Governing the Rural Family in Australia from a Distance: The Family Provision Act and the Role of ‘Expert Knowledges’

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Abstract

This article examines the governance of rural families in Australia and the legal treatment of inheritance disputes. It makes this analysis through an examination of Family Provision legislation, which imposes the legal obligation on every testator or testatrix to make proper provision for the support and maintenance of certain defined dependants. This form of law has been seen as an intervention into the private sphere to curtail the notion of individual freedom as regards property and to protect the position of women who were not properly provided for. This article makes a critique of Family Provision law as regards the composition of such law and its operation in rural Australia.

To make this critique the article, firstly, outlines forms of rhetoric which justify farming sons’ inheriting family property. Secondly, the article describes how court judgments are involved in what Foucault called the ‘examination’ and in a process of ‘normalisation’. Thirdly, the article demonstrates how such cases are involved in the governance of rural society and how these cases incorporate ‘expert knowledges’. This analysis achieves the aim of the article to describe the forms of cases that reflect how law was imbricated with expert forms of knowledges that enable the state to ‘rule from a distance’.

1. Introduction

This article began as part of a project on rural inheritance[1] that found that many farmers were not able to complete successful transfers of family farms to the next

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1 See Voyce, 2019, this article draws on this work, with permission of the publisher.

generation. A common sentiment among families was the desire 'to keep their farm in family hands' and to continue with a line of male succession. Underlying property division were implicit evaluations concerning the contributions of each respective family member. As Jack Goody has argued, splitting up family property splits up people (Goody 1976, 9).

As the project developed, several research questions were formulated. Firstly, what was the role of law in assisting families seeking to complete an intergenerational transfer of the farm? This was important, as family conflicts were often resolved through an interpretation of legal decisions or what has been called 'bargaining in the shadow of the law' (Mnookin & Kornhauser 1979).

A common approach when helping people with legal disputes is to provide them with an analysis of the law. Rather, this work seeks not only to provide legal analysis on family law matters but also to examine how the law incorporates different forms of argument about rural society. My objective is to ask 'how does law accept or reject rhetorical forms of argument about rural values and family work?' Here reference is made to arguments by litigants about the value of looking after parents, the importance of ancestral property, the sacrifice of farming sons' working on farms for many years with minimal rewards and the rightful expectations of off-farm children.

Secondly, given the great distances in the Australian landscape and the isolation of rural farms from each other, the issue arises as to how successive governments (imperial, federal and state) encouraged economic activity and regulated a rural society based on family farming. In other words, 'how did the centralized state rule from a distance, where proximity between state officials and subjects was not possible?' I later argue how local forms of authority (solicitors, welfare agencies), merged with notions implicit in legal institutions.

To achieve its goals the article, firstly, describes the social background of family farming as regards property disputes. Secondly, the article details the operation and role of Family Provision law. Thirdly, the article develops the theoretical approach of this work, namely Foucault's governmentality approach and the use of the concepts of 'normalisation' and 'examination'. Fourthly, a critique is made of the current approaches to Family Provision law. Fifthly, the article examines the form of property narratives claimants deploy in property disputes. The article then examines specific types of claimants such as farming sons', farming widows and daughters. The article concludes with reflections on the role of rhetoric found in these cases and how different forms of expertise have enabled the state to rule rural Australia from a distance.

2. The social background to family property disputes

Farming communities adhere to an ideology that prioritises the passing of farm property to someone in the next generation of the family.[2] The intergenerational

2 Lehrs 2017, 47; Barclay, Foskey & Reeve 2007.

exchange of transferring the farm on to someone in the next generation may be seen as a 'script'. Vanclay and Silvasti say 'this script represents an ideology of patrilineal succession embodying the continuity of the family farm' to keep the farm in the family (Vanclay & Silvasti 2009, 155).

These authors recognise that a strong ideology in family farming is based on the notion that supports male dominance in agriculture that results in the differential treatment of children along gender lines. Rural patriarchy 'does not operate in a vacuum' but has a material base, resting on, in part, men's control over women's access to the means of livelihood and through a form of control through economic dependence on males (Lehrs 2017, 49).

The distribution of assets in inheritances often meets bitter divisions and acrimony amongst family members when one child receives a larger than expected share. This may especially be the case with farms as there is a tendency of farming sons to receive the largest share. This pattern of inheritance goes against the notion of equality usually favoured in modern forms of inheritance. This tension is often exacerbated by the fact that farms have escalated in value, a fact that breeds ground for acrimony and rancour within families.[3]

Each member of a family may have their own expectations about who should inherit farm property. I call these expectations 'property narratives'. I describe these narratives as forms of rhetoric[4] as they often resonate with historical sentiments and the different justifications about the significance of owning property. These stories about property often express in popular form ideas that philosophers such as Locke make in their justifications for property rights (Rose, Saunders, Newby & Bell 1978).

An examination is made of the various narratives deployed in Family Provision cases as regards the labour of a farming son and the foundation events surrounding the development of the farm. It is suggested these accounts exhibit a rhetorical form in that they represent coherent arguments that contain autobiographical events and a version of community history.

Firstly, ideas of property imbricate narratives of kinship and significant personal relationships. At the same time, they are connected to notions of personhood and identity.[5] Families may be regarded as being based on the bonds that structure and

3 Conway 2016, 36-37. A number of recent studies have dealt with modern views on inheritance, see for instance Douglas, Woodward, Humphry, Mills and Morell 2011; White, Tilse, Wilson, Rosenman, Purser, Roseman and Coe 2015. Also see recent ethnographical work by Lehrs 2017; Williams 2010.

4 To analyse property claims as rhetorical the term 'rhetoric' needs some explanation. Scholars have in the last century expanded on the notion of rhetoric to include popular forms of thinking which have creditability. The meaning of the term rhetoric has thus shifted from the time of Aristotle, where it is generally seen as pervasive forms of argument (Aristotle 1909). Here I take rhetoric to mean statements that have or contain the logic of reasonableness or common belief which is adopted in a form which constructs an authoritative discourse which shapes subjects and makes calibrations about what is acceptable and what is illicit. I expand on the notion of rhetoric later. On property narratives see Rose 1990.

5 As Radin wrote there is a relationship between personhood and property. She wrote that 'most people possess certain objects they feel are almost part of themselves'. In Radin's view such objects are 'bound up with the holder' and essential to the self. The loss of these objects harms the individual and interferes with their ability to flourish and develop. Radin 1982, 959.

give meaning to their lives (Spencer & Pahl 2006, 45). Recent studies show contrary to notions of individualism, that there is a concern to take responsibility and obligation towards dependants and a concern to preserve the blood line and one's heritage (Douglas et al. 2011, 247).

Secondly, 'property' is connected to a process of location and place as property dwellers experience 'place attachment'. The expression 'attachment' describes the emotional bond which develops between a person and a place which may arise out of memories and feelings evoked by the landscape. Such an approach emphasises the lived experience and everyday experience of belonging to a place (Graham 2011, 14).[6]

Thirdly, land has been associated with the idea of improvement, that those who work on the property should be able to receive its reward[7] and that such work improves their moral character. This argument about the value of property paid less attention to the value of the land itself but more on the moral claims or entitlements of those who worked it (Ashcroft 1995, 51).[8]

Fourthly, there is the idea of custodianship or trusteeship. These ideas come in various forms. For instance, the central goal of medieval families from an aristocratic family was the protection of their landed estates intact for the male (Davidoff and Hall 1987, 205-206). In Australia in recent times farmers have often expressed the idea that farming land was a form of trust property that should be kept for successors.[9] For instance, some farmers have a 'longitudinal approach' to property that three generations may be currently involved in one property. As Carrington writes the land transfer process 'is in a continuous state of transition between generations' (Carrington 1997, 121).

3. Family Provision law

Family Provision legislation[10] imposes a legal obligation on every testator or testatrix to make proper provision for the support and maintenance of certain defined

6 Along these lines, Carter argues that property ownership represents the struggle to control or repress nature and that the cultural preoccupation with property is symptomatic of a desire to be placed or grounded. See Carter 1996, 2; Graham 2011, 14.

7 This idea has been associated with John Locke. See Arneil 1994.

8 In the context of squatting it was argued that land was made valuable through the application of squatter's labour. This argument was used to justify their occupation over extensive areas of vacant land. Ironically it was recognised later in the late nineteenth century that wool was of more value than the land. See Buck 1994, 128.

9 For sentiments along these lines see Submission of the Family Law Council to the *Joint Select Committee on Certain Aspects of the Operation of the Interpretation of the Family Law Act 1975*. 1992. 30:76–77.

10 Standard works include Englefield 2011; De Groot and Nickel 2012; Atherton and Vines 2013; Mackie 2013. On family farms and Family Provision, see Voyce 1993 and 1994. As regards the legislation in this area see the various Acts and ordinances: Family Provision Act 1969 (ACT); Succession Act 2006 (NSW); Family Provision Act (NT); Succession Act 1981 (Qld); Inheritance (Family Provision) Act 1972 (SA); Testator's Family Maintenance Act 1912 (Tas); Administration and Probate Act 1958 (Vic); Inheritance (Family) and Dependents Provision Act (WA) 1972.

dependants.[11] Should a testator or testatrix fail to make such provision in his/her will or should intestacy provisions fail to provide for such a dependant, the aggrieved dependant may obtain such an order, varying the terms of the will or varying the statutory rules on intestacy. The Act, however, does not empower the court to make a new will for the testator. Courts will only alter a will (or intestacy provisions) so far as it is necessary to provide for the proper maintenance and support of dependants where adequate provision has not been made for this purpose.[12]

Those conversant with distributions under the Family Law Act 1975 (Cth) will recognise that in property settlements following divorce, that 'contributions' are assessed as regards financial and non-financial contributions. In the Family Provision context what is assessed are the *needs* of the parties. In a nutshell, the applicant must demonstrate to the Court that 'adequate provision' has not been made from the estate for their 'proper maintenance and support'.[13] In coming to a decision, a court must act from the perspective of 'a just and wise testator' and from a perspective that reflect community standards (Dal Pont & Mackie 2013, 573).

In New South Wales, Family Provision legislation lays down that character or conduct is relevant.[14] However, a broad consideration of conduct has been relevant in case law given that the focus of the legislation has generally been defined in terms of the moral obligation of the deceased (Atherton 1993, 363). This is the case despite the fact that from time to time judges have attempted to repudiate the notion that there is a connection between good conduct and an order being made.[15]

As regards the claim for further provision from an estate the applicant must clearly prove need and provide all the financial information necessary. Applicants must provide in affidavits full details of the assets and liabilities, and the extent of their

11 Eligible dependants are defined by the respective state and territory laws and ordinances. As regards NSW, see section 57 of the Succession Act 2006 (NSW). Note in NSW the list of eligible claimants has been expanded.
12 Stout CJ in *Re Allardice* (1910) 29 NZLR 959, 969. Although the range of applicants has been enlarged since Stout made this comment, the thrust of the comment is still true as to the overall limit of the discretion.
13 The term 'adequate provision for proper maintenance and support' is an intentionally ambiguous statement, which is considered relative to each individual's circumstance. In order to determine whether adequate provision has been made, the court will consider the terms 'adequate' and 'proper' in relation to the applicant's situation. As such, the terms 'adequate' and 'proper' must be considered in the context of: The age, sex, condition, lifestyle and situation of the applicant. The applicant's needs and the resources they require for meeting those needs. The nature, extent and character of the estate and other claims upon it. What the will-maker regarded as superior claims or preferable dispositions. *Vigolo v Bostin* (2005) 221 CLR 191, 231 [122] (Callinan and Heydon JJ). *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ), cited in *Draskovic v Bogisevic* [2007] VSC 36 (1 March 2007) [24], *Collicoat v McMillan* [1999] 3 VR 803, 820 [47].
14 In NSW the court is now authorised expressly to take into account contributions whether of a financial character or not. This includes contributions directly or indirectly (i) to the acquisition, conservation or improvement of the property of the deceased, or (ii) the welfare of the deceased person including a contribution as homemaker. As regards a wife's claim there is an implicit assumption that a wife has been dutiful and that her claim has not been disqualified by disentitling conduct (Atherton 1993, p. 361). Thus, a person who has behaved badly in a consistent fashion towards the deceased may get less than otherwise might have been the case. For instance, the courts have taken into account conduct such as a good and loving wife, a deeply affectionate mistress, a close and loving daughter. Certoma 1997, 228-235; De Groot & Nickel 2012, 37.
15 *Blore v Lang* (1960) 104 CLR 124, 134 (Fullagar and Menzies JJ).

needs, such as housing, living costs and so on. In regard to the value of property expert evaluators are required (Englefield 2011, 176-177).

4. Foucault and governance, normalisation and the 'examination'

Foucault's ideas of 'governmentality' regarded government not as a form of representation but as a matter of intervention. To comprehend government, he suggested we should see it as a form of technology which sought to translate thought into reality to establish a world of persons and things for acting on subjects (Rose & Miller 1990, 8).

This use of the term 'technology' suggests an approach which shows that attention should be given to the form of mechanisms through which governments seek to shape subjects and to normalise them in their conduct and thought. Thus, to understand modern forms of rule we should examine humble and ordinary mechanisms like techniques of accountancy and other forms of evaluation (Rose & Miller 1990, 8).

Should we see the family and the family farm as a technical device we may conceive that the family become a key field of intervention for the state as families represented a bridge to larger reactions of power. Kinship, procreation and inheritances were the domain of state power as the family worked as a 'hinge' or 'switch point' between localised forms of power and state power (Foucault 2003, 81-82; Martin 2012, 866-869).

Foucault regarded the family as having a degree of local sovereignty as it could be relied upon to police its members and to offer them up to state authorities for education or therapy (Foucault 1978). However, the family at the same time was subject to professional disciplines of individualisation, categorization and spatial segregation. In Donzelot's words there was a 'transition from a *government of families* to a *government through the family*' (Donzelot 1979, 92, my emphasis).

Foucault showed how disciplinary power has several components, namely hierarchical observation, normalisation and the examination. Normalisation establishes a corrective function which determines whether one is a good soldier, teacher or worker. Its purposes are to establish the gaps that exist between expectations and practice. Foucault says of the 'examination':

> The examination combines the techniques of an observing hierarchy and those of a normalizing judgment. It is a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish. It establishes over individuals a visibility through which one differentiates and judges them. That is why, in all the mechanisms of discipline, the examination is highly ritualized. In it are combined the ceremony of power and the form of the experiment, the deployment of force and the establishment of truth (Foucault 1978, 184).

While I have mentioned the nature of the examination it is necessary to give a further analysis of this idea and relate it to how a legal judgment incorporates different forms of knowledges. Foucault's purpose in outlining the different forms of legal processes was to show how the examination incorporates 'normalisation' and forms of expert knowledges. Foucault does this in two ways.

Firstly, Foucault outlines the form of truth finding in early Greek legal processes. He regarded the dispute between Antilochus and Menelaus in the *Iliad* as illustrative of a previous method for obtaining truth.[16]

Foucault saw the way truth was reached in this context was by way of a testing game. He extrapolates that the modern form of trial differs in that it draws on the observation of power holders and a criterion of normality. In other words, the trial process draws on a contextually specific power-knowledge complex that constructs normality or what Foucault called normalisation (Foucault 2000; Pavlich 2010, 215).

Secondly, the reader may recall the description in *Discipline and Punish* of the dramatic physical punishment of Damien through the progressive destruction of his body. This mutilation represented to Foucault the end of an era with the consequent development through the introduction of the 'examination' as a forum for a whole series of assessments, diagnoses, prognoses and corrective suggestions. By focusing on the trial rather than the criminal act we may see how all kinds of expert opinions from the sciences were incorporated into the trial. Foucault links this development with the birth of a 'new epistemological-juridical formation' (Foucault 1978, 23; Suntrup 2017, 317). This new event brought about 'epistemic competition' between legal and scientific discourse (Suntrup 2017, 318). I outline in my conclusion how this way of approaching texts throws light on Family Provision law.

5. Critical approaches to family provision law

Commentators on Family Provision law have observed how the state at the turn of last century intervened in family life to override individual action and curtail free will. This approach was at odds with then current view of *laissez-faire* as expressed in the idea of 'freedom of property' (Atherton 1990a, 1993, 131; Voyce 2001). This move by the state was reflected in the introduction of Family Provision law as a form of legislation which was seen to intervene into the family realm to restore imbalances of power and improve the inequalities between men and women. As has been well shown by Atherton, Family Provision legislation developed as a response to men who neglected to make testamentary provision for their wives and children following the abolition of dower (Atherton 1988).

This form of critique of Family Provision legislation was based on the liberal assumption of a division between the public and the private realm, where the state was seen as the main source of governance and the progressive idea that reform measures will restructure social life. This approach assumed that the domestic sphere was primarily governed by centralised measures and the assumption that

16 In the chariot race of the games Antilochus crossed the line first, but an indignant Menelaus accused him of a foul at the post, challenging him to swear an oath by Zeus that he did not cheat. Antilochus refuses to take this challenge, and thereby invites the judgment that he did commit a foul and so must forfeit the race. As Foucault observed, this is a peculiar way to produce truth, to establish juridical truth – not through the testimony of a witness but through a sort of testing game, a challenge hurled by one adversary at another. Foucault 2000, 18.

disciplinary technologies had little sway on people's lives.

The 'liberal approach' approach to Family Provision law has ignored other forms of power and technologies, such as the disciplinary role of economics, which operated upon family life and how such disciplines interlocked with each other at a local level (Voyce 2008). It is therefore suggested a new approach to Family Provision law is needed to understand how it operates as part of rural governance.

The only other critique of Family Provision law was provided by Cownie and Bradley who make an analysis of Family Provision legislation in the United Kingdom.[17] Cownie and Bradley argued that the most common form of legal reasoning may be called 'deductive reasoning'. However, they argue Family Provision law does not utilise this form of logic.[18]

By contrast they argue that Family Provision law uses a different form of rhetoric allied to a different set of concerns. Cownie and Bradley take as an example the type of rhetoric reasoning found by Bonaventura de Sousa Santos, in cases of disputes as regards resident's association in shantytowns in Brazil.

De Sousa Santos found that while shantytown occupiers had no legal title to the property they occupied, they nevertheless developed an informal and unofficial legal system to deal with the occupation of their houses and property disputes. He found that these people had an informal system of augmentative rhetoric that was deployed in such disputes.

De Sousa Santos's as well as Cownie and Bradley's work is of help in the Family Provision context as it indicates how there may be a transplant of rhetorical forms from a social arena into a legal forum**.** These authors usefully indicate that Family Provision cases deploy a different form of analysis, based on a different form of logic. Hence, I refer to how rhetoric as a form of persuasion by argumentation and as a decision-making strategy was transposed into family property decisions.[19] At the same time such decisions were subject to the process of normalisation.

6. The narratives of specific claimants about property

I now examine aspects of the cases involving family property disputes. My analysis of cases involves typical 'actors' in the 'drama' of these cases (sons, widows, daughters). This form of analysis examines the personal narratives of family disputants and the

17 Inheritance (Provision for Family and Dependants) Act 1975 (UK).

18 Cownie and Bradley see the reasoning in Anglo-American jurisprudence as being based on the elaboration of general principles of an axiomatic nature from which necessary solutions can be deduced logically within the premises of a closed system. See Cownie & Bradley 2003, 580. On the role of discretion in family law see the comments by Parkinson and Dewar. Parkinson says that in the family law area that judgments are 'often intuitive rather than reasoned, subjective rather than principled' (Parkinson 1999, 122-123). Dewar says that family law has no explicit normative and justificatory framework (Dewar 1997). Note these authors are writing about family law but the same may be said of Family Provision law. See also Ingleby & Johnstone 1995 and Glendon 1986.

19 It is acknowledged that Foucault avoids talking of rhetoric as he adopted the term discourse. However, according to some writers his approach parallel ideas on modern forms of rhetoric. See Bizzell & Herzberg 1990, 1127.

form of rhetoric incorporated (or excluded) in these cases.

6.1 The Farming son's cases

Many family members feel a special connection with the property as a farm may have been in the family for several generations. This is especially the case with 'farming sons' who regard that they are 'special' for a variety of reasons. Such sons may feel they are charged with carrying the family legacy of the farm tradition and bear a personal responsibility to continue the farm in the family.

They also feel their labour is not recognised as it should be given a greater family significance. Frequently a son will leave school early and join his father after an agricultural or trade course. Sons are subsequently trained by their fathers to be farmers. In many cases an applicant may have helped build up the assets of the farm, frequently doing much of the heavy work long hours for a low wage, while their father continues to hold the purse strings.

In *Vigilo v Boston*[20] the son whose claim was not recognised said:

> I've put up with hell since I was 16, and trying to bring a family up with $40 a week at that stage, my wife working, you know, we were working basically 15 hours a day 7 day a week to survive on promises of 'Great, beauty, one day it's going to be mine.' We were looking for this bit of dirt, and at the end of the day told to leave with the shirt on my back. It's a bit hard. And also like Subarian [his lawyer] pointed out, that what are you going to do at 16 or 18, was I going to go out and get a solicitor and say 'Pop, let's go and see the solicitor and put it all down in writing'. You know what he would have said? Just imagine you doing that to your father, what would he say? [21]

In *Dawson v Joyner*[22] there were two sons claiming the land. The judge said about their situation:

> Until about age 23 Garry had precisely the same relationship with the testator as did Ross. Both were raised on the family property. Both worked on the property as children being paid very modest sums. Garry was sent off to Agricultural College with the intent that he return and work on the property. Ross stayed on the property. As adults they were paid an award wage together with benefits such as fuel, free meat and milk, accommodation, and groceries to be charged to the testators' account up to $30 per week. While there may be some dispute about the detail of the payments made it seems clear that both worked hard for fairly modest financial returns.

The testator made it plain to his two sons that the intention was that the aggregation

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20 *Vigilo v Bostin* (2005) 221 CLR 191; Voyce 2005.

21ABC program 'Farms, Families and Fights over Wills', 12 April 2015 available at <http://www.abc.net.au/radionational/programs/lawreport/2005-04-12/3453104>.

22 [2011] QSC 385 (12 December 2011).

would be built up by their joint efforts to enable their two families to live off the properties and that they would one day inherit the family properties.

In *Daniels v Hall* [23] the judge described the plaintiffs as:

> the plaintiff continued to live on the family farm and was persuaded, he would say compelled, by his father to leave school early and to devote the whole of his time and efforts to working the family farm and, in the process, to take up additional land in the plaintiff's own name and to work that in conjunction with the home farm. According to the plaintiff, he did this out of respect for his father's demands and worked hard for small financial reward.

The judge commented:

> There is no doubt that Robert Daniels was an attentive and assiduous worker on the farm and in the partnership right from the inception, that is, before the formalisation of the partnership in 1974. Indeed, he claims that he was constantly working on the farm from the age of 10 and that he had abandoned an ambition to have a working career as a pilot because of his father's insistence that he should stay and work on the farm. It is also clear that Robert was attentive to the needs of his mother and his father, the deceased, particularly when they were in declining health. As already mentioned, he helped build the house on the block at 28 Gibson Way, Hopetoun and he used to visit his mother at regularly intervals when she was in care at the Ravensthorpe Hospital. He continued to see his father regularly after the dissolution of the partnership in 1997 with his father visiting the farm almost every day until his cancer diagnosis. Robert assisted with the care and treatment of Arnold by driving him to Perth and back on occasions when chemotherapy was administered and in bringing Arnold to his own home at the farm during intervals between treatment when he needed care and attention.

6.2 Farming widows

Widows are often seen as objects of pity and sympathy as their husbands had often left them in a financially precarious position. By contrast there was the 'merry widow' often created by men as a consequence of their fears of female sexuality and their own mortality (Hart 2009, 11). Despite the patriarchal nature of the law a study of nineteenth century widow's wills has shown that many men attempted to provide for their families.[24] However, they were also worried that their property could come under the protection of another man (Hart 2009, 69).

Typically, such widows had spent their life on the farm and were dependent on the surviving family for support in old age. Such a widow may well have borne the testator's children, lived on the farm with him for many years and helped him in his declining health. We must remember in this context that women outlive men (De

23 [2014] WASC 152, [12].

24 For English evidence see Goody, Thirsk & Thompson 1976, 350 and 353.

Groot & Nickel 2012, 90).[25]

Widows were often thought to be taken care of should the property of the estate be placed in a life estate.[26] The pattern of life estates for widows is still found in rural Australia and is especially used in the cases of remarriage to protect members of blended families.

Implicit in such settlements was the typical of the eighteenth-century view, which regarded women as mere objects of protection being conduits or vessels, in the sense that the property was to be protected for the ultimate male heirs, while the widow was to be maintained and protected as the bearer of heirs (Atherton 1993, 106). As Atherton argues:

> Judges echoed loudly the eighteenth-century framework […] in which women generally and married women in particular were seen as objects of protection – but only in a 'conduit pipe' sense. She was protected in so far as her need for maintenance was concerned, but not to the extent of any real notion of independent mind. The concept is dynastic: it is the property itself which is to be protected for the ultimate heirs, her children, while she is to be maintained and protected as the bearer of the heirs.

Life estates are time honoured devices usually created in a will or through an *inter vivos* trust set up by a solicitor to be administered by an accountant. The device allows the life tenant (usually the widow) to enjoy the benefits of the estate while the son farms the property with the expectation he will inherit the property on the death of the life tenant. The device is created in a way that the life tenant receives the profits of the estate while the remainderman will receive a salary and on the death of the widow, the farming son will inherit the property.

Historical evidences have shown that rural accountants used technical accounting formulations that operated to minimise the proportion a widow may receive from an estate. The case of *McBride v Hudson*[27] allowed a trustee the option of utilising a form of apportionment which is deemed peculiar to station properties. This case indicated that trustees in farming estates may hold that the increase in sheep in any one year belonged to capital (that is, the remainder farmer) and should not be seen as a profit for the life tenant (that is, the widow).

Implicit in this apportionment principle is the notion that the life tenant's share should be minimised to help smooth the transition of the estate between different generations of males.

Life estates are technical creations that split ownership over time between two successive owners. While we may suppose these devices are neutral it is suggested these

25 Early Family Provision decisions formulate the claim of the surviving widow as having a 'paramount claim' (Englefield 2011, 112-116). Recently it has been stated that there is no rule that 'the widow takes all' as each case depends on the circumstance. *Bladwell v Davis* [2004] NSWCA 170, [12]. See De Groot & Nickel 2012, 90. See also *Burke* [1940] QLR 45.

26 Analogous methods are a provision for a widow that is terminable upon marriage and the provision of an annuity rather than a capital sum, see Dickey 1992, 120.

27 (1963) 107 CLR 604.

devices are implicated in local power networks which operate to discriminate against farming widows (Voyce 2001).

The legal and accounting administration of life estates and the carriage of the legal affairs of the family was usually a local solicitor and accountant acting in concert for a male representative of the family. This relationship operated over time to reinforce the interests of life tenant as against the interest of the widow.

6.3 Daughters

Daughters on family farms are usually expected to participate in farm work and they usually develop skills comparable to their brothers. However, this work is not usually recognised and daughters who wish to take up farming as a career are normally discouraged because the prevailing attitude favours sons as successors (Lehrs 2017, 40). As Riley reports girls see their place on the farm as 'transitory' while boy's engagements through farm tasks are seen as 'rites of passage' (Riley 2009, 252). It is instructive that in some cases judgments refer to the life story of the daughter, with no mention of her efforts on the farm in her youth.[28]

At the same time Family Provision cases show a lack of recognition for girls who looked after aging parents.[29] For instance, in *Salmond v Osmond* the judge commented:

> the daughter, like her siblings, grew up on the farm. It had been her wish to stay on the farm and help her father, but he considered that that was inappropriate and he found her a job in a pharmacy in Wagga Wagga.
>
> [although she] lived away from Wagga from about the time she commenced her relationship with Mr Long, she maintained contact with her parents, visiting two to three times a year. During those visits, she always assisted around the farm.[30]

While cases usually consider the needs of individual applicants there have been cases where judges consider the wellbeing of the family as a whole. For instance, in one case a judge minimised the contribution a daughter might have received to help support the rest of the family. In this case an applicant daughter was entitled to a significant portion of her father's estate to purchase a house in town. The trial judge said that the bulk of the farm should not be sold as the farm was being used to support other family members and they intended to leave the farm to other family members.[31] The judge said:

> Disrupting the arrangements would disrupt the pattern of family relationships upon which their lives and happiness are formed, and would also disrupt the

28 *Roberts v Roberts* [1999] SCWA (4 September 1999) 8568.

29 These features of rural life have been well reported by Alston 1988, 2004; Gray and Lawrence 2001. An important study on the socialization into gender roles is Scharz 2004.

30 [2015] NSWCA 42 (10 March 2015), [29]–[30] (Beazley J).

31 *Lloyd-Williams v Mayfield* (2005) 63 NSWSC 631.

interests, expectations and life plans of close relatives with whom they feel a sense of identity.

6.4 'Marrying-off the daughters'

A feature of many cases in Family Provision cases is that married daughters who made applications under family Provision legislation have been considered as sufficiently well maintained and not in need of support if their husbands were doing well in life (De Groot & Nickel 2012, 74). This view reflects the idea of women as 'dependent' on the husband who could be relied on as the primary earner of the relationship. The result, in effect, is by not providing for a daughter the rest of the estate is released to help establish the male farmer.

For instance, in *Re Hodgson*[32] the daughter was regarded as 'taken care of' as she had married well. In deciding whether or not the testator was guilty of a breach of moral duty towards the daughter, one of the relevant factors was the income and prospects of the husband the daughter had married. As she had married a prosperous husband, Herring J considered she had 'transferred into another household' where her husband consequently was responsible for her.[33] Martin J held that as the property was small and probably was not susceptible to division, that in the circumstances he concluded that the elder son had 'at all events a strong moral claim to be entitled to carry it (the farm) on as a dairy farm'.[34]

The judges concluded that she was well provided for as she was married to a healthy husband with adequate means and good prospects. As regards the daughter Sholl J said:

> When he came to the situation of the daughter, he was aware that she had recently married a young farmer in the vicinity who appeared to be in quite comfortable circumstances, and well able to support her and the child she then had. In those circumstances the problem is whether she had some need and some moral claim. So far as need is concerned she has given no evidence as to her husband's assets other than that the husband was making a modest living and was not affluent. It appears from her cross-examination that he owns two farms and has an interest in the partnership in the lease of another. I don't know what he earns, but I see no reason to doubt the statement that he is in comfortable circumstances. She was at the death of the testator married to a young farmer who is well off financially and well able to look after her. He could be reasonably assured that their married life would be a success. Should any misfortune overtake him, she has the benefit of his will or of the statute. Her financial future was perfectly assured or appears to be so. I see great difficulty in seeing how the daughter has a claim on his bounty.[35]

32 [1955] VLR 481.
33 Ibid, see 484 per Herring J, the other two judges agreed with this approach.
34 Ibid, 487.
35 Ibid, 24.

In effect the judges were saying that having left one family for the security of her husband's family she had therefore lost her claim on her father's estate.[36]

7. Conclusion one: the role of rhetoric in family provision cases

I now examine how the type of cases I have examined adopt forms of rhetoric. I also refer to the significance of Foucault's insights as regards the importance of expert knowledges.

I have argued disputes for family property enshrine forms of rhetoric. I take rhetoric to mean statements that contain a logic of reasonableness or common way of thinking that is adopted by judges as part of the presentation of their judgment. This approach sees law as a cultural description[37] as well as a form of reasoning. These forms of presentations also enshrine calibration about what is acceptable and what is illicit. As I will later argue such rhetoric incorporates forms of normalisation.

I have examined forms of rhetoric active in Family Provision cases as regards family farms. They were claims firstly based on the history of the farming son on the farm and the work he had done on the farm. Secondly, I examined cases where the long-term viability of the farm was the factor that underpinned the decision. In these later cases widows and daughters received minimal amounts on the basis that intergenerational continuity for a son should be maintained.

The first group of cases discussed described the claims of farming sons who had been brought up to work on the land.

Milner suggests that such 'property narratives' show stories of identity pertaining to the sons' history, property and place.[38] These farming sons' stories in general reflect the values of intergenerational exchange of family ownership as seamless flow between generations as each contribute to the property to pass it on to the next generation. In these cases, the land was 'family land' in the sense that it was intergenerational property as a result of a reciprocal exchange of property title for labour.

This is implicit in the founding stories of the family on the land and the recognition given to the son for his work. Part of the family story is how sons leave their previous existence as off-farm workers and become stake holders as 'farmers'.

These accounts emphasise what Milner calls the 'rites of settlement'. These accounts represent rites of struggle and of hard work, and the taming of nature. These struggles also emphasise a son's status as a farmer and the supposed right to keep the fruits of their struggle.

Secondly, I referred to a group of cases which marginalised women's contributions. These happened in two sorts of cases. The first group dealt with the case of widows who received life estates and a second group of cases dealt with 'farming daughters'.

36 The Full Court per Herring CJ, Martin and Sholl JJ.

37 See my earlier comments on rhetoric. I acknowledge here the work of James Boyd White. He importantly draws a distinction between 'law as a machine' and law as a social and cultural endeavour. While he concedes law is a method of social control, he argues it is a culture of argument, see White 1984 and 1985.

38 I acknowledge my debt here to Neil Milner and his study of leaseholder's land disputes in Hawaii, see Milner 1993.

Cownie and Bradley have argued that Family Provision cases are a form of *topoi,* or forms of argument which operate from different forms of dialectical and rhetorical proofs as found in other areas of law. Cownie and Bradley argue that these forms of argument adopt arguments from generally accepted opinions and arguments. Such arguments they argue are fragmentary insights, points of view, that orientate the discussion and problem and open a different set of solutions (Cownie & Bradley 2003, 580; De Sousa Santos 1977, 14, 17).

The deployment of this form of rhetoric is consistent with the critique generally advanced on the role of discretion found in Family Provision law.[39] It is suggested also that this form of approach utilises a particular form of discretion that is not a form of 'inquiry' but an 'examination' based on the notion of normalisation.

As indicated normalisation involves the construction of an idealised norm of conduct. Normalisation is one of the assemblage of tactics used for social control with the minimum expenditure of force through forms of what Foucault calls 'disciplinary power'. I develop the significance of this later.

8. Conclusion two: the imbrication of 'expertise' into family provision judgments and governance of family farms

The settlement of rural Australia was facilitated by a variety of 'expert forms of knowledges' which allowed the state to govern the family situation from a distance. By the term expert 'forms of knowledges', it is meant those forms of knowledges based on surveying, cartography, and demography which allowed the family to be 'governed from a distance' where direct control was not possible (Voyce 2007; Rose & Miller 1990; Latour 1987, 219-232).

While these devices were crucial in creating a form of internal government for the family, such as its form of property holding, the institution of marriage itself and the various programs of governmental support, attention is directed now to how decisions in Family Provision cases were composed through the imbrication of different forms of expert knowledges. I turn here to what Foucault regarded as 'economics' as a prime instance of an expert knowledge.

Foucault regarded professional forms of expertise, such as economics[40] as a form of knowledge that constructed a technology for evaluating certain types of subjects and practices (Mitchell 2002, 80-119). Foucault regarded economics, for example, not as an autonomous realm of exchange, but rather as a form of technology or as a mode of inquiry to be conducted through examination, measurement and objectification of the productive subject.

At the same time these economic forms of measurement, as part of a complex 'assemblage' of practices and technologies, were connected to 'knowledge formations'

39 See former discussion and critique of Dewar 1997 and Parkinson 1999.

40 This approach builds on the notion that the 'economy' was essential to the emergence of a new form of political rationality which Foucault called 'governmentality', which linked the management of the self, the family and the state (Barry, Osborne & Rose 1996).

(formal and informal) which were united in the role of governance. Through this linkage at a local and state level the rudiments of the pioneer settler state were established.

This way of proceeding toward 'economics' as outlined instructs us to think of expert knowledges (widely conceived) as 'dividing practices'[41] that operate in judgments, in the case of farms, as a device which separates those who are in need and those who are not.

Within this approach there is implicit in judgments an 'examination' of the 'needs' of the applicant and the family in general. Seen as an *examination* each farming dispute adopts one of the types of rhetoric outlined. These as indicated were 'as the son had worked on the farm he should inherit the farm', and that an economic perspective dictated that women should receive minimal amounts to preserve the farm in the long term.

I will conclude how Foucault's methodical approach to law texts and to forms of governance underpins six insights into Family Provision law.

Firstly, should we conceive of the farm as a vehicle for family governance we may see that the idea of property enables the state to govern from a distance as regards what may be called as a 'family's internal property relations'. This approach is in line with some property theorists who argue that we should examine the relationship between the stakeholders of property owners through how law governs their relationship with each other (Alexander 2012, 1860). The techniques of governance I suggest are not neutral but contain social implications.

For instance, 'accountancy technology' utilised in life estates enabled substantial farm wealth to be directed to farming sons. The deployment of the capital income distinction, utilised in a special way for farming properties constructed women as conduits for the continuation of male farming. Likewise, daughters' efforts on farms were downgraded in the interests of intergenerational continuity. Underpinning these decisions were economic evaluations that male labour was more productive and women's labour a hindrance on male continuity of farming.

Secondly, I take Foucault's method to reveal that we should focus on the notion that the Family Provision hearing is a form of 'examination' rather than an 'inquiry'. As I have indicted an *inquiry* is the knowing of events according to witnesses, according to criteria of observation. By contrast an *examination* is knowing individuals according to the observation of power holders and a criterion of normality or what Foucault called 'normalisation' (Elden 2017). This process involves the creation of standards to separate out undesirable subjects. An analysis of the cases presented show that productive labour was rewarded, and long-term commitment endorsed, by way of an allocation of property that supported male continuity of family farming.

Thirdly, the result in each case should not be seen as creating a 'precedent' in the traditional legal sense of deciding cases according to consistent principled rules so that similar facts will yield similar and predictable outcomes. Practitioners in the

41 Examples are the mad from the sane, the sick from the healthy, and the criminals from the 'good boys' (see Foucault 1982, 208).

area of Family Provision often complain about the lack of consistency in decisions.[42] Perhaps the best view is from Gillian Douglas who writes:

> that the only way one can 'articulate' how that judgment is made, is by understanding that what the judges are doing is using their own experience of family practices and norms to assess the family tie between deceased and applicant, taking due account of how that family itself 'operated' and what norms it shared. In so doing, the law can be used dynamically to determine which kinds of relationship, and what qualities of emotional or supportive bonds, should be recognized as giving rise to a 'sense of obligation', as Janet Finch would put it, to provide some financial provision for the applicant. (Douglas 2014, 240.)

It is suggested then that seeing the cases as an 'examination' rather than as a form of inquiry goes further than doctrinal analysis as usually conceived. This is the case as this way of proceeding draws on forms of power-knowledge as expressed in judgments. As George Pavlich writes the modern form of examination 'can only claim legitimacy by drawing on contextually specific power-knowledge complexes that define how to discover and investigate legal truths' (Pavlich 2010, 215).

In the context of family farm judgments, we may observe the role of local power networks. Thus, in the case of farming sons the preeminent local solicitors in towns as regards Family Provision matters and divorce cases act for male litigants exclusively. At the same time women who desert their husbands may not receive credit facilities in local stores. Alternatively, women are entrenched in male dependence on account of the social welfare rule on cohabitation rule (Voyce 2008). Finally, a woman might be excluded from rural society as she may be seen not to have a proper mental capacity consistent of those required to support rural masculine values.[43] In short, solicitors, police and welfare agencies worked and supported patriarchal views of farming communities (Voyce 2008, 342).

Fourthly, I have shown that family narratives about family property reflect various values as to ideas on property. The Family Provision cases I have discussed coincide with a rural view that property should be inherited by those who worked on the land, that land should be preserved to support family cohesion. In this form of rhetoric ideas as to rural forms of identity or sense of 'place attachment' underpin these decisions although they are not referred to as such. Other ideas excluded such as the laudable merit of helping aging parents, assisting widows or married daughters.

Fifthly, Foucault scholars have interpreted Foucault's approach to law in various ways. One school of thought is that in the light of expert disciplines law has withered away as it has been colonised by other forms of discourses. The argument by Hunt and Wickham was that law acts as a norm which has been shaped by scientific

42 See earlier comments on the role of discretion in Family Provision cases.
43 See the story of Catherine Currie in McLeary and Dingle 1998, 106-108. On the colonial construction of madness, note Colebourne 1997.

disciplines such as criminology, economics and psychiatry. In this view law has been 'emptied' out or even dismantled and is entering into a terminal process of decline (Hunt & Wickham 1994; O'Malley & Valverde 2014, 326).

However, I suggest it is unproductive to generalise about the relationship between law and the disciplines as each area of law should be considered separately. I consider that the Family Provision cases bring about a system of normalisation as a result 'epistemic competition' (Teubner 1989, 749).

As indicated by 'normalisation' I mean that in the 'farming cases' inheritance by sons of farmers tended to be supported with only moderate amounts for other members of the family. In line with this approach family solicitors supported this approach in the affirmation of male power in local communities. It is acknowledged that more recent cases have ended the special consideration given to farming sons and the idea that the farm must be kept in the family (Voyce 1993).

As regards what Teubner called 'epistemic competition' I would argue that what is brought about through the result of human sciences being imbedded in law, represents what Foucault called as a 'grotesque cog in the mechanism of power' (Foucault 1999, 11; Suntrup 2017, 318). In other words, we have what Teubner called as 'a new reality that is neither a purely judicial construction nor a purely scientific construction' (Teubner 1989, 750; Suntrup 2017, 319). For instance, in the case of life estates there are rules where forms of accounting have excluded other interpretations of law to in effect deny support for meritorious widows and daughters to ensure the long-term viability of the farm for the son.

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