



Précis Paper

A testator's moral duty to their adult children - *Re Christu; Christu v Christu* [2021] VSC 162.

Abstract – The vexed issues surrounding a testator's moral duty to their adult children under the *Administration and Probate Act 1958* (Vic) pt IV are discussed in conjunction with the recent case *Re Christu; Christu v Christu* [2021] VSC 162.

Discussion Includes

- Parties in the Proceedings
- The Deceased's Last Will
- The Parties' Health and Financial Position
- Key Issues
- Moral Duty
- Nature of the Relationship
- The Last Time Period
- The Findings
- Points That Stood Out
- Establishing Estrangement

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A testator's moral duty to their adult children - *Re Christu; Christu v Christu* [2021] VSC 162.

1. In this edition of BenchTV, Jonathan McCoy, barrister, and Nicholas Baum, barrister, discuss the issues regarding a testator's moral duty to their adult children under the *Administration and Probate Act 1958* (Vic) pt IV ('the Act'). This discussion is in the context of the recent decision *Re Christu; Christu v Christu* [2021] VSC 162.

Parties in the Proceedings

2. The claim was brought by an adult son of the deceased testator against his two siblings, who were the will's executors. The plaintiff sought further provision from the deceased's estate, pursuant to the Act pt IV.

The Deceased's Last Will

3. Following the death of his wife, the deceased made his last will in April 2016. The will left everything to his two executors, the defendants, leaving nothing to the plaintiff. It was an even share between the two executors.
4. The reasoning in the will for not making provision for the plaintiff was that he had little to no relationship with the deceased. It was accepted that the plaintiff maintained a very poor relationship with the deceased in the last four years of his life.
5. A solicitor drafted the will.

The Parties' Health and Financial Position

6. The plaintiff owned his property, free of mortgage, but has limited super, and relied on a government New Start Allowance payment to live.
7. The older defendant has a significant medical condition that prevented him from working. He had assets of about \$250,000 primarily in shares, some super, and some cash savings. Nevertheless, his financial position was also very limited.
8. The other defendant was in a much more favourable position. She was a single parent who earned a reasonable income. However, she was the sole income earner of her household, and her children also have health issues that were an expense. She owned a home more valuable than the deceased and the two siblings. While subject to a mortgage, she owned most of the equity in the house. She also received financial support from a close friend.

Key Issues

9. A critical issue in the case was whether the plaintiff was estranged from the deceased.
10. To bring a claim under the Act, an applicant must satisfy three major criteria. Firstly, there is an eligibility requirement to bring a claim. This was not an issue in the claim.
11. Secondly, did the deceased owe a moral duty to provide for the plaintiff's proper maintenance and support. The defendants asserted that the plaintiff was estranged from the deceased at the time of his death, and on that basis, the plaintiff was not owed a moral duty by the deceased to provide for his proper maintenance and support in the will.
12. The third issue is whether an adequate provision is made for the proper maintenance and support of the eligible person.

Moral Duty

13. The judgement makes reference to a number of amendments that came into effect in 2017, which essentially codified the law that the courts were already applying. There is a different focus now, as the legislation has primacy.
14. The *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) introduced an express reference to 'moral duty' in subsection s 91(2)(c) of the Act.
15. The defendants stated that the plaintiff had a bad relationship with the deceased, marked by tension, conflict, and occasionally violence, over many years. By the time of the deceased's passing, contact had ceased entirely. The relationship was essentially estranged.

Nature of the Relationship

16. The defendants produced evidence from the years leading up to the end of the deceased's life. However, the plaintiff produced evidence from the whole duration of their lives.
17. The plaintiff and the deceased appeared to have had a somewhat combative relationship over their lives. One incident was put before the court where there was an argument between the deceased and the plaintiff where the plaintiff smashed a glass table, then ran away from home.
18. Another incident was at the plaintiff's first child's christening. There was an argument between the deceased and the plaintiff's wife's family in which the plaintiff intervened. Consequently, there was no contact between them for about two years.
19. The plaintiff then lived with the deceased and his wife for about six months following the plaintiff separating from his wife.

The Last Time Period

20. The plaintiff and the deceased had a workable relationship. However, this was fraught with tensions and incidents. The plaintiff had a much closer relationship with his mother, and so, when she was alive, the plaintiff would visit them together regularly.
21. Five years before the deceased passing, his wife passed away. At this point, the relationship between the deceased and the plaintiff declined substantially, with the plaintiff attempting to make contact only once or twice a year.
22. When the deceased died, the plaintiff had not spoken to him for about six to eight months.

The Findings

23. The whole of the relationship between the son and father needs to be taken into consideration, it cannot be reduced to just one point in time.
24. The conclusion was that there was no total abandonment of the relationship. It never ceased permanently in the way that the defendants alleged.
25. There was never an estrangement of the kind depicted by the defendants or that undermined the moral duty that the deceased owed to the plaintiff. There was still a moral duty owed to the plaintiff to provide for his proper maintenance and support.
26. Pursuant to s 91 of the Act, the court ordered that a provision of \$110,000 be made for the plaintiff.

Points That Stood Out

27. The first point is that it is a high threshold to establish estrangement sufficient to deny a parent's moral duty to an adult child.
28. There is value in cases of this nature of telling the whole story, giving context to the nature of the relationship as a whole.

Establishing Estrangement

29. Based on the findings in *Brandon v Hanley* [2014] VSC 103, the judge discussed a total absence of a relationship as being the test for estrangement. The other terminology used was that the relationship was never completely abandoned. Therefore, the absence of relationship and complete abandonment appear to be a high threshold to meet.
30. This case demonstrates the extent of difficulty regarding severance of the moral duty a parent owes to their adult children under the modern approach to the legislation.

BIOGRAPHY

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Mr McCoy has a general commercial and common law practice. Prior to coming to the Bar, he was the senior associate to the Honourable Justice McMillan at the Supreme Court of Victoria. Before his associateship, he was a solicitor with Hall & Wilcox.

Nicholas Baum

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Mr Baum practises in all areas of commercial law, public law, and wills and estates. Before coming to the Bar, he practised in public and constitutional law at the Victorian Government Solicitor's Office. He is also a former associate to the Hon Justice McMillan of the Supreme Court of Victoria.

BIBLIOGRAPHY

Focus Case

Re Christu; Christu v Christu [2021] VSC 162

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_wills_estate_super/benchmark_16-04-2021_weekly_wills_estate_super_law.pdf

Judgment Link

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2021/162.html?context=1;query=re%20christu;mask_path=

Cases

Brandon v Hanley [2014] VSC 103

Legislation

Administration and Probate Act 1958 (Vic)

Justice Legislation Amendment (Succession and Surrogacy) Act 2014 (Vic)