COMMENT

TESTATOR'S FAMILY MAINTENANCE: LATE APPLICATIONS—*EASTERBROOK* v. *YOUNG*

BY C. J. ROWLAND*

Easterbrook v. *Young*[1] is of great importance for the law relating to Testator's Family Maintenance, particularly since the High Court, in its unanimous judgment, pointed out that it would affect not only New South Wales, but other States as well.

The facts were that an intestate left a small estate in which the major asset was a cottage. The beneficiaries under the intestacy law were the intestate's wife and the two sons of the marriage. Each beneficiary was entitled to a one-third share in the estate. In 1959 letters of administration were granted to one of the sons and the cottage was transmitted to him as administrator, but the beneficial shares to which the beneficiaries were entitled were never formally transferred to them. The debts having been paid, the two sons agreed to allow their mother, the applicant, to continue to live in the cottage, and this arrangement continued to operate until 1973, when the mother applied for T.F.M. —fourteen years after the grant of letters of administration.

The grounds were that the cottage was not in good repair, and substantial expenditure on maintenance was needed. This the appellant could not provide, as she had no income apart from an old age pension.

Section 5(2A)(a) of the Testator's Family Maintenance and Guardianship of Infants Act 1916 (N.S.W.)[2] empowers the court to grant an extension of time subject to the rule that "every application for extension shall be made before the distribution of the estate".

Section 5(2A)(a), in relation to *late* applications, continues:

> and no distribution of any part of the estate made before the application shall be disturbed by reason of the application or of an order made thereon.

However, where an application is made *within* the time limit, section 11(3) applies:

> Nothing in this section shall prevent the court from ordering that any provision under this Act shall be made out of any assets so distributed.

The question therefore arose: could an extension of time be granted? Had the asset (*i.e.* the cottage) already been "distributed"? In the

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[1] (1977) 13 A.L.R. 351; [1977] A.E.G.R. 70-075; (1977) 51 A.L.J.R. 456. Barwick C.J., Mason and Murphy JJ. In this note page references are to the A.L.R. The writer gratefully acknowledges the help given by Mr Ric Lucas in preparing this note.

[2] Hereinafter called the T.F.M. & G. of I. Act.

Supreme Court of New South Wales[3] Holland J. held, on the basis of case authority, that the estate *had* been finally distributed. Holland J. would have preferred to hold, on the wording of the T.F.M. and G. of I. Act and the Wills, Probate and Administration Act 1898 (N.S.W.)[4] that there had been no final distribution. On appeal to the High Court Barwick C.J. and Mason and Murphy JJ. in a joint judgment held that they were not bound by the earlier decisions by which Holland J. had regarded himself as bound, and on the basis of the unreported judgment of Mahoney J. in *A.H. Keys (decd) & T.F.M. Act*[5] and particularly on the legislation itself, "read in accordance with the purpose and policy of the Act as evidenced by its provisions"[6] held that the estate had not been finally distributed and that the applicant could therefore be granted testator's family maintenance out of the estate. In the result the High Court allowed the appeal, extended the time and ordered that the entire interest in the real estate—*i.e.* the cottage—be vested in the mother to the exclusion of the sons.

The first question which arises is: when did the property cease to form part of the estate of the deceased? The High Court simply overruled those cases which held that distribution of an asset had taken place (and that that asset was therefore not available for a late testator's family maintenance order) if the capacity in which the personal representative held the property changed from personal representative to trustee. The new test laid down by the High Court is formulated thus:[7]

> the disabling circumstance in s 5(2A) is the actual distribution of the estate, its removal from the hands or name of the personal representative and its placement in the hands or name of the testamentary or statutory beneficiary.

The High Court seems to have made an effort to ensure that the principle it propounded would apply indifferently to executors and to administrators. Thus, throughout the judgment, although the estate in question was intestate, the law relating to wills and executors is discussed. Indeed, the Court seems to have devoted more attention to the rules governing executors than to those governing administrators. Thus[8] the Court said that the:

> fundamental question to be decided, then, is whether the change in the capacity of the executor or administrator, if indeed in the latter case there is any such change, in whose hands or name the property remains is relevant to the construction of the Act.

The Court never decided whether "any such change" takes place in the capacity of an administrator. Nor did they consider whether there should be any difference between an executor and an administrator.

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[3] *Easterbrook* v. *Young* [1974] 1 N.S.W.L.R. 676.
[4] Hereinafter the W.P.A. Act.
[5] Case No. 690 of 1972 Equity; judgment delivered on 6 June 1974.
[6] *Easterbrook* v. *Young* (1977) 13 A.L.R. 351, 356, *cf.* 358, 364.
[7] *Id.* 358 l. 15; *cf.* 358 l. 36.
[8] *Id.* 357.

The respondent was not an executor. Nearly all the cases cited by the Court are cases dealing with executors, and no clear reason is given why they are relevant to administrators.

Does an administrator who has completed his duties of administration become a trustee automatically?

The authorities are by no means clear on whether in fact there *is* a change in the capacity of an administrator when he has completed his administratorial duties (apart from actual distribution). Nor, indeed, are the cases unanimous on when the administratorial duties are complete.[9]

There seems to be little room for doubt that in Victoria, as in England, an administrator can change his capacity from administrator to trustee by completing his duties as administrator and then managing the property concerned as trustee. Thus, for example, in *Blake* v. *Bayne*[10] the sureties to the administration bond of an administratrix who managed real property as trustee and not as administratrix were not liable on the bond for her mismanagement, because the next of kin were *sui juris* and had consented to all the administratrix' actions. In the circumstances the liability of the sureties was terminated. Gowans J. in *Re McPhail (decd)*[11] said:

> In effect it was held that it was by reason of the conduct of the next of kin, after the debts had all been paid, they being all *sui juris*, that the administration had been brought to an end before the conduct complained of.[12]

In *McPhail's* case Gowans J. carefully discussed the authorities. He was not prepared to conclude that an administrator who has completed all the duties of administration holds as trustee and not as administrator, but the cases Gowans J. cites go a long way towards establishing that that is the true position.[13] In Victoria section 41 of the Administration and Probate Act 1958 (Vic.) apparently extends the law of assents to intestacy.[14] Even if it does apply to intestacy, however, section 41(4), which requires assents vesting a legal estate to be in writing will probably not make it impossible for an administrator to become a trustee by completing his administratorial duties, since becoming a trustee will not pass a legal estate. The statement in *Easterbrook* v. *Young*[15] that

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[9] On this point *cf.* O'Hare, "The *Situs* of the Interest in the Trust Estate" (1970) 7 University of Queensland Law Journal 57, 68-70, and Mahoney J. in *Keys'* case (690 of 1972 Eq. 6 June 1974).

[10] (1908) 6 C.L.R. 179; [1908] A.C. 371, on appeal from Victoria.

[11] [1971] V.R. 534, 542.

[12] Gowans J. points out that the emphasis on the need for the consent of beneficiaries who are *sui juris* is due to the fact that *Commissioner of Stamp Duties* v. *Livingston* (1964) 112 C.L.R. 12; [1965] A.C. 694 had not been decided, nor was there at that time a statutory trust for sale. After *Livingston* the same result could perhaps be reached without the active co-operation of the beneficiaries.

[13] *McPhail's* case is discussed by R.A.S., (1972) 46 A.L.J. 36 and by R. A. Sundberg, "Assents by Personal Representatives to the Vesting of Real Estate" (1975) 49 A.L.J. 678.

[14] *Cf.* R.A.S. (1972) 46 A.L.J. 36, 37.

[15] (1977) 13 A.L.R. 351, 356.

"the decision in this case will determine the meaning and effect of comparable provisions elsewhere in Australia" therefore probably will apply to Victoria.

In New South Wales an administrator cannot become a trustee by assent strictly speaking, for at common law assents do not apply to intestacies[16] and no statutory provision for assents has been made. Section 41 of the Victorian Act has no equivalent in New South Wales. If an administrator can become a trustee in New South Wales by completing his administratorial duties, he can only do so under the general law, that is, under the cases discussed in *McPhail's* case.[17]

The principal relevant statutory provision seems to be section 46E(1)[18] of the W.P.A. Act (N.S.W.). This section applies equally to executors and administrators, and provides that:

> Real estate vested in an executor or administrator shall not be divested from him and vested in another person who may be entitled thereto either beneficially or as a trustee, or an executor or administrator, otherwise than by a registered conveyance, or by an acknowledgement operating under section 83, or by registration under the provisions of the Real Property Act, 1900.

Two points can be made about this section. Firstly, the cases dealing with the change in capacity of an executor do not raise this section as an obstacle to the change. Secondly, the section speaks of a *divesting* from an executor or an administrator and a vesting in another person. Before a personal representative becomes a trustee the beneficiary has no interest in the asset itself, only a chose in action against the personal representative.[19] When the personal representative completes his executorial duties the beneficiary obtains an equitable interest in the property itself, and the personal representative holds as trustee.[20] However, it is submitted that this does not amount to a *divesting* from the personal representative. It was emphasised in *Livingston's* case that it was fallacious to insist that at all times separate equitable and legal interests had to be found in any asset. When the whole right is in a person, as it is in the personal representative, "there is no need to distinguish between the legal and equitable interest in that property".[21] The two titles merge into the legal estate.[22] When the personal representative becomes trustee the type of trust which arises depends upon the particular case. The analogy would be either a discretionary trust (in which case the beneficiary *still* has no interest in the individual trust assets) or a fixed trust, in which case an equitable interest in the asset

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[16] Williams, *The Law Relating to Assents* (1947) 4; *Bryen* v. *Reus* (1960) 61 S.R. (N.S.W.) 396, 399.

[17] [1971] V.R. 534, and see Williams, *op. cit.* 116 ff.

[18] This section was added in 1930.

[19] *Livingston's* case (1964) 112 C.L.R. 12. It seems clear that the principle in *Livingston's* case applies to administrators as well as to executors.

[20] *Perpetual Trustee Company Limited and Others* v. *Commissioner of Stamp Duties, New South Wales* (*Shallard's* case) [1976] A.E.G.R. 70-073; (1976) 7 A.T.R. 76.

[21] *Supra* n. 12, 22.

[22] *Fung Ping Shan* v. *Tong Shun* [1918] A.C. 403, 411; adopted in *Purcell* v. *Deputy Federal Commissioner of Taxation* (1920) 28 C.L.R. 77, 88.

is called into existence by equity and resides in the beneficiary. It does not pass by a divesting from the personal representative and a vesting in the beneficiary.[23] The conclusion is that section 46E does not prevent a personal representative from becoming a trustee by operation of the general law when he completes his executorial duties.[24]

There seems to be little judicial questioning of the principle that an executor who completes his executorial duties in New South Wales thereafter holds as trustee, and the principle tacitly underlies a number of cases.[25] However, there do not appear to be many cases in which the principle is spelled out. The most important of those that do is

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[23] See generally O'Hare, "The *Situs* of the Interest in the Trust Estate" (1970) 7 University of Queensland Law Journal 57, 60.

[24] Other sections which might bear on the question, but which, it is submitted, do not exclude the general law are:

(a) S. 44 of the W.P.A. Act. This section vests the estate in the executor or administrator.
(b) S. 46 of the W.P.A. Act.
(c) S. 47 of the W.P.A. Act.
(d) S. 49(1) of Division 2 of Part II of the W.P.A. Act (*not* the intestacy provision) has been repealed in relation to intestates dying after 1 January, 1955.
(e) S. 11(1) of the Trustee Act 1925 (N.S.W.) applies only to executors.
(f) S. 46 of the Trustee Act 1925 applies (by virtue of s. 5) to executors and administrators.
(g) S. 49(1)(a) of Division 2A of Part II of the W.P.A. Act provides that an administrator on intestacy holds on *statutory trust* for issue, and on *trust* for other relatives including the surviving spouse under s. 49(1)(a)(i)(d) Sixthly. However, s. 50 simply provides that the husband or wife "shall be entitled on the death of the other . . . to the following shares only:
    (a) where there is issue living at the death of the intestate—
        (i) in the case where such issue comprises or includes two or more children of the intestate, to one-third share of such property".

This is the case which applied to the estate in *Easterbrook* v. *Young*. Literally, therefore it would appear that the administrator held in statutory trust for the issue, but, subject, *inter alia*, to ss. 61, 44 and 46A, of the W.P.A. Act, the surviving spouse was "entitled on the death of the other" to the estate. The Court in *Easterbrook* v. *Young* simply remarked that a T.F.M. order would vary "the statutory trusts" in the case of an intestacy. This requires justification in the case of a surviving spouse. *Cf.*, too the judgment of the Court below in *Easterbrook* v. *Young* [1974] 1 N.S.W.L.R. 676, 678A.

In an important amendment to the W.P.A. Act the Wills Probate and Administration Amendment Act 1977 enacts a new scheme of intestacy for New South Wales. The new ss. 61B and 61C unify the rules relating to surviving spouses and other relatives into a single system, and these sections make it quite clear that the administrator holds in trust for *all* classes of beneficiary, thus eliminating one anomaly from the old Part II Division 2A which applied to *Easterbrook* v. *Young*. The new s. 61B(1) also clarifies the position in relation to the applicability of s. 83 to real property passing on intestacy:

> . . . the real and personal estate of that person shall, subject to the payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of that estate, be distributed or held in trust in the manner specified in this section, and the real estate of that person shall be held as if it had been devised to the persons for whom it is held in trust under this section.

[25] *E.g.*, *Shallard's* case, *supra* n. 20.

McCaughey v. *Commissioner of Stamp Duties (New South Wales)*[26] in which Jordan C.J. said:[27]

> An executor who has once taken out probate never during his lifetime ceases to be executor (unless enabled to do so by some statute), and any property which becomes vested in him as executor is held by him not in trust but in *auter droit*. He may, however, eventually come to hold the property as trustee. If, having been appointed executor only, he continues to hold it after his executorial duties have been completed, he is regarded as then holding it as constructive trustee. If, having been appointed trustee as well as executor, he continues to hold it when those duties are completed, he is regarded as holding it as express trustee.

Jordan C.J.'s remarks applied to real property. Some of the testators concerned in the case died after section 46E had been enacted. The section therefore applied to these estates, but Jordan C.J. did not refer to section 46E. If he had regarded section 46E as affecting this doctrine he would surely have said so.

Section 46E applies equally to executors and administrators. If section 46E does not affect the principle that an executor who completes his executorial duties becomes a trustee, it does not affect an administrator in the analogous position. An administrator as administrator holds on trust from the death of the intestate for issue of the intestate.[28] When his duties are complete there might well be no divesting of legal or beneficial interests and vesting of those interests in another person, even though there is a change of capacity and the administrator no longer holds those assets in the capacity of administrator. That the administrator also holds on trust for the surviving spouse is stated in the W.P.A. Act as amended in 1977.[29]

A case in which an intestacy arose is *Perpetual Trustee Co. (Ltd)* v. *Commissioner of Stamp Duties (Lady Douglas's Case)*.[30] In that case Ferguson J. (one of the majority) said that when

> the fund was established and the balance of the estate distributed, there were no further administrational functions to be performed. The administrators became constructive trustees of the fund.

The other member of the majority, Wallace J., said[31] that sections 46 and 49 of the W.P.A. Act were relevant and supported his similar, but less explicit view.

The effect of section 46E was not taken into account.

Again, George Weir, writing in 1936 (after section 46E had been enacted) said that:[32]

> there appears to be no reason why—in New South Wales, at any rate—similar considerations should not apply to administrators

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[26] (1945) 46 S.R. (N.S.W.) 192.
[27] *Id.* 209.
[28] S. 61B(1), (3), (4) of Part II Division 2A of the W.P.A. Act.
[29] S. 61B(2) of Part II Division 2A of the W.P.A. Act.
[30] [1961] S.R. (N.S.W.) 333, 343.
[31] *Id.* 345.
[32] Weir, "Administration De Bonis Non" (1936) 10 A.L.J. 13, 16.

as apply in the case of executors. After completion of his duties as administrator, he becomes a constructive trustee for the beneficiaries.

It is suggested that this is correct, and that the statutory provisions cited above do not in the end invalidate it.[33]

In the important case of *A.H. Keys (decd) & T.F.M. Act*[34] Mahoney J. was prepared to accept that an executor could become a trustee according to the principles of the general law, and that the W.P.A. Act left the general law in operation. Real property was involved. Because this judgment is not readily available the portion of the judgment dealing with the process by which an executor becomes trustee is quoted in full as an appendix to this note. Mahoney J. also accepted that the law of assents applied in New South Wales.

A very important feature of this part of Mr Justice Mahoney's judgment is his emphasis that the test of when an executor has become a trustee depends on the purposes for which the powers of executor are given. If the executor has achieved the purposes for which the office of executor was given him, then the powers of that office cease even if actual distribution has not taken place. So, prior to actual distribution, an executor could "be held to hold assets not as executor but as a trustee", for instance, where he is appointed trustee by the will. In that case the office of executor will not include the duty to distribute, and it would follow that a later distribution would be as trustee and not as executor. Mahoney J. said that the same principles applied where assets were set apart "or otherwise dealt with . . . in accordance with recognised principles of law so as to remove them from the estate and convert them into trust assets".

It seems clear that, although the impact of legislation has not been fully examined judicially, the general law relating to the change in capacity from personal representative to trustee does apply in New South Wales, and that, in order to hold that assets which an executor or administrator holds as trustee (but are not yet physically distributed) it was necessary for the High Court to hold that the change in capacity from personal representative to trustee did not amount to a "distribution". This approach was adopted by Mahoney J. in *Keys*,[35] and it is submitted to be correct.

If it is accepted that an administrator can become a trustee by completing his duties a number of important results follow. These include the appointment of new administrators or trustees, the liabilities of sureties and the *locus* of assets for tax purposes. However, it is respectfully submitted that the policy underlying the High Court judgment is right. Clearly this change in capacity is technical and artificial, and even ill-defined, and it is not an appropriate test for the availability or non-availability of assets for the satisfaction of a late

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[33] *Cf.*, O'Hare, "The *Situs* of the Interest in the Trust Estate" (1970) 7 University of Queensland Law Journal 57, 68.

[34] Unreported: 690 of 1972 Eq. dated 6 June 1974.

[35] *Supra.*

T.F.M. application. Since *Easterbrook* v. *Young* the change in capacity is not decisive as to whether an asset is available for satisfaction of a late T.F.M. application. The important question is rather: bearing in mind the position of the parties in all the circumstances, would an order in satisfaction of a late application act too harshly or unfairly on the beneficiary whose interest in the estate is adversely affected by the order, or on the applicant?

In order to try to establish that this is and ought to be the central consideration, some alternative approaches in different jurisdictions will be looked at.

Alternative tests for deciding when an asset has been distributed so as to make it unavailable for a T.F.M. order.

1. *New Zealand*

In 1931 *Public Trustee* v. *J.A. Kidd*[36] became the first in a series of cases establishing the principle that once the personal representative has become a trustee there has been a "final distribution" and that therefore no late application can be granted.

This series of cases is described by the High Court in *Easterbrook* v. *Young*. In New Zealand itself the Legislature clearly did not approve the policy embodied in this line of cases, for in 1939 what is now section 2(4) of the Family Protection Act 1955 (N.Z.) was enacted in the following terms:

> For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person . . . shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

"Administrator" includes all personal representatives.[37] New Zealand has, therefore, effectively disowned the line of cases which, over the years, has continued to influence Australian courts, and, furthermore, it would not improve the position of a beneficiary if a New Zealand personal representative, holding property for a beneficiary whose interest is not absolutely vested in interest, were to pass the legal estate to a new trustee.

2. *New South Wales*

The New South Wales Law Reform Commission in its Report *The Testator's Family Maintenance and Guardianship of Infants Act, 1916*[38] proposed a different approach to the problem posed by the New Zealand cases, which were strongly influential in Australia.[39] This new approach is embodied in the Family Provision Bill, which is published with the

[36] [1931] N.Z.L.R. 1.
[37] Administration Act 1969, s. 2(1) (N.Z).
[38] L.R.C. 28, 1977.
[39] *Cf. Easterbrook* v. *Young* [1974] 1 N.S.W.L.R. 676.

Report. Therefore, the High Court decision in *Easterbrook* v. *Young* will no longer be authoritative in New South Wales if the Bill becomes law.

In the first place the Bill provides that the normal time within which an application must be made is 18 months after the date of the death of the decedent.[40] This is a very long period, and it will be discussed later in this comment.

In the second place,[41] it is provided that an application for extension of time must be made "before all the property in the estate is distributed" and that no distribution already made shall be disturbed by a late application.

Section 5(3) of the Bill reads:

> Where property in the estate of a deceased person is held by an administrator, not as personal representative, but as trustee for a person or for a charitable purpose, then, for the purposes of this Act, the property is distributed, unless the property will not become absolutely vested in interest in that person or for that purpose except upon a contingency, in which case, for the purposes of this Act, the property is not distributed.

In their explanatory notes the Commissioners[42] point out that this does not go very far beyond the position which was laid down by the New Zealand cases and accepted by Holland J. in the Court below in *Easterbrook* v. *Young*. The Commissioners cite the New Zealand amendment of 1939, and reject it because:

> We believe . . . that where property is held by a trustee and the property has vested in interest in the person for whom it is held, the property should not, except in special circumstances, be at risk of a late application for provision. To us, the settled expectations of the person concerned are entitled to greater protection from the law than the claims of a person who fails to commence his proceedings within the time fixed by the law.

3. *Canada*

Most family provision statutes in Canada do not vary greatly from one Province to another, and in relation to late T.F.M. claims they do not differ very greatly from the New South Wales T.F.M. and G. of I. Act. In contrast with New Zealand, and Holland J. in the Court below in *Easterbrook* v. *Young* the Canadian courts seem generally to have adopted the view that assets held by a personal representative as trustee, after he has completely administered the estate, are generally available for a late T.F.M. order.

In *Re Brill*[43] and in *Re Hull Estate*[44] assets which were clearly held by the personal representative as trustee were treated as being undistri-

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[40] S. 14.
[41] In s. 14(4) and (5) of the Bill.
[42] At 17, 19-20.
[43] [1967] 2 O.R. 586.
[44] [1943] O.R. 778 (Court of Appeal).

buted. The matter is not fully discussed, but in *Re Brill* the Court referred [45] to the New Zealand cases as "in any event... not helpful". In *Re Hull Estate* the executor had completed his executorial duties and was clearly holding as trustee. The Court ordered an extension of time.[46]

In every case in which a Canadian court is considering whether to grant a late application, the court asks whether an injustice would be done if the late application were granted (or refused),[47] and thus the claims of the applicant are balanced against the reasonable expectations of the beneficiaries. However, assets which have been passed to a new trustee or have been physically distributed to beneficiaries, cannot be affected by a late application.[48] Therefore, in spite of the fact that the situation envisaged with apprehension by W.A. Lee[49] exists in Canada, the reported cases give no indication that dire consequences have ensued.[50] It is significant that Canadian legislatures have apparently not found it necessary to alter their provisions relating to extension of time.

4. *The test laid down by the High Court in Easterbrook* v. *Young*

The Court stated the test to be applied thus:[51]

> the disabling circumstance in s 5(2A) is the actual distribution of the estate, its removal from the hands or name of the personal representative and its placement in the hands or name of the testamentary or statutory beneficiary.

Later the High Court said:[52]

> It is, in our opinion, only when the personal representative has parted with all the assets which came into his hands by the grant of probate or letters of administration that there has been a final distribution of the estate of the testator or intestate,

and,[53] "it is, in our opinion, incongruous to deny jurisdiction so soon as executorial duties are complete".

The precise meaning of this test is not entirely clear. W.A. Lee[54] criticises the judgment roundly, and says that personal representatives holding as trustees will now have to hand over to new trustees.

> The only way in which they can protect their beneficiary's interests is to resign from the trusteeship—or refuse to accept it—and to appoint new trustees and vest the trust fund in the new trustees.

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[45] At 591-592.

[46] See too *In re Monkman Estate* [1920] 1 W.W.R. 376 (the shares in the cement company—379, 380).

[47] *Re De Roche Estate* (1964) 49 W.W.R. 761 (Sask.); *Re Kvasnak (Kvasnąkova)* [1951] 3 D.L.R. 412; [1951] 2 W.W.R. (N.S.) 174; *Re Hull Estate* [1943] O.R. 778 (C.A.).

[48] *Hull's* case [1943] O.R. 778, 782.

[49] Lee, The Bulletin 16 April 1977, 7.

[50] The actual period within which an application must be made is, in most Provinces, six months from the grant. References are given in n. 67.

[51] (1977) 13 A.L.R. 351, 358.

[52] *Ibid.*

[53] *Id.* 364.

[54] Lee, The Bulletin 7 April 1977, 7.

> In that way the estate will be distributed and freed of the possibility of a claim.

Would transferring to new trustees in fact relieve the assets from the possibility of a late claim? The basic test is that laid down on page 358. On this test it would not be sufficient merely to change trustees—it must go into the "hands or name" of the beneficiary. Does this mean merely that the beneficiary must obtain an interest vested indefeasibly or absolutely, *i.e.* does it come to the same thing as the New South Wales provision, or does it mean the legal and beneficial interest must be transferred to the beneficiary, like the New Zealand provision? The fact that the serious anomaly referred to by Lee disappears only if *Easterbrook* v. *Young* is interpreted as amounting to the same thing as the New Zealand statute in itself suggests that the judgment must be construed in this sense. The main passage containing the test[55] states that the test is twofold: not only must the personal representative have divested himself of all legal and equitable interests in the property, but the property must *also* have been placed *in the hands or name* of the beneficiary. This can only mean that "actual distribution" has not taken place so long as the assets are held in trust for the beneficiary by *any* trustee. In the light of the second passage cited above[56] it might seem that the disabling circumstance is the personal representative's parting with the assets. However, the wording of the main passage is so clear—the property must be placed "in the hands or name" of the beneficiary—that, it is submitted, it is not watered down by the subsequent passage from page 358. The last of the three passages cited[57] is equivocal, since it gives no guidance on when executorial duties are in fact completed,[58] nor does it state when the cutoff *does* occur.

Reading the main statement of the test[59] literally, it would seem that the High Court is indeed laying down a test similar to section 2(4) of the New Zealand Act. It is not enough simply to appoint a new trustee: the asset must pass into the hands or name of the beneficiary. If this is so, then Lee is wrong, and it will not help the beneficiaries or personal representatives to appoint new trustees in order to meet the High Court's definition of "final distribution".

This leaves one unsatisfactory aspect: if, say, an administrator distributes much of an intestate estate, but retains one portion in trust for an infant beneficiary, that portion would be available for a late T.F.M. order. The same would be true even if the administrator who becomes trustee hands over the legal estate to a new trustee. This seems harsh, but it is mitigated by the principle that a court in deciding on a

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[55] The first passage from 358 cited above—text to n. 51.

[56] Also at 358.

[57] At 364.

[58] For a discussion of cases on completion of executorial duties see *McPhail* [1971] V.R. 534; *Keys'* case, unreported: Mahoney J., 6 June 1974 and *cf. Anderson* v. *Williams* [1956] N.Z.L.R. 657. It must be borne in mind that this question is linked with *Stamp Duties Commissioner (Queensland)* v. *Livingston* (1964) 112 C.L.R. 12 and to the body of authority dealing with the beneficiary's interest in an unadministered estate.

[59] *Supra* n. 51.

late T.F.M. application will always consider whether in all the circumstances an order would be fair to all those affected.

However, whether Lee is right or wrong, practical caution suggests that so long as doubt remains, personal representatives should heed Lee's advice and divest themselves of the legal interest in the property as soon as possible after the expiry of the period for T.F.M. claims, if there is any possibility of a late claim being made.

5. *The English solution*

Section 4 of the Inheritance (Provision for Family and Dependants) Act 1975 (Eng.) provides:

> An application for an order under section 2 of this Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

The Act lays down no further guidelines for the granting of an extension of time.

As originally enacted the English legislation gave little scope for late applications, and an order made on a late application could only affect a very limited class of assets.[60] These limitations were gradually eliminated[61] and were not restored in the 1975 Act. In discussing its discretion to make an order on a late application the Court in *In re Ruttie (decd) Ruttie* v. *Saul*[62] acknowledged that it had an unfettered discretion. A number of alternative criteria for the exercise of this discretion were referred to by the Court, and the Court emphasised "how dangerous it is to attempt to establish prematurely guiding principles", and asked whether "in these circumstances it is reasonably clear that the extension of time is required in the interests of justice".

The Court proceeded to balance the hardship to the applicant if an extension were refused against the hardship to the beneficiary if one were granted.

This legislative approach seems to be wise, and to be preferred to the legalistic rules proposed by the New South Wales Law Reform Commission. The High Court's judgment in *Easterbrook* v. *Young* could in due course lead without further legislation to a similar (although still somewhat narrower) end result provided that courts are careful not to lay down guiding principles prematurely.

What should the true policy be, and how close does Easterbrook v. *Young come to realising this policy?*

The High Court in *Easterbrook* v. *Young* (as did Mahoney J. in *Keys'* case) attempted to draw from the T.F.M. and G. of I. Act itself

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[60] Inheritance (Family Provision) Act 1938 (Eng.) ss. 2 and 4.

[61] By way of the Intestates' Estates Act 1952 (Eng.) which added s. 2(1A) to the Inheritance (Family Provision) Act 1938 (Eng.), listing various circumstances in which the court could grant an extension of time, and the Family Provision Act 1966 (Eng.) which repealed s. 2(1A) and enacted a new s. 2(1) which gave the court a general discretion to hear a late application.

[62] [1970] 1 W.L.R. 89, 93-94.

the true policy. It is respectfully submitted that this attempt failed, and had to fail, because the Act really does not make its own policy on this question clear. Indeed, the High Court in its discussion of sections 5(2A) and 11(3) seems to have become confused into believing that, if the New Zealand cases are followed, no distribution already made will be disturbed to satisfy a T.F.M. application *even if the application is made within time.*[63] This vitiates the High Court's attempt to draw the policy of the Act on this question from the Act itself. It is submitted that there can be no logically strict basis for concluding that any assets not yet transmitted "into the hands or name" of the beneficiary are available to satisfy a late T.F.M. claim. It can only be justified on general principle. What *is* the true principle of policy? Firstly, it is submitted that it must always be unsatisfactory to create an artificial barrier to define the point where an asset ceases to be available for a late application. (This is particularly true of the ill-defined moment when a personal representative becomes a trustee.) Circumstances differ. The New South Wales Law Reform Commission retained the artificial barrier of distribution,[64] but created one exception: it does not apply when the applicant lacks capacity. In this case already distributed assets are fully available for late claims.[65]

It is submitted that no such detailed, rigid, legislative balancing of interests can be satisfactory. It is bound to lead to hard cases and to further attempts to refine the legislation to cope with the hard cases. The simplicity of the English statute and its recognition of basic principle is fundamentally attractive, and this is the solution which is approached by *Easterbrook* v. *Young* and in Canada by the courts, and in New Zealand by statute. The very fact that the tendency in England, New Zealand, and the High Court in Australia has been towards including a very wide range of assets in the ambit of the court's discretion suggests that no rigid, fixed rules embodied in a statute can ever satisfactorily delimit for all cases what property is not ever available to satisfy a late T.F.M. application. It is submitted that the approach of the English statute is correct in principle: the statute gives the courts a completely free hand. An extremely wide range of assets is theoretically available for a late application—the range of available assets is even wider than that in New Zealand—but at the same time the court asks in every case: in all the circumstances, would an injustice be done if the application were granted?[66]

A further advantage of the English approach is that the period during which administration is held up pending possible late claims is only six months, and no unnecessary applications to court are made. The

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[63] (1977) 13 A.L.R. 351, 359. Nevertheless, the argument (358) based on s. 40B(3) of the W.P.A. Act is, with respect, persuasive, and suggests that in New South Wales, at least, the fact that the personal representative has become trustee is not sufficient to make affected assets unavailable for a late T.F.M. application.

[64] S. 5(3) of the Family Provision Bill 1977 quoted above.

[65] S. 14 (7).

[66] S. 4, Inheritance (Provision for Family and Dependants) Act 1975 (Eng.) and *Ruttie's* case [1970] 1 W.L.R. 89.

Canadian courts have evolved a similar approach within the framework of their statutes: in granting a late application they cannot reach assets which have been physically distributed, but in every case where a late application is made, whether or not the executor has become trustee, the courts ask: would an injustice be done by granting (or by refusing) a late application? Because the Canadian statutes generally prescribe that assets which have been distributed are not available for satisfaction of a late T.F.M. application, the Canadian courts do not have the freedom that the English (or New Zealand) courts have.

Another factor in establishing a satisfactory policy for late T.F.M. applications is the period within which a normal application must be made.

In most Canadian jurisdictions the period within which an application must be made is six months after the grant, while in Ontario the surviving spouse or minor dependants must apply when application for probate is made; other applications must be made within three months after the testator's death.[67]

In New Zealand the period is twelve months from the grant, except where an applicant lacks mental capacity or is a minor. In this case the period is extended to two years.[68]

In most Australian jurisdictions the period is six months.[69]

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[67] *British Columbia*
6 months: s. 11(1) of the Testator's Family Maintenance Act, R.S.B.C. 1960 c. 378. No provision for extension of time exists in British Columbia—*cf. Re Hirsch* [1977] 2 B.C.L.R. 216.
Manitoba
6 months: a judge may "if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application". Ss. 15(1) and (2) of the Testator's Family Maintenance Act Manitoba Statutes c.T 50.
New Brunswick
6 months: terms similar to those in Manitoba—Testator's Family Maintenance Act R.S.N.B. 1973 c.T 4 ss. 14(1) and (2).
Newfoundland
6 months: terms similar to those in Manitoba—Family Relief Act R.S.Nfld. 1970 c. 124 ss. 14(1) and (2).
Nova Scotia
6 months: terms similar to those in Manitoba—Testator's Family Maintenance Act R.S.N.S. 1967 c. 303 ss. 13(1) and (2).
Ontario
The Dependant's Relief Act R.S.O. 1970 c. 126 s. 4(2) reads:
> Where letters probate have been or are applied for by the wife or husband of the testator or a guardian on behalf of minor dependants, an application for an allowance for such wife or husband or for such minor dependants shall be made at the time of applying for letters probate and in every other case the application shall be made within three months after the death of the testator, but the judge, if he deems it just, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

[68] Family Protection Act 1955, s. 9(2).
[69] *Queensland*: 6 months "unless the court otherwise directs":
Queensland Succession Acts, s. 89(8) and (9).
South Australia: 6 months:
Inheritance (Family Provision) Act 1972, s. 8.

The period in England is six months.[70] A suggestion was made that the period within which an application had to be made be reduced to only two months from the date of grant, but the suggestion was rejected.[71]

The New South Wales Family Provision Bill is strikingly different. It provides that the normal time within which an application must be made is 18 months after the *death* of the decedent.[72] As this time is different from the executor's year, and as the time is likely to be embarrassingly long for needy beneficiaries, this period is likely to cause problems with the personal representative's duty to distribute and the legitimate entitlements of beneficiaries. The Bill avoids these problems by creating a special ground for a subsidiary application to court (complete with the attendant problems and costs that go with additional applications to court).

J. Gareth Miller[73] says that the

> English system of administration of estates, which involves the minimum of court interference with the personal representative, is similar to the system of "independent administration" as it is called in Texas and a few other American States. It is, however, in complete contrast to the traditional American system of "continuous court supervision" which still prevails in the majority of States. Under such a system the personal representative is not supposed to take any step without the formal approval of the court and distribution is effected by order of the court. This understandably results in increased expense and delay, and probably explains why a book entitled *How to avoid Probate* became a best seller in the United States.

The present writer has some experience of the South African system, which is one of "continuous court supervision", and it is submitted that

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Western Australia: 6 months:
Inheritance (Family and Dependants Provision) Act 1972, ss. 7(2) and 8(1). Distributed property can be affected in certain cases under s. 65 of the Trustees Act 1962.
Tasmania: 3 months:
Testator's Family Maintenance Act 1912, s. 11.
A.C.T.: 12 months:
Family Provision Ordinance 1969, s. 9.
N.T.: 12 months:
Family Provision Ordinance 1970, s. 9.

[70] S. 4 of the Inheritance (Provision for Family and Dependants) Act 1975 (Eng.).

[71] *Cf.* Mackay, "Family Provision on Death" (1976) 126 New Law Journal 228, 229. The Law Commission's *Second Report on Family Property: Family Provision on Death* (Law Com. No. 61, 31 July 1974, para. 144, p. 37 reads:

> The personal representatives are protected if, no application having been made, they distribute any part of the estate after the expiration of the six months' period, but this is without prejudice to any right to recover any part of the estate distributed. A time limit for applications must balance the interests of the possible applicants for family provision against the need for certainty in administering the estate, and we think the present balance is fair. We make no proposal for change.)

[72] S. 14—discussed 50 ff. of the L.R.C. Report.

[73] *The Machinery of Succession* (1977) 84.

it would be most unfortunate if the "independent administration" systems in Australia gave way to the rigidly supervised system. The new Family Provision Bill unfortunately does go some way towards a system of "continuous court supervision".

It is submitted, in the light of the New Zealand statute, the English statute and the Canadian statutes and cases, and the bulk of Australian statutes that the most satisfactory policy has four elements:

(a) a reasonably short period within which a normal application must be made. Six months from the grant is widely accepted: twelve months is rare. The principle would seem to be that in any case the period should not be longer than the executor's year.

(b) A wide—extremely wide—range of assets should be available to the court since justice will sometimes demand that assets which have actually been distributed to beneficiaries be reclaimed for satisfaction of a late claim.

(c) However, since justice demands that the settled expectations and interests of beneficiaries be free from the risk of disturbance if possible, no late claim should be granted unless the court is satisfied that settled expectations must be disturbed in order that justice can be done. Only in special circumstances could the court be so satisfied, since the settled expectations of beneficiaries constitute an extremely weighty consideration.

These three elements are satisfied in the English legislation. They are not satisfied by the New South Wales Family Provision Bill. They are very largely satisfied by the New Zealand and less so by the Canadian law. In *Easterbrook* v. *Young* the High Court has opened the way to Australian courts to operate within a satisfactory framework: the period in most Australian States is short; in the light of *Easterbrook* v. *Young* the range of assets available to satisfy a late claim is very wide, and, in the exercise of their discretion to affect those assets, the courts will balance the interests of affected persons, and decide whether an order would in the circumstances be fair to all concerned.

(d) The principle of freedom of testation is widely accepted in Australia, and the principle underlies the approach of the courts to T.F.M. actions. Thus, in a very well-known passage in *Pontifical Society for the Propagation of the Faith* v. *Scales*[74] Dixon C.J. said: "All authorities agree that it was never meant that the Court should re-write the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court. An observer of the course of development in the administration in Australia of such statutory provisions might be tempted to think that, unchecked, that is likely to become the practical result. Perhaps this Court and other Courts of Appeal have attached too much significance to the discretionary aspects of orders under appeal and have accordingly allowed orders to stand which no member of the Court of Appeal would himself have made, had he sat at first instance."

[74] (1962) 107 C.L.R. 9, 19.

This passage was quoted in full by Murphy J. in *Cooper* v. *Dungan*[75] in which the High Court reduced an order made in the Court below. It is submitted that if this passage is borne in mind in every case where a late application is being considered, the true policy of the legislation will be effected, and the wide discretion given by *Easterbrook* v. *Young* will be tempered by accepted principle. If the principle of freedom of testation is not given sufficient weight by the courts, then detailed restrictions like those set out by the New South Wales Law Reform Commission will be necessary.

Conclusions

(a) The general law relating to the process and time by which a personal representative becomes a trustee applies in New South Wales, and so does the law relating to assents.

An administrator on intestacy can in New South Wales become a trustee under the general law. The law of assents does not apply to an administrator of an intestate estate, but such an administrator can become a trustee in relation to particular assets or to an estate, *inter alia*, by completing his administratorial duties. These propositions are not affected by the W.P.A. Act.

(b) Since *Easterbrook* v. *Young* it is not important for the purposes of a late T.F.M. application to ask whether a personal representative has become a trustee.

(c) It is submitted that four policy criteria must be met as preconditions for a satisfactory system for dealing with late T.F.M. applications. These criteria are stated, and it is concluded that *Easterbrook* v. *Young* makes it possible for Australian jurisdictions to come close to meeting these criteria without the need for legislative intervention. The decision in *Easterbrook* v. *Young* is therefore welcomed, while the proposals of the New South Wales Law Reform Commission are criticised.

[75] (1976) 9 A.L.R. 93, 101.

Appendix: Extract from A.H. Keys (decd) & T.F.M. Act per Mahoney J., unreported, 690 of 1972, judgment delivered on 6 June 1974.

The real question is whether [at the date of making the application or making the order] there was anything which was "the estate of the deceased".

This question has caused me considerable difficulty. It is not in contest that all of the assets, excluding the realty, had before the relevant date been disposed of or given to the plaintiff and all debts, funeral and testamentary expenses of the deceased had been paid. The realty, which is land registered under the provisions of the Real Property Act, 1900, was by a transmission application dated 18th April, 1969, Ex. 1, and presumably registered shortly after that date, registered in the names of the plaintiff and Mr Wrigley and the land is presumably held subject to the normal Registrar General's caveat. The realty is, in any event, still held by the persons who were appointed executors.

However, Mr Rayment has submitted, first, that these persons have ceased to hold it as executors and hold it in another capacity; and, second, that therefore, the realty is no longer part of the estate of the testator. He has argued that when an executor has completed his executorial duties any assets that devolve from the deceased are held by the executor not as executor but as trustee in any event in a capacity other than that of executor. He has submitted that at such a time the assets cease to be assets of the estate of the testator.

Mr Rayment has referred in support of his submissions to a number of authorities: See *Burke* v. *Dawes* (1938) 59 C.L.R. 1; *Public Trustee* v. *J.A. Kidd* [1931] N.Z.L.R. 1 at pp. 3-4; *In re Perry (decd)* [1950] N.Z.L.R. 530; *In re Lerwill* [1955] N.Z.L.R. 858; *In re McGregor* [1960] N.Z.L.R. 220; *Re Donkin* [1966] Qd.R. 96; and *Re McPhail* [1971] V.R. 534; and Mr Bowen-Thomas for the applicant has also referred me to a number of decided cases: See *Harvell* v. *Foster* [1954] 2 Q.B. 367 at pp. 379-380; *McCaughey* v. *Commissioner of Stamp Duties* (1945) 46 S.R. (N.S.W.) 192 at p. 209; *In re Pratt* (1963) 80 W.N. 1416. I am indebted to counsel for their assistance in the analysis of these cases.

The Wills, Probate and Administration Act, s. 47 provides that, on grant of probate, executors hold the assets of the deceased estate upon the trusts of the will. This, however, does not in my opinion cause the executors to cease to hold the estate otherwise than in the capacity of executors and I do not think that this section determines the present case. If the matter is to be determined, as Mr Rayment's submissions suggest, according to the general law principles, it is necessary to consider what is the position of executors in the position of the present executors under the general law in relation to these assets.

Under the general law one might be pardoned for thinking that in addition to such duties as the collection of the assets and the payment of all debts, funeral and testamentary expenses, the duties of an

executor included the actual distribution of the estate: see *Commissioner of Stamp Duties (Queensland)* v. *Livingston* (1964) 112 C.L.R. 12 at pp. 17-18. Where, for example, the executor is not by the will appointed to be a trustee and is not given trusts to execute, the distribution of the estate can be, it might be thought, in no other capacity than that of executor. Even in such a case, (that is where the executor has not been given trusts to execute) cases may occur in which powers incidental to the office of an executor, for example, the power to sell, may cease before the actual distribution of the estate; some of the cases in which the general law as to the duties of executors has been discussed have been cases dealing with the existence or non-existence of such powers at particular stages in the administration of a deceased estate. This, however, in my opinion, is because, by the time that all which is left for the executor to do is to distribute the estate to the beneficiaries, the purpose of the power, namely, to effect the proper administration of the estate, has been achieved; the fact that a power has ceased may be, not because the executor has ceased to be an executor or because the assets he holds have ceased to be held by him as executor, but because the purpose for which the power was granted has ceased to exist.

I am conscious that, in general, when assets are held by an executor the ultimate beneficiaries have no proprietary interest in the assets and that it has been held that such beneficiaries do acquire a proprietary interest in the assets when the estate has been "cleared" or fully administered even though, of course, the assets themselves have not been distributed: see *Livingston's* case (*supra*) at p. 21. However, in my opinion, the fact that a proprietary interest accrues in the assets does not mean that the executor has ceased to hold the assets as executor or that the assets cease at that point to be "assets of the estate". It means merely that at the relevant stage in the administration of the assets, the proprietary interest arises.

There is in my opinion nothing in the observations made as to the nature of a beneficiary's interest in a deceased estate which is inconsistent with this view. Circumstances may indeed arise in which prior to the actual distribution of the assets to the beneficiaries an executor may be held to hold the assets not as executor but as a trustee. A typical case of this kind is where the executor is also appointed by the will to be trustee of trusts created by the will. In such a case a physical distribution is not called for and it may become necessary for the law to determine the point at which the assets cease to be held by the relevant person as executor and commence to be held by him as trustee, in order, for example, to determine whether powers incident to the office of executor have ceased to be available or whether powers and duties conferred upon trustees have come into operation in respect of those assets. In such a case, the duty of the executor cannot, he being also the trustee, include the duty of actual or physical distribution of the estate and, therefore, on the completion of the other executorial duties, the office of executor must cease. I do not think that these cases are of direct assistance in such a case as the present. Such a

situation may also arise, in my opinion, where the executor has set apart assets or otherwise dealt with them in accordance with recognised principles of law so as to remove them from the estate and convert them into trust assets or assets in which otherwise a particular beneficiary has the proprietary interest. This may arise in an appropriate case of assent to a particular bequest or it may arise by assent to the holding of the assets generally for a residuary beneficiary or otherwise by an arrangement made between the executor and the particular beneficiary. However, these cases operate by way of qualification of the general principles to which I have referred. They do not establish, in my opinion, that only in the normal case an executor who holds assets of the deceased for distribution holds them otherwise than as executor or otherwise than as assets of the estate.

In considering the application of the principles to which I have referred to the particular will or, indeed to any will, it is necessary to consider what are the duties, that is, the executorial duties, which have been imposed upon the executors in the particular case. The will of the deceased in the present case was a short one. It was in the following terms:

> "This is the last will and testament of me Albert Henry Keys of 105 Bent Street Lindfield in the State of New South Wales. I revoke all other wills made by me. I appoint my wife Olive Jobson Keys and Walter Wrigley of Grosvenor Road Lindfield New South Wales to be my executors and direct that my funeral and testamentary expenses and all my debts shall be paid as soon as conveniently may be after my decease. I give devise and bequeath unto my wife Olive Jobson the whole of my assets for her use during her life and after her decease the whole assets to be converted into cash and equally divided between my son Leslie Albert and daughters Barbara Winifred and Margaret Olive."

In my opinion, having regard to the principles to which I have referred and the terms of this will, the realty in the present case is still held as an asset of the estate. There are other directions in the deceased's will, for example, the direction to convert and divide on the death of the widow, which still remain to be carried out. These directions are, in my opinion, directions given to an executor as such and not directions given to the executors after they have ceased to hold that office and in some other capacity.

A somewhat similar question arose for consideration in *In re Pratt (decd)*, (1963) 80 W.N. 1416. The then Chief Judge in Equity, McLelland J., considered whether in a case similar to the present the directions dealing with a widow's interest for her life were such directions as resulted in the assets being assets which were not assets of the estate. His Honour appears to have been of the view that the directions were directions to the executors as such and that the executorial duties were not completed prior to the carrying out of these duties.

Reference was made by Mr Rayment in the course of his argument to certain statements which were made by Mr Wrigley to Mrs Keys in

or about June 1969 in relation to the estate. In his affidavit of 5th May, 1973, Mr Wrigley said that after having forwarded a particular sum to the applicant he said to her, "In relation to our duties as executors, 'We cannot do any more now. That should finalise the whole estate. We should not have any more trouble'. Mrs Keys made no reply to this statement". It was argued by Mr Rayment that this amounted to an assent by the applicant to the position that there had been a full and final administration of the estate. I do not think that the conversation amounts to this. I do not think that the applicant would on the evidence before me have had such a background as would enable her to appreciate the significance of what was said nor do I think that her silence in relation to the statement amounted to any assent to the kind of situation to which Mr Rayment refers.

I, therefore, do not think that, if the matter is to be determined by reference to the general principles which determine when an executor ceases to be an executor the present is a case in which the executors have ceased to be executors or in which the realty has ceased to be part of the estate of the deceased.

However, it may well be that to deal with the matter upon this basis is not to deal with it correctly. I am conscious of what has been said in some of the cases as to the correlation between the time at which an asset ceases to be part of the estate of the deceased for the purposes of this legislation and the point at which there has been the discharge of the executorial duties. However, ultimately, in my opinion, the question to be determined is one which turns upon the construction of the legislation.[76]

[76] The passages in *Keys'* case which deal with the construction of the legislation were quoted in *Easterbrook* v. *Young* [1974] 1 N.S.W.L.R. 676 and *Easterbrook* v. *Young* (1977) 13 A.L.R. 351.