FORGIVENESS OF DEBT BY WILL: A *BONE* OF CONTENTION

A paper delivered to the STEP Australia National Conference by Judge Bernard Porter QC

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1. A parent is owed a debt by a child. The parent makes a will which says "I release the debt". The parent dies. How is the debt to be dealt with in the administration of the estate?

2. The prevailing view is that the release takes effect as a specific legacy and is to be characterised as such for estate administration purposes. This is the position in two of the leading texts.[1] The principle has been stated as follows (footnotes omitted):[2]

> **Forgiveness of debt**
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> The forgiveness of a debt due to the testator from a particular person is a form of, and has characteristics of, a specific legacy. It is, indeed, subject to the rules which affect all legacies...The debt is not discharged until the executor has assented to the release.

3. The most frequently cited case in support of that charaterisation of a release by will is *In Re Wedmore* [1907] 2 Ch 277. The approach in that case was apparently confirmed by the Privy Council in *Commissioner of Stamp Duties v Bone* (1976) 135 CLR 223.

4. It is arguable, however, that those cases are no longer authoritative in Australia and that the characterisation of a release of debt by will as a specific legacy does not represent the law in Australia.

5. That argument arises from a consideration of the circumstances of the *Bone* litigation in the mid-1970s. In *Bone v Commission of Stamp Duties for NSW* (1974) 132 CLR 38, the High Court decided a release by will was not a specific legacy (as had been previously thought) but an equitable release which took effect on death, subject only to creditors' claims. That case went on appeal to the Privy Council. The Privy Council overturned the High Court's decision and reinstated the prevailing *Wedmore* approach (more or less). That litigation throws up the following questions:

   (a) **First**, given the final excision of the Privy Council from the appeal hierarchy of State courts by the Australia Acts[3], which *Bone* decision represents the law in Australia in 2019, the Privy Council decision or the High Court decision? This question raises squarely the status as binding precedents today of Privy Council decisions which are inconsistent with High Court decisions given prior to 1986.

   (b) **Second**, was that question of precedent authoritatively determined by the NSW Court of Appeal in 2015?

   (c) **Third**, which judgment has preferable reasoning; and

   (d) **Fourth**, if the High Court approach was adopted, what might that mean for estate administration?

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[1] A A Preece, *Lee's Manual of Queensland Succession Law* (8th ed, 2019, Thomson Reuters) at [10.100] and A Learmonth, C Ford, J Clark and J R Martyn, *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (21st ed of *Williams on Executors*, 9th ed of *Mortimer on Probate*, 2018, Thomson Reuters) at 76-06.

[2] *Williams, Mortimer and Sunnucks* at 76-06.

[3] *Australia Act 1986* (UK) and *Australia Act 1986* (Cth).

Before the *Bone* litigation

6. *In Re Wedmore* dealt with the question of whether the forgiveness of certain debts due from the testator's sons to the testator abated along with other general legacies where there was insufficient funds in the estate to meet all legacies in full. Kekewich J found that the true character of the forgiveness of debt was not a general legacy at all. It was a specific legacy. His reasoning is pithy. He observed (at 283-284):

> To my mind it is purely a question of construction as to what is the meaning of the words "I forgive my child all debts and sums of money due from him on my death, and not secured by bond, bill, note, or other security." … I cannot see myself any substantial difference between what I have just read and "giving" the debt due from another, merely because the former is in the nature of a surrender or release. It really is a gift to the child of what he owes, so that he would not be bound to pay the debt to the executors of the testator. If the testator gives to one of his children, or even to a stranger, that which is due from someone else, that would be specific, and must be set apart and appropriated. Supposing that, instead of giving it to his son or to a stranger, he forgives the debt which is due from a son, is there any difference? It seems to me that in substance there is none. These legacies must therefore be declared to be specific, and not liable to abatement.
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> [Underlining added]

7. It can be seen that Kekewich J did not characterise a forgiveness of debt as a specific legacy of money. Rather he characterised it as a gift to the debtor of the chose in action represented by the debt. However, it is a short step from this to saying that the forgiveness is a gift of money in the amount of the debt. Other authorities seem to have taken this step.

8. *Attorney-General v Holbrook* (1829) 3 Y. & J. 114 [148 ER 1115] involved legacy duty under the then current English statute. The deceased had forgiven by his will the liability of his brother on a bond given as payment for transfer of a brew house. The Court held that legacy duty was payable because the forgiveness of the bond was a bequest of so much money to the debtor. Baron Graham said (at 1118):

> It is said this is not within the purview of this act of Parliament, because it is not a legacy. What was this debt? It was so much money in the hands of the testator which they were bound to pay him; it is as much as to say, I give you the amount of that debt, my money, in the hands of you the persons who have entered into that obligation to me; and therefore I can form no doubt at all that the remission of a debt that is due to the testator, is to all intents and purposes a bequest of so much money to the party, and must be so considered; the words of the different acts of Parliament are large enough to comprehend the case of the forgiveness of a debt.

9. *Wedmore* and *Holbrook* and other cases dealing with releases by will in different contexts were considered by the High Court in *Bone*. Like *Holbrook*, *Bone* was a death duties case. It concerned the question of whether the "dutiable estate" of a testator for the purpose of calculation of NSW death duties included the value of debts forgiven in the testator's will. The testator (by her will) forgave all sums which any of her children owed her. She also made each child an executor and trustee of her estate. The dutiable estate of the testator was calculated on the property of the testator "to which any person becomes entitled under the will" or any property "disposed of" by the will.

10. The case concerned two questions: first, whether the effect of appointing a debtor as executor was to release the debt by operation of law; and second, what was the true effect of a release by will, assuming that the debt had not been extinguished as a consequence of the appointment of the children as executors.

11. The High Court answered the first question in the negative and the Privy Council agreed. That question need not be further considered in this paper.

12. As to the second question, the High Court unanimously determined that the amount of the debts due from the children did not form part of the dutiable estate because upon her death, the forgiveness in the will operated in equity immediately to release the debts. The debtors did not become entitled to any property under the will nor was property disposed of by the will. The leading judgments were given by Stephen and Mason JJ, reasoning along similar lines.

13. Stephen J stated the proposition as follows (at 47):

> The appellants'… submission is that by… the will the executors' debts were extinguished at the moment of death; thereafter they were incapable of constituting property of the deceased and no person could become entitled to them under the will. This submission has the merit of giving to these clauses an effect which accords precisely with their ordinary meaning; each expressly forgives and releases unto the particular child all sums... There is no question of any gift of the debt itself being made but only of its forgiveness; claims are relinquished, not transferred. Only if faced with compelling authority would I be disposed to regard these clauses in the light for which the respondent contends, as conferring legacies of the debts upon the three children. This would be a conceivable, although curious, mode of discharging indebtedness but the words of the testatrix do not suggest that this was the course which recommended itself to her; she adopted, instead, the straightforward course of forgiveness and release.
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> [Underlining added]

14. His Honour went on to consider whether there was any such compelling authority. In doing so he considered various cases in which releases were dealt with as if they took effect as a gift or legacy and concluded that those cases "*tended to look at the ultimate practical effect of the provision of the will*" (at 48). His Honour further concluded that those cases concerned with death duties issues were explicable on the basis of the statutory definition of dutiable legacy under consideration.

15. His Honour then turned to *Wedmore* and concluded as follows (at 49):

> Only two later cases need be noted. In *In re Wedmore* (1907) 2 Ch 277 Kekewich J, in determining whether or not the forgiveness of all unsecured indebtedness owed to a testator by his children was liable to abatement, held such a provision to be a specific legacy not subject to abatement and, like the members of the Court in *Holbrook's Case* (1823) 12 Price 407 [1829] ER 207; (147 ER 761); was assisted to his conclusion by considering the substance or ultimate effect of the provision; he said that "in substance" there was no difference between giving a debt to the debtor or to a third party and forgiving the debtor his debt. In the last case, *Colgan v MacDonnell*, Kennedy CJ had to determine whether a testator's bequest to his debtor of a charge over the debtor's property amounted to a simple bequest which lapsed on the prior death of the debtor. This case appears to turn exclusively on a point of construction.
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> ...
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> None of these cases appear to me to require that cll. 4, 5 or 6 of the will should be treated otherwise than as effecting, at the date of death of the deceased, a release in equity of the debts owed to her. In these cases in which the debtor was found to have predeceased the testator the Courts had to determine what should then be the fate of the provisions for forgiveness of indebtedness; they looked to the intention of the testator and if it appeared that it was the debtor personally who was to be advantaged they applied, by analogy, the doctrine of lapse, familiar in the case of legacies, just as in *In re Wedmore* (1907) 2 Ch 277 Kekewich J. proceeded by way of analogy and treated a provision for forgiveness of debts as a specific legacy in determining whether

> the doctrine of abatement was applicable. These cases appear to me to have little relevance to the present question save to the extent to which the decision of Lord Hardwicke in *Sibthorp v. Moxom* [1747] ER 194; (1747) 3 Atk 580 (26 ER 1134); makes it clear that, although not operating as a release at common law, a testamentary forgiveness of indebtedness will be effective as a release in equity, subject only to the claims of creditors.
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> [Underlining added, footnotes omitted]

16. Having confined earlier decisions to their specific facts, his Honour then concluded as follows (at 49-50):

> But where the critical question is whether there exists any property of the deceased to which any person becomes entitled under the will it is irrelevant to observe that the ultimate effect of a testamentary forgiveness is the same as would be a gift to the debtor of an amount equal to the debt or a gift to him of the creditor's chose in action itself; the question is not what is the practical effect of the benefaction but, rather, how is it bestowed, does it involve the acquisition of an entitlement to property of the deceased under his will? The issue is as to the precise means by which the benefit is conferred. In the present case I consider that it arises by the release of the indebtedness in equity once the will takes effect on the death of the testatrix and that, accordingly, there is no property to which any entitlement is conferred under the will.
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> [Underlining added]

17. His Honour's judgment could be thought to preserve the authority of the cases to which he referred, including importantly *Wedmore*, though confining them to their specific circumstances.

18. Mason J gave reasons which might be thought to be more consciously inconsistent with *Wedmore* and *Holbrook*. His Honour held (at 54-55, footnotes omitted):

> In relation to the express provision for release of the debts, the point at issue is whether it exonerated or extinguished the debts or was a bequest of property operating as a legacy. The mode of operation of such a provision was the subject of speculation by the textwriters. It was acknowledged that at common law the forgiveness of a debt by will could not operate as a release which, for its efficacy, required a release under seal executed by the testator in his lifetime (*Sibthorp v. Moxom*, per Lord Hardwicke L.C.; *Elliott v. Davenport*; *Wankford v. Wankford*). Wentworth in his Office of an Executor, 14th ed. (1829), pp. 71-73, and Toller in *Law of Executors and Administrators*, 7th ed. (1838), p. 307, relying strongly on the fact that a debt is not discharged when the assets are insufficient to meet creditors, express the view that a release of a debt is in the nature of a legacy, the debt not being discharged until there is an assent by the executor. A similar view was taken in *Attorney-General v. Holbrook*, where the Court of Exchequer held that the forgiveness of a debt owing to a testator under a bond was a legacy subject to legacy duty.

19. His Honour then set out the above quote from *Holbrook* and continued (at 55-56):

> To the same effect are the observations of Garrow B. and Hullock B. See also *In re Wedmore*.
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> The decision in *Attorney-General v. Holbrook* may be supported as a matter of construction of the statute but the observations to which I have referred disregard the true character of the debt as a chose in action and assimilate it to a sum of money. In my view this reasoning cannot be sustained unless it be correct to say that the provision in the will does not itself extinguish the debt, that it requires for its implementation the assent of the executor and that it is a disposition of the testator's property in favour of the debtor.
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> To my mind this conclusion is supported neither by the observations of Lord Hardwicke L.C. in *Sibthorp v. Moxom* nor by the decided cases. Lord Hardwicke said:

> "To be sure where a testator gives a debt, or forgives a debt, it is a testamentary act, and will not be good against creditors, but against an executor it may.
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> And though this cannot operate as a release at law, yet equity will carry it that length, and if an action had been brought on the bond, this court would have granted an injunction, or an original application might be made to this court."
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> In that case and in others the question whether the forgiveness of a debt was to operate as an equitable release or as a legacy was held to be one of construction — see *Elliott v. Davenport*; *Toplis v. Baker*; *Maitland v. Adair*; *Izon v. Butler*.
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> In my opinion the approach taken in these cases was correct. Excepting the case when other assets are insufficient to satisfy creditors, the forgiveness or release of a debt by will may operate in equity to release or extinguish the debt. An assent by the executor, although apt as to a legacy, is inappropriate to a release. What is material is that the release in equity, when it takes effect on death, destroys or annihilates the chose in action or, if you like, the debt. It does not vest the chose in action in the executor or the debtor. It would be incongruous to regard a provision for the release of a debt as having the effect of vesting in the debtor a right to sue himself.
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> This conclusion disposes of the matter. If the provision in the will destroyed the chose in action in the sense explained above, the chose in action was not property to which any person became entitled by the deceased's will. On the contrary, it was property which was destroyed by her will.
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> [Underlining added]

20. Thus, according to the High Court in *Bone*, if the plain meaning of the language used in a will is that the debt is forgiven or released, that will take effect in equity on death, except to the extent that assets are insufficient in the estate to meet the claims of creditors. And according to at least Mason J, the reasoning which underpins *Wedmore* and *Holbrook* is wrong. It is difficult to see how those cases can remain authoritative if the reasoning is wrong, though the same outcome might be reached by different reasoning (which appears to be how Stephen J approached the matter).

21. The High Court did not explain expressly why the release would be subject to the claims of creditors. That limitation was adopted from *Sibthorp v. Moxom* (1747) 3 Atk. 580 [26 E.R. 1134]. The reasoning behind that case seems to lie in the idea that inoculating an asset of the estate by will is unconscientious and will not be permitted to stand. Equity can impose conditions on a remedy arising from the release by will to prevent unconscientiousness. That is not how the matter is expressly stated by the High Court but is, it is suggested, what lies behind the decisions. It should be noted, however, that that case pre-dated modern bankruptcy recovery actions, a matter to be returned to at the end of this paper.

Bone **in the Privy Council**

22. The Commissioner appealed to the Privy Council. This occurred just prior to the passing of the *Privy Council (Appeals from the High Court) Act 1975* (Cth) which eliminated appeals from the High Court to the Privy Council on matters of state law. As appeals on federal law matters from the High Court had already been eliminated in 1968,[4] after the 1975 Acts no appeals lay from the High Court after the transition period for the 1975 Act. However, parties could still appeal to the Privy Council *or* the High Court on state matters. That was the situation from 1975 until the Australia Acts eliminated Privy Council appeals in 1986. So for some 11 years, the High Court and the Privy Council shared the position of being the ultimate court of appeal for

[4] *Privy Council (Limitation of Appeals) Act 1968* (Cth).

state law matters, an unusual situation in which "*the doctrine of binding precedent must…be regarded as a casualty of events*".[5]

23. *Bone* was heard in the Privy Council in January 1976. Because of the transitional provisions in the 1975 Act, such appeals continued until 1980 when the Privy Council over-ruled the High Court's decision in *Port Jackson Stevedoring v Salmond & Spraggon* (1980) 144 CLR 300 in its final act as an appellate court from the High Court of Australia.

24. [*Port Jackson Stevedoring v Salmond & Spraggon* was considered by the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 but without any discussion of the question of interest to this paper. The trial judge proceeded on the basis of the principle as stated in the Privy Council decision and the High Court plainly thought that approach was correct: see [69] to [79].]

25. The Privy Council in *Bone* reversed the High Court's decision and applied the line of authority which is typified by the reasoning in *Wedmore*. Lord Russell of Killowen[6] delivered the judgment. The central conclusion appears in the following passage ((1976) 135 CLR 223 at 229-230):

> … There was not truly a release of the debt. A debt can only be truly released and extinguished by agreement for valuable consideration or under seal. By "giving " or "forgiving" or "releasing" by will a debt to the debtor a testator, in their Lordships' opinion, is but leaving a legacy of the amount of the debt: for it is clear that by such purported release the testator cannot remove this asset from the claims of creditors of the estate and the requirements of funeral and administration expenses: the testator can give to his benefaction no other status than that of a specific legacy of the value of the debt. The debt remains outstanding as an asset of the estate: but, on analysis, the debtor is in a position to deny an obligation to pay it to the extent that the specific legacy is effective as such. The equation of such a testamentary provision with a legacy has a long history in authority, with particular reference to matters such as ademption and lapse: …
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> In the opinion of their Lordships a "release" such as is to be found in clauses 4, 5 and 6 is accordingly not a provision which truly extinguishes the asset of the estate: it is in truth and reality a legacy of property forming part of the estate of the testatrix at her death to which the debtor can only become entitled under the will, within section 102(1)(a). Moreover it is immaterial if the same debtor is appointed executor and proves: for, as earlier indicated, that event per se does no more than transmute the liability in debt into exactly equivalent liability to account which remains property of the estate.
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> [Underlining added]

26. The following points are of interest.

27. **First**, while it is clear that the Privy Council did not agree that the release took effect as such, it is a little ambiguous as to exactly how the release is characterised. The statement that the release "is legacy for the amount of the debt" is consistent with the approach in *Holbrook*, i.e. a gift of money equal to the amount of debt. This approach is inconsistent, in the writer's view, with the approach in *Wedmore*, which treated the release as a gift of the chose in action (as the writer and, more authoritatively, Stephen J read *Wedmore*). The other underlined statements are ambiguous, but might be thought to support the *Wedmore* approach. In my view, *Bone* in the Privy Council leaves the correctness of the reasoning in *Wedmore* in doubt: if the release is a gift of

[5] In *Viro v R* (1978) 141 CLR 88 per Stephen J at 132.

[6] The third Law Lord of that name, the son of Frank Russell, Baron Russell of Killowen and the grandson of Charles Russell, Baron Russell of Killowen, both Lords of Appeal in Ordinary.

the amount of the debt, without identifying a specific source of those funds, how can it be characterised as a specific legacy? Reflection on this point might be thought to demonstrate artificiality in the *Wedmore* approach.

28. **Second**, the decision did not engage in any detail with the High Court's analysis of the release as a release in equity.

29. The question then arises, in the post Australia Acts era, as to which judgment represents the common law of Australia and which judgment should a trial judge or intermediate Court of Appeal follow pending a future decision by the High Court?

First Question: Which decision represents the common law in Australia in 2019?

30. As has been noted, from 1975, the High Court and the Privy Council were alternative final courts of appeal for State courts in relation to state law matters. That created a complication for the doctrine of precedent which the High Court tried to deal with in *Viro v R* (1978) 141 CLR 88. Seven separate judgments were given. There was a clear principle articulated that the High Court was no longer bound by Privy Council decisions and could depart from them as the High Court could depart from its own earlier decisions.[7]

31. However, the views of the seven Justices on the position of State courts differed.[8] Four Justices (Barwick CJ and Jacobs, Mason and Murphy JJ[9]) supported the view that *generally* the State courts should follow High Court decisions in preference to conflicting decisions of the Privy Council. Relevant for the purposes of this paper, however, is Murphy J's observation that a State court should consider itself bound by a Privy Council decision given on appeal from the High Court "*for the present as equivalent to a High Court decision*". It might reasonably be inferred that his Honour's observations had some such statutory scheme as the Australia Acts in mind when making the observation. If that inference is drawn, Murphy J's judgment supports following the High Court in *Bone*.

32. Stephen and Aickin JJ[10] took the view that it was not for the High Court to tell State courts how to deal with Privy Council decisions (a view which had much to commend it where the High Court and Privy Council were of equal status in the appeal hierarchy). Gibbs J chose not to give prescriptive guidance, but suggested some guidelines (at 121).

33. Of course the statutory landscape of *Viro* changed with the Australia Acts in 1986. The Privy Council was no longer in the appellate hierarchy of any Australian court. What did that mean for the precedential status of Privy Council decisions?

34. Justice McHugh gave the most well-known answer (at least until recent authority) in his dissenting judgment in *Hawkins v Clayton* (1986) 5 NSWLR 109. His Honour said that that no decision of the Privy Council remains binding on any Australian court.

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[7] Per Barwick CJ at 93, Gibbs J at 120-121, Stephen J at 129-130, Mason J at 135, Jacobs J at 150, Murphy J at 166 and Aickin J at 174.

[8] See the helpful summary of the different judgments in A MacAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998, Butterworths) at [6.15].

[9] At 94, 151, 136 and 166 respectively.

[10] At 132 and 176 respectively.

35. His Honour was there dealing with a conflict between the reasoning in a High Court decision and a later Privy Council decision criticising that reasoning. The key passage is as follows (at 136-137):

> ... Now that appeals from the State courts to the Privy Council have been abolished, I do not think that Australian courts are bound by any previous decisions of that body. The Privy Council is no longer part of the structure of the administration of justice in Australia. It takes no place in the hierarchical structure of the Australian courts. No one suggests that the High Court is bound by decisions of the Privy Council given at a time when appeals could be taken from the High Court to the Privy Council. The position of the High Court in regard to old Privy Council decisions does not depend on it being the ultimate Australian appellate court, but on the fact that it is no longer bound by the Privy Council: *Viro v The Queen* (1978) 141 CLR 88 at 93, 120, 129-130, 135, 150-151. Logically, the same consideration requires that all Australian courts are no longer bound by Privy Council decisions.

36. Neither Kirby P nor Glass JA expressed a view on this issue. However, McHugh JA's reasoning has been given considerable weight by later single judge decisions,[11] particularly in the context where there are competing ratios in decisions of the High Court and the Privy Council, in which case those cases support the High Court decision prevailing. I do not have time to review all these authorities. However, their gravamen is to approve the underlying principle applied by McHugh JA: that is that lower courts are bound by higher courts in their appeal hierarchy because those courts can assert the authority of their previous decisions. That principle has considerable authority to support it. Indeed, *Viro* itself strongly supports the principle underpinning his Honour's view. Each of the judgments approached the question of how State courts should deal with conflicts between the High Court and Privy Council by reference to this principle, as McHugh JA noted. Just one example will suffice. Barwick CJ observed (at 93):

> The essential basis for the observance of a decision of a tribunal by way of binding precedent is that the tribunal can correct the decisions of the court which is said to be bound.

37. The power to correct might, incidentally, also be the basis of the doctrine of precedent in the Norwegian legal system, at least in the opinion of Høyesterettsdommer Karin Bruzelius, a retired Justice of the Norwegian Supreme Court (1997 to 2011).[12] However, the Norwegians are much less voluble about the doctrine of precedent and its place in its legal system.[13]

38. As noted, the cases which expressly approve the judgment of McHugh JA are single judge decisions. So far there is nothing binding on the subject by the High Court other than what can be extracted from *Viro*, decided in a different context. However, it can be strongly argued that *Viro* cannot be ignored. Statements that State courts should follow the High Court in preference to the Privy Council at that time apply *a fortiori* in the post Australia Acts context (and see Murphy J's observations discussed in paragraph 31 above).

Second Question: Is the First Question authoritatively determined by *Perilya*?

[11] See cases cited in O Jones, *Do the Law Lords bind lower courts?* (2013) 87 ALJ 383 at 384-385.

[12] *The Norwegian legal system, the work of the Appeal Committee and the role of precedent in Norwegian law*, a paper produced as part of the Norwegian Mission of Rule of Law Advisers to Moldova 2007-2017.

[13] See Eng, *The Doctrine of Precedent in English and Norwegian Law – Some Common and Specific Features* (2000) 39 Sc. St. L. 275-324 at 288-293.

39. A clear position was adopted by the NSW Court of Appeal on this question of the precedential status of Privy Council decisions which conflict with High Court decisions from before 1986 recently in *Perilya Broken Hill Ltd v Valuer-General* [2015] NSWCA 400. *Perilya* concerned the proper construction of a section which defined the basis upon which land was to be valued for rating purposes. The question which arose was whether land should be valued under the relevant section on the basis that all minerals were privately owned, even if they were reserved to the Crown in the relevant grant. The Court held that valuation should occur on that basis. Justice Leeming gave the leading judgment, with Bathurst CJ and MacFarlan JA agreeing.

40. The question of relevance to this paper concerned two cases: the High Court decision of *Royal Sydney Golf Club v FCT* (1955) 91 CLR 610 and a later Privy Council decision, *Gollan v Randwick Municipal Council* [1961] AC 82, an appeal from the Full Court of the Supreme Court of NSW. As to those cases it is enough to observe that:

    (a) The *Sydney Golf Club* was favourable to the appellant and unfavourable to the Valuer-General;

    (b) *Gollan* was favourable to the Valuer-General and unfavourable to the appellant.

41. Leeming JA held that *Gollan* bound the NSW Court of Appeal and *Sydney Golf Club* did not. He did so expressly on the basis that Privy Council decisions which overruled High Court decisions were binding on all courts except the High Court unless and until the High Court overruled them. That clear statement is made all the more relevant to this paper because his Honour referred to the *Bone* litigation in reaching that conclusion.

42. As the High Court made clear in *Farah Constructions v Say-Dee*,[14] other courts applying the common law in Australia should apply a decision of an intermediate court of appeal from another jurisdiction, even if not in its appeal hierarchy, unless the other court considers the decision plainly wrong.[15] So is that the end of the matter for all State courts until the issue reaches the High Court?

43. There are two matters to consider:

    (a) **First,** does the principle in *Farah Constructions* apply so as to give *Perilya* pre-eminent status; and

    (b) **Second,** might another court be persuaded that the decision is incorrect?

Other intermediate court of appeal judgments?

44. The principle in *Farah Constructions* calls for there to be a single authority on the particular question. It is arguable that there are other intermediate court of appeal judgments which express a different view, though they predate the passing of the Australia Acts.

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[14] (2007) 230 CLR 89.

[15] *ASC v Marlborough Gold Mines Limited* (1993) 177 CLR 485 at 492 in respect of uniform or common statutory schemes; for an example where the Queensland Court of Appeal applied this principle, despite doubts as to the correctness of the previous decision, see *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 at [63]; for the same approach being applied to decisions on general law matters see *Farah Constructions v Say-Dee* (2007) 230 CLR 89 at [135]; *Kellas-Sharpe & Ors v PSAL Limited* [2012] QCA 371 at [42].

45. The first is *National Employers' Mutual General Association Ltd v Waind and Hill (No. 2)* [1978] 1 NSWLR 466. That case is important because it involved the NSW Court of Appeal sitting as five judges setting down authoritatively a precedent to be followed by all courts in NSW in the event of conflicting decisions as between the Privy Council and the High Court. President Moffitt gave the leading judgment, with which the rest of the Court agreed.

46. His Honour's judgment first outlines the effect of the judgments in *Viro v R*, focusing on the matters discussed in paragraphs 31 and 32 above. His Honour then consciously identified the need for trial courts to have clear guidance as to how to approach conflicting authority.[16]

47. His Honour held that when faced with a conflict in ratio between High Court and Privy Council decisions, courts in NSW should follow the High Court decision, subject to an exception where the Privy Council decision was made at the time when it was the ultimate court of appeal on state law matters and the decision of the High Court overturned was a decision of "some antiquity" such that the Privy Council decision has become part of the fabric of the law of Australia. His Honour then stated the rule for trial courts to apply and why (footnotes omitted):[17]

> For reasons I will indicate, in my view decisions of the High Court should be preferred in cases of conflict, subject to a reservation to which I will later refer. This conclusion is stated for objective reasons, and with the very greatest respect to the Privy Council, which has played so important a part in the development of the law applicable in this State. It should be stated that, by reason of assumed conflicts of decision, an unprecedented situation has arisen where a choice has to be made on some basis as to which ultimate court is to be preferred upon such a conflict. Preference based on the last to speak can only lead to the futile vacillation exposed by Aesop: Fable XLIII.
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> …
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> The Commonwealth Parliament, pursuant to provision made in the *Constitution* enacted legislation culminating in the *Privy Council (Appeals from the High Court) Act 1975* (Cth.) held valid in *Attorney-General Cth.) v. T. & G. Mutual Life Society Ltd.* The consequence of this legislation, made under the *Constitution*, is that the High Court is now the ultimate court of appeal from State courts in the appellate channel provided by the *Constitution*.
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> The second matter is the persuasion provided by the position of advantage enjoyed by the High Court in determining what is the appropriate law for Australia and again with respect I would adopt what has been said by Gibbs J. and by Mason J. in this regard.
>
> …
>
> I make two comments in respect of the conclusion indicated, that courts of this State should now follow decision of the High Court even when in conflict with decisions of the Privy Council. The first is to emphasize that I refer precisely to decisions, and not to dicta. The second is that, at least for the present, there should be reserved for consideration as possible exceptions cases where the High Court decision is one of some antiquity, and that of the Privy Council is a later decision. Cases of this class fall into different categories. One extreme is where an old High Court decision has been reversed on appeal by the Privy Council, or has been overruled or departed from in a later decision of the Privy Council, at a time when the Privy Council was the

[16] At 474B-C.
[17] At 474-475.

> ultimate appellate Court and in circumstances such that it is clear that the Privy Council decision has become part of the fabric of the law of Australia: see *Favelle Mort Ltd. v. Murray*. For State courts now to prefer the old High Court decision in these circumstances would involve discarding the law applying in the Australia prior to 1975. At the other extreme is the case where the old High Court decision has stood without being departed from by the High Court, but since 1975 the Privy Council has given a contrary decision in an appeal or on appeal from State courts. Courts of this State should follow the High Court decision until the High Court decides otherwise. There are some cases closer to the first which may cause difficulty. I would reserve such for consideration and decision until they arise, or until the High Court has dealt more directly with them. In *Viro's* case only Barwick C.J. and Gibbs J. dealt directly with old decisions and, in this matter, were in conflict. It is not altogether clear whether any other judge, even Jacobs J., has precisely dealt with such cases. It can be said, however, that it will normally be appropriate even in respect of old cases for this Court to follow the High Court decision.
>
> It follows from what I have just said that courts of this State certainly should prefer a decision of the High Court given since 1975 to a conflicting decision of the Privy Council, and hence prefer the decision in *Grant v Downs* to the hypothetical inconsistent Privy Council decision. It follows that, if the latter were given, it could provide no precedent in this State. It follows, as earlier stated, that a conclusion such as this makes it appropriate that leave to appeal to the Privy Council be refused.

48. Although the decision concerned a High Court decision given after the 1975 Act, the principle was not so limited. The *Bone* litigation does not fall within the exception articulated by his Honour. Further, given the reasoning adopted by his Honour, his approach would apply *a fortiori* following the passing of the Australia Acts.

49. The next decision, also pre Australia Acts (but decided with those changes in express contemplation), is a decision of the Victorian Full Court: *Metal Fabrications (Vic) Pty Ltd v Kelcey* [1986] VR 507. That case concerned the question of where the onus lay in a civil damages case as to mitigation of loss. Simplifying the case a little, the choices were between High Court authority which said that the defendant bore the onus of demonstrating failure to mitigate, and later Privy Council authority which said that the plaintiff bore the onus of demonstrating reasonable mitigation.

50. Murphy J, with whom Brooking and Nicholson JJ agreed, held for the High Court position. His Honour reached that conclusion in response to a direct submission that the Victorian Full Court was bound by the Privy Council decision. His Honour reached that conclusion, however, on the basis of his analysis demonstrating that the Privy Council position was not ratio of the relevant decision.[18] At least where the Privy Council decision is obiter not ratio, this case is authority for the proposition that a State court should follow an earlier High Court decision over a later Privy Council decision. It is strongly arguable that a lower court should adopt a similar approach to both ratio and considered dicta in the ultimate court of appeal in its hierarchy.[19]

51. There is also a decision of another intermediate court of appeal which supports the position in *Perilya*, though without any detailed reasoning.[20]

52. Since *Perilya*, the issue has only been mentioned in any significant way in *Martin v Electoral Districts Boundaries Commission* (2017) 127 SASR 362, a decision of the

[18] At 509.33 to 513.10 especially at 513.1 to .10.
[19] *R v Keenan* (2009) 236 CLR 397 at [35] per Kirby J; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* at [147] and [158].
[20] *Rockwell Graphic Systems Ltd v Freemantle Terminals Ltd* (1991) 106 FLR 294 from 301.

Full Court of the South Australian Supreme Court, at [180] to [181]. The Court noted that different views had been expressed on the issue and said it was unnecessary to decide the matter. Interestingly, however, it appears that the Court did not consider that the *Perilya* position had the field to itself, at least in South Australia.

53. In my view, it is arguable that there are differing intermediate court of appeal decisions on the issue dealt with in *Perilya*. Outside NSW at least, a court would not have to be convinced it was plainly wrong before not following it.

Is the law in Perilya the better view?

54. Of course if a non-NSW court took the view the *Perilya* approach was correct, it would apply it. It is convenient briefly to consider this matter. It is relevant to observe that the appellant in *Perilya* did not contend that the Court should not follow *Gollan*. Accordingly, it is reasonable to infer that the question of the status of Privy Council decisions as binding precedents was not fully argued.

55. Putting that to one side, the reasoning was follows:[21]

> 70. Perilya did not submit that this Court should not follow *Gollan*. Although there may be some uncertainty as to the precise precedential status of Australian appeals to the Privy Council, I consider that Perilya was correct to proceed on that basis.
>
> 71. *Gollan* (and *Broken Hill Proprietary Co Ltd v Valuer-General*) were appeals directly from the Supreme Court of New South Wales to the Privy Council. Such appeals no longer lie. I can see force in the proposition that, just as the High Court is no longer bound by the Privy Council, by the same reasoning this Court is likewise no longer bound. That proposition found favour with McHugh JA in *Hawkins v Clayton trading as Clayton Utz & Co* (1986) 5 NSWLR 109 at 136-137. However, with great respect, I do not think that it applies to *Gollan*, bearing in mind three matters.
>
> 72. The first is that I think the position is different in the case of a Privy Council appeal from the High Court of Australia. Obviously, if the appeal is dismissed, the High Court's decision will continue to bind all Australian courts, irrespective of the cessation of Privy Council appeals. But take for example the Privy Council's decision in *Commissioner of Stamp Duties v Bone* [1977] AC 511, allowing an appeal from the unanimous decision of the High Court in *Bone v Commissioner of Stamp Duties* [1974] HCA 29; (1974) 132 CLR 38 (and restoring the decision of this Court constituted by Jacobs P, Hope and Reynolds JJA). The Privy Council's view of the effect of a testamentary release of a debt when the will appointed the debtor as the executor undoubtedly bound all Australian courts, including the High Court, after 1977. I cannot presently see why the position of Australian courts below the High Court was any different after appeals ceased to lie to the Privy Council. In point of principle, I think it is for the High Court, and the High Court alone, to determine that a decision of the court which formerly was at the apex of the Australian legal system in matters of private law ceases to bind.
>
> 73. Secondly, that accords with what Heydon J said (dissenting, but not on this point) in *Barclay v Penberthy* [2012] HCA 40; 246 CLR 258 at [103]:
>
> > "Nothing in *Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376 at 389-390 undercuts the present status as authorities in Australian courts of Privy Council decisions before 1986, until they are overruled by this Court."
>
> 74. It may in fact be that *Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376 is to be read as *confirmatory* of the ongoing binding effect of decisions in Privy Council appeals. The relevant passage in *Cook v Cook* is in the joint reasons of Mason, Wilson, Deane and Dawson JJ. It was directed to the question whether the South Australian Supreme

[21] *Perilya Broken Hill Ltd v Valuer-General* [2015] NSWCA 400.

> Court should follow a decision of the English Court of Appeal or dicta from two Justices of the High Court. After confirming the continued utility of obtaining assistance and guidance from United Kingdom courts, the joint judgment said at 390:
>
> > "Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning."
>
> 75. That statement is, in terms, directed to the fact that decisions in other legal systems are *not* binding. However, it may be read as also confirming the converse position, that Privy Council decisions given when appeals lay to that body from Australia (and thus formed part of the Australian legal system) continue to bind, in the manner stated above. The fact that their Honours reserved the position of decisions of the House of Lords during that period as a potential special case tends to confirm this (for if the joint judgment was saying nothing about decisions which were binding, the first half of the sentence is otiose). That is contrary to the view expressed by McHugh JA, but his Honour's statement predated *Cook v Cook*. (The fact that the principal aspect of *Cook v Cook* was overturned by *Imbree v McNeilly* [2008] HCA 40; 236 CLR 510 does not alter the status of the passage of present relevance.)
>
> 76. Thirdly, and in any event, Malcolm CJ, with whom Pidgeon and Nicholson JJ agreed, took that approach in *Rockwell Graphic Systems Ltd v Fremantle Terminals Ltd* (1991) 106 FLR 294 at 301, stating that it was for the High Court and the High Court alone to determine whether to depart from a Privy Council decision which itself overturned a decision of the High Court. I see no compelling reason for this Court to depart from that approach.
>
> 77. I return to *Gollan. Gollan* was an appeal directly from this Court to the Privy Council, but in issue was the correctness of the decision of the High Court of Australia in *Royal Sydney Golf Club* on a different, but materially identically worded, statute. *Gollan* confirmed the correctness of the High Court's decision. I consider that it follows that it is to be treated as if it were an appeal from the High Court, such that it is for the High Court, and the High Court alone, not to follow the construction applied by it. Accordingly, Perilya was correct to proceed on the basis that *Gollan* continues to bind this Court.

56. It can be seen that Justice Leeming recognised the force of the reasoning in *Hawkins v Clayton*. However, he took the view that the reasoning in that case did not apply to *Gollan* for three reasons.

57. The first was that a decision of the Privy Council on appeal from the High Court was in a different position from the situation where there is just inconsistent reasoning of the kind in *Caltex* and *Candlewood*.[22] His Honour gave the example of the *Bone* litigation. In reaching that conclusion, his Honour observed that the Privy Council decision, when made, bound all courts in Australia including the High Court.

58. I have a little difficulty with this proposition. By the time the decision in *Bone* was given, the High Court was not bound by the *Bone* decision. The 1975 Act had been passed by that time. The consequences for the doctrine of precedent as it then applied were explained by the High Court later in 1977 or early 1978 (depending on matters we need not consider) when *Viro* was delivered. *Viro* recognised that the 1975 Act had changed everything, as did *National Mutual v Waind*. Neither case was specifically considered in *Perilya*.

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[22] *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529; *Candlewood Navigation Corp v Mitsui OSK Lines* [1986] AC 1.

59. The second point relied upon was the observation by Heydon J about *Cook v Cook* and the inferences that were said to flow from that decision. However, it can be seen that the case does not deal in terms with the question of how to deal with the *Bone* situation.

60. His Honour also referred to *Rockwell Graphic Systems Ltd v Fremantle Terminals Ltd* (1991) 106 FLR 294 at 301, a decision of the WA Court of Appeal. However, in that case, the question of the status of Privy Council decisions was not in dispute (indeed the point was conceded by counsel) and the statement that the Privy Council remained binding was not accompanied by any reasoning or consideration of other authority.

61. Outside NSW, I think it would be open to a court to conclude that the *Hawkins v Clayton* approach applied to *Bone* and that the High Court decision is binding in Australia in 2019.

62. Whether the matters raised above would be sufficient to persuade a court that *Perilya* is wrong is another matter.

63. Ultimately, it is respectfully suggested that the correct position, based on *Viro*, *Waind* and *Hawkins v Clayton*, is that generally courts below the High Court should follow High Court decisions prior to 1986 in preference to Privy Council decisions given before then. There is much to be said for the caveat that where the Privy Council decision has become part of the fabric of the common law of Australia, courts should apply that principle over an inconsistent principle stated in an earlier High Court decision. However, that might be thought to be an unsatisfactorily ambiguous way for questions of precedent to be resolved.

Which approach to characterisation of a testamentary release is preferable?

64. If a court was free to decide the question afresh, which of the two views in *Bone* should be preferred? In the author's respectful view, the High Court reasoning is more persuasive for the following reasons.

65. **First**, the High Court judgment gives effect to the ordinary and objective meaning of the words used in a will. A release is dealt with as a release. A forgiveness as a forgiveness. This kind of approach to construction is consistent with the approach of the modern High Court to all formal legal documents: contracts, wills and trust deeds.[23] In my respectful view, the High Court today would be much more inclined to the approach of Stephen and Mason JJ which focuses on the ordinary meaning of the text used, than that of the Privy Council which involves attributing a meaning to the words 'release' or 'forgive' which is inconsistent with their ordinary meaning.

66. 'Release' might be thought to have a technical legal meaning in the context in which it is used. However, even if one thought so, there is no reason why one would not adopt that meaning when the word is used in a formal legal document, particularly one drafted by a solicitor.[24]

67. **Second**, in the writer's respectful view, the Privy Council judgment is unsatisfactory in the manner in which it rejects the characterisation of the release as such. The judgment points out (as did the High Court) that the release in a will is not a release at law because a debt can only be released at law for consideration or under seal. However, it deals unsatisfactorily with the idea of a release in equity. It discounts that approach because the release is defeasible to creditors of the estate. However, that

[23] *Byrnes v Kendall* (2011) 243 CLR 253.
[24] See G E Dal Pont and K F Mackie, *Law of Succession* (2nd ed, 2017, LexisNexis Butterworths) at [8.14].

consideration did not trouble the High Court in its characterisation of the release. The writer does not see why it does create any difficulty. It is unremarkable that equity assist a debtor to take the benefit of a release in a will only on condition that the estate is able to meet the claims of its creditors. This is simply a reflection of the flexibility which marks equitable doctrines and gives them their efficacy to respond to lacunae in the common law (see paragraph 21 above).

68. **Third**, one cannot help but perceive the Privy Council decision as consciously seeking to resolve the case consistently with the earlier authorities which equated a release with a legacy. That history, according to Mason J at least, did not speak with one voice. Further, the inconsistency in *Wedmore* and *Holbrook* in the detail of the analysis undertaken has already been noted. The history of cases dealing with releases in the different context of administration provide an unsatisfactory foundation for identifying an established approach to characterisation of a release by will.

Implications for administration

69. What are the implications for estate administration if the approach of the High Court were to be adopted and releases treated as releases in equity? Space does not permit full consideration of all the possibilities. However, two issues seem worth particular consideration: the implications for Family Provision claims and the implications for abatement.

70. No case was found in Australia where the Privy Council approach in *Bone* was applied in a Family Provision claim. The writer's associate located an unreported decision in the High Court of New Zealand, *George v Blomfield* [2016] NZHC 3099. In that case, Courtney J (now of the New Zealand Court of Appeal) applied the Privy Council decision in *Bone* in dealing with a submission that certain forgiven debts were not part of the estate in a *Family Protection Act 1955* (NZ) claim. Obviously, New Zealand judges are unconcerned by the status of the High Court decision in *Bone*.

71. The writer suspects that the reason that there are not cases which raise this issue in Australia is because practitioners apply the statements in *Wedmore* and the leading texts and approach the matter on the basis that the debts remain part of the estate.

72. Would the position be different if the release in equity approach of the High Court was adopted? It is arguable that it could be, at least in Queensland.

73. Section 41(1) of the *Succession Act 1981* (Qld) confers power on the Court, in the circumstances set out therein, to order provision "out of the estate" of the deceased person. The word 'estate' is not defined. It has been recognised that the reference to the estate does limit the assets out of which provision may be made.[25] The estate for the purposes of FPA does not include assets held on trust.[26] It could be argued that the effect of the principle articulated by the High Court is that on death, the released debt is held on trust, subject only to claims of creditors of the estate (this is consistent with Mason J's judgment at least). A Family Provision applicant is not a creditor of the estate.[27] Accordingly, the limit on the equitable release recognised by the High

[25] *Easterbrook v Young* (1976-77) 136 CLR 308 at 314

[26] See the cases collected in L Englefield, *Australian Family Provision Law* (1st ed, 2011, Thomson Reuters) at [525.130].

[27] See the cases in J de Groot and B Nicol, *Family Provision in Australia* (4th ed, 2012, LexisNexis Butterworths) at [8.10]-[8.12].

Court in *Bone* would not assist an FPA claimant. Result: debts forgiven by will would not be part of the estate for Family Provision purposes.

74. For the sake of completeness, one should note the extension of the meaning of 'estate' in the *Succession Act 1981* (Qld) in s. 41(11) to property received by any person as a *donatio mortis causa*. The release of a debt by will taking effect in the manner identified by the High Court in *Bone* would not be such a gift. It is the will which triggers the release, not some *inter vivos* act done conditional on death.

75. Review of the other Family Provision statutes in Australia gives the impression that they operate in this respect in the same way as the Queensland Act. Provision is made out of the estate, with 'estate' being undefined in the statute and left to the common law meaning.

76. However, there is an important distinction between Queensland and other states and territories. All other statutes in Australia provide that an order for provision takes effect as if it were a codicil to the will of the deceased person executed immediately before death.[28] In *Easterbrook v Young* (1976-77) 136 CLR 308, the High Court was considering whether the then current NSW statute (which contained such a provision) permitted a Court to make an order in circumstances where the estate had been fully administered but was still held by the personal representative on trust for the beneficiaries as such. The Court concluded on the proper construction of the statute that it did. The context of the judgment is important to bear in mind. However, in the course of reasoning to that conclusion, the majority of Barwick CJ, Mason and Murphy JJ observed:[29]

> We turn now to the relevant provisions of the Act. The court's order has effect as a codicil in the case of a testate estate and as a variation of the statutory trusts in the case of an intestacy. The court, by the effect of its order, can alter the operation of the very dispositions of the will which might otherwise determine the capacity or power of the personal representative as well as the beneficial interests which would otherwise arise. As a codicil, the court's order operates as on the death of the deceased: see s. 4 (1) and (2). The evident purpose of the Act is to place the assets of the deceased passing to the personal representative at the disposal of the court in the provision of maintenance for the nominated dependants of the deceased. Because the court's order has effect as a codicil, the property out of which provision may be ordered includes property which, but for the order, would have been beneficially owned either wholly or partly by donees under the will or next of kin under an intestacy. It is plain that the burden of an order is to be thrown on property to which persons are beneficially entitled under the will or on intestacy.

77. This passage was cited with approval in *Barns v Barns* (2003) 214 CLR 169 at 191. Although concerned with a different factual circumstance, this passage strongly supports the view that the estate out of which provision may be ordered includes assets which come into the hands of the executor subject to a trust created by the will. McLelland J's judgment in *Lim v Permanent Trustee Co Ltd*,[30] cited with approval in *Barns v Barns* at [93]-[94] by Justices Gummow and Hayne, also supports that

[28] Section 16 *Family Provision Act 1969* (ACT); Section 16 *Family Provision Act 1970* (NT); Section 10(a) *Inheritance (Family Provision) Act* 1972 (SA); Section 9(3)(a) *Testator's Family Maintenance Act 1912* (Tas); Section 97(4)(a) *Administration and Probate Act 1958* (Vic); Section 10 *Family Provision Act 1972* (WA). Section 72 Succession Act 2006 (NSW) does not include the notional execution date but nothing seems likely to turn on that distinction.

[29] At 316-317.

[30] Unreported, SC(NSW) – Equity Division, 26 March 1981.

conclusion. In that case McLelland J found that the estate for the purposes of family provision orders included property the subject of a secret trust.

78. It is therefore strongly arguable that even if the High Court's equitable release approach is adopted, the debt subject to the release will still be able to be treated as part of the estate for family provision purposes. Though it is emphasised that the specific point has not been considered so far as the writer can determine and it only applies to states other than Queensland.

79. Before Queensland lawyers get excited, however, it remains to consider the effect of *Barns v Barns*. I do not have time to fully examine that interesting case. And I emphasise again that that case was not considering equitable release of debt by will. However, the core proposition to emerge from that case is that when contractual or equitable rights relating to promises or undertakings about the making of testamentary dispositions arise, they fix on the estate taking into account creditors and any order for provision affecting the estate. That follows because of the effect of the statutory scheme properly construed on such promises and undertakings.[31] If the release in question operates as an equitable release, it is strongly arguable that the approach in *Barns* would apply.

80. One further argument needs to be considered. It might perhaps be argued, as the Privy Council said in *Bone*, that the debts were assets of the deceased at death and therefore were part of the deceased's estate. However, it is clear from the High Court reasons that the release takes effect in equity on death. That is, the release becomes irrevocable by, and on, the death of the deceased.

81. It might be argued that there must have been a theoretical moment in time when the debts were part of the deceased estate. However, in my view, the law in relation to assignments of future property in equity stands against that proposition. The leading authority is the decision of Dixon J in *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27. There his Honour explains that the assignment takes effect in equity, and it binds the conscience of the assignor on the instant after acquired property comes into existence. It never belongs beneficially to the assignor. There is no good reason why that analysis would not apply to the equitable release on death contemplated by the High Court in *Bone*. Indeed, Stephen J more or less stated this proposition when his Honour said "*by… the will the executors' debts were extinguished at the moment of death; thereafter they were incapable of constituting property of the deceased*."[32]

82. In conclusion, it seems to the writer unlikely that characterizing a release of debt by will as an equitable release would have the consequence that the debt is not available as part of the estate for the purposes of family provision claims.

83. Attention is now turned to the question of abatement.

84. The starting point is to observe that even the position articulated in *Wedmore* might be questioned following the Privy Council's decision in *Bone*. As noted already, *Wedmore* turns on the characterisation of the release as a specific gift of the chose in action represented by the debt released. And that must be so. The issue for abatement is whether a gift is a specific or general gift. Obviously different considerations apply depending on which is applied.

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[31] See Gleeson CJ at [32]-[35]; Gummow and Hayne JJ at [114]-[115]; Kirby J at [129] agreeing with Gleeson CJ.

[32] *Bone v Commission of Stamp Duties for NSW* (1974) 132 CLR 38 at 47.

85. The approach in *Wedmore* allows for the conclusion that the release is a specific gift of the specific chose in action represented by the debt. However, the Privy Council characterised the release as a "*legacy of the amount of the debt*". That is different from a gift of the chose in action represented by the debt. On one view of it, *Wedmore* is not good law any more. Rather, a release is a general legacy, the amount of which is defined by indebtedness at death. On that basis, a release abates as a general legacy. However, let it be assumed that the language of the Privy Council decision was a little loose and the intention was to approve the approach in *Wedmore*.

86. The first difficulty in applying the High Court approach in *Bone* to *Wedmore* is that Stephen and Mason JJ adopted subtly different approaches to it. Stephen J distinguished it. He did not overrule it. He characterised *Wedmore* as approaching the release by way of analogy with a specific gift. Mason J on the other hand seemed directly to contradict the reasoning which lay behind *Wedmore* and *Holbrook*. In the writer's view there is a strong argument his Honour overruled those cases because he made clear that the (slightly different) principles they articulated were wrong. A release is a release, it is not a gift of a chose in action or a gift of money.

87. If there is a difference in the two judgments, it is worth noting that Barwick CJ and McTiernan J agreed with both sets of reasons, while Menzies J agreed with Mason J alone.

88. It is strongly arguable, however, that *Wedmore* cannot stand even in the face of Stephen J's judgment, despite the case being distinguished by Stephen J. The reasoning in his Honour's judgment is, in the writer's view, inconsistent with the reasoning in *Wedmore*.

89. There is a good argument that if the principle articulated by the High Court in *Bone* is applied, the release will not be a general or specific gift or legacy. It will not be a gift at all.

Another approach to testamentary release?

90. There are numerous other issues which could be considered: lapse, ademption and satisfaction and so on. However, they are beyond the scope of this paper. There is one final matter to be dealt with.

91. The writer suggests that a release by will could be characterised as a release at law. True it is that, as the law stands, a release can only take effect at common law for consideration or under seal. However, the characteristic of both forms of release is that they have the effect of binding the creditor to the release in a manner which cannot be revoked.

92. Why is a release by will any different? On death, the creditor is bound so that he or she cannot resile from the release and is so bound because the undertaking is by will, a formal legal act.

93. The common law can and does change. There is no reason why it could not be extended to recognise a release by will as a release at law. It is interesting that the same argument was advanced in *Holbrook* nearly 200 years ago. It was rejected because the particular will in that case imposed formal requirements for delivery of the bond as part of the release, not because the proposition was otherwise wrong in principle.[33]

[33] That exchange occurred in argument and is only reported in the other version of this case reported as 12 Price 407 at 425 [147 ER 761].

94. The main problem with this from the perspective of the High Court decision in *Bone* is that it might leave creditors of the estate unpaid. However, if the estate was insolvent, it would be administered under the *Bankruptcy Act 1966* (Cth). It would not be difficult to establish that the release by will was an undervalued transaction under s. 120 of that Act. French J reached the conclusion that a release at law was within the scope of that section in *Jabbour v Sherwood* [2003] FCA 529. If a release by will was recognised as a release at law, there is no reason why that authority would not apply to make the release void against the Trustee in Bankruptcy. That option was not available when the concept of equitable release was recognised in *Sibthorp* in 1747 (see paragraph 21 above). It is now.

95. This would of course create real difficulties with applying the approach in *Barns v Barns* to the release, as there would be no equity to be deferred to claims on the estate. This might take release debts outside the Family Provision regime in Queensland at least. It might also raise questions about how the codicil provisions apply in other states. It would eliminate questions of abatement. It would probably cause all sorts of other disruption to accepted approaches to releases by will.

Judge Bernard Porter QC

17 May 2019