The costs of the first Defendant on the trustee basis be paid out of the estate of the testator.
4. There be no order as to the costs of the Plaintiff or Plaintiffs as the case may be or as to the costs of the second Defendant.

ORDERED: 26 February, 1981.  
ENTERED: 9 April 1981

By the Court  
(Sgd.) J. RODDEN (L.S.)  
DEPUTY REGISTRAR

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
EQUITY DIVISION

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No. 3456 of 1978

PAMELA MAY MARSDEN

Plaintiff

BRIAN ROBERT HOGAN

1st Defendant

MILDRED FRANCES GREEN

2nd Defendant

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ORDERS.

THE COURT DIRECTS THAT:-

1. Pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an Order under Section 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 2 of the Children (Equality of Status) Act 1976 on the application of an illegitimate child of the testator.

THE COURT ORDERS that:-

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2. The Summons be dismissed.

3. The costs of the first Defendant on the trustee basis be paid out of the estate of the testator.

4. There be no order as to the costs of the Plaintiff or Plaintiffs as the case may be or as to the costs of the second Defendant.

ORDERED: 26 February, 1981.  
ENTERED: 9 April 1981

By the Court  
(Sgd.) J. RODDEN (L.S.)  
DEPUTY REGISTRAR

30. Minutes of Order,  
3456 of 1978

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES ) C.A. 89 of 1981  
 ) Eq. No. 3474 of 1978  
COURT OF APPEAL )

IN THE MATTER OF Section 3 of the Testators Family  
Maintenance and Guardianship of Infants Act, 1916,

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

HELEN MARGARET HOGAN  
ELIZABETH DOROTHY HOGAN 10  
HEATHER MARY HOGAN by their Tutor  
MARRIE MAY HOGAN

Plaintiffs -  
Appellants

BRIAN ROBERT HOGAN

1st Defendant -  
1st Respondent

MILDRED FRANCES GREEN

2nd Defendant -  
2nd Respondent 20

NOTICE OF APPEAL

APPELLANTS: HELEN MARGARET HOGAN  
ELIZABETH DOROTHY HOGAN  
HEATHER MARY HOGAN

1st RESPONDENT: BRIAN ROBERT HOGAN  
2nd RESPONDENT: MILDRED FRANCES GREEN

The proceedings appealed from were heard on 25 February, 1981  
and decided on 26 February, 1981.

The Appellants appeal from the whole of the decision of  
Mr. Justice McLelland. 30

GROUNDS:

1. His Honour was in error in holding that upon the death of  
the testator the Second Defendant acquired a vested and inde-  
feasible interest in the estate of the testator.

2. His Honour was in error in holding that the interest of

the Second Defendant could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred.

3. His Honour was in error in failing to take into account the fact that probate was granted by this Honourable Court in its Probate Division to the First Defendant after 1 July, 1977.

4. His Honour was in error in holding that any beneficiary under the will of a testator who died prior to 1 July, 1977 10 possessed accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916.

5. His Honour was in error in holding that Section 6 of the Children (Equality of Status) Act, 1976 (hereinafter referred to as "the Act"), in the events which happened, did not intend to disturb or render vulnerable to defeasance rights of a beneficiary under a will of a testator who died prior to 1 July, 1977. 20

6. His Honour was in error in holding that Section 9 of the Act is not intended in any relevant way to qualify or be inconsistent with Section 6 of the Act.

7. His Honour was in error in holding, as to Section 6 of the Act, that it would be incongruous to provide (as in Section 9(4)) of the Act that the subsection does not effect any rights under the intestacy of a person dying before the commencement of the Act if it were contemplated that the general provisions of Section 6 of the Act might effect such rights.



8. His Honour was in error in failing to adequately consider or analyse the decisions of this Honourable Court in Gorey -v- Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh -v- Williams (1979) 2 N.S.W.L.R. 543.

9. His Honour was in error in failing to adequately consider, or alternatively, failing to consider at all the general scope and purview of the statute, the remedy sought to be applied, the former state of the law and what it was that the legislature 10 contemplated.

10. His Honour was in error in failing to hold in the events which happened that Section 6 of the Act did not operate so as to enlarge the meaning of the word "children" in Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 to include the Appellants herein.

11. His Honour was in error in directing pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an order under Section 3 of the Testators Family Maintenance 20 and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to commencement of Part 2 of the Children (Equality of Status) Act 1976 on an application of an illegitimate child of the testator.

12. His Honour was in error in dismissing the Summons.

ORDERS SOUGHT:

1. The appeal be upheld.
2. It be recorded as a decision of the Court that the Court

Notice of Appeal,  
89 of 1981

does have power to make an order under Section 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 3 of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator.

- 3. That the matter be remitted to the Equity Division for hearing.
  - 4. That the costs, as to the Appellants, be provided for out of the estate on a common fund basis and, as to the First Respondent, be provided for out of the estate on a trustee basis.
  - 5. Such further or other order as to the Court seems fit.
- Appeal papers will be settled on 8th day of May 1981 at 11 a.m. in the Registry of the Court of Appeal.

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APPELLANTS:                    HELEN MARGARET HOGAN  
    ELIZABETH DOROTHY HOGAN  
    HEATHER MARY HOGAN

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APPELLANTS' SOLICITOR:            Messrs. Kearns & Garside, Solicitors,  
    31 Bong Bong Street, Kiama, N.S.W. 2533.  
    Tel: (042) 321188. D.X. 5188 Wollongong.

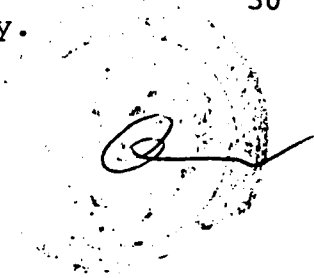
APPELLANTS' ADDRESS FOR SERVICE:            C/- Messrs. Kearns & Garside, Solicitors,  
    31 Bong Bong Street, Kiama, N.S.W. 2533.  
    Tel: (042) 321188. D.X. 5188 Wollongong.

By their City Agent: Bryan G. Turner Esq.,  
 Solicitor, 39 Hunter Street, Sydney. 2000.  
 Tel: (02) 2321466. D.X. 452 Sydney.

ADDRESS OF REGISTRY:                    Supreme Court, Queens Square, Sydney.

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FILED: 13th April, 1981.            .....  
    Appellants' Solicitor.



IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

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C.A. 90 of 1981.  
Eq. No. 3454 of 1978.

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

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

MARJORY JEAN FELILA

Plaintiff - 10  
Appellant

BRIAN ROBERT HOGAN

1st Defendant -  
1st Respondent

MILDRED FRANCES GREEN

2nd Defendant -  
2nd Respondent

NOTICE OF APPEAL

APPELLANT: MARJORY JEAN FELILA

1st RESPONDENT: BRIAN ROBERT HOGAN

2nd RESPONDENT: MILDRED FRANCES GREEN

20

The proceedings appealed from were heard on 25 February, 1981  
and decided on 26 February, 1981.

The Appellant appeals from the whole of the decision of  
Mr. Justice McLelland.

GROUND:

1. His Honour was in error in holding that upon the death  
of the testator the Second Defendant acquired a vested and  
indefeasible interest in the estate of the testator.

2. His Honour was in error in holding that the interest of

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the Second Defendant could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred.

3. His Honour was in error in failing to take into account the fact that probate was granted by this Honourable Court in its Probate Division to the First Defendant after 1 July, 1977.

4. His Honour was in error in holding that any beneficiary under the will of a testator who died prior to 1 July, 1977 possessed accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916. 10

5. His Honour was in error in holding that Section 6 of the Children (Equality of Status) Act, 1976 (hereinafter referred to as "the Act"), in the events which happened, did not intend to disturb or render vulnerable to defeasance rights of a beneficiary under a will of a testator who died prior to 1 July, 1977. 20

6. His Honour was in error in holding that Section 9 of the Act is not intended in any relevant way to qualify or be inconsistent with Section 6 of the Act.

7. His Honour was in error in holding, as to Section 6 of the Act, that it would be incongruous to provide (as in Section 9(4)) of the Act that the subsection does not effect any rights under the intestacy of a person dying before the commencement of the Act if it were contemplated that the general provisions of Section 6 of the Act might effect such rights.

8. His Honour was in error in failing to adequately consider or analyse the decisions of this Honourable Court in Gorey -v- Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh -v- Williams (1979) 2 N.S.W.L.R. 543.

9. His Honour was in error in failing to adequately consider, or alternatively, failing to consider at all the general scope and purview of the statute, the remedy sought to be applied, the former state of the law and what it was that the legislature 10 contemplated.

10. His Honour was in error in failing to hold in the events which happened that Section 6 of the Act did not operate so as to enlarge the meaning of the word "children" in Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 to include the Appellants herein.

11. His Honour was in error in directing pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an order under Section 3 of the Testators Family Maintenance 20 and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to commencement of Part 2 of the Children (Equality of Status) Act 1976 on an application of an illegitimate child of the testator.

12. His Honour was in error in dismissing the Summons.

ORDERS SOUGHT:

1. The appeal be upheld.
2. It be recorded as a decision of the Court that the Court

Notice of Appeal,  
90 of 1981

does have power to make an order under Section 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 2 of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator.

3. That the matter be remitted to the Equity Division for hearing. 10
4. That the costs, as to the Appellant, be provided for out of the estate on a common fund basis and, as to the First Respondent, be provided for out of the estate on a trustee basis.
5. Such further or other order as to the Court seems fit.

Appeal papers will be settled on 21 day of May 1981 at 12 noon in the Registry of the Court of Appeal.

APPELLANT: MARJORY JEAN FELILA

APPELLANT'S SOLICITOR: Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533. 20  
Tel: (042) 321188. D.X. 5188 Wollongong.

APPELLANTS ADDRESS FOR SERVICE: C/- Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533.  
Tel: (042) 321188. D.X. 5188 Wollongong.

By their City Agent: Bryan G. Turner Esq.,  
Solicitor, 39 Hunter Street, Sydney. 2000.  
Tel: (02) 2321466. D.X. 452 Sydney.

ADDRESS OF REGISTRY: Supreme Court, Queens Square, Sydney.

FILED: 13th April, 1981.

.....  
Appellant's Solicitor.

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL

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C:A. 91 of 1981  
Eq. No. 3457 of 1978

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

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

BARBARA ANN HOGAN

Plaintiff - 10  
Appellant

BRIAN ROBERT HOGAN

1st Defendant -  
1st Respondent

MILDRED FRANCES GREEN

2nd Defendant -  
2nd Respondent

NOTICE OF APPEAL

APPELLANT: BARBARA ANN HOGAN  
1st RESPONDENT: BRIAN ROBERT HOGAN  
2nd RESPONDENT: MILDRED FRANCES GREEN

20

The proceedings appealed from were heard on 25 February, 1981  
and decided on 26 February, 1981.

The Appellant appeals from the whole of the decision of  
Mr. Justice McLelland.

GROUNDS:

1. His Honour was in error in holding that upon the death  
of the testator the Second Defendant acquired a vested and  
indefeasible interest in the estate of the testator.

2. His Honour was in error in holding that the interest of

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the Second Defendant could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred.

3. His Honour was in error in failing to take into account the fact that probate was granted by this Honourable Court in its Probate Division to the First Defendant after 1 July, 1977.

4. His Honour was in error in holding that any beneficiary under the will of a testator who died prior to 1 July, 1977 possessed accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916. 10

5. His Honour was in error in holding that Section 6 of the Children (Equality of Status) Act, 1976 (hereinafter referred to as "the Act"), in the events which happened, did not intend to disturb or render vulnerable to defeasance rights of a beneficiary under a will of a testator who died prior to 1 July, 1977. 20

6. His Honour was in error in holding that Section 9 of the Act is not intended in any relevant way to qualify or be inconsistent with Section 6 of the Act.

7. His Honour was in error in holding, as to Section 6 of the Act, that it would be incongruous to provide (as in Section 9(4)) of the Act that the subsection does not effect any rights under the intestacy of a person dying before the commencement of the Act if it were contemplated that the general provisions of Section 6 of the Act might effect such rights.



8. His Honour was in error in failing to adequately consider or analyse the decisions of this Honourable Court in Gorey -v- Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh -v- Williams (1979) 2 N.S.W.L.R. 543.

9. His Honour was in error in failing to adequately consider, or alternatively, failing to consider at all the general scope and purview of the statute, the remedy sought to be applied, the former state of the law and what it was that the legislature 10 contemplated.

10. His Honour was in error in failing to hold in the events which happened that Section 6 of the Act did not operate so as to enlarge the meaning of the word "children" in Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 to include the Appellants herein.

11. His Honour was in error in directing pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an order under Section 3 of the Testators Family Maintenance 20 and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to commencement of Part 2 of the Children (Equality of Status) Act 1976 on an application of an illegitimate child of the testator.

12. His Honour was in error in dismissing the Summons.

ORDERS SOUGHT:

1. The appeal be upheld.
2. It be recorded as a decision of the Court that the Court

Notice of Appeal,  
91 of 1981

does have power to make an order under Section 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 2 of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator.

3. That the matter be remitted to the Equity Division for hearing. 10
4. That the costs, as to the Appellant, be provided for out of the estate on a common fund basis and, as to the First Respondent, be provided for out of the estate on a trustee basis.
5. Such further or other order as to the Court seems fit.

Appeal papers will be settled on 8 day of May 1981 at 12 noon in the Registry of the Court of Appeal.

APPELLANT: BARBARA ANN HOGAN

APPELLANT'S SOLICITOR: Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533. 20  
Tel: (042) 321188. D.X. 5188 Wollongong.

APPELLANT'S ADDRESS FOR SERVICE: C/- Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533.  
Tel: (042) 321188. D.X. 5188 Wollongong.

By their City Agent: Bryan G. Turner Esq.,  
Solicitor, 39 Hunter Street, Sydney. 2000.  
Tel: (02) 2321466. D.X. 452 Sydney.

ADDRESS OF REGISTRY: Supreme Court, Queens Square, Sydney.

.....  
Appellant's Solicitor.

FILED: 13th April, 1981.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

)  
)  
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C.A. 92 of 1981  
Eq. No. 3458 of 1978

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

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

JANICE MARIE DOWNES (HOGAN)

Plaintiff - 10  
Appellant

BRIAN ROBERT HOGAN

1st Defendant -  
1st Respondent

MILDRED FRANCES GREEN

2nd Defendant -  
2nd Respondent

NOTICE OF APPEAL

APPELLANT: JANICE MARIE DOWNES

1st RESPONDENT: BRIAN ROBERT HOGAN

2nd RESPONDENT: MILDRED FRANCES GREEN

20

The proceedings appealed from were heard on 25 February, 1981  
and decided on 26 February, 1981.

The Appellant appeals from the whole of the decision of  
Mr. Justice McLelland.

GROUNDS:

1. His Honour was in error in holding that upon the death  
of the testator the Second Defendant acquired a vested and  
indefeasible interest in the estate of the testator.

2. His Honour was in error in holding that the interest of

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the Second Defendant could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred.

3. His Honour was in error in failing to take into account the fact that probate was granted by this Honourable Court in its Probate Division to the First Defendant after 1 July, 1977.

4. His Honour was in error in holding that any beneficiary under the will of a testator who died prior to 1 July, 1977 10 possessed accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916.

5. His Honour was in error in holding that Section 6 of the Children (Equality of Status) Act, 1976 (hereinafter referred to as "the Act"), in the events which happened, did not intend to disturb or render vulnerable to defeasance rights of a beneficiary under a will of a testator who died prior to 1 July, 1977. 20

6. His Honour was in error in holding that Section 9 of the Act is not intended in any relevant way to qualify or be inconsistent with Section 6 of the Act.

7. His Honour was in error in holding, as to Section 6 of the Act, that it would be incongruous to provide (as in Section 9(4)) of the Act that the subsection does not effect any rights under the intestacy of a person dying before the commencement of the Act if it were contemplated that the general provisions of Section 6 of the Act might effect such rights.

8. His Honour was in error in failing to adequately consider or analyse the decisions of this Honourable Court in Gorey -v- Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh -v- Williams (1979) 2 N.S.W.L.R. 543.

9. His Honour was in error in failing to adequately consider, or alternatively, failing to consider at all the general scope and purview of the statute, the remedy sought to be applied, the former state of the law and what it was that the legislature 10 contemplated.

10. His Honour was in error in failing to hold in the events which happened that Section 6 of the Act did not operate so as to enlarge the meaning of the word "children" in Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 to include the Appellants herein.

11. His Honour was in error in directing pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an order under Section 3 of the Testators Family Maintenance 20 and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to commencement of Part 2 of the Children (Equality of Status) Act 1976 on an application of an illegitimate child of the testator.

12. His Honour was in error in dismissing the Summons.

ORDERS SOUGHT:

1. The appeal be upheld.
2. It be recorded as a decision of the Court that the Court

Notice of Appeal,  
92 of 1981

does have power to make an order under Section 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 2 of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator.

3. That the matter be remitted to the Equity Division for hearing. 10
4. That the costs, as to the Appellant, be provided for out of the estate on a common fund basis and, as to the First Respondent, be provided for out of the estate on a trustee basis.
5. Such further or other order as to the Court seems fit.

Appeal papers will be settled on 8 day of May 1981 at 10.30 a.m. in the Registry of the Court of Appeal.

APPELLANT: JANICE MARIE DOWNES

APPELLANT'S SOLICITOR: Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533. 20  
Tel: (042) 321188. D.X. 5188 Wollongong.

APPELLANT'S ADDRESS FOR SERVICE: C/- Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533.  
Tel: (042) 321188. D.X. 5188 Wollongong.

By their City Agent: Bryan G. Turner Esq.,  
Solicitor, 39 Hunter Street, Sydney. 2000.  
Tel: (02) 2321466. D.X. 452 Sydney.

ADDRESS OF REGISTRY: Supreme Court, Queens Square, Sydney.

.....  
Appellant's Solicitor

FILED: 13th April, 1981.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES ) C.A. 93 of 1981  
 ) Eq. No. 3455 of 1978.  
COURT OF APPEAL )

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

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

LYNETTE SHARON HARRIS

Plaintiff - 10  
Appellant

BRIAN ROBERT HOGAN

1st Defendant -  
1st Respondent

MILDRED FRANCES GREEN

2nd Defendant -  
2nd Respondent

NOTICE OF APPEAL

APPELLANT: LYNETTE SHARON HARRIS

1st RESPONDENT: BRIAN ROBERT HOGAN

20

2nd RESPONDENT: MILDRED FRANCES GREEN

The proceedings appealed from were heard on 25 February, 1981  
and decided on 26 February, 1981.

The Appellant appeals from the whole of the decision of  
Mr. Justice McLelland.

GROUNDS:

1. His Honour was in error in holding that upon the death  
of the testator the Second Defendant acquired a vested and  
indefeasible interest in the estate of the testator.

2. His Honour was in error in holding that the interest of 30

the Second Defendant could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred.

3. His Honour was in error in failing to take into account the fact that probate was granted by this Honourable Court in its Probate Division to the First Defendant after 1 July, 1977.

4. His Honour was in error in holding that any beneficiary under the will of a testator who died prior to 1 July, 1977 10 possessed accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916.

5. His Honour was in error in holding that Section 6 of the Children (Equality of Status) Act, 1976 (hereinafter referred to as "the Act"), in the events which happened, did not intend to disturb or render vulnerable to defeasance rights of a beneficiary under a will of a testator who died prior to 1 July, 1977. 20

6. His Honour was in error in holding that Section 9 of the Act is not intended in any relevant way to qualify or be inconsistent with Section 6 of the Act.

7. His Honour was in error in holding, as to Section 6 of the Act, that it would be incongruous to provide (as in Section 9(4)) of the Act that the subsection does not effect any rights under the intestacy of a person dying before the commencement of the Act if it were contemplated that the general provisions of Section 6 of the Act might effect such rights.



8. His Honour was in error in failing to adequately consider or analyse the decisions of this Honourable Court in Gorey -v- Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh -v- Williams (1979) 2 N.S.W.L.R. 543.

9. His Honour was in error in failing to adequately consider, or alternatively, failing to consider at all the general scope and purview of the statute, the remedy sought to be applied, the former state of the law and what it was that the legislature 10 contemplated.

10. His Honour was in error in failing to hold in the events which happened that Section 6 of the Act did not operate so as to enlarge the meaning of the word "children" in Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 to include the Appellants herein.

11. His Honour was in error in directing pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an order under Section 3 of the Testators Family Maintenance 20 and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to commencement of Part 2 of the Children (Equality of Status) Act 1976 on an application of an illegitimate child of the testator.

12. His Honour was in error in dismissing the Summons.

ORDERS SOUGHT:

1. The appeal be upheld.
2. It be recorded as a decision of the Court that the Court

Notice of Appeal,  
93 of 1981

does have power to make an order under Section 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 2 of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator.

3. That the matter be remitted to the Equity Division for hearing.
4. That the costs, as to the Appellant, be provided for out of the estate on a common fund basis and, as to the First Respondent, be provided for out of the estate on a trustee basis.
5. Such further or other order as to the Court seems fit.

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Appeal papers will be settled on 21 day of May 1981 at 10.30 a.m. in the Registry of the Court of Appeal.

APPELLANT: LYNETTE SHARON HARRIS

APPELLANT'S SOLICITOR: Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533.  
Tel: (042) 321188. D.X. 5188 Wollongong.

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APPELLANT'S ADDRESS FOR SERVICE: C/- Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533.  
Tel: (042) 321188. D.X. 5188 Wollongong.

By their City Agent: Bryan G. Turner Esq.,  
Solicitor, 39 Hunter Street, Sydney. 2000.  
Tel: (02) 2321466. D.X. 452 Sydney.

ADDRESS OF REGISTRY: Supreme Court, Queens Square, Sydney.

.....  
Appellant's Solicitor

FILED: 13th April, 1981.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES ) C.A. 94 of 1981.  
 ) Eq. No. 3456 of 1978.  
COURT OF APPEAL )

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

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

PAMELA MAY MARSDEN

Plaintiff - 10  
Appellant

BRIAN ROBERT HOGAN

1st Defendant -  
1st Respondent

MILDRED FRANCES GREEN

2nd Defendant -  
2nd Respondent

NOTICE OF APPEAL

APPELLANT: PAMELA MAY MARSDEN  
1st RESPONDENT: BRIAN ROBERT HOGAN  
2nd RESPONDENT: MILDRED FRANCES GREEN

20

The proceedings appealed from were heard on 25 February, 1981  
and decided on 26 February, 1981.

The Appellant appeals from the whole of the decision of  
Mr. Justice McLelland.

GROUNDS:

1. His Honour was in error in holding that upon the death  
of the testator the Second Defendant acquired a vested and  
indefeasible interest in the estate of the testator.

2. His Honour was in error in holding that the interest of

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the Second Defendant could be properly described as comprising accrued rights the title to which consisted in facts and events that had already occurred.

3. His Honour was in error in failing to take into account the fact that probate was granted by this Honourable Court in its Probate Division to the First Defendant after 1 July, 1977.

4. His Honour was in error in holding that any beneficiary under the will of a testator who died prior to 1 July, 1977 10 possessed accrued rights which were incapable of being depleted or diminished upon the application of an illegitimate child of the testator under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916.

5. His Honour was in error in holding that Section 6 of the Children (Equality of Status) Act, 1976 (hereinafter referred to as "the Act"), in the events which happened, did not intend to disturb or render vulnerable to defeasance rights of a beneficiary under a will of a testator who died prior to 1 July, 1977. 20

6. His Honour was in error in holding that Section 9 of the Act is not intended in any relevant way to qualify or be inconsistent with Section 6 of the Act.

7. His Honour was in error in holding, as to Section 6 of the Act, that it would be incongruous to provide (as in Section 9(4)) of the Act that the subsection does not effect any rights under the intestacy of a person dying before the commencement of the Act if it were contemplated that the general provisions of Section 6 of the Act might effect such rights.

8. His Honour was in error in failing to adequately consider or analyse the decisions of this Honourable Court in Gorey -v- Griffin (1978) 1 N.S.W.L.R. 739 and McIntosh -v- Williams (1979) 2 N.S.W.L.R. 543.

9. His Honour was in error in failing to adequately consider, or alternatively, failing to consider at all the general scope and purview of the statute, the remedy sought to be applied, the former state of the law and what it was that the legislature 10 contemplated.

10. His Honour was in error in failing to hold in the events which happened that Section 6 of the Act did not operate so as to enlarge the meaning of the word "children" in Section 3 of the Testators Family Maintenance and Guardianship of Infants Act, 1916 to include the Appellants herein.

11. His Honour was in error in directing pursuant to Part 31 Rule 5 of the Supreme Court Rules that it be recorded as a decision of the Court that the Court does not have power to make an order under Section 3 of the Testators Family Maintenance 20 and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to commencement of Part 2 of the Children (Equality of Status) Act 1976 on an application of an illegitimate child of the testator.

12. His Honour was in error in dismissing the Summons.

ORDERS SOUGHT:

1. The appeal be upheld.
2. It be recorded as a decision of the Court that the Court

Notice of Appeal,  
94 of 1981

does have power to make an order under Section 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 2 of the Children (Equality of Status) Act, 1976 on the application of an illegitimate child of the testator.

3. That the matter be remitted to the Equity Division for hearing. 10
4. That the costs, as to the Appellant, be provided for out of the estate on a common fund basis and, as to the First Respondent, be provided for out of the estate on a trustee basis.
5. Such further or other order as to the Court seems fit.

Appeal papers will be settled on 21 day of May 1981 at 11 a.m. in the Registry of the Court of Appeal.

APPELLANT: PAMELA MAY MARSDEN

APPELLANT'S SOLICITOR: Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533. 20  
Tel: (042) 321188. D.X. 5188 Wollongong.

APPELLANT'S ADDRESS FOR SERVICE: C/- Messrs. Kearns & Garside, Solicitors,  
31 Bong Bong Street, Kiama. N.S.W. 2533.  
Tel: (042) 321188. D.X. 5188 Wollongong.

By their City Agent: Bryan G. Turner Esq.,  
Solicitor, 39 Hunter Street, Sydney. 2000.  
Tel: (02) 2321466. D.X. 452 Sydney.

ADDRESS OF REGISTRY: Supreme Court, Queens Square, Sydney.

.....  
Appellant's Solicitor

FILED: 13th day of April, 1981.

IN THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL DIVISION

CA 89, 90, 91, 92, 93, 94 of 1981

ED 3474, 3454, 3457, 3458, 3455, 3456 of 1978.

IN THE MATTER OF SECTION 3 OF THE TESTATORS FAMILY  
MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT

AND IN THE MATTER OF SECTION 5 OF THE CHILDREN (EQUALITY  
OF STATUS) ACT 1976

HELEN MARGARET HOGAN & ORS.

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Plaintiffs (Appellants)

BRIAN ROBERT HOGAN & ANOR

Defendants (Respondents)

NOTICE OF CONTENTION BY 1ST RESPONDENT

Filed: 2nd October 1981

TAKE NOTICE that the first respondent wishes to contend if it be necessary to do so that the decision of the Court below (the Honourable Mr. Justice McLelland) should be affirmed on grounds additional to those relied upon by his Honour, but it does not seek a discharge of variation of any part of the orders of his Honour.

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It was contended below by the first respondent that:

- (a) Section 6 of the Children (Equality of Status) Act 1976 (NSW) on its proper construction did not amend Section 3 of the Testators Family Maintenance and Guardianship of Infants Act 1916, and
- (b) If the first submission be incorrect, nevertheless the consequence of the sequence of events in this case was that accrued rights under the Will of the testator were

Notice of Contention  
by First Respondent

not disturbed or rendered vulnerable to defeasance by the alteration to Section 3 effected by Section 6 of the 1976 statute.

His Honour held against the first respondent on the first submission, stating that Section 6 of the 1976 statute amended Section 3 by enlarging the denotation of the expression "children" therein, so as to include ex-nuptial children. His Honour referred to V. v. G. [1980] 2 NSWLR 366. 10

However, his Honour held in favour of the first respondent on the second ground argued.

Upon the hearing of the appeal, the first respondent will wish to contend that the decision of his Honour should be supported not only upon ground (b) but also upon ground (a).

The grounds relied upon in support of this contention are:

- (i) The decision in V. v. G. [1980] 2 NSWLR 366 was in error and should be overruled.
- (ii) The only statutes to which amendment is made by the 1976 Act are those specified in the manner described in Section 25 thereof. 20
- (iii) Section 6 on its proper construction is concerned with changing status whenever issues arise under the general law (eg. with the doctrines of undue influence and satisfaction and ademption, and under the rules of private



Notice of Contention  
by First Respondent

international law) for the resolution of which the  
legitimacy of a child will be a determinative norm.

B.G. Turner

City Agent - Solicitor for the first  
Respondent

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL DIVISION

C.A. 89, 90, 91, 92, 93, 94 of 1981

E.C. 3474, 3454, 3457, 3458, 3455, 3456 of 1978

IN THE MATTER OF SECTION 3 OF THE TESTATORS FAMILY  
MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT

AND IN THE MATTER OF SECTION 5 OF THE CHILDREN (EQUALITY  
OF STATUS) ACT 1976

HELEN MARGARET HOGAN & ORS.

10

Appellants

BRIAN ROBERT HOGAN & ANOR.

Respondents

NOTICE OF CONTENTION BY 2ND RESPONDENT

Filed: October, 1981

TAKE NOTICE that the second respondent wishes to contend if it be necessary to do so that the decision of the Court below (the Honourable Mr. Justice McLelland) should be affirmed on grounds additional to those relied upon by His Honour, but it does not seek a discharge of variation of any part of the decision of His Honour.

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Upon the hearing of the appeal, the second respondent will wish to contend that the decision of His Honour could also be supported on the basis that section 6 of the Children (Equality of Status) Act 1976 on its proper construction did not amend section 3 of the Testators Family Maintenance and Guardianship of Infants Act 1916.

The grounds relied upon in support of this contention are:

Notice of Contention  
by Second Respondent

- (1) The decision in V. v. G. (1980) 2 N.S.W.L.R. 366 was in error and should be overruled.
- (2) The only statutes to which amendment is made by the 1976 Act are those specified in the manner described in section 25 thereof.
- (3) Section 6 on its proper construction is concerned with changing status whenever issues arise under the general law (as opposed to statutory law) for the resolution of which the legitimacy of the child will be determinative.

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B.L. Thompson

.....  
Solicitor for the Second  
Respondent

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES ) C.A. Nos. 89, 90, 91, 92, 93, 94  
 ) of 1981  
 ) E.D. Nos. 3474, 3454, 3457, 3458,  
COURT OF APPEAL ) 3455, 3456 of 1978

CORAM: STREET, C.J.  
GLASS, J.A.  
MAHONEY, J.A.

4th December, 1981.

HOGAN & ORS. v. HOGAN & ANOR

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JUDGMENT

STREET, C.J.: Bede Leo Hogan died on 30th April, 1977. Probate of his will was granted on 26th October, 1977. 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 (the second respondent). He described Mildred Frances Hogan in his will as "my wife" but in fact the parties were never married. He left no widow or legitimate children.

The testator was survived by eight exnuptial daughters (the present appellants), being the issue of an earlier relation- 20 ship which he had had with Marrie May Hogan. He and Marrie May Hogan were never married.

Proceedings were commenced in the Equity Division by the appellants seeking relief under the Testator's Family Maintenance Act. Mr. Justice McLelland, before whom these proceedings came, ordered, in each set of proceedings, that there be decided separately from any other question, the question:

"... whether the Court has power to make an order under s.3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 in respect of the estate of a testator who died prior to the commencement of Pt.II of the

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60. Reasons for Judgment of his Honour, Mr. Justice Street

Children (Equality of Status) Act, 1976, on the applica-  
tion of an illegitimate child of the testator."

Part II of the Children (Equality of Status) Act, 1976 commenc-  
ed on 1st July, 1977. It will be noted that this was a date  
after the death of the testator and, for whatever significance  
it might have, prior to the grant of probate.

Mr. Justice McLelland, having heard argument on this ques-  
tion, in due course gave judgment directing that it be recorded 10  
as a decision of the Court that the Court does not have such  
power. The applications of the daughters were ordered to be dis-  
missed. The present appeals are brought against those orders. In  
each appeal it is sought to reverse the answer made by the learned  
Judge to the question which was argued and to have recorded an  
answer affirming the power of the Court to make an order in the  
stated circumstances. It is sought by way of consequential re-  
lief that each application be remitted to the Equity Division  
for hearing on the merits.

The resolution of the dispute turns upon the ascertain- 20  
ment of the construction and operation of s. 6 of the Children  
(Equality of Status) Act, a statute I shall refer to as the  
Status Act. This section is to be construed against the back  
ground of the general law and in the context in which it  
appears in the Status Act. In order to undertake this task it  
is necessary to refer at some length to the Status Act.

The first portion of the title to the Act describes it as  
"An Act to remove legal disabilities of exnuptial children".  
It contains five Parts and two Schedules. The only presently  
relevant provisions are contained in s.5 of the "Preliminary", 30  
Reasons for Judgment of his  
61. Honour, Mr. Justice Street

Part I, and in Part II headed "Status of Children and Dispositions of Property".

Section 5 is of general application. Sub-section (1) provides that the Act shall apply wherever and whenever a person was born and regardless of his parents' domicile.

Part II contains four sections, the first of them having the marginal note "All children of equal status". The section reads:

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"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."

Section 7 bears the marginal note "Construction of instruments providing for dispositions of property". In its operative sub-sections s.7 provides: that in a disposition to which the section applies a reference to the child of any person shall, unless the contrary intention appears, be construed as including a reference to an exnuptial child (sub-s. (2)); that in construing a disposition to which the section applies the words "legitimate", "lawful", "married", "husband", "wife" etc. shall not amount to an expression of a contrary intention (sub-s. (3)); and that the rule of law avoiding dispositions in favour of exnuptial children as contrary to public policy is abolished (sub-s. (4)). Importance attaches to sub-s. (1) of s.7 stating the dispositions to which it applies. This sub-section is in the following terms:

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- "7. (1) This section applies to -
- (a) dispositions made inter vivos after the commencement of this Act; and
  - (b) dispositions made by will or codicil executed before or after the commencement of this Act by a person who dies after that commencement."

Section 8 bears the marginal note "Application of Act to certain dispositions". Sub-section (1) is in the following terms: 10

- "8. (1) Dispositions -
- (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."

Sub-section (2) provides that in a disposition referred to sub-s. (1) containing a special power of appointment, nothing in the Act will extend the class of persons in whose favour the power may be exercised. 20

Section 9 bears the marginal note "Rights of exnuptial children, with respect to estates of intestate relatives, and vice versa". Sub-section (1) of that section provides that "Without limiting section 6" an exnuptial child is in effect entitled on the intestacy of a relative to take such interest as he would have been entitled to take "if his parents had been married to each other when he was born". Sub-section (2) of s.9 provides that "Without limiting section 6" where an exnuptial child dies intestate his relatives shall be entitled to 30

such interest in his property as they would have been entitled to if his parents "had been married to each other when the child was born". Sub-section (3) of s. 9 provides that "Notwithstanding section 6", the intestacy entitlements enacted in sub-ss. (1) and (2) of s. 9 do not apply in the case of an adopted child. Importance attaches to sub-s. (4) of s. 9 which is in the following terms:

"9. (4) This section does not affect any rights under the intestacy of a person dying before the commencement of this Act." 10

Leaving aside, for the moment, canons of construction appropriate for remedial statutes and affecting retrospectivity in relation to accrued rights, the statutory scheme embodied within these sections is relatively clear. Section 6 is intended to have universal operation in scope and in time to legitimate exnuptial children, this being achieved by rendering it irrelevant to inquire whether the father and mother of any child are or have ever been married to each other. 20

"Section 6 is drawn in terms of principle and is, in my opinion, intended to be applied generally to legislation in which the relationship of a child with its father or mother falls to be determined and to alter the operation of that legislation accordingly. Having regard to the evident purpose of the Status Act, it should, in my opinion, be given a wide and beneficial operation."

(per Mahoney, J.A. in *Gorey v. Griffin*, 1978, 1 N.S.W.L.R. 739 at 753.)

This general or universal operation of s. 6. is expressly made subject to ss. 7 and 8. Sections 7 and 8 are complementary; together they mark the commencement of the Act as a cut-off point after which illegitimacy will have no effect in 30



construing dispositions identified in s. 7, and before which illegitimacy will have both relevance and substantive effect in construing dispositions identified in s. 8. Dispositions inter vivos made after or before the commencement of the Act fall respectively within s. 7 or s. 8. Testamentary dispositions made by persons dying after or before the commencement of the Act fall respectively within s. 7 or s. 8. The purpose of these two sections obviously is to avoid affecting the construction of instruments disposing of property which have come into effect prior to the commencement of the Act and to affirm the legitimating operation of s. 6 when construing dispositions of property becoming operative after the commencement of the Act. 10

Section 9 (1) and (2) are both expressed to be "Without limiting section 6". They make specific and entirely self-contained provisions equalising exnuptial and legitimate children in rights to take under intestacy and, conversely, in the determination of rights of relatives to share in the intestate distribution of the estates of such children. The relevant criterion for the operation of these two sub-sections is the date of death of the intestate (sub-s. (4)). Those deriving rights in an intestacy from a death before the commencement of the Act are not to have their rights affected by it. If the right of an exnuptial child to claim under the Testator's Family Maintenance Act derives from s. 6, then that right will not be limited by s. 9. If that right derives from s. 9, then claims by exnuptial children in intestate estates are valid only where 20

the intestate dies after the commencement of the Act. I am not confident that s. 9, rather than s. 6, is the relevant source of validity for Testator's Family Maintenance Act claims in intestate estates, and I refrain from indicating any view or drawing any guidance from this aspect.

I leave out of account s. 9(3). This is a special provision the formulation of which to my mind does not cast any light upon the legislative scheme incorporated in the other provisions 10 of Part II.

It can be seen from the foregoing analysis that the scheme in ss. 6 to 9 inclusive falls into two parts. Section 6 has a universality which the next two sections qualify in respect of dispositions of property by confining it to instruments becoming operative after the commencement of the Act. Section 9 is an original provision, standing on an equal footing with s. 6, operating to remove the effect of illegitimacy for such aspects of intestacy as are specifically canvassed in sub-ss. (1) and (2) of s. 9; it applies only to intestacies arising 20 after the commencement of the Act.

The broad policy enacted in Part II is to negate all distinctions between legitimate and exnuptial children. This is achieved by rendering it irrelevant for all purposes to investigate whether the parents of a child were married whenever a question arises regarding the relationship of a child with its parents. There is a special exception to this broad policy, namely, that dispositions inter vivos, testamentary dispositions

and rights under intestacies that have come into effect or existence prior to the commencement of the Act are to be construed and ascertained as if the Act had not been passed.

Within this statutory scheme the Court is now called upon to decide the place of a claim under the Testator's Family Maintenance Act by an exnuptial child whose parent died prior to the commencement of the Act.

It is established that, prior to the Status Act, an ex- 10  
nuptial child did not have the status to seek relief under the Testator's Family Maintenance Act (Re Turnbull 1975, 2 N.S.W.L.R. 360). It is equally plain that since the commencement of the Status Act s. 6 has the effect of conferring the requisite status upon an exnuptial child (V. v. G., 1980, 2 N.S.W.L.R. 366).

The effect of s. 44 of the Wills, Probate and Administra-  
tion Act is to affirm that upon the grant of probate or admini-  
stration, the estate vests in the executor or administrator as  
from the death of the testator or the intestate. As law 20  
students are taught - the will speaks from the date of death.  
Rights to succession, whether testamentary or intestate, whilst  
dependent for their effectuation upon a grant of probate or  
administration, derive from and are determined in substantive  
character as at the date of death.

The Testator's Family Maintenance Act confers upon the Court jurisdiction, where a case is made out under s. 3, to order that provision be made out of the estate for the

maintenance, education and advancement of the wife, husband or children. The jurisdiction extends to intestacies (s.3 (1A)). The order has substantive effect as a testamentary instrument and it, too, speaks as from the date of death. Section 4 (1) confirms this, namely:

"4. (1) Every provision made under this Act shall, subject to this Act, operate and take effect as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death." 10

It is well established that for the purposes of applying the Testator's Family Maintenance Act the family and personal situation existing at the date of death is that which is of significance.

"The ultimate question must remain one of adequate provision for proper maintenance and support as at the date of the testator's death."

(per Dixon, C.J. in *Coates v. National Trustees Executors and Agency Company Limited and Another*, 95 C.L.R. 494 at 508). 20

"... the material date in determining whether a dependant was left without adequate provision is the date of the testator's death"

(*Dun v. Dun*, 1959 A.C. 272 at 292).

This, then, sets the context in which the present question must be answered.

It has been contended on behalf of the appellants that the Status Act is a remedial statute and that it should be construed liberally and beneficially. "For the purpose of giving effect to the manifest intention of Parliament in a remedial statute, even the literalism of the Act may be departed from." 30

(per Isaacs, J. in *George Hudson Limited v. The Australian Timber Workers' Union*, 32 C.L.R. 413 at 436, 437).

Clearly enough Part II of the Status Act is a remedial enactment. Whilst I recognise the canon of construction which frees a court from literalism when construing a remedial statute, this does not authorise a court to push the meaning of a remedial statute beyond its literal interpretation where it can be seen that the extended meaning does not accord with the manifest intention of the legislature. The court's authority to extend the meaning and application of a remedial statute beyond the strict literalism of the words in which the remedial purpose is enacted does not permit a court to extend the remedial purpose itself. In the present case an intended limitation on the remedial purpose comes through clearly: the general equalisation of legitimate and exnuptial children is not to affect testate or intestate succession where the relevant death occurred before the commencement of the Act. Nor is it to affect dispositions made inter vivos before the commencement of the Act (s.8(1)(a)) or adopted children (s.9(3)); but those provisions are not presently relevant. 10 20

In conformity with this manifest intention a claim under the Testator's Family Maintenance Act is not to be regarded as available to an exnuptial child of a parent dying before the commencement of the Act. I am content to decide the fate of this appeal upon the foregoing approach. There is a further specific consideration which is confirmatory of that conclusion.

Section 8(1)(a), to which s. 6 is expressly subject, provides that dispositions of persons dying before the commencement of the Act shall be construed as if the Act had not been passed. It is argued that upon death of the present testator, his named beneficiary acquired a vested right in his estate. This right is, pending grant of probate, at least "a transmissible interest in the estate, notwithstanding that it remains unadministered". (See re Leigh's Will Trusts, 1970 1 Ch. 277 at 282 - cf. Wills, Probate and Administration Act, s.29). It is argued that the Status Act, which commenced subsequently, should not be construed so as to affect that vested right. 10

"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 that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events: ..... 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." 20

(per Kitto, J., Ogden Industries Pty. Limited v. Lucas, 116 C.L.R. 537 at 564).

In answer to this contention, the appellants contend that the relevant date to which reference must be made in recognising the operation of the disposition and in recognising the coming into existence of property rights cognisable within the principle of non-interference is the date of the grant of probate. This date was after the commencement of the Act. 30

In the development of these matters the Court has been assisted with comprehensively researched and closely reasoned

arguments. Without wishing to appear lacking in appreciation of the depth of the research and the quality of these arguments, it is sufficient to note three salient factors which, taken together, provide positive and unequivocal guidance: the will speaks from death; the Testator's Family Maintenance Act jurisdiction is exercised and orders made thereunder operate with the date of death being the pivotal point; and the Status Act is not to affect the construction of testamentary dispositions when 10 the testator died before the commencement of the Act. Whatever may be the precise characterisation of the rights of the beneficiary under will (whether they be of a conventional proprietary character, whether they be of a purely contingent, inchoate nature, or whether they be no more than mere expectancies) those rights are, where the testator died before the commencement of the Act, to be construed and given effect as if the Act had not been passed. I would hesitate long before recognising s.6 as having the effect of bringing into existence a new statutory claim impinging on those rights. 20

For the reasons I have earlier stated, I agree with the conclusion reached by Mr. Justice McLelland and with the orders that he made. I would propose that the appeals be dismissed. Assisted by the very fair approach taken at the Bar table I would propose that the orders for costs made in the Equity Division should stand unaffected, that the costs of the appellants and of the second respondent be paid out of the estate

Reasons for Judgment of his  
Honour, Mr. Justice Street

of the testator and that the costs of the first respondent be  
paid out of the estate of the testator on the trustee basis.

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I certify that this and the 12 preceding pages are a  
true copy of the reasons for judgment herein of His  
Honour The Chief Justice of New South Wales.

Barbara Hawke  
Associate

Dated

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<u>IN THE SUPREME COURT</u>	)	C.A.	89	of	1981
	)	C.A.	90	of	1981
<u>OF NEW SOUTH WALES</u>	)	C.A.	91	of	1981
	)	C.A.	92	of	1981
<u>COURT OF APPEAL</u>	)	C.A.	93	of	1981
		C.A.	94	of	1981

E.D. 3474 of 1978  
E.D. 3454 of 1978  
E.D. 3457 of 1978  
E.D. 3458 of 1978  
E.D. 3455 of 1978  
E.D. 3456 of 1978

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CORAM: STREET, C.J.  
GLASS, J.A.  
MAHONEY, J.A.

4th December, 1981.

HOGAN & ORS. v. HOGAN & ANOR.

JUDGMENT

GLASS, J.A.: Prior to his death on 30th April, 1977 Bede Leo Hogan (the testator) fathered eight daughters. But he was never married to their mother. Probate of his will was granted to the executor on 26th October, 1977. Between those two dates viz. on 1st July, 1977 the Children (Equality of Status) Act 1976 (the Act) commenced. The principle of that statute, broadly speaking, was to abolish all legal disqualifications attaching to the status of ex nuptial children. Applications have been brought by each daughter under s. 3 of the Testator's Family Maintenance and Guardianship of Infants Act 1916 (the T.F.M. Act) by which they seek orders providing for their maintenance etc. out of the deceased estate. The defendants to each summons were the executor and the beneficiary under the Will. The T.F.M. Act confers the right to apply on children which, until 1st July, 1977, meant lawful children only but

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73. Reasons for Judgment of his Honour, Mr. Justice Glass

since then includes ex nuptial children as well. The defendants question the competence of the eight applications relying upon death before the commencement of the Act. The plaintiffs defend competence relying inter alia upon the grant of probate after its commencement. The trial judge (McLelland J.) ruled in favour of the defendants.

The relevant provisions of the Act are as follows:

"PART II.

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STATUS OF CHILDREN AND DISPOSITIONS OF PROPERTY.

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. 20
7. (1) This section applies to -
  - (a) dispositions made inter vivos after the commencement of this Act; and
  - (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) ...
- (3) ... 30
- (4) ...
8. (1) Dispositions
  - (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) ...
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. 10
- (2) ...
- (3) ...
- (4) This section does not affect any rights under the intestacy of a person dying before the commencement of this Act."

The statutory material should be augmented with the following information. By judicial construction, s. 3 of the T.F.M. Act hinges the Court's jurisdiction to make an order upon the circumstances which existed at the date of death, Coates v. National Trustees, Executors & Agency Co. Ltd. (1956) 95 C.L.R. 494. Section 4 of the T.F.M. Act by its terms provides that every provision made by the Court under the Act shall take effect as if made by codicil immediately before the date of death. The Wills, Probate and Administration Act 1898 provides that pending a grant of probate the estate vests in the Public Trustee (s.61); the executor's title when derived from the grant relates back to the death (s.44). 20 30

The Court is obliged to choose between two constructions of the words in s. 6 "whenever the relationship of a child with his father ... falls to be determined". The executor contends

that it operates only with respect to the death of testators occurring after its commencement. The applicant daughters submit that it means that whenever at any time, past or future, a relationship of father and child is shown to have existed, it shall be recognised in future legal proceedings without regard to the existence or non-existence of any nuptial relationship between the father and mother of that child. If s. 6 stood alone its language would favour such a construction, particularly since s. 5 provides that the Act applies in respect of a person whether born before or after its commencement.

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But the section must be construed in the context of the other provisions in the Act and in the light of a presumption that legislation is prima facie to be construed "as not affecting rights or liabilities which the law had defined by reference to past events" Maxwell v. Murphy (1957) 96 C.L.R. 261 at 267 or "as not attaching new legal consequences to facts or events which occurred before its commencement" Ogden Industries Pty. Ltd. v. Lucas (1967) 116 C.L.R. 537 at 564.

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For the applicants it was argued that the rights of the beneficiary before grant were too inchoate and contingent to attract this principle of construction. There is a difference of judicial opinion as to how these rights should be described. But in my view it is immaterial whether the beneficiary had at the date of death merely an interest in having the estate properly administered Commissioner of Stamp Duties v. Livingston (1965) A.C. 694, or a mere right to apply for probate in the

event of default by the executor, s.75(1) Wills, Probate and Administration Act, or a proprietary interest in the nature of a chose in action, In re Leigh's Will Trusts (1970) Ch. 277. She 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. That right was coupled with an immunity from disturbance by any T.F.M. application as the law then stood. That right and that immunity, 10 whatever their precise legal classification, were such in my view as to attract the Maxwell v. Murphy principle of construction. Further, the presumption against the displacement of those rights by subsequent legislation is fortified by other provisions in the Act. When the remedial legislation stipulates that it does not affect settlements made before its commencement (ss. 7 and 8), the wills of persons who died before its commencement (Ibid) or the intestate estates of persons dying before its commencement (s.9), it discloses 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 testate or intestate before its commencement. The implicit denial of T.F.M. rights to ex nuptial children where death precedes the commencement of the Act marches with the express denial of cognate rights where death or settlement antedates the commencement. It is also enhanced by the statutory context of the T.F.M. Act which ordains that the benefits it confers are linked to the date of death.

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Reasons for Judgment of his  
Honour, Mr. Justice Glass

For these reasons I am satisfied that the trial judge was right and that the appeals should be dismissed with costs. I agree with the costs orders proposed by the Chief Justice.

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I Certify that this and the 5 preceding pages are a true copy of the reasons for judgment herein of The Honourable Mr. Justice Glass.

Margaret G. Newby  
Associate

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Date

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL

) C.A. 89, 90, 91, 92, 93, 94  
) of 1981  
) E.D. 3474, 3454, 3457, 3458,  
) 3455, 3456 of 1978  
)

CORAM: STREET, C.J.  
GLASS, J.A.  
MAHONEY, J.A.

4th December, 1981.

HOGAN & ORS. v. HOGAN & ANOR.

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JUDGMENT

MAHONEY, J.A.: The facts relevant to this appeal may be stated shortly as follows. On 1st March, 1946, Bede Leo Hogan (the testator) made what, in the event, was his last will. He appointed the first defendant as executor and left the whole of his estate to the second defendant. He died on 30th April, 1977. The Children (Equality of Status) Act, 1976 ("the Act") relevantly commenced on 1st July, 1977. (It had been assented to on 17th December, 1976). In 1978, applications were made under the Testators Family Maintenance and Guardianship of Infants Act, 1916 (as amended) ("the T.F.M. Act") by eight ex-nuptial children of the testator. On 26th February, 1981, McLelland, J. held that the applicants were not entitled to bring applications under the T.F.M. Act, and subsequently their applications were dismissed. They have now appealed to this Court against his Honour's orders.

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Had the Act not been enacted, it is accepted that the applicants could not have made applications under the T.F.M. Act. It is also accepted, in my opinion correctly, that the effect of the Act is to enable ex-nuptial children to make

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applications under the T.F.M. Act: the respondents have accepted that the reasoning of the High Court in Douglas v. Longano, 55 A.L.J.R. 352, a decision upon the equivalent Victorian legislation, is applicable in this State. But the respondents submitted, and his Honour held, that the Act does not authorise such applications where the testator died prior to the commencement of the Act. The question to be determined on this appeal is whether that is correct.

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The question turns upon the ambit of operation of Part II of the Act and in particular, s. 6. The Part deals with the Status of Children and Disposition of Property. The terms of it have already been referred to and I do not repeat them.

The case for the applicants was, in substance, that when they made their applications, s. 6 came into operation in their favour. S.3 of the T.F.M. Act (as far as is here relevant) provides:

"S.3(1). If any person (hereinafter called "the testator") dying, or having died since 7th October, 1915, 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 ... on application by or on behalf of such wife husband or children or any of them" make provision accordingly.

It is, as I have said, accepted that, prior to the Act, "children" in s. 3(1) was, in accordance with the established principle of construction, limited to lawful children, i.e., children born in wedlock. The argument suggested that, when their applications came to be considered, there fell to be



determined whether their relationship to the testator was that of "children" and that that determination was, by force of s.6, now to be made irrespective of whether the testator had been married to their mother. If that be so, they would be "children" for the purposes of s. 3 (1) and therefore entitled to make their applications.

There is, in my opinion, substantial force in the case of the applicants to this point. Where the jurisdiction of a court depends on whether the relationship of the natural parent to his child is nuptial or ex-nuptial, that relationship "falls to be determined" within s. 6 when that jurisdiction is invoked: see *Gorey v. Griffin* (1978) 1 N.S.W.L.R. 739 at p. 753E. 10

I do not think that, if it stood alone, the operation of s.6 would be limited to the nature of the relationship between parent and child only at times after the commencement of the Act. A question may arise as to what, at any point of time, whether before or after the commencement of the Act, was the nature of that relationship. In my opinion, the section has operation in each of such cases: it was intended to have a wide and beneficial operation. Thus, if after the commencement of the Act, it was necessary to determine what was the relationship of a father and child at a point in time prior to that commencement, the section would prima facie have operation. 20

This view of the operation of s. 6 is, in my opinion, supported by the stated purpose of the Act, viz., "to remove legal disabilities from ex-nuptial children". The disabilities

of such a child under the previous law would normally arise because, at a particular point in time, his status was such, and that point in time might be either before or after the date of the commencement of the Act. I do not think that the purpose of the Act is limited to the removal of only those disabilities which arise from the fact that such a child would have been seen to be ex-nuptial at a point after the commencement of the Act: I think that purpose includes the removal of such liabilities as would arise from his having been, at any point in time, ex-nuptial. I think that the purpose of the Act was, subject to the relevant exceptions, to remove completely from the law of New South Wales the status of illegitimacy.

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There is further support for this view in the terms of the sections in Part II. S.6 is general in its terms. It does not refer to the state of the relationship between a parent and a child at a particular point in time: it applies "whenever" that relationship falls to be determined. I do not think that there should be read into the section words limiting the "relationships" which may fall to be determined to those existing after the commencement of the Act.

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This is supported by the words "subject to ss. 7 and 8 in s. 6, and by the fact that it was seen necessary to make the provisions contained in ss. 7, 8 and 9. Thus, s. 7 provides that a reference to a child of a person shall be construed as including a reference to an ex-nuptial child of that person; but it limits its effect to dispositions which, in effect,

operate after the commencement of the Act. The inference is that s. 6 was made "subject to" s. 7, because, were it not made subject to that section, s. 6 would be wide enough in its operation to have effect upon references to the child of a person in dispositions made before the commencement of the Act. The intention of the legislature was that that should not be so, hence the limitation at the commencement of s. 6 and the express provision in that regard in s. 7. The relationship between ss. 6 and 8 is similar.

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The relationship between s. 6 and s. 9 is expressed in a different way but, in my opinion, s. 9 also reflects the recognition by the draftsman of what otherwise would be the width of the operation of s. 6. It is the intention of the Act that the change made by s. 9 to the law relating to those who may take on an intestacy is not to apply to persons dying before the commencement of the Act: that intention appears from the terms of s. 9. S.6 was seen as prima facie having application in respect of such intestacies. It was therefore necessary to refer to s. 6 in s. 9. The words chosen for this purpose, "without limiting s. 6" might perhaps have been expanded. They were, I think, intended to have effect as if they were words such as "without limiting what otherwise is the effect of s. 6, this section makes provision in respect of intestacy as follows ...". But the point of significance for present purposes is that the draftsman recognised that s. 6, standing alone, would have the general operation to which I have referred.

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The respondents have advanced two main arguments to avoid the general effect of s. 6. Mr. Gummow, for the executor, submitted, in effect, that whatever the generality of s. 6, it does not operate upon s. 3(1) of the T.F.M. Act. His submission turns upon the terms of s.3(1) and the established principle that "the jurisdiction" of the Court under the T.F.M. Act is to be determined at the date of death of the testator. He submits 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 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 applicants 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.

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I do not feel able to accept this argument. I think that it gives less than full effect to the generality of s.6 of the Act. As I have said, s. 6, in my opinion, 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.

The second argument advanced by Mr. Gummow invoked the

principle of accrued rights. It was submitted that, in the absence of a contrary intention, an Act is to be interpreted so as, to put the matter broadly, not to interfere with accrued rights: that if s. 6 is construed as the applicants submit, it interferes with accrued rights: and that therefore its operation should be restricted accordingly.

The existence of the principle is not in issue. The relevant authorities are discussed in many cases: see, for example, *Ogden Industries Pty. Ltd. v. Lucas*, 116 C.L.R. 537; (1970) A.C. 113. I do not feel it necessary to determine whether the present is a case in which an enactment is repealed, in whole or in part, and whether therefore the matter falls to be determined according to s. 8 of the Interpretation Act, 1897. The matter may, I think, be determined according to the general law. However, it was not suggested that, in the present context, the principles to be applied would be relevantly different.

The general rule of the common law is that a statute changing the law ought not, unless the contrary intention appears with reasonable certainty, to be understood to apply to factual events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law has defined by reference to the past events: *Maxwell v. Murphy*, 96 C.L.R. 261 at p. 267; *Ogden Industries Pty. Ltd. v. Lucas*, 116 C.L.R. 537 at pp. 556-7, 564. (I do not think that what was said by the Privy Council in the *Ogden* case: (1970)

A.C. at pp. 128-9; qualifies the statement of the principle by Kitto J. at p. 564). What, for this purpose, constitutes accrued rights or liabilities has been considered in many cases. I referred to some of these in *Walton v. Baffsky* (1975) 2 N.S.W.L.R. 572 at p. 577.

That which the sole beneficiary under the testator's will had at the date of his death was, in my opinion, a "right" within the sense of the common law principles. The effect of the death of the testator was that the beneficiary became entitled to such rights as a sole beneficiary under such a will would have; and those rights were subject to the possibility of variation only upon the application of (as it was in the present case) such lawful children as the testator might have left. (In the event, there were none). There has been considerable argument upon this appeal as to the nature of the rights accruing on death to a sole beneficiary. I do not think that, for present purposes, it is necessary to examine the cases which had been assiduously collected by Mr. Parker, Q.C., and the submissions made by him in relation to them. Whatever the nature of those rights be, they accrued at that point and were subject to variation only to the extent then provided by the T.F.M. Act. 10 20

If s. 6 of the Act is to be read as the appellants have submitted, the effect would be to make the rights of the sole beneficiary become subject to the possibility of variation from the date of the commencement of the Act, upon the application

of any ex-nuptial child of the testator. To subject those rights to the possibility of variation in this way would be to "affect" them within the common law principles. The question to be determined is, therefore, whether there appears from the Act the intention that they should be so affected.

I do not think that that intention appears. Insofar as an intention appears, it is, in my opinion, that existing rights of a proprietary nature should not be interfered with. The provisions of ss. 7, 8 and 9 indicate this. I appreciate that these sections may be seen as indicating merely that the effect of s. 6 upon existing rights is to be limited only to the precise extent of the operation of those sections. However, I do not think that that is to be the inference as to the legislative intention which is to be drawn from the sections. I think the intention is to be seen to be wider. But, however this be, I do not think that, within the common law rule, there is to be seen from the Act an intention that the Act should affect existing rights.

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In view of the conclusions to which I have come, it is not necessary to consider the arguments of the respondents based upon s. 3(1A) of the T.F.M. Act.

In taking this view of the effect of s. 6 upon the T.F.M. Act, I do not mean to indicate that the scope and operation of s. 6 is less than that to which I have referred. As I have said, I take that section to be directed to the abolition, in general, of the status of illegitimacy, both in the past and

Reasons for Judgment of his  
Honour, Mr. Justice Mahoney

for the future; I see its purpose to be the removal of the disabilities of that status accordingly. The fact that, in accordance with the established common law principles, it does not affect existing rights is not inconsistent with that intention.

I agree with the orders which have been proposed.

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I hereby certify that this and the preceding 9 pages are a true copy of the reasons for judgment herein of His Honour Mr. Justice Mahoney.

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B.N. Levy  
Associate

Date:



IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
COURT OF APPEAL DIVISION

) C.A. 89 of 1981  
) E.D. 3474 of 1978  
)  
) C.A. 90 of 1981  
) E.D. 3454 of 1978  
)  
) C.A. 91 of 1981  
) E.D. 3457 of 1978  
  
C.A. 92 of 1981  
E.D. 3458 of 1978  
  
C.A. 93 of 1981  
E.D. 3455 of 1978  
  
C.A. 94 of 1981  
E.D. 3456 of 1978

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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

HELEN MARGARET HOGAN, ELIZABETH DOROTHY HOGAN, HEATHER MARY HOGAN  
by their Tutor MARRIE MAY HOGAN, 20  
MARJORY JEAN FELILA, BARBARA ANN HOGAN, JANICE MARIE HOGAN, (DOWNES)  
LYNETTE SHARON HARRIS,  
PAMELA MAY HOGAN

Appellants (Plaintiffs)

BRIAN ROBERT HOGAN

1st Respondent (1st Defendant)

MILDRED FRANCES GREEN

2nd Respondent (2nd Defendant)

ORDER

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THE COURT ORDERS THAT:-

1. The Appeals be dismissed.
2. The orders for costs made in the Equity Division on 26 February, 1982 stand.
3. The costs of the Appellants and of the Second Respondent be paid out of the estate of the testator.

Minute of Order of  
89. Court of Appeal

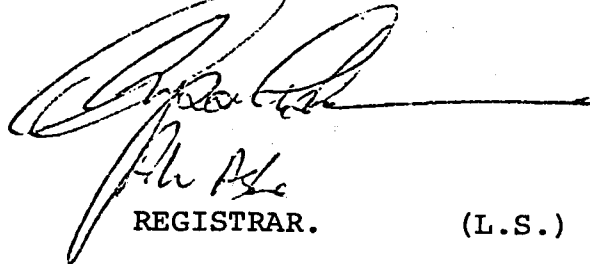
Minute of Order of  
Court of Appeal

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

ORDERED: 4 December, 1981

ENTERED: 11 June, 1982.

BY THE COURT



REGISTRAR. (L.S.)

IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
COURT OF APPEAL DIVISION

) C.A. 89 of 1981  
) E.D. 3474 of 1978  
)  
) C.A. 90 of 1981  
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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

HELEN MARGARET HOGAN, ELIZABETH DOROTHY HOGAN, HEATHER MARY HOGAN  
by their Tutor MARRIE MAY HOGAN 20  
MARJORY JEAN FELILA, BARBARA ANN HOGAN, JANICE MARIE HOGAN (DOWNES), LYNETTE SHARON HARRIS, PAMELA MAY HOGAN

Appellants (Plaintiffs)

BRIAN ROBERT HOGAN

1st Respondent (1st Defendant)

MILDRED FRANCES GREEN

2nd Respondent (2nd Defendant)

ORDER

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THE COURT ORDERS THAT:-

1. Leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal delivered on 4 December, 1981 be granted to the Appellants/Plaintiffs herein.

2. Direct the Appeals be consolidated.

Order granting Conditional  
91. Leave to Appeal

Order granting Conditional  
Leave to Appeal

3. The leave referred to in paragraph 1 hereof is conditional upon:-

(a) The Appellants within three months from the date hereof giving security to the satisfaction of the Prothonotary in the amount of \$1,000 for the due prosecution of the consolidated appeal and the payment of such costs as may become payable to other parties in the event of the Plaintiffs not obtaining an order granting them final leave to appeal from the said declaration and orders or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellants to pay the costs of other parties of the said appeal as the case may be.

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(b) The Appellants within fourteen days from the date of this Order depositing with the Registrar the sum of \$50.00 as security for and towards the costs of the preparation of the transcript record for the purposes of the said appeal.

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(c) The Appellants within three months from the date of these Orders taking out and preceding upon all such appointments and taking all other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Registrar to certify that the said index has been settled and that the conditions herein before referred to have been duly performed, and

Order granting Conditional  
Leave to Appeal

(d) The Appellants obtaining a final order of this Court granting them leave to appear as aforesaid.

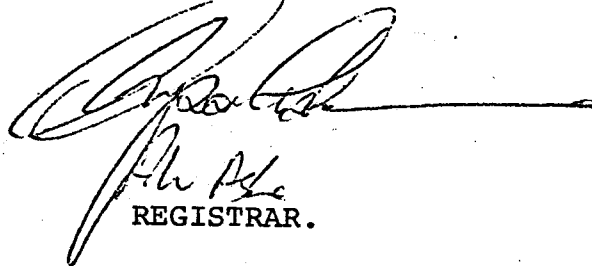
4.        The costs of the parties of this order and of the preparation of the said transcript record and of all other proceedings hereunder and of the said final order to follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or do abide the result of the said appeal in case the same shall stand or be dismissed for non-  
prosecution or be deemed so to be, subject however to any orders that may be made by this Court up to and including the final orders or under any of the rules regarding appeals from this Court to Her Majesty in Council. 10

5.        The costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party to this Appeal be taxed and paid to the party to whom the same shall be payable.

ORDERED: 15 March, 1982

ENTERED: 11 June, 1982.

BY THE COURT



REGISTRAR.

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IN THE SUPREME COURT  
OF NEW SOUTH WALES  
SYDNEY REGISTRY  
COURT OF APPEAL

) C.A. 89 of 1981  
) E.D. 3474 of 1978  
) C.A. 90 of 1981  
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C.A. 92 of 1981  
E.D. 3458 of 1978  
C.A. 93 of 1981  
E.D. 3455 of 1978  
C.A. 94 of 1981  
E.D. 3456 of 1978

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IN THE MATTER SECTION 3 Testators Family Maintenance  
& Guardianship of Infants Act

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

HELEN MARGARET HOGAN, ELIZABETH  
DOROTHY HOGAN, HEATHER MARY HOGAN  
by their Tutor MARRIE MAY HOGAN,  
MARJORY JEAN FELILA, BARBARA ANN 20  
HOGAN, JANICE MARIE HOGAN (DOWNES),  
LYNETTE SHARON HARRIS,  
PAMELA MAY HOGAN

Appellants (Plaintiffs)

BRIAN ROBERT HOGAN

1st Respondent (1st Defendant)

MILDRED FRANCES GREEN

2nd Respondent (2nd Defendant)

ORDER

THE COURT ORDERS THAT:-

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1. Final leave to appeal to Her Majesty in Council from the  
Judgments of Their Honours Chief Justice Mr. Justice Street,  
Mr. Justice Glass and Mr. Justice Mahoney given and made herein  
on 4th December, 1981 be granted to the Appellants.

2. Upon payment by the Appellants of the costs of the pre-  
paration of the transcript record for the purposes of the said

94. Order granting Final Leave  
to Appeal

Order granting Final Leave  
to Appeal

appeal and despatch thereof to England the sum of \$50-00  
deposited in Court by the Appellants as security for and  
towards such costs be paid out of Court to the Appellants herein.

ORDERED: 28 June, 1982

ENTERED: 17 November, 1982.

BY THE COURT

(SGD.) G.J. BERECRY (L.S.)

Acting Registrar.

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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 and HEATHER MARY  
HOGAN by their Tutor MARRIE MAY  
HOGAN

MARJORY JEAN FELILA

BARBARA ANN HOGAN

JANICE MARIE HOGAN (DOWNES)

10

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

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CERTIFICATE OF THE REGISTRAR OF THE COURT OF APPEAL  
OF THE SUPREME COURT OF NEW SOUTH WALES  
VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I, GRAHAME JAMES BERECRY, Acting Registrar of the Court of  
Appeal of the Supreme Court of New South Wales.

DO HEREBY CERTIFY as follows:-

That this transcript record contains a true copy of all such  
Orders, Judgments and documents as have relation to the matter  
of this Appeal and a copy of the reasons for the respective

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Certificate Verifying  
Record

Judgments pronounced in the course of the proceedings out of which the Appeal arose.

That the Respondents herein have received notice of the Order of Her Majesty in Council AND have also received notice of the dispatch of this transcript record to the Registrar of the Privy Council.

DATED at Sydney in the State of New South Wales this 17th day of November One thousand nine hundred and eighty-two.  
(L.S.)

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G.J. Berecry (L.S.)  
Acting Registrar of the Court  
of Appeal of the Supreme Court  
of New South Wales