

Is Family Provision's Limitation to Testamentary Freedom Justified or Not?

Pingping Wang¹

¹ College of Law, The Australian National University, Canberra, Australia

Correspondence: Pingping Wang, College of Law, The Australian National University, Canberra, Australia.

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Abstract

Testamentary freedom is a fundamental principle in testamentary inheritance and bequests, and it is a principle that is generally accepted in all countries of the world. The theoretical basis of testamentary freedom derives from the autonomy of will in civil law, a principle that was developed considerably in the Age of Enlightenment. Family provision is a subsequent development that limits the freedom of testamentary freedom. This essay analyzes the content of family provision, the value of testamentary freedom and family provision, and the nature of testamentary freedom from three perspectives, and shows that only freedom based on rules is true freedom. It is argued that family provision is justified to restrict the principle of testamentary freedom.

Keywords: testamentary freedom, family provision, justified

1. Introduction

Testamentary freedom has a very long history, and the rise of the Enlightenment in the seventeenth century gave it scope for further development. In the nineteenth century, liberal ideas evolved towards a more decisive humanist attitude. The need to restrict testamentary freedom arose when it was abused to the detriment of women's rights¹, and family provision emerged in this background. This article is divided into three parts. The first of this essay argues for the background and significance of the development of testamentary freedom. The second part analyses why testamentary freedom needs to be restricted by the family provision. The third part analyses why the limitations on testamentary freedom imposed by family provision legislation are justified from two perspectives. On the one hand, the limitations on testamentary freedom imposed by the family provision are clear and limited. On the other hand, if the limitation of testamentary freedom by family provision does not undermine or even extend the value of testamentary freedom, this reflects the fact that the family provision's limitation to testamentary freedom is justified.

2. The Development and Importance of Testamentary Freedom

2.1 *The Foundation and Background of the Development of Testamentary Freedom*

2.1.1 Private Property Principle Is the Foundation of Testamentary Freedom

It was not by accident that testamentary freedom developed so dramatically in the 17th century². It was a period known as the Age of Enlightenment. It was an exciting and tumultuous period in which personal freedom and liberty were at the forefront of political and legal debate³. Testamentary freedom also had a material foundation for its development—the development of private ownership. John Locke argued that private property ownership was established in the state of nature and that people were naturally and absolutely entitled to it.⁴ Testamentary freedom is closely related to this development. The expression and realisation of human freedom require a measure of wealth, and property protects individual freedom and gives individuals the space and capacity for autonomy. In a sense, ownership is an extension of the personality. The individual owns private property while alive and can possess, use, benefit and dispose of property according to his or her desires. The right to control

property can also extend to the owner's death. If the individual's control over the property does not extend to the time of the owner's death, the right of ownership would be incomplete. Consequently, the private property principle is the foundation of testamentary freedom. If the individual does not have the right to private property, testamentary freedom loses its basis of existence. The principle of testamentary freedom further protects private property.

2.1.2 The Assumption of Human Rationality as the Basis for Absolute Testamentary Freedom

By the beginning of the 17th century, with the development of the Enlightenment, Europe entered the Age of Reason. In this period, the highest authority and criterion for judging everything within human knowledge was not religious revelation or the authority of the Church but human rationality. Man is rational, and under his rationality, he can make decisions in social life that are in the interests of the individual, the family and society⁵. A rational person can use the minimum amount of resources and within his or her knowledge to achieve goals. Human rationality is the presumption of the existence of testamentary freedom. The testator is presumed to be a diligent and good-hearted manager who has all the family's assets and is responsible for the entire family. All testators are of high moral character and love their children and relatives so much that they establish their heirs in their wills without forgetting their family responsibilities and duties. They consciously arrange for their children to live on their property. When a will was made, it was customary for the testator to give his or her children, who were not heirs, a certain amount of property for their future maintenance and to fulfil their parental responsibilities. Thus, based on the assumption of the testator's rationality and goodness, the early testamentary freedom was absolute.

2.2 *The Important Role and Value of Testamentary Freedom*

2.2.1 Filling in the Gaps of Statutory Wills

Statutory wills are governed by law and are mandatory. Testamentary freedom, on the other hand, directly reflects the testator's will and has a priority over statutory wills, which can be seen as a presumption of the decedent's will. This presumption is somewhat empirical⁶, and the statutory will rule implementing the presumption of the intent of the deceased and the principle of testamentary freedom has not been harmonised in modern law. Social life is ever-changing, and the law is only the result of historical experience, so predetermined legal rules cannot seamlessly accommodate all the facts of social life. For the law to be understood and accepted by the majority, certain specific features are discarded in enacting the law. Thus, the statutory wills model is only the "ideal" model among the many options. The legislator's "confidence" is reflected in this and in his "helplessness".

This inheritance model sometimes does not always correspond to the individual circumstances and wills of the parties. The freedom of testamentary wills remedies the shortcomings of statutory wills. Only the testator knows what rules of life and behaviour he needs. The testator has the greatest informational advantage in knowing his family and the extent to which each family member expects his inheritance⁷. On the other hand, the composition of each family is not the same. If there are only statutory wills, this can sometimes exclude from the inheritance those members whom themselves need it most in order to make ends meet. This would result in an inequitable division of the estate and would not maximise the value of the estate⁸. Giving the testator the right to freely dispose of the estate would remedy these deficiencies.

2.2.2 Motivating People to Work Hard

Testamentary freedom is an incentive mechanism that is effective not only for heirs but also for testators. For testamentary heirs, testamentary freedom is also a mechanism to stimulate hard work. Granting the testator the right to dispose of the property freely will make the property that could have been inherited by the legal heir in an uncertain state.⁹ Due to the secrecy of the will, the heir does not know whether he can obtain the inheritance before the testator's death, so the heir must be self-reliant and work hard to get paid. Even if the heir knows that the testator left the estate to him in the will, this promise or arrangement is still highly uncertain, the testator can still withdraw and amend the will at any time, and the heir may also be unable to obtain the property. Therefore, for heirs, testamentary freedom can also promote their hard work to avoid becoming opportunists.

Testamentary freedom can also be an inducement and incentive for the testator to make full use of his free will while he is alive. Ownership is a basis for expectation. This "expectation" also contains the owner's wishes on how the property will be arranged after death. If this "expectation" is fulfilled, it will bring happiness to the owner. The testator will enjoy a sense of satisfaction in both the 'acquisition' and the 'bequest' of property, making them more willing to accumulate wealth rather than consume it irrationally and destroy it. They will continue accumulating wealth after they have prepared for their own needs during their lifetime, expanding the total wealth of society and contributing to its productivity.

2.2.3 Promoting Family Harmony and Happiness

Testamentary freedom can help to address the issue of care and nursing for older people. When older people need care and assistance, it is natural that they often look to their children and relatives as their primary caregivers. It is not only a moral or legal obligation for the children to take care of their parents but also a natural incentive to do so, given the parent's past upbringing and the bond between parent and child.¹⁰ This may be an ideal model. However, in reality, not all children are willing to care for their parents; it requires collaboration between the children and more sacrifice on the part of some children. Testamentary freedom can provide a degree of reward and guidance. Testamentary freedom can link the acquisition of inheritance rights to the care of the testator, avoiding opportunistic behaviour among heirs and inducing them to take care of the testator so that they treat them better while they are alive.

2.2.4 Testamentary Freedom Can Promote Charity

Before a testator's death, if money is left over after the family's needs have been met, the testator can do his or her duty to society by bequeathing the money to charity. Warren Buffett, for example, donated the vast majority of his life's wealth to charity. Testamentary freedom allows people to donate their assets to charities that provide relief to the poor, orphans, the elderly, and others who have no one to depend on to improve their living conditions. Testamentary freedom can optimise the use of society's limited resources, solve many of the problems in society and maximise the value of property. At the same time, testamentary freedom can also help to develop a good moral ethos, enabling people to take on more social responsibility within their abilities and promote the civilised development of society. Conversely, the absence of testamentary freedom can increase the gap between the rich and poor regarding personal wealth.

3. Why Does Testamentary Freedom Need to Be Restricted by the Family Provisions?

3.1 Private Property Covered by Testamentary Freedom Has Family Character

When we consider testamentary freedom from the perspective of private property, it plays a vital role in protecting both private property and the rights of liberty. However, the property dealt with by wills also has the character of the family. In other words, the estate may not have been accumulated solely based on the testator's contribution and ability but also with the indirect contribution of other family members¹¹, such as the wife. As such, the estate may be said to be the private property of a family. This means that in the pursuit of testamentary freedom, we need to consider the family nature of the estate. The property belongs to the family to some extent, and the family's right to inherit should be safeguarded. The testator cannot bequeath the entirety of the property to a family member or persons outside the family until the estate meets the needs of some family members who need special protection. Family members have a legitimate right to an inheritance, and restrictions on testamentary freedom are justified. The rights of family members should not be merely a moral claim but should also be recognised by law. This legal recognition is reflected in the practice of family provision. The exercise of jurisdiction in family provision matters is therefore a balancing act between the notion of absolute freedom of disposition by will, on the one hand, and that of moral responsibility of the testator, on the other.¹²

3.2 There Are Limits to Human Rationality

Absolute testamentary freedom is based on the full rationality of man. However, in reality, the testator is nowhere near as rational as the Enlightenment expected of a rational person. Human rationality is limited, and testamentary freedom is not absolute. Any form of freedom or right is relative, with specific boundaries. Testamentary freedom, like other forms of freedom, is subject to the limits of human rationality and the law. Limited rationality makes it possible for a person to act in life in a way that the legislator does not expect in law. For example, it is inherently unfair for a wife to leave her job to manage a household while a husband leaves his entire estate or most of it to his mistress at his death.¹³ Furthermore, a rational person can be sensible and think through his or her actions, but this does not mean the actions are "good". "Evil" can also be well thought out, and rationality can sometimes be a force for "evil". A selfish testator can avoid family responsibilities in his will and leave his family members to starve. Freedom is not the only value sought by the law. Fairness and justice are also goals pursued by the law. Therefore, testamentary freedom must be confined to certain limits. Any act of testamentary freedom that infringes on the rights of others or society should be restricted.

4. Why Are Family Provisions Justified as Limitations on Testamentary Freedom?

Testamentary freedom should not deprive family members of their proper expectations of inheritance. The testator and stakeholders are embedded in a family network; they tolerate, trust and help each other. In order to prevent testators from making wills that are so whimsical that they abandon social values such as solidarity, family, loyalty and fraternity, legislation should act accordingly to prevent this and to protect and promote social justice.

In the 21st century, regardless of the choice of family model and legislative orientation, all agree that testamentary freedom is not absolute and advocate necessary restrictions¹⁴. However, the difference lies in the "extent" of the limitations on testamentary freedom. The "extent" depends on the legislator's and people's

distinction between family ethics and the interests of the individual, the family and society, as well as their “tolerance” of testamentary freedom. The Australian family provision legislation is within the appropriate “extent” of limitations on testamentary freedom. The justification for this limitation is reflected in the following two aspects:

4.1 The Content of the Family Provision Is Specific and Reasonable

Australian family provision legislation was developed from New Zealand’s 1900 legislation, and the wording varied between the states as it developed. Queensland, Tasmania and Victoria use the term ‘maintenance and support’¹⁵, while the Australian Capital Territory, Northern Territory, New South Wales and South Australia use the term ‘maintenance, education and advancement in life’¹⁶. Western Australia uses the term ‘proper maintenance, support, education or advancement in life’¹⁷. Although the terms used are different, the essence is the same. Dixon CJ stated that ‘the legislation of the various States is grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided’¹⁸. In addition to this, the law is also specific about the application of the family provision. For example, in New South Wales, eligible applicants are the spouse and former spouse of the deceased person, the person has a de facto relationship with the deceased person, the child and grandchild, the person wholly or partly dependent on the deceased person, a member of household and the person have a close personal relationship with the deceased person.¹⁹

Further restrictions are placed on applying the slightly broader subjects of de facto relationships and close personal relationships, which need to be continuous in time and continue until the death of the deceased. In addition, the time for applying for family provision is also limited to 12 months from the deceased’s date of death.²⁰ While the court has discretion in deciding whether a provision in a will is adequate, it has to put itself in the testator’s shoes as far as possible. Moreover, the court needs to consider whether the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or children.²¹ Thus, the family provision application in Australia is limited and regulated by specific and clear legislation. The discretion of the judge is exercised within the bounds of rationality. In this aspect, the family provision framework is within the appropriate limits on testamentary freedom. ‘Freedom of testamentary disposition remains a prominent feature of the Australian legal system’²².

4.2 Family Provision Does Not Destroy the Value and Function of Testamentary Freedom

The testamentary freedom can remedy the deficiencies of statutory wills, and the family provision is also a remedy for the deficiencies of testamentary freedom. Husbands and fathers have enormous power and influence over their families because they control the family’s money. Absolute testamentary freedom allows testators to threaten and disinherit poor and suffering wives and children who do not obey their orders²³. In such situations, even a hardened individualist would agree that some remedy would be appropriate²⁴. The institution of the family provision thus compensated for the negative effects of an unjust will.

The family provision not only does not remove the incentive of testamentary freedom for heirs to work hard, but it also enhances it. The family provision does not negate the testator’s will, the testator has testamentary freedom, but the exercise and enjoyment of rights and freedoms must be consistent with the rights and freedoms of others. A family provision is a remedy for the testator’s infringement of the property rights of other family members used for maintenance after the testator’s death. From this perspective, only when the eligible applicants of the family provision have met their basic needs of life and education can they better integrate into society, work hard to accumulate wealth and contribute to the development of society.

Testamentary freedom can incentivise some willing relatives or neighbours to care for the elderly. Caring for the elderly requires a lot of time and effort, but these people who put in the fruits of their labour do not have a definite incentive to receive the benefits of the will. The family provision system can help these people when the will does not cover the person caring for the elderly. If a close friend of the elderly person continues to assist the elderly person, this assistance and care will continue until the death of the elderly person. After the death of the elderly person, the friend is living in poverty and is unable to support himself or herself. Then the friend can apply for family provision support based on a close personal relationship with the elderly. The existence and protection of a family provision protect the kind person who is not protected by a will made under the testamentary freedom. Therefore, family provision is also useful in addressing the issue of care and nursing for the elderly.

While family provision restricts testamentary freedom, it also helps to promote the charity. In fact, without family provision, family members who could not support themselves on their own would need the charity’s help, which would place an additional burden on the charity. The family provision provides these family members with a minimum level of security, allowing them to meet their basic needs without having to enter society to seek social welfare assistance again. Therefore, the family provision reduces the burden on social welfare, in another way, contributes to the development of the charity.

5. Conclusion

After analysing the value and background of testamentary freedom, this essay argues why limitations on testamentary freedom by the family provision are justified. The essay provides arguments and ideas for why the family provision is a justifiable limitation on testamentary freedom from the perspective of both the family provision legislation itself and the impact of the family provision on testamentary freedom. However, this essay also has some limitations. The literature referenced in this thesis is also from other countries, which makes the argument less logical. In addition, the research is not very in-depth due to the author's position. Future research could incorporate more cases, Australian books, and sources for a more detailed analysis.

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⁴ John Locke, (1988). *Two Treatises of Government*, (Cambridge University Press, rev ed, 1988).

⁵ Hedlund (n 3) 59.

⁶ Melanie B Leslie, (1996). 'The Myth of Testamentary Freedom', *Arizona Law Review*, 38, pp. 235.

⁷ Hedlund (n 3) 61.

⁸ Croucher (n 2) 12.

⁹ Joshua C Tate, (2006). 'Conditional Love: Incentive Trusts and the Inflexibility Problem', *Real Prop. Prob. & Tr. J.*, 41, pp. 445.

¹⁰ *Morrison v Carruthers* [2010] NSWSC 430.

¹¹ Joshua C Tate, (2008). 'Caregiving and the case for testamentary freedom', *University of California, Davis*, 42, pp. 129, 149.

¹² *Andre v Perpetual Trustees WA Ltd* [2009] WASCA 14.

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¹⁵ *Succession Act 1981* (Qld) s 41(1); *Testator's Family Maintenance Act 1912* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 91(3).

¹⁶ *Family Provision Act 1969* (ACT) s 8(2); *Family Provision Act 1970* (NT) s 8(1); *Succession Act 2006* (NSW) s 59(1)(c); *Inheritance (Family Provision) Act 1972* (SA) s 7(1)(b).

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¹⁸ *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494, 507.

¹⁹ *Succession Act 2006* (NSW) s 57.

²⁰ *Ibid* s 58.

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²² *Collins v Mutton* [2012] NSWSC 548, 553 [19].

²³ Hannah (n 14) 22.

²⁴ *Ibid*.

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