REPORT TO THE STANDING COMMITTEE OF ATTORNEYS GENERAL ON FAMILY PROVISION

National Committee for Uniform Succession Laws

Queensland Law Reform Commission
Miscellaneous Paper 28
December 1997

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REPORT TO THE STANDING COMMITTEE OF ATTORNEYS GENERAL ON FAMILY PROVISION

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UNIFORM SUCCESSION LAWS PROJECT COMMITTEE

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Queensland Law Reform Commission
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Ms Claire Riethmuller

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Attorney General's Dept, South Australia
Ms Margaret Doyle

NEW ZEALAND

Law Commission
Mr D F Dugdale

Special mention is made of Dr Peter Handford, Executive Officer and Director of Research, Law Reform Commission of Western Australia who was on the National Committee from its inception until August 1997. Dr Handford's enthusiasm for the project and his willingness to contribute of his time, ideas and legal skills were infectious. He played a large part in the development of the recommendations included in this Report. No replacement for Dr Handford has yet been nominated by the Attorney General for Western Australia.

The National Committee also acknowledges the valuable contributions made to this project by other past members of the National Committee: Professor Richard Sutton, former Commissioner with the Law Commission, New Zealand; Ms Margaret Cross, Attorney General's Department, South Australia; Ms Lyn Douglas and Ms Judy Bonner, Northern Territory Attorney General's Department; The Hon Dr Robert Dean MP and Mr James Guest, formerly of the Victorian Parliamentary Law Reform Committee. The Committee also acknowledges the outstanding contribution to the project by Mr Tony Lee, former part-time member of the Queensland Law Reform Commission and a consultant to that Commission on the Uniform Succession Laws Project. The National Committee wishes to thank the members and officers of the various Agencies and Government Departments from which its members have been drawn for their assistance, in particular, Mr Joseph Waugh and Ms Leonie Armstrong of the New South Wales Law Reform Commission, and Mr Tony Allingham formerly with the Tasmanian Law Reform Commissioner.

Please note: This publication is a report to the Standing Committee of Attorneys General and will be available for public distribution only with the approval of the Standing Committee of Attorneys General.

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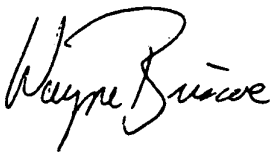
1 Professor Tilbury is a part-time member of the New South Wales Law Reform Commission and Academic Secretary to the Victorian Attorney General's Law Reform Advisory Council.

2 See note 1 of this Report.

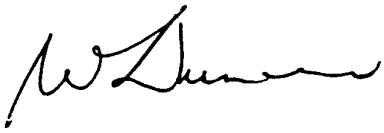
To: The Standing Committee of Attorneys General

The National Committee for Uniform Succession Laws is pleased to present its Report on *Family Provision*.



Wayne Briscoe
Commissioner, Queensland Law Reform Commission, Co-ordinating Agency for Uniform Succession Laws Project, as Member of National Committee

The Honourable Justice P de Jersey
Chairman, Queensland Law Reform Commission
Co-ordinating Agency for Uniform Succession Laws Project



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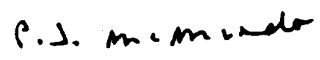
Commission, as Member of the National Committee

Professor DRC Chalmers
former Law Reform Commissioner of Tasmania and the Tasmanian Attorney-General's representative on the National Committee

D F Dugdale
Commissioner, Law Commission, New Zealand
as Member of the National Committee

David Edwards PSM
Deputy President, Australian Law Reform Commission
as Member of the National Committee

Peter McDermott RFD
Commissioner, Queensland Law Reform Commission, Co-ordinating Agency for Uniform Succession Laws Project



Phil McMurdo QC
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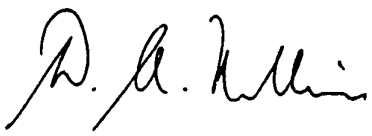

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Senior Research Officer, Queensland Law Reform Commission, as Member of the National Committee

Suzanne Sheridan
Commissioner, Queensland Law Reform Commission, Co-ordinating Agency for Uniform Succession Laws Project

Charles Rowland
Special Advisor (Succession Law), Community Law Reform Committee, Attorney-General's Department, ACT as Member of the National Committee

Professor Michael Tilbury
Academic Secretary to the Attorney-General's Law Reform Advisory Council (Victoria), as Member of the National Committee

PREFACE

1. THE PROJECT'S BEGINNING AND THE CO-ORDINATING ROLE OF THE QUEENSLAND LAW REFORM COMMISSION

In 1991 the Standing Committee of Attorneys General approved the development of uniform succession laws for the whole of Australia. In 1992 the Queensland Law Reform Commission was requested by the Queensland Attorney General to co-ordinate that project.

At that time the Queensland Law Reform Commission was engaged upon a reference to reform Queensland's intestacy rules. Work on that reference was prioritised in the hope that updated Queensland intestacy rules could be used as the basis for work on a future uniformity project on intestacy. The Commission's work on that reference culminated in the completion of its Report, *Intestacy Rules*, in June 1993.[3]

In 1993 and 1994 Mr W A (Tony) Lee, a then part-time member of the Queensland Law Reform Commission (and currently an expert consultant to that Commission), assisted the Victorian Parliamentary Law Reform Committee in the preparation of its Report and Draft Legislation on the law of wills in Victoria. That Report, *Reforming the Law of Wills*, was published in May 1994.[4]

In order to accommodate the work of the Victorian Law Reform Committee in the uniformity reference, the Queensland Law Reform Commission confined its initial attention to the law of wills, which is the area of the law of succession in which the greatest degree of diversity exists amongst the States and Territories.

In 1994, the Queensland Law Reform Commission released an Issues Paper, *The Law of Wills*,[5] which identified a number of significant issues relating to uniform wills legislation. Shortly thereafter, the Commission published an Issues Paper, *Family Provision*.[6] Since 1994, the Commission has produced a large number of papers on various issues relating to wills, family provision and other succession law topics.[7]

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3 Queensland Law Reform Commission *Intestacy Rules* (R 42, June 1993).

4 Victorian Parliamentary Law Reform Committee *Reforming the Law of Wills* (May 1994).

5 Queensland Law Reform Commission *Uniform Succession Laws for Australian States and Territories: First Issues Paper: The Law of Wills* (MP 10, July 1994) reissued as WP 46, June 1995.

6 Queensland Law Reform Commission *Uniform Succession Laws for Australian States and Territories: Issues Paper No. 2: Family Provision* (WP 47, June 1995). See pages (vi) and (vii) of this Preface for references to publications produced and consultations conducted in other jurisdictions.

7 See, for example, page (vi) of this Preface.

2. THE NEED FOR UNIFORMITY AND ITS ACHIEVABILITY

Although the succession laws were uniform in the Australian colonies during the nineteenth century, they diverged during the twentieth century when the colonies began to enact their own legislation. Those divergences have become more marked as States and Territories have embarked on more purposive law reform. As a result, there are no two States or Territories in Australia where the succession laws are the same.

Among the States and Territories there are numerous significant differences in the law of wills. In intestacy, the rights of a surviving spouse vary greatly from jurisdiction to jurisdiction. In family provision schemes, qualification to apply for provision is far from uniform as are also the grounds on which the Courts in different jurisdictions may order that provision be made. In the administration of deceased estates, there is a lack of uniformity in the law relating to devolution of title and the payment of debts from assets, and uncertainty with respect to interstate recognition of grants of probate.

Less significant differences are numerous, particularly in those relatively neglected areas of law reform such as probate and administration. To practise successfully in succession law requires State by State expertise. Since most succession practice is, or should be, concerned with minimising the costs of administering deceased estates, the majority of which are of no great financial value, it is ordinary people who suffer most from the inevitable increase in costs which must occur if a deceased estate has a connection with more than one jurisdiction.

To date, in Australia, State and Territory succession laws have been reformed in a piecemeal manner. There has never been an attempt to reconsider all the succession laws in their entirety in any State or Territory. Piecemeal reforms have tended to be concentrated on relatively urgent or popular issues.

Ideally, uniform laws should be identical, word for word, in every State and Territory, although in practical terms consistency might be the most achievable result. Whether uniform or consistent, all the succession laws must be up-to-date. The law of wills, intestacy, family provision, administration and probate, and administration of assets must share, as far as possible, a common underlying principle. Unnecessary provisions and old language must be recognised and removed.

Such a project inevitably entails law reform. Nevertheless, it may be said that between them, the statutes of the States and Territories probably achieve all that could be desired to ensure that proper provision can be guaranteed for persons having legitimate claims on the estates of deceased persons. Furthermore, in recent years, a number of law reform bodies have reported on a need for reform in their respective jurisdictions in one or more significant areas of succession law. These reports invariably contain the most comprehensive and up-to-date thinking on the topics covered, and are the ideal starting point for a discussion on appropriate directions for uniformity.

The development by the National Committee of model legislation[8] to be used as the basis for reform by individual States and Territories provides an opportunity for the States and Territories to adopt uniform, or at least consistent, laws relating to family provision.

3. CO-ORDINATION OF THE PROJECT ON A NATIONAL BASIS

In order to ensure that the Uniform Succession Laws Project maintained an Australia-wide focus and was regarded as an undertaking of all Australian jurisdictions, the Queensland Law Reform Commission, as co-ordinator of the project, asked the Queensland Attorney General to request each of his counterparts in other Australian jurisdictions to nominate a person or agency to represent his or her respective jurisdiction on a National Committee to guide the project. Nominees were subsequently appointed in each Australian jurisdiction.

The New Zealand Law Commission asked to be represented on the National Committee. As the New Zealand Law Commission was also working on succession law reform, Professor Richard Sutton, a commissioner of the Law Commission and an expert in succession law, was welcomed on to the National Committee.[9] The New Zealand Law Commission is strongly supportive of the uniform succession laws project, and that Commission's contribution will be of great assistance to the development of uniform succession laws in Australia and possibly between Australia and New Zealand.[10]

The current members of the committee are:[11]

- Professor Don Chalmers, Professor of Law, University of Tasmania[12]
- Professor Michael Tilbury, Academic Secretary to the Victorian Attorney General's Law Reform Advisory Council and Commissioner, New South Wales Law Reform Commission

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8 Drafting instructions for such legislation in the area of family provision are included in Appendix 1 to this Report. Model legislation is being prepared by New South Wales Parliamentary Counsel and will be presented to the Standing Committee of Attorneys General when settled.

9 Professor Sutton has subsequently retired from the Law Commission.

10 The New Zealand Law Commission has recently reported on the law of wills in New Zealand: *Succession Law: A Succession (Wills) Act* (NZLC R41, October 1997). The recommendations made in that Report were developed after considering the draft *Wills Act 1994* (Vic) and the initial work of the National Committee on Uniform Succession Laws.

11 In August 1997, Dr Peter Handford, of the Law Reform Commission of Western Australia, resigned from the National Committee pursuant to the Attorney General of Western Australia's decision to restructure the Law Reform Commission of Western Australia of which Dr Handford is Executive Officer and Director of Research.

12 Formerly the Tasmanian Law Reform Commissioner.

- Mr Peter Hennessy, Executive Director, New South Wales Law Reform Commission
- Ms Margaret Doyle, Director, Policy and Research, Attorney General's Department, South Australia
- Ms Barbara Bradshaw, Policy Officer, Policy Division, Northern Territory Attorney-General's Department
- Mr Charles Rowland, Special Adviser (Succession Law), Community Law Reform Committee, Attorney-General's Department, Australian Capital Territory
- Ms Ruvani Wicks, Legal Officer, Victorian Department of Justice
- Mr David Edwards PSM, Deputy President, Australian Law Reform Commission
- Mr D F Dugdale, Commissioner, Law Commission, New Zealand
- Mr Wayne Briscoe, Commissioner, Queensland Law Reform Commission
- Ms Claire Riethmuller, Senior Research Officer, Queensland Law Reform Commission

Since the National Committee was first formed there have been some changes in its membership. This was to be expected given the nature of the organisations from which most National Committee members were drawn. Also, a number of the Attorneys General who were in office at the time the original nominations were made no longer hold office. Nevertheless, the National Committee has retained the expertise and interest in succession law that are vital to the success of the project.

Individual members of the National Committee are not necessarily plenipotentiaries of the organisations they represent, although, wherever possible, members of the National Committee have sought the views of their organisations before adopting a stance in relation to particular issues discussed at the National Committee level. The Queensland Law Reform Commission, for example, has considered all significant issues. The advantage in that approach for Queensland will be that the Queensland Law Reform Commission will be able to report to the Queensland Attorney General on reforms that should be implemented in Queensland to bring Queensland in line with the preferred uniform approach.

A number of the organisations from which the National Committee members are drawn have particular references from their respective Attorneys General that are relevant to the Uniform Succession Laws Project. For example, the New South Wales Law Reform Commission and the Queensland Law Reform Commission have specific references relating to the Uniform Succession Laws Project.

The Queensland Law Reform Commission as co-ordinating body for the project is indebted to the individual members of the National Committee for their interest and efforts to date. It is hoped that the National Committee structure will continue for future uniform succession law topics to be dealt with by this project.

4. THE ACHIEVEMENTS OF THE UNIFORM SUCCESSION LAWS PROJECT TO DATE

(a) The Issues Papers

In an attempt to identify matters that could be the subject of a common approach to succession law throughout Australia, the Queensland Law Reform Commission prepared an Issues Paper on *The Law of Wills*[13] and an Issues Paper on *Family Provision*[14] as well as a number of memoranda, referred to below.[15]

In Queensland, the Issues Papers were widely distributed to individuals and organisations with a particular interest or expertise in the issues under review. A number of submissions were received from within Queensland and from national organisations. Consultations in other jurisdictions were also based on the Issues Papers.

(b) The National Committee's Deliberations

The National Committee established as a result of nominations from all Australian Attorneys General met for the first time in Brisbane in September 1995. All States and Territories, as well as the Commonwealth and New Zealand, were represented at that meeting. It was agreed at that meeting that the National Committee would concentrate on the law of Wills as its first project and that the draft *Wills Act 1994* (Vic), included in the Victorian Parliamentary Law Reform Committee's Report on *Reforming the Law of Wills*,[16] would be used as the basis for discussion. The draft Victorian legislation was the most recent proposal for wills law reform in Australia.

It was also agreed at the 1995 meeting of the National Committee that work would be undertaken on the discrete topic of the abolition of the *lex situs* rule in relation to succession to immovable property. It was generally considered that the abolition of that rule may diminish the adverse effects of lack of uniformity.

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13 Queensland Law Reform Commission *Uniform Succession Laws for Australian States and Territories Issues Paper No. 1 The Law of Wills* (WP 46, June 1995) originally released in July 1994 as MP10.

14 Queensland Law Reform Commission *Uniform Succession Laws for Australian States and Territories: Issues Paper No. 2: Family Provision* (WP 47, June 1995).

15 See (iv) of this Preface.

16 Victorian Parliamentary Law Reform Committee *Reforming the Law of Wills* (May 1994) xxxv.

Following the September 1995 meeting, the Queensland Law Reform Commission prepared a series of memoranda for the National Committee on particular issues raised by the draft *Wills Act 1994* (Vic) and on the *lex situs* rule.[17] The various memoranda were:

1. *Preliminary Matters and Capacity*
2. *Executing a Will*
3. *Revocation, Alteration and Revival*
4. *Interested Witnesses*
5. *Marriage and Divorce*
6. *Foreign Laws*
7. *Construction of Wills - The Anti-Lapse Rule*
8. *Construction of Wills and Miscellaneous Matters*
9. *Admission of Extrinsic Evidence*
10. *The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property*

Consultations on the issues relating to the law of Wills were undertaken in each jurisdiction by the National Committee's member in that jurisdiction.

The Queensland Law Reform Commission used the memoranda to seek specific comment from individuals and organisations within Queensland with an interest or expertise in the law of wills.

The New South Wales Law Reform Commission re-published and distributed the Issues Papers on *The Law of Wills*[18] and *Family Provision*[19] to assist in its consultation process.

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17 The first nine memoranda were published as Queensland Law Reform Commission *Uniform Succession Laws: Wills* (MP 15, February 1996). The tenth was published as Queensland Law Reform Commission *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (MP 16, February 1996).

18 New South Wales Law Reform Commission *Uniform Succession Laws: The Law of Wills* (Issues Paper 10, February 1996).

19 New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (Issues Paper 11, February 1996).

The Law Reform Commission of Western Australia sought comment on the issues discussed in the memoranda from Mr Neville Crago of the University of Western Australia. Mr Crago has wide experience, both academic and professional, in the area of succession law. Comment was also sought from about forty individuals and organisations in Western Australia including judges, lawyer-politicians, academics, the Law Society, various government agencies and trustee companies. A press release was sent out and a notice was placed in the journal of the Law Society of Western Australia (*Brief*).

The Constitutional and Law Reform Branch of the Australian Capital Territory's Attorney General's Department sought advice from Mr Charles Rowland, then of the Australian National University. Mr Rowland is an internationally recognised expert on succession law and is now a member of the National Committee.

The Tasmanian Law Reform Commissioner convened an advisory committee of experienced Tasmanian legal practitioners and a member of the judiciary.

Members of the National Committee in other jurisdictions conducted such consultations as they considered appropriate.

The National Committee next met in Melbourne on 20 May 1996. The meeting was hosted by the Victorian Department of Justice and was chaired by Dr Robert Dean MP, Parliamentary Secretary to the Victorian Department of Justice and former member of the Victorian Parliamentary Law Reform Committee.

The principal aims of the Melbourne meeting were to:

- assist the process of Wills law reform in Victoria (and hence provide a standard for other jurisdictions in Australia) by providing Australia-wide comment on the proposed Victorian wills legislation;

- assist the process of uniform succession law reform by exchanging views and seeking consensus on particular succession law issues - in particular, in relation to the law of wills and the *lex situs* rule; and

- set an agenda for future work on the Uniform Succession Laws Project.

The Melbourne meeting was most successful. All Australian jurisdictions except South Australia and the Northern Territory were represented. A representative of the New Zealand Law Commission also attended. Agreement was reached on a large number of issues.

At the conclusion of the meeting it was agreed that a report on Wills law reform would be prepared for the Standing Committee of Attorneys General.

(c) The National Committee's Reports on Wills

Following the May 1996 Melbourne meeting of the National Committee, the Queensland Law Reform Commission prepared a Report to the Standing Committee of Attorneys General on behalf of the National Committee on a number of significant issues relating to *The Law of Wills*.[20] That Report was forwarded to the Standing Committee of Attorneys General in October 1996.

At an April 1997 meeting of the National Committee, it was noted that the Standing Committee of Attorneys General had expressed support for the concept of the National Committee and had requested the completion of the Wills project by the end of 1997. The National Committee decided to prepare a Consolidated Report for the Standing Committee of Attorneys General on the issues covered by the October 1996 Report as well as a number of outstanding wills issues. It was also decided that the Consolidated Report should include draft model wills legislation based upon the National Committee's recommendations. The model legislation could form the basis of legislative reform in any jurisdiction interested in adopting the proposals contained therein.

The National Committee's Consolidated Report on *The Law of Wills* will be presented to the Standing Committee of Attorneys General in December 1997.

(d) The National Committee's Work on Family Provision

At the April 1997 meeting of the National Committee, discussion commenced on issues covered by the Issues Paper on *Family Provision*; and on a number of other issues in Family Provision raised primarily by respondents to the Issues Paper. It was noted that the Standing Committee of Attorneys General had also requested the completion of the Family Provision project by the end of 1997.

At the April 1997 meeting it was decided by the National Committee that model *Family Provision* legislation would also be prepared and form part of the report to the Standing Committee of Attorneys General.

The Law Reform Commission of Western Australia considered the possibility of drafting the Report to the Standing Committee of Attorneys General on behalf of the National Committee, but was unable to do so. The Queensland Law Reform Commission then undertook to prepare the Report on behalf of the National Committee, and the New South Wales Law Reform Commission undertook to arrange for the drafting of model legislation by the New South Wales Office of Parliamentary Counsel.

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20 National Committee for Uniform Succession Laws *Uniform Succession Laws for the Australian States and Territories: Report to the Standing Committee of Attorneys General: The Law of Wills* (MP19, October 1996).

At a meeting of the National Committee in Melbourne in September 1997, a draft of the report to the Standing Committee of Attorneys General on Family Provision was considered and significant discussion took place on relevant issues. The National Committee has met on a number of occasions by way of telephone conference for detailed discussion of issues.

(e) The Issues Considered by the National Committee

The National Committee has based its deliberations on issues raised in the Issues Papers on Family Provision[21] and on submissions received in response to consultations undertaken in various jurisdictions on the basis of the Issues Papers or consultations conducted in other ways. The National Committee is very grateful to the many individuals and organisations who have made submissions to its inquiries. Without those submissions, many of the issues and responses discussed in this Report may not have been identified.

(f) Model Legislation

Drafting instructions for model family provision legislation are attached to this Report as Appendix 1. The National Committee has based its deliberations on Family Provision on the New South Wales *Family Provision Act 1982*. The New South Wales legislation was considered to be the most up-to-date and comprehensive family provision legislation in Australia. In its submission to the National Committee, the Law Society of New South Wales observed:

> In the area of family provision however, the most recent rewrite of the law was in New South Wales in 1982 and it will be obvious as you proceed through this submission that in our view the law in New South Wales is the most extensive and most well reasoned legislation, in particular in the area of 'notional estate'. The New South Wales Act which commenced on 1 September 1983 has had only three changes made to it:
>
> (a) Section 9(6) relating to an interim order.
>
> (b) Section 11(1) & (2) in relation to orders that can be made for provision - extending the orders to be made in respect of property situated in or outside New South Wales. This clause should be adopted throughout Australia but more will be said about this in relation to the issue for consideration at 8.1(c).
>
> (c) Section 20(2) & (3) in relation to the Court disregarding persons who have not applied for provision when making its ruling.
>
> It is clearly evident that due to the small number of alterations over more than 12 years, the New South Wales Act has been successful. Through a survey of a number of cases, interpreting the New South Wales Act, there have been few judges who have criticised its philosophy or terms of specific sections. An example would be Justice Cohen in *Tobin v*

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21 Queensland Law Reform Commission *Uniform Succession Laws for Australian States and Territories: Issues Paper No 2: Family Provision* (WP 47, June 1995) and New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision* (Issues Paper 11, February 1996).

Estate of Keith Hardy, Deceased determined 14 October 1992 No EI 548/92, in which he discussed the construction difficulty of Section 23 - Notional Estate.

A review of texts such as De Groot & Nickel, *Family Provision in Australia & New Zealand*, Butterworths 1993, Dickey, *Family Provision After Death*, 1992, The Law Book Co Limited and Newton, *Protecting Your Will*, 1994, The Federation Press, makes it clear that New South Wales stands alone in many aspects of family provision, most notably in the areas of notional estate and orders being applicable to property, including real property in or outside New South Wales. The philosophy behind the New South Wales law which makes it stand alone and above the other States' laws is that it has protective provisions that severely limit avoidance of the protective provisions. Just like any effective taxation or revenue laws, an effective family provision legislation will only be so if evasion is halted.

(g) The next stage of this Project

Work has commenced on the third stage of this project - the administration of estates. The final major stage will be a review of intestacy laws.

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CHAPTER 4

CHAPTER 1

FAMILY PROVISION SCHEMES AND CONCEPTS

1. INTRODUCTION

The law relating to "family provision" or "testator's family maintenance" has traditionally been regarded as a mechanism to override the effect of a deceased person's testamentary intentions (by way of a will) or the rules of intestacy (which apply when a person dies not having left a will or an entirely effective will) in favour of a group of eligible people on certain grounds. The mechanism, found in legislation in all Australian jurisdictions, is an attempt to address the concern that some testators fail to have regard to commonly acknowledged responsibilities when organising the distribution of their estate upon their death or that the applicable intestacy rules may, in the circumstances, fail to provide adequately for someone to whom the testator owed such responsibilities.
Rosalind Atherton notes that:[22]

> **Family provision legislation enables a court to override the individual's discretion, with a judicial discretion.**

Family provision legislative schemes in Australia and New Zealand differ in a number of respects, in particular, with regard to who is an eligible person to apply for family provision. The relevant legislation is:

New South Wales	*Family Provision Act 1982*
Australian Capital Territory	*Family Provision Act 1969*
Northern Territory	*Family Provision Act 1970*
Queensland	*Succession Act 1981*
South Australia	*Inheritance (Family Provision) Act 1972*
Tasmania	*Testator's Family Maintenance Act 1912*
Victoria	*Administration and Probate Act 1958*
Western Australia	*Inheritance (Family and Dependants Provision) Act 1972*
New Zealand	*Family Protection Act 1955*

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22 Atherton RF and Vines P *Australian Succession Law Commentary and Materials* (1996) para 16.1.1.

In devising a model scheme for family provision the National Committee considered what would be the most appropriate philosophical basis for such a scheme. Taking into account:

> that all people with a strong moral claim to a share of the deceased person's estate should be entitled to apply for provision; and,
>
> the ability of the Courts to exercise their discretion to make appropriate decisions regarding an applicant's entitlement to provision

the National Committee has based its proposed family provision scheme on the belief that the scheme should facilitate, and the Court determine, what is "just" in all the circumstances.

The *Family Provision Act 1982* (NSW) has formed the basis of the National Committee's deliberations and of the drafting instructions for model legislation attached to this Report as Appendix 1. The New South Wales legislation is the most comprehensive and recent[23] legislation in this area. That is not to say that provisions in other legislation may not be preferable to their equivalent provisions in the New South Wales legislation. Where the National Committee has considered that to be the case then the other provision or a modification of the relevant New South Wales provision has been recommended.

2. FAMILY PROVISION AND INTESTACIES

The original family provision legislation in all Australian jurisdictions was concerned only with failure by a deceased person to make adequate provision for the maintenance and support of surviving family members in his or her will. Thus, as Dickey observes:[24]

> These statutes accordingly concerned only *testators'* family maintenance, thus giving rise to the name which is sometimes still used to signify what is now more commonly called family provision. ... In order to cover the case of inadequate provision for surviving family members as a result of the application of the rules of intestacy, Australian family provision legislation was subsequently changed to enable a court to order provision from a deceased's estate whether the deceased died testate or intestate.

For the purposes of family provision, no Australian jurisdiction now distinguishes between deceased estates which are governed by a will and deceased estates which are governed by an intestacy.

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23 The Victorian *Wills Act 1997* which includes significant amendments to the *Administration and Probate Act 1958* is not yet in force. Even when the *Wills Act 1997* is in force, the Victorian legislation will not be as comprehensive as the *Family Provision Act 1982* (NSW).

24 Dickey A *Family Provision after Death* (1992) 5.

Thus, subsection 14(1) of the *Family Provision Act 1982* (NSW) reads:

> An order made by the Court for provision out of the estate of a deceased person (whether or not an order made in favour of an eligible person) shall, except insofar as the Court otherwise directs, take effect as if the provision had been made;
>
> (a) where the deceased person died leaving a will - in a codicil to the will; or
>
> (b) where the deceased person died intestate - in a will of the deceased person.

In any event, the Courts tend to treat the distribution of estates governed by an intestacy as estates governed by a fictional will. In *Re Russell*,[25] Lucas J stated:[26]

> It seems to me that the most practical way to look at the matter is to imagine that the deceased had made a will whereby he directed that his estate should be distributed as on intestacy, and then to consider the needs and moral claims of the persons who benefit from a distribution in this manner.

In relation to the concept of fictional wills de Groot and Nickel observe:[27]

> The concept of the fictional will has much to commend it and is one likely to be adopted by most judges. There can be no doubt that, as Lucas J remarked in *Re Russell*:[28]
>
> > ... the fact that the distribution is statutory is not a fact which assumes any particular importance.
>
> A consideration of the authorities shows that this statement forms the basis of the decisions even though no reference is made to it.

For the purposes of this Report an application for family provision will refer to an application in relation to an estate distributed by way of will, an estate distributed by way of the intestacy rules and an estate distributed by way of a will and the intestacy rules (in the case of a partial intestacy).

3. ELIGIBILITY TO APPLY

Each jurisdiction has defined classes of individuals who may apply for provision from the deceased person's estate by way of the mechanism of family provision. Those classes have been enlarged over the years to include individuals who would not traditionally have been regarded as family members of the deceased person. However, different jurisdictions have adopted different classes and, in relation to some classes,

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25 [1970] QWN 22.

26 Id at 56.

27 de Groot JK and Nickel BW *Family Provision in Australia and New Zealand* (1993) para 210.

28 *Re Russell* [1970] QWN 22 at 56.

have imposed additional criteria for eligibility to apply.

Specific categories

The traditional classes of individuals who, without more, have been eligible to apply for family provision have been:

* a surviving wife or husband of the deceased person; and

* a child of the deceased person.

Other classes of individuals recognised as having a right to apply for family provision in some jurisdictions include:

* former wife or husband of the deceased person (New South Wales, South Australia, Queensland, Western Australia, the Northern Territory, the Australian Capital Territory, but only former wife in Victoria and Tasmania). Restrictions are imposed in some jurisdictions;

* step children (Australian Capital Territory, Northern Territory, Queensland, South Australia);

* grandchildren (New South Wales, with dependency requirements);

* members of the household (New South Wales, with dependency requirements);

* *de facto* spouses (all jurisdictions, with various restrictions);

* parents (all States except Victoria and the Territories, with dependency requirements);

* brothers and sisters (South Australia, provided that they cared for the deceased person during the deceased person's lifetime or contributed to the maintenance of the deceased person during his or her lifetime);

* young people (Queensland includes any minor if, at the time of death he or she had been substantially maintained by the deceased person).

These specific categories are discussed in more detail in Appendix 4 *Specific Categories of Persons Currently Automatically Entitled to make Application for a Family Provision Order.* The Appendix is included for information purposes only. It should not be regarded as an expression of support for, or rejection of, any category by the National Committee.

General categories

In two jurisdictions there have been proposals to introduce broader categories of eligible people either in addition to the specific categories referred to above or in place of them.

New Zealand

The New Zealand Law Commission has proposed two different types of claim on the deceased person's estate:[29]

* property division and contribution claims, where claimants seek the return of benefits they have conferred on the "will-maker";[30] and

* support claims, where the will-maker had a special and immediate responsibility for claimants, who seek to be supported for their reasonable needs in life.

Under the proposed New Zealand scheme people in a limited number of mainly traditional categories of eligible people (widows, widowers, *de facto* partners, children, children for whom the "will-maker" has assumed, in an enduring way, the responsibilities of a parent) may be able to make both a contribution claim and a support claim.

The concept of "contribution claims" does not fall neatly within the topic of family provision. It has to do primarily with the ability of a person to claim from the estate of a deceased person any contribution of a benefit (for example, money, property, work or services) to the deceased person during the deceased person's lifetime, in circumstances where justice requires that the deceased person make some provision in return. The New Zealand Law Commission believes that people who make such contributions should have a specific statutory claim on the estate of the deceased person. Under the law of New Zealand and the various Australian jurisdictions, people who wish to be paid for the benefit would need to bring a claim based on contract, estoppel, restitution or trusts.

There may be distinct advantages if the person seeking a contribution from the estate did not have to rely on a claim under the general law which may be difficult to establish and maintain. The National Committee believes that the concept developed by the New Zealand Law Commission should be investigated in the Australian context. However, it was agreed that such an investigation would not be appropriate in the context of a report on family provision. It may

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29 Law Commission (NZ) *Succession Law: Testamentary Claims* (NZLC PP24, August 1996).

30 The term "will-maker" is used by the Law Commission to mean testator or testatrix. See: Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLC R39, August 1997) 1.

be dealt with as a separate project of the National Committee at a future time.

Victoria

The *Wills Act 1997* (Vic) which amends the family provision scheme in the *Administration and Probate Act 1958* (Vic) is not yet in force. When amended, the Victorian family provision scheme will include an essentially unlimited category of eligible persons.[31] The new category of eligible persons - people owed a duty by the deceased person to be maintained - will be in lieu of traditional categories of eligible persons. The Victorian proposals are discussed in more detail in Chapter 2 of this Report.

4. DETERMINATION OF THE APPLICATION

In order to make a family provision award, the Court generally undertakes a two stage process. The first stage is often referred to as the determination of the jurisdictional question. The second stage is referred to as the discretionary question. The stages are implied from the wording of provisions conferring power on the Court to make family provision orders.[32]

(a) The jurisdictional question

The Court must determine whether, as a result of the distribution of the deceased person's estate, an eligible person has been left without adequate provision for his or her maintenance. In order to do this the Courts will be required to undertake a number of inquiries:

a what constitutes proper maintenance for the applicant (taking into account present and future needs)?

b has the applicant been left without adequate provision for maintenance from the deceased person's estate (taking into account factors such as the applicant's needs, the size of the estate and claims of others on the estate)?

c the Courts have also made it clear that there must be an inquiry into the moral claim of the applicant to provision from the deceased person's estate.

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31 Part 7 of the *Wills Act 1997* (Vic) will amend the *Administration and Probate Act 1958* (Vic) in relation to applications for family provision.

32 In New South Wales the power is conferred on the Court by two sections - sections 7 and 9 of the *Family Provision Act 1982* (NSW).

Thus, the Court must determine whether the applicant has a moral claim to provision from the deceased person's estate and, if so, whether he or she has been left without adequate provision for his or her proper maintenance in light of this claim.

(b) The discretionary question

If it has been determined that the applicant has been left without adequate provision the Court must determine what provision, if any, should be made from the deceased person's estate. This determination is entirely within the discretion of the Court.

5. THE ESTATE

Generally, in Australian jurisdictions other than New South Wales, the "estate" over which people may claim for family provision is only that property which would otherwise pass to the personal representative under a deceased person's will or intestacy. The deceased person may also have other property which passes independently of the will or intestacy in circumstances where the recipient of the property is protected from family provision claims, such as jointly owned property, which will automatically pass to the co-owner; property followed by the Registrar in Bankruptcy on behalf of the deceased person's creditors if the deceased person's estate is insolvent under Australian bankruptcy legislation;[33] and, persons having a legal claim against the personal representatives of the deceased person, for instance, in contract, debt or trust.

In most jurisdictions, assets other than property available to the personal representative for distribution pursuant to a will or upon an intestacy are normally beyond the Court's control for family provision purposes. In particular, assets which the deceased person has, during his or her lifetime, disposed of in order to avoid those assets being used to satisfy the family provision claims of otherwise potential claimants will be beyond the reach of the Court. In those jurisdictions, the Court is powerless to make distribution orders in relation to such property. In New South Wales, anti-avoidance provisions enable the Court to take into account certain transactions entered into by the deceased person prior to his or her death, if the deceased person's estate is insufficient to satisfy successful claims for family provision.

The New South Wales' position is discussed in Chapter 6 of this Report.

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33 *Bankruptcy Act 1966* (Cth) Part XI.

CHAPTER 2

ELIGIBILITY TO APPLY FOR FAMILY PROVISION

1. THE NATIONAL COMMITTEE'S APPROACH

The categories of people specifically eligible to apply for family provision vary between jurisdictions and have generally grown in number over the years. A comparison of the categories of eligible people in the various jurisdictions shows that there is no unanimity as to categories of eligible claimants or as to the rationale for including the categories. Some categories are obviously included because of a view that if a person is being maintained by the deceased person at the time of death, then the deceased person's estate should be called upon to continue that support after death. Other categories appear to have been recognised because of a perceived moral obligation on the part of the deceased person to provide for people within a certain relationship to the deceased person, irrespective of whether they were maintained by the deceased person at the time of death.

This suggests that there is no clear principle that can serve as a basis for identifying the categories in a convincing way, and no attempt to do so will meet all the cases which arise or satisfy all the jurisdictions. Appendix 4 of this Report sets out each of the categories recognised in the various Australian jurisdictions and highlights some of the definitional and other problems which have become apparent in relation to a number of the categories.[34]

Whilst there have been suggestions that the various categories of eligible applicants should be expanded, there have not been consistent calls for some or other defined category to be removed from the list of categories. There will always be deserving applicants in any category.

As regards the consideration of expanded categories of applicants, there is the same difficulty. In considering any potential new category of applicant, it is easy to envisage circumstances that would warrant conferring eligibility on that category. However, it is just as easy to suggest examples where it seems inequitable that a particular person in that category should be eligible to apply for family provision. This is an inherent difficulty in defining eligibility in terms of arbitrary categories, rather than by reference to a set of criteria that are directed to the **nature** of the relationship between an applicant and a deceased person.

The former approach is, admittedly, a more certain one, as far as identifying who is a possible applicant. However, that certainty is gained as a result of the rigidity of a system that bases eligibility on falling within one of a fixed number of categories. It is

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34 The Appendix has been included in this Report for information purposes only and should not be read as indicating any views of the National Committee in relation to the specific categories.

a rigidity that has the potential to cause injustice - by excluding meritorious claims and making unmeritorious claims possible.

For this reason, the National Committee favours an approach that limits automatic eligibility to apply for family provision to those categories where the eligibility of the members is unlikely to be seriously disputed. As to the balance, the Commission favours an approach whereby eligibility to apply for family provision turns, not on membership of some arbitrary class of persons, but on the establishment of a "special responsibility" on the part of the deceased person towards the applicant.[35]

The National Committee's approach has been to consider:

* whether spouses and children of the deceased person should continue to be automatically entitled to apply for family provision;

* the concept of "special responsibility" and how applications on that basis should be made;

* whether, having regard to the National Committee's recommendations about special responsibility, there is a case for any additional specific categories of eligible applicants, or whether the entitlement of those potential applicants can properly be subsumed within the proposed provisions dealing with special responsibility.

2. AUTOMATIC ELIGIBILITY

(a) Introduction

Two categories of eligible applicants have appeared in all family provision legislation since their original introduction - lawful spouses and children of the deceased person. Out of all categories, these two would generally have the strongest claim for support from the deceased person's estate. During the life of the deceased person, his or her spouse and children would usually have been in a relationship with the deceased person whereby the deceased person was, by virtue of the relationship alone, regularly under a duty to support the spouse and/or children. During the deceased person's life that duty would often have been a legal as well as a moral duty.

The categories of lawful spouse and children are also usually the easiest categories to define and prove. Once people claiming to be in either of these categories can prove that claim and establish that proper provision was not made for them by the deceased person in the deceased person's will or as a result of the deceased person's intestacy, they should expect the Court to order that provision be made for their

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35 See the discussion of the concept of "special responsibility" at Part 4 of this Chapter.

maintenance from the deceased person's estate, unless there are good reasons for denying that support, in whole or in part.

(b) Eligibility of adult children

No Australian jurisdiction imposes an age restriction on the automatic eligibility of children to apply for family provision, although obviously the Courts will take into account the minority or majority of a child of the deceased person in determining what, if any, part of the deceased person's estate the child should receive.

There are a number of jurisdictions outside Australia where a distinction is made between minor and adult children at the threshold point of determining eligibility to apply for family provision. For example, Manitoba's *Dependants Relief Act* defines "dependant" to include a child of the deceased person:[36]

> (i) who was under the age of 18 years at the time of the deceased's death;
>
> (ii) who, by reason of illness, disability or other cause was, at the time of the deceased's death, unable to withdraw from the charge of the deceased or to provide himself or herself with the necessaries of life; or
>
> (iii) who was substantially dependent on the deceased at the time of the deceased's death.

Atherton observes, in relation to this type of provision:[37]

> Such a limited definition of children places eligibility squarely within a maintenance framework of parental responsibilities. ... Such a definition also thereby places a premium on testamentary freedom: allowing the testator to discriminate between his or her adult children.

Atherton goes on to remark that this type of provision would prevent many of the adult children cases from proceeding. Only those cases where an adult child would not have been able to achieve a self-reliant state would be considered for family provision.

In time past the Courts were generally reluctant to make family provision awards to able-bodied adult children of the deceased person. From an historical perspective Atherton notes:[38]

> In the light of the philosophical background to testamentary powers, one could argue that the only duty of a parent to a child was to see the child through their minority and the completion of education: to launch the child in life. The principle of self reliance in relation to applications by adult sons articulated just such a viewpoint. While the support of infants

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36 *Dependants Relief Act SM 1989-1990* c42, s1.

37 Atherton RF *Family Provision* (Victorian Attorney-General's Law Reform Advisory Council Expert Report 1, 1997) para 3.15.

38 Id para 2.89.

> was considered an aspect of the father's duty of maintenance and support, there was considered to be no general duty to support an adult son, nor a married daughter, as, generally speaking, it was expected that the son would support himself and the daughter would be supported by her husband.
>
> Adult able-bodied men were expected to be self-reliant: their fathers did not have a moral obligation to provide for them.[39]
>
> A similar, but not quite as strict approach was taken in regard to daughters.[40]

However, in recent years, the Courts appear to have been more generous in their approach to able-bodied adult children "through developing a broader approach of what was 'proper' and the range of 'needs' that could be considered, and through utilisation of the concept of 'advancement' or 'support' as the basis of making an order."[41] The New Zealand Law Commission has recognised this trend, even though it does not agree with it from a philosophical point of view:[42]

> Claims by adult children under the Family Protection Act 1955 [New Zealand] are often made on the basis not of need but on the basis that the will-maker breached an undefined moral duty. This regime is indefensible because will-makers cannot determine and comply with its requirements in advance, and because it may disregard moral imperatives of the will-maker that are not shared by whichever judge is called upon to decide the claim.

The New Zealand Commission commented in the New Zealand context, which is similar to the Australian context, that parents' duties during their lifetimes to provide financial support to minor and disabled children are widely accepted and clearly defined. However, by contrast, claims by adults under family provision legislation are in "urgent need of review".[43] The Commission observes:[44]

> The test of a will-maker's "moral duty" to adult children has never been expressly approved by Parliament as a test for entitlement. The test assumes that there is general acceptance of the exact content of a will-maker's moral duty to adult children. No social inquiry the Commission knows about supports this assumption.
>
> The test also makes a second incorrect assumption: that New Zealand society is culturally and ethnically homogeneous. This assumption of homogeneity may make it difficult for will-makers and their families to have their different ethnic and cultural values recognised, respected and protected. The consequences of the absence of any norm of this kind are that a deceased's perception of his or her moral duty is overruled by a particular judge's assessment of current social norms. This assessment is necessarily based on the judge's personal sense of the fitness of things, shaped by such factors as religious and cultural

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39 Id para 2.91.

40 Id para 2.92.

41 Id para 2.93.

42 Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLC R39, August 1997) para 4.

43 Id para 32.

44 Id para 33.

background, family history and attitudes, and personal experiences.

The New Zealand Commission believes that family provision law has become unclear in its purposes:[45]

> Failure by the courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker's arrangements results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the court's distribution is more commendable than the will-maker's. There are appreciable differences in the awards made to adult children. These differences mean that conscientious will-makers find it hard to know and comply with the requirements of the law, and bring the law into disrepute. Even though it is not clear now (if it ever was) that the reasons for court intervention are understood or widely accepted by the wide variety of communities and families in New Zealand, claims by adult children succeed in a very high percentage of cases.

The New Zealand Commission recommended that children should have a clear right to claim support in three cases, that is, if they are:[46]

> minors; or
>
> under 25 and undertaking educational or vocational training; or
>
> unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25.

If adult children could not make support claims, the New Zealand Law Commission recognised that many parents would continue to make provision during their lives and under their wills for their children, and to treat their children equally, "just as they do now".[47] But, observes the Commission, this is what they would want to do:[48]

> The real question is whether, if this is not what they want to do, courts should be empowered to override their wishes and to substitute for the will-maker's wishes the court's view of how the estate should be distributed.

The Law Commission considered that powers to provide for adult children that are as extensive and indeterminate as those in the present law would, if applied to the living, be judged as rightly unacceptable and that no reason was advanced to the Commission why they should apply after a will-maker's death.

Also, the Law Commission recognised the corrosive effect on family relationships of claims by adult children and the delay that, under the present law, these claims can cause in the administration of estates and the uncertainty that the possibility of these

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45 Id para 34.

46 Id para 70.

47 Id para 73.

48 Ibid.

claims can add to the process of will-making.[49]

Atherton, in a report to the Victorian Attorney-General's Law Reform Advisory Council on family provision,[50] also recommended that minor children should be treated differently from adult children.

The National Committee is in favour of restricting the specific category of "children" to non-adult children, as they would generally have a far greater moral claim to the deceased person's estate than adult children. Non-adult children will be entitled to apply for family provision as of right on the basis that, in the vast majority of cases, the deceased person would have had a moral if not legal duty to maintain such children during his or her lifetime.

However, under the National Committee's approach, all adult children may still be able to apply for family provision by establishing that the deceased person owed them a "special responsibility".[51]

The definition of "non-adult children" for the purposes of automatic entitlement to apply for family provision should not include stepchildren because of the definitional difficulties which may arise which would lead to further uncertainty.[52] It is hoped that such uncertainty would be avoided by referring to specific categories of people with automatic entitlement to apply for provision from the estate. If step-children, including former stepchildren of the deceased person, were owed a "special responsibility" (as described below) then they would be eligible under a separate "catch-all" provision to apply for family provision. They would then be dealt with in exactly the same manner as any other applicant for family provision.

The National Committee considered that "non-adult" children should refer to children of the deceased person who were under the age of 18 years at the time of the death of the deceased person. Given the relatively short period of time for making an application for family provision,[53] it should make little, if any, difference to the Court's determination whether the child became an adult after the death of the deceased person and before the application was made or before the Court's orders were handed down. It is unlikely to affect the Court's assessment of the child's need for maintenance.

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49 Id para 76.

50 Atherton RF *Family Provision* (Victorian Attorney-General's Law Reform Advisory Council Expert Report 1, 1997) para 3.15.

51 See Part 4 of this Chapter.

52 See Appendix 4 for discussion of relevant cases on this point.

53 See Chapter 3 for discussion on time limits.

The National Committee also believes that there should be no exceptions to the proposed automatic entitlement of non-adult children to apply for family provision, particularly in light of the National Committee's proposals detailed below in relation to "special responsibility". An adult child who can establish that the deceased person owed a "special responsibility" at the time of his or her death to maintain the adult child will be eligible to apply for family provision under the National Committee's proposals. Adult children with certain disabilities or who are living with a parent and studying full-time at the time of the parent's death will most probably have little difficulty in establishing a "special responsibility" on the part of the parent to provide for the maintenance of the adult child.

(c) Eligibility of spouses

The National Committee decided to restrict automatic eligibility to apply for family provision to the lawful spouse of the deceased person at the time of the deceased person's death. This decision was not the result of a particular view that former spouses or *de facto* spouses should not be eligible for family provision, but rather, resulted from a desire to keep the scheme simple, coupled with a view that the "special responsibility" provisions (referred to below) would enable all people with a legitimate claim (irrespective of their relationship to the deceased person) to apply for family provision.

In a society that sees fewer formal marriages and many people building long term family arrangements outside marriage as a matter of conscious choice, the dichotomy between formal and *de facto* marriages is not as easily justified as it was a generation or two ago. Nevertheless, the National Committee considered that *de facto* spouses should not be a separate category of eligible persons, nor should they be covered by a broad definition of "spouse" - rather, they should, if the relevant facts are set out, be subsumed within the category of "special responsibility".

It is unlikely that Governments in a number of Australian jurisdictions would agree to place *de facto* spouses on the same level of recognition as married spouses. Furthermore, it is unlikely that most jurisdictions would be able to agree on one definition of *de facto* spouse or on the relevant qualifying period.

3. GENERAL CATEGORIES OF ELIGIBLE PERSONS

Although no other category of claimant would generally have as good a claim for family provision as the lawful spouse and non-adult children of the deceased person, the National Committee saw no good reason for denying people falling outside those categories the opportunity to apply for family provision if they were left without adequate provision for maintenance either by the will or under the intestacy rules.

(a) New South Wales

In New South Wales, the definition of "eligible person" for the purposes of entitlement to apply for family provision includes:[54]

> a person:
>
> (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
>
> (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member.

Although the effect of this provision is that a person not in one of the traditional categories of eligible persons, and not necessarily a member of the deceased person's family, could make an application, there are significant restrictions on its coverage. The person must have been wholly or partly dependent upon the deceased person and must have been a member of the deceased person's household.

It is possible that a person who was not dependent upon the deceased person could have a strong moral claim to maintenance and support from the deceased person's estate. Similarly, being a member of the deceased person's household is not necessarily an indication that the deceased person owed the person a responsibility of maintenance and support upon the deceased person's death.

(b) England

In England, the *Inheritance (Provision for Family and Dependants) Act 1975* enables a small number of specific categories of people (spouse, former spouse who has not remarried, child, person treated by the deceased person as his or her child, *de facto* spouse) and, in addition, a general category of people to apply for an order for provision from the deceased person's estate on the ground that the disposition of the deceased person's estate is not such as to make reasonable financial provision for the applicant. The general category is referred to as follows:[55]

> any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased.

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54 *Family Provision Act 1982* (NSW) s6(1).

55 *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s1(1)(e). This is qualified in subsection (3):

> For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

Where an application is made for a share of the deceased person's estate the Court must determine whether the disposition of the deceased person's estate is such as to make reasonable financial provision for the applicant and, if not, determine what orders to make, having regard to a number of matters. These matters are relevant to all categories:[56]

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

Where an application is made by the wife or husband of the deceased person or by a former wife or husband of the deceased person who has not remarried, the Court must, in addition to the matters listed above, have regard to:[57]

(a) the age of the applicant and the duration of the marriage;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

These considerations are also relevant when considering applications by *de facto* spouses of deceased persons.[58]

In relation to applications by children of the deceased person and children the deceased person treated as his or her own, other considerations are specified.[59]

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56 Id s3(1).

57 Id s3(2). That subsection also states that regard must be had to the provision the applicant might reasonably have been expected to receive if the marriage had been terminated by divorce rather than death.

58 Id s3(2A).

59 Id s3(3).

In relation to applications by persons claiming to be covered by the general provision in subsection 1(1)(e) the Court is also to consider:[60]

> ... the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and the length of time for which the deceased discharged that responsibility.

Under the English legislation there are no separate procedures for determination of eligibility applicable to persons making applications pursuant to the general provision.

(c) Victoria

When the amendments to the *Administration and Probate Act 1958* (Vic) by the *Wills Act 1997* (Vic) commence, Victoria will have the broadest category of eligibility of any scheme reviewed by the National Committee. The Victorian Attorney General, the Honourable Jan Wade MP in her Second Reading speech on the *Wills Bill 1997* on 9 October 1997 described the new provisions in the following manner:[61]

> This Bill introduces amendments to the act to enable a wider group of people to apply to the court for testator's family maintenance. The Bill empowers the court to make an order for provision out of the estate of a deceased person for the maintenance and support of a person for whom the deceased had responsibility to make provision. The bill does not include a list of eligible applicants for testator's family maintenance, instead leaving it to the court to determine on a case-by-case basis whether provision should be made for a particular applicant, which is a more equitable method of dealing with testator's family maintenance applications. To ensure that only genuine applications are made, the bill allows the court to order costs against an applicant if the court is satisfied that the application was made frivolously, vexatiously or with no reasonable prospect of success.

The Attorney General concluded her speech by observing:[62]

> This bill implements long overdue reform both to the law of wills in Victoria and to testator's family maintenance legislation. It is hoped that with a more accessible and simpler Wills Act, more people will be encouraged to make their wills.

The *Wills Act 1997*[63] will introduce a new section 91 into the *Administration and Probate Act 1958 (Vic)* which will empower the Court to order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased person had responsibility to make provision.

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60 Id s3(4).

61 Victorian Legislative Assembly *Parliamentary Debates* 9 October 1997, 436.

62 Ibid.

63 *Wills Act 1997* (Vic) s55. This Act is not yet in force.

The Victorian proposals require the Court, in determining whether or not provision should be made for a particular applicant out of the estate of a deceased person and the quantum of any such provision, to have regard to a list of factors specified in subsection 55(4) of the *Wills Act 1997* (Vic) (proposed subsection 91(4) of the *Administration and Probate Act 1958* (Vic)), namely:

> (e) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;
>
> (f) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;
>
> (g) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;
>
> (h) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;
>
> (i) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;
>
> (j) the age of the applicant;
>
> (k) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;
>
> (l) any benefits previously given by the deceased person to any applicant or to any beneficiary;
>
> (m) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;
>
> (n) the liability of any other person to maintain the applicant;
>
> (o) the character and conduct of the applicant or any other person;
>
> (p) any other matter the Court considers relevant.

Thus, any person will be able to apply for family provision - but will not be awarded provision from the estate unless the Court is satisfied that a responsibility was owed to the applicant by the deceased person to make provision for proper maintenance and support and the applicant was not left with adequate provision for maintenance and support by the deceased person either by will or by the operation of the intestacy rules or as a result both of a will and the intestacy rules in the case of a partial intestacy. In determining those matters as well as the quantum of any award, the Court must have regard to the list of matters.

The only provision in the *Wills Act 1997* (Vic)[64] which may deter unmeritorious applicants is a proposed amendment to subsection 97(6) of the *Administration and Probate Act 1958* (Vic) to enable the Court to make the following orders:

> (6) Subject to sub-section (7), the Court may make any order as to the costs of an application under section 91 that is, in the Court's opinion, just.
>
> (7) If the Court is satisfied that an application for an order under section 91 has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant.

The National Committee was initially attracted to the proposed Victorian provisions because of their ability to enable all people with meritorious claims to apply for family provision. However, the National Committee was concerned with the requirement that all of potential applicants, including spouses and children, would have to establish that a "responsibility" was owed to them by the deceased person. In the vast majority of cases it could be assumed that spouses and non-adult children were owed a relevant responsibility.

The National Committee acknowledges the significance of the proposed new costs provisions to deter unmeritorious claims, but is concerned that they may not be sufficient to avoid the Courts having to determine the position of many applicants - particularly in large estates. This could result in a significant waste of Court time and prove to be an expensive exercise for all involved. Further, the costs provision is discretionary and it may very well be that some Courts will be reluctant to order costs against people who make frivolous claims if the estate appears to be sufficient to bear those costs.

(d) Alternative approach: specific categories and "Special Responsibility"

An alternative approach is for there to be an eligibility threshold for family provision applications which would, in addition to identifying a small number of categories of automatically eligible persons (such as spouses and non-adult children), permit anyone else to apply for family provision, provided that the Court makes a determination that that person was owed a special responsibility by the deceased person to provide for his or her maintenance. In making that determination the Court would need to take into account a number of matters relevant to determining the existence of a "special responsibility". The same list of matters should be taken into account by the Court to determine the quantum of an award to any applicant (whether automatically entitled to apply or entitled to apply by reason of having established the existence of a "special responsibility" owed to him or her by the deceased person).

The Court should not have to take into account a matter in the list unless it is relevant to the case being determined. If the Court were required to take into account every

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64 Id s59(3).

matter in the list, as is the case in the proposed new section 91, *Administration and Probate Act 1958* (Vic)[65] a result may be that appeals will be sought on the basis that the Court failed to take a particular matter into account or failed to give equal consideration to each matter - irrespective of its relevance in the particular case.

4. SPECIAL RESPONSIBILITY

The "special responsibility" concept would enable any deserving person to apply for an order for family provision from the deceased person's estate. At the same time it would act as a means by which the Courts could quickly bring proceedings to an end if an applicant was not within one of the specified categories of eligible persons or could not establish that the deceased person owed him or her a special responsibility to provide for the maintenance of the applicant.

A person applying for family provision on the basis of a special responsibility owed by the deceased person may or may not fall within one of the specific categories of eligible persons currently found in the legislation of the various jurisdictions. Nevertheless, the person would still have to establish that he or she held a significantly close relationship to the deceased person to qualify for consideration as an eligible recipient of a portion of the estate.

Once it had been determined that the deceased person owed the applicant a special responsibility, the applicant would be in the same position as an applicant who was the spouse or non-adult child of the deceased person. It would then be up to the Court, in its discretion, to determine what, if any, amount should be awarded to that person from the estate.

(a) Relevant factors

The National Committee has decided that the matters which a Court is to take into account in determining "special responsibility" should be based on the proposed Victorian legislation with a number of amendments. The final list would include the following matters:

(a) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;

(b) the nature and extent of any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

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65 *Wills Act 1997* (Vic) s55.

(c) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;

(d) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;

(e) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;

(f) the age of the applicant;

(g) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased person or the family of the deceased person. "Adequate consideration" is not to include the payment of a carer's pension;

(h) any provision made in favour of the applicant by the deceased person either during the person's lifetime or out of the person's estate;

(i) the date of any will of the deceased person and the circumstances in which the will was made;

(j) whether the applicant was being maintained by the deceased person before the deceased person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased person had assumed that responsibility;

(k) any relevant Aboriginal or Torres Strait customary law or any other customary law;

(l) the liability of any other person to maintain the applicant;

(m) the character and conduct of the applicant or any other person both before and after the death of the deceased person;

(n) any other matter the Court considers relevant.

Changes to the list of matters in the proposed Victorian legislation were made by the National Committee in the following areas:

(i) Aboriginal and Torres Strait Islanders and members of other communities

The National Committee considered the relevance of Aboriginal customary law in family provision proceedings. The Law Reform Commission of Western Australia, in response to its consultations on the Queensland Law Reform

Commission's Issues Paper on *Family Provision,*[66] received a detailed submission from the Aboriginal Legal Service of Western Australia (Inc). That respondent was concerned that the exclusive category of persons entitled to apply for family provision in Western Australia was too narrowly defined in view of Aboriginal family and kinship provisions. The respondent stated that it would:

> support family legislation which includes a general class of eligible adults and a general class of eligible children who could apply for provision as long as the matters which Courts should take into account in considering such applications allowed for consideration of Aboriginal cultural issues. This would help alleviate some of the problems that currently exist for Aboriginal and Torres Strait Islander people because of the relatively narrow categories of people who may apply for family provision.

A similar concern could be expressed in relation to cultural issues relating to other communities in Australia. For example, followers of Islam may be concerned about the inheritance provisions in the Koran which are not reflected in Australian succession legislation.

Only the Northern Territory has, to an extent, recognised Aboriginal customary law in relation to family provision. Subsection 7(1A) of the *Family Provision Act 1970* (NT) extends entitlement to apply for family provision to traditional Aboriginal spouses in the same way as persons married under the *Marriage Act 1961* (Cth):

> For the purpose of determining whether a person is entitled to make an application under subsection (1), an Aboriginal who has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal, and all relationships shall be determined accordingly.

Cultural and customary practices and customary laws in relation to inheritance will vary within communities and between communities. Not every member of a particular community will feel bound by the customary practices and customary laws associated with that community. Furthermore, customary practices and customary laws within any community may change over time due to changing beliefs or outside influences.

The National Committee considered it inappropriate to specify what customary practices and customary laws should be taken into account by the Court when determining a person's eligibility to apply for family provision from the estate of a deceased member of a particular community. However, the National Committee considered it important to enable the Court to take into account the deceased person's and the applicant's membership of a particular community and the customary practices and customary laws which help define that

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66 Queensland Law Reform Commission *Uniform Succession Laws for Australian States and Territories: Issues Paper No. 2: Family Provision* (WP 47, June 1995).

community in determining whether the deceased person owed the applicant a "special responsibility".

The National Committee agreed to add to the list:

> Any relevant Aboriginal or Torres Strait customary law or any other customary law.

(ii) Carer's pension

In item (k) of the list of matters in the Victorian legislation[67] reference is made to contributions made by the proposed applicant to building up the estate of the deceased person or his or her family - "other than for valuable consideration". The fact that a carer is on a carer's pension should not be classified as a contribution to the deceased person's welfare "for valuable consideration". The National Committee is of the view that a carer's pension is more compensation for income that the carer might otherwise have earned than it is remuneration.

(iii) The deceased person's will

A matter not addressed in the Victorian list of matters relates to where the deceased person left a will. Obviously, great weight must be paid to the terms of the will, although less weight might be given to the will if it was made a long time before the death. The circumstances in which the will was made are strictly speaking irrelevant but persons disappointed by the provisions of a will might consciously opt to make a family provision application rather than to dispute the will on the grounds of undue influence or suspicious circumstances. A will made in circumstances of great secrecy may be unassailable in probate law but those circumstances, if admissible in family provision proceedings, may illuminate an imbalance of fairness in the distribution of the estate or disclose a state of affairs in which the testator did not really have an opportunity to consider all the claims incumbent upon her or him. The Court should not have to address an argument that it cannot consider such matters because they are not mentioned in the list.

The National Committee agreed to the addition of the following matter to the list of matters for the Court to consider:

> the date of any will of the deceased person and the circumstances in which the will was made.

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67 *Wills Act 1997* (Vic) s55, inserting a new s91 *Administration and Probate Act* 1958 (Vic). The *Wills Act 1997* (Vic) is not yet in force. Item (k) refers to the proposed new s91(4)(k).

(iv) Benefits given by deceased person

Item I of the Victorian list refers to "any benefits previously given by the deceased to any applicant or to any beneficiary". The National Committee considered that a preferable provision would be based upon subsection 9(2)(a) of the *Family Provision Act 1982* (NSW) which reads:

> the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate.

(b) Registrar or court

The National Committee considered whether it would be appropriate for Registrars of the Court to hear and make determinations in relation to "special responsibility". This may assist in preventing courts from being clogged with applications for such determinations, particularly in uncontested and/or uncontentious matters. With the introduction of such a general eligibility provision as "special responsibility", it would be expected that applications would be received from a greater variety of people who had some type of relationship with the deceased person than is currently possible in most jurisdictions. Proceedings before a Registrar may also involve less of a cost burden on the parties and on the estate.

The National Committee decided that it would be preferable to leave it to the Courts to make determinations relating to "special responsibility" particularly given that such determinations may, in some cases, be dealt with in the same hearing as the final determination relating to quantum. Further, the same list of matters will need to be taken into account when determining the existence of a "special responsibility" and when determining quantum. It may not be efficient to have two bodies considering the same list for different reasons. They are unlikely to pay the same regard to each matter.

Leaving aside the practical and political problems which may be involved in enabling Registrars to undertake such work, there would ordinarily be an automatic right of appeal from a Registrar to a court. Rather than saving costs and time, it may be more expensive to the parties or to the estate, and involve a protraction of proceedings if the Registrar were required to make such determinations.

The question of an appropriate mechanism for determining eligibility for family provision is, of course, a procedural matter, and it has generally been the policy of the National Committee to leave decisions about procedural matters to each jurisdiction. After experience by the Courts with the concept of "special responsibility" some jurisdictions might consider whether it would be more efficient to enable Registrars or other judicial officers to make determinations as to special responsibility prior to the Court hearing the application for family provision. In the meantime, however, the National Committee is of the view that the model legislation should include a provision enabling the Court

to authorise an appropriate court officer to hear family provision matters.

(c) The application

From the point when it is determined that an applicant has been owed a "special responsibility" by the deceased person the applicant should be in the same position as an applicant from a category of persons automatically eligible to apply - that is, spouses and non-adult children of the deceased person.

In most cases it is envisaged that all matters relating to an application, including the determination of "special responsibility", if appropriate, will be dealt with at the same hearing. Of course, the Court may wish to make a determination early in the proceedings as to whether a special responsibility in fact existed. If a special responsibility did not exist then that application could proceed no further. In every other respect, however, all applications are to be dealt with in the same manner. In making a determination in relation to "special responsibility" and in making other determinations in relation to all applicants, the Court is to take into account the list of matters referred to at pages 27 to 28 of this Report.

The time for bringing an application for family provision should be the same for applicants basing their eligibility upon "special responsibility" as for applicants basing their eligibility upon their membership of a category of automatic eligibility (that is, spouses or non-adult children). In this Report the National Committee has recommended that that time should be 12 months from the date of death of the deceased person.[68]

(d) The National Committee's proposed scheme

The National Committee's proposals in relation to persons eligible to apply for family provision by virtue of being owed a "special responsibility" by the deceased person fit into the traditional family provision schemes as follows:

> In relation to an applicant who is neither a spouse nor a non-adult child of the deceased person at the time of the deceased person's death the Court must determine whether the deceased person owed a special responsibility to the applicant to provide maintenance. If so, the application is to be dealt with in the same manner as an application from a spouse or non-adult child of the deceased person. It will then be up to the Court to decide:
>
> > has the applicant been left without adequate provision for

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68 See Chapter 3 of this Report.

maintenance?[69]

if so, what, if any, order should be made in favour of the applicant?[70]

5. THE NATIONAL COMMITTEE'S DECISION: ELIGIBILITY (pages 2-5 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include provisions along the lines of the following:

1. "Eligible person", in relation to a deceased person, means

   (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death;

   (b) a non-adult child of the deceased person [to be defined to refer to people who were under the age of 18 years at the date of the deceased person's death; the definition should not include step-children of the deceased person, but would include natural and adopted children];

   (c) a person to whom the deceased person owed a special responsibility to provide maintenance, education or advancement in life. ["special responsibility" is not to be defined].

2. The Court may, having regard to all the circumstances of the case (whether past or present) order that provision be made out of the estate of a deceased person for the proper maintenance, education and advancement in life of an eligible person.

3. The Court must not make an order under subsection (2) in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person effected by -

   (a) his or her will (if any); or

   (b) the operation of the provisions of the intestacy rules;

   (c) both the will and the operation of the intestacy rules -

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69 See Chapter 4 of this Report.

70 See Chapter 5 of this Report.

does not make adequate provision for the proper maintenance, education or advancement in life of the person.

4. The Court in determining -

(a) whether or not the deceased person had special responsibility to make provision for a person; and

(b) whether or not the distribution of the estate of the deceased person as effected by -

(i) the deceased person's will; or

(ii) the operation of the intestacy rules; or

(iii) both the will and the operation of the intestacy rules

makes adequate provision for the proper maintenance, education or advancement in life; and

(c) the amount of the provision (if any) which the Court may order for the person; and

(d) any other matter related to an application for an order under subsection (1)

must have regard to so many of the following matters as the Court considers relevant -

(a) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;

(b) the nature and extent of any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

(c) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;

(d) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;

(e) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;

(f) the age of the applicant;

(g) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased person or the family of the deceased person. "Adequate consideration" is not to include the payment of a carer's pension;

(h) any provision made in favour of the applicant by the deceased person either during the person's lifetime or out of the person's estate;

(i) the date of any will of the deceased person and the circumstances in which the will was made;

(j) whether the applicant was being maintained by the deceased person before the deceased person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased person had assumed that responsibility;

(k) any relevant Aboriginal or Torres Strait customary law or any other customary law;

(l) the liability of any other person to maintain the applicant;

(m) the character and conduct of the applicant or any other person both before and after the death of the deceased person;

(n) any other matter the Court considers relevant.

5. In considering the matters listed in 4 the Court must have regard to the facts as known to the Court at the date of the order.

The model legislation should include a provision enabling the Court to authorise an appropriate court officer to hear family provision matters.

CHAPTER 3

THE TIME WITHIN WHICH AN APPLICATION MUST BE MADE

1. INTRODUCTION

The bringing and determination of family provision proceedings is envisaged, by the terms of family provision legislation, as part of the administration of the deceased estate. The imposition of time limits for the bringing of family provision applications is an attempt to ensure that the administration is not unduly delayed but also to ensure that those people who have a genuine claim on the deceased person's estate do not miss out on the opportunity to have their claim determined.

Dickey has observed the following reasons for time limits:[71]

> First, a time limit enables a deceased's personal representative to know when he or she may commence to distribute the estate to the beneficiaries without regard to the possibility of an application for family provision. Secondly, it enables beneficiaries of the estate to know when they may have some certainty of their entitlements, again without regard to the possibility of an application for family provision. ... The expiration of a time limit for an application for family provision does not extinguish a right to claim relief; it simply bars the hearing of an application for relief and thus the grant of relief. A statutory provision prescribing a time limit consequently concerns procedure and not jurisdiction.

A principal objective of estate administration law is to ensure the speedy completion of the personal representative's duties, which are to bring in the deceased person's estate, to pay all debts and to distribute the balance to those entitled under the will or intestacy. The performance of those duties could be impeded if an applicant for family provision were allowed a long time within which to commence proceedings. There are differences between the States and Territories in the approach to this issue, one of which is significant, the others more procedural.

As to the time within which the application must be made, time limits vary from six months to eighteen months. More significant is that in some jurisdictions the application must be made within the specified period after the death of the deceased person but in other jurisdictions the application must be made within the specified period after the grant of probate or letters of administration.

In all States and Territories power is given to the Court or a judge to extend the period of time within which the application may be brought, but there are differences in wording, and again the issues raised at the end of the above paragraph may warrant a flexible approach to extensions of time.

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71 Dickey A *Family Provision After Death* (1992) 13.

Where an estate or substantial property has been justifiably left upon a life interest, there seems to be no reason for refusing to allow the Court to adjourn or defer a family provision application, with respect to property the subject of the life interest, until after the death of the life tenant.

Other differences tend to be matters of detail or procedure. It is necessary to quote the legislation in some detail.

2. THE LEGISLATION

The time limits for bringing applications vary significantly between the various jurisdictions. In the Territories it is 12 months from the grant of probate. In New South Wales the time limit is 18 months from the date of death with a provision enabling interested persons to apply for an earlier distribution. In Queensland the time limit is 9 months from death (although a personal representative is protected from liability if he or she distributes the estate after 6 months if no notice of intention to apply has been received). In Tasmania it is 3 months from the grant. In South Australia, Victoria and Western Australia the time limit is 6 months from the date of the grant. The relevant provisions are set out below.

New South Wales

Section 16 of the *Family Provision Act 1982* (NSW) sets out the time within which an application must be made:

> (1) In this section, "prescribed period" in respect of an application in relation to a deceased person, means:
>
> (a) where the Court has, in an order made under section 17, specified a period in relation to the application - that period; or
>
> (b) in any other case - the period of 18 months after the death of the deceased person.
>
> (2) An order under section 7 shall not be made unless the application for the order is made within the prescribed period in respect of that application or within such further period as the Court may, having regard to all the circumstances of the case but subject to subsection (3), by order, allow.
>
> (3) The Court shall not make an order under subsection (2) allowing an application in relation to a deceased person to be made after the expiration of the prescribed period unless sufficient cause is shown for the application not having been made within that period.
>
> (4) The Court may make an order under subsection (2) with respect to an application in relation to a deceased person whether or not:

(a) the prescribed period in respect of the application in relation to the deceased person has expired;

(b) the application for the order under that subsection was made before that period expired; or

(c) the application in relation to the deceased person has been made.

(5) Notwithstanding subsections (2) and (3), where administration has been granted in respect of a person whose date of death is so uncertain as to make it impossible to apply subsections (2) and (3) with respect to an application in relation to the person, the Court may, whether or not the application in relation to the person has been made, by order, allow the application in relation to the person to be made within such period as it thinks reasonable and such an order has effect according to its tenor.

Subsection (4) allows the Court to make an order outside the prescribed period. Subsection (5) enables the Court to make an order where the date of death of the deceased person is uncertain.

The wording of subsection (3) suggests that the Court cannot allow an extension on the basis that it would be more appropriate to determine the application at a later date such as on the death of a life tenant. It can only concern itself with reasons why the applicant failed to bring the application in time.

Section 17 enables the Court to order that the application be made before the expiration of 18 months after the death of the deceased person.

Section 17 provides:

(1) On an application made to the Court by the administrator of the estate of a deceased person or by any other person who, in the opinion of the Court, has a sufficient interest in proceedings in respect of the estate or notional estate of a deceased person, the Court may, if it is satisfied that, having regard to all the circumstances of the case, it is reasonable to make an order under this section, order that, in respect of an application in relation to the deceased person by a specified person, the period within which the application shall be made shall be such period (being a period expiring before the expiration of the period of 18 months after the death of the deceased person) as the Court specifies.

(2) An application by a person under this section shall not be deemed to be an admission by the person of any matter for any purpose.

(3) An administrator shall not be regarded as being under any duty to make an application under this section.

This provision is discussed in more detail in part 6 of this Chapter.

Australian Capital Territory and Northern Territory

Section 9 of the *Family Provision Act* in each Territory[72] provides:

> (1) Subject to subsection (2), an application for an order under section 8 shall be made within a period of 12 months after the date on which administration in respect of the estate of the deceased person has been granted.
>
> (2) The Court may, after hearing such of the persons affected as the Court thinks necessary, extend the time within which an application may be made under section 8.
>
> (3) An extension of time in pursuance of this section may be granted -
> (a) upon such conditions as the Court thinks fit; and
> (b) whether or not the time for making an application has expired.
>
> (4) An application for the extension, under this section, of the time within which an application for provision out of the estate of the deceased person may be made under section 8 shall [may] not be made after the estate of a deceased person has been lawfully and fully distributed.
>
> (5) An application for provision out of the estate of a deceased person shall, for the purposes of this section, be deemed to have been made on the day upon which the notice of motion or other document instituting the application is filed.

Queensland

Subsection 41(8) of the *Succession Act 1981* (Qld) provides:

> Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made.

Subsection 44(3) has some effect on this provision:

> No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative -
>
> (a) not earlier than 6 months after the deceased's death and without notice of any application or intended application under section 41(1) or 42 in relation to the estate; or
>
> (b) if notice under section 41(1) or 42 has been received - not earlier than 9 months after the deceased's death, unless the personal representative receives written notice that the application has been commenced in the court or is served with a copy of the application.

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72 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

Section 42 is concerned with the variation of Court orders.

The effect of subsection 44(3) is to impel potential applicants to commence proceedings, or to advise the personal representative of an intention to commence proceedings, within six months of the death, although the actual proceedings may be brought within nine months after the death. It may reflect a sentiment that six months is a bit short, despite the hope that the administration of a deceased estate should be completed as quickly as possible.

South Australia

Section 8 of the *Inheritance (Family Provision) Act 1972* (SA) provides:

> (1) Subject to this section, an application shall not be heard by the Court at the instance of a person claiming the benefit of this Act unless the application is made within six months from the date of the grant in this State of probate of the will, or letters of administration of the estate, of the deceased person.
>
> (2) The Court may, after hearing such of the persons affected as the Court thinks necessary, extend the time for making an application for the benefit of this Act.
>
> (3) An extension of time granted pursuant to this section may be granted -
>
> (a) upon such conditions as the Court thinks fit; and
>
> (b) whether or not the time for making an application pursuant to subsection (1) of this section has expired.
>
> (4) An application for extension of time pursuant to this section shall be made before the final distribution of the estate.
>
> (5) Any distribution of any part of the estate made before the application for extension of time shall not be disturbed by reason of that application or any order made thereon.
>
> (6) An application for the benefit of this Act shall be deemed to be made on the day when the summons by which it is instituted is served on the administrator of the estate.
>
> (7) Where an application has been made for the benefit of this Act, the Court may, if satisfied that it is just and expedient to do so, permit at any time prior to the final determination of the proceedings, the joinder of further claimants as parties to the application.

Tasmania

Section 11 of the *Testator's Family Maintenance Act 1912* (Tas) provides:

> (1) Except as provided by subsection (2) of this section, the Court or judge shall have no jurisdiction to hear any application, or to make any order under this Act, unless

the summons hereinbefore mentioned be taken out before or not later than three months after the date of grant of probate of the will of the deceased person, or letters of administration of the estate of the deceased person, as the case may be.

(2) Notwithstanding anything in subsection (1) of this section, upon application being made in that behalf by a person claiming the benefit of this Act, the Court or a judge may, after hearing such of the persons affected or likely to be affected by that application as it or he may think fit, extend the time limited by that subsection for the taking out of a summons for such further period as the Court or judge may think necessary.

(3) The powers conferred on the Court or a judge by subsection (2) of this section may be exercised notwithstanding that the time limited by subsection (1) of this section for the taking out of a summons may have expired (whether that time expired or expires before or after the commencement of this subsection).

(4) An application under subsection (2) of this section shall be made before the final distribution of the estate of the deceased person, and no distribution of any part of the estate made before the making of an application under that subsection shall be disturbed by reason of that application or of any order made thereon or in consequence thereof.

Victoria

Section 99 of the *Administration and Probate Act 1958* (Vic) provides:

No application shall be heard by the Court at the instance of a party claiming the benefit of this Part unless the application is made within six months after the date of the grant of probate of the will or of letters of administration (as the case may be):

Provided that the time for making an application may be extended for a further period by the Court after hearing such of the parties affected as the Court thinks necessary, and this power shall extend to cases where the time for applying has already expired but in all such cases the application for extension shall be made before the final distribution of the estate and no distribution of any part of the estate made prior to the application shall be disturbed by reason of the application or of any order made thereon.

Provided further that the time for making an application under this Part shall be extended by a period equal to the period between the commencement of proceedings in an application under Part V and the making of an order by the Court granting or dismissing the application.

Western Australia

Subsections 7(2)and (3) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provide:

(2) No application under subsection (1) of this section shall be heard by the Court unless -

(a) the application is made within six months from the date on which the

Administrator becomes entitled to administer the estate of the deceased in Western Australia; or

(b) the Court is satisfied that the justice of the case requires that the applicant be given leave to file out of time.

(3) A motion for leave to file out of time may be made at any time notwithstanding that the period specified in paragraph (a) of subsection (2) of this section has expired.

3. SPECIFIC ISSUES: DATE OF DEATH OR DATE OF GRANT?

The difference is significant in that personal representatives often decide to administer without taking out a grant, unless circumstances beyond their control, for example the existence of shares in the deceased estate, make it imperative that they show title to estate assets, by way of a grant.

Where the personal representatives do not take out a grant, then, in a jurisdiction where an application must be made within a specified period after the grant of probate, an application for family provision may be made at any time. A testator might make a will appointing an only adult child as executor and leaving the child all the estate. The child might decide not to take out probate. A potential applicant for family provision would then be able to defer making an application virtually indefinitely. It may well be that this anomaly persuaded some legislatures to provide that the application for family provision should be made within a specified period after the death of the deceased person.

The National Committee considers that the time limit for bringing an application for family provision should commence from the date of death of the deceased person. This date is usually certain. Having the time run from death may also encourage all parties to finalise the deceased person's affairs and in particular the final distribution of his or her estate.

4. SPECIFIC ISSUES: THE TIME LIMIT

The National Committee was in favour of a 12 month period from the date of the deceased person's death within which an application for family provision should be made. That time was considered appropriate both in the context of the efficient administration of the estate and from the point of view of certainty on the part of those with an interest in the distribution of the estate. This time limit was a compromise between the shorter periods such as 9 months from the date of death of the deceased person in Queensland (with the possibility of distribution after 6 months if no notice has been received of an intended application) which, by all accounts works well, and the longer period of 18 months applying in New South Wales.

5. SPECIFIC ISSUES: EXTENSIONS OF THE TIME LIMIT

In all jurisdictions, the Court is able to grant an extension of the time for bringing an application for family provision. The power to extend may be exercised before or after the expiration of the statutory time limit.

The extension powers are largely discretionary. For example, in Queensland the power is found in the introductory words to subsection 41(8) of the *Succession Act 1981*:

> **Unless the court otherwise directs**, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased ... [emphasis added]

In Victoria the power is not discretionary if proceedings have been commenced under Part V of the *Administration and Probate Act 1958* (Witness Beneficiaries), in which case the Court must grant an extension of time for a period equal to that from the commencement of the proceedings under Part V to the making of the final orders.[73] "Witness beneficiaries" are people who would have benefited under a will had it not been for the fact that they witnessed the testator's will and thereby forfeited their share of the estate. This issue has been addressed in the National Committee's Consolidated Report to the Standing Committee of Attorneys General on *The Law of Wills*. The proposed "interested witnesses" provision in the model legislation attached to that Report provides that a beneficial gift to such a witness is not void if the testator knew and approved of the gift and that the gift was given or made freely and voluntarily by the testator. By the *Wills Act 1997* (Vic) it is proposed to abolish the interested witnesses rule altogether.[74]

Apart from the current limited exception in Victoria, the Court's discretion in the various jurisdictions is virtually unfettered. There are some differences in relation to **when** the application for an extension may be made. In Victoria, South Australia and Tasmania the application has to be made before the **final distribution** of the estate.[75] In the Northern Territory and the Australian Capital Territory the application must be made before **full distribution** of the estate, that is, before the estate of the deceased person

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73 *Administration and Probate Act 1958* (Vic) s99.

74 *Wills Act 1997* (Vic) s11. The provisions of this Act are not yet in force.

75 *Administration and Probate Act 1958* (Vic) s99; *Inheritance (Family Provision) Act 1972* (SA) s8(4); *Testator's Family Maintenance Act 1912* (Tas) s11(4). Dickey A *Family Provision After Death* (1992) 15-16 states that according to the High Court in *Easterbrook v Young* (1977) 136 CLR 308 "final distribution" means the complete removal of all assets from executor or administrator to the beneficiaries and according to Dickey does not occur if the personal representatives hold the property on trust for the beneficiaries. However in *Re Lago [deceased]* [1984] VR 706 the Supreme Court of Victoria held that final distribution occurs where the personal representatives have done all they need to do to transfer the property even if the beneficiaries have not registered their title.

has been lawfully and fully distributed.[76]

In other jurisdictions (Western Australia, Queensland and New South Wales) it is in the Court's discretion whether a extension will be granted at any time.[77] There is no mention of when the application need be made.

The National Committee is in favour of an unfettered discretion in the Court to extend or not to extend the time for bringing an application for family provision. That discretion would alleviate the need to delineate whether the application has to be made before the "final" or the "full' distribution of the estate.

The National Committee would prefer the discretion to be expressed in terms along the lines of the introduction to subsection 41(8) of the *Succession Act 1981* (Qld): "Unless the Court otherwise directs ...."

6. SPECIFIC ISSUES: SHORTENING TIME LIMIT

As noted above, subsection 17(1) of the *Family Provision Act 1982* (NSW) enables the Court to shorten the time limit for an application for family provision for a particular person if it considers this to be reasonable in the circumstances of the case. The application to shorten the time limit may be made by the executor or the administrator of the estate or by any person who has a sufficient interest in the proceedings.

The National Committee is of the view that there is no need for a provision in the model legislation along the lines of subsection 17(1), given the National Committee's recommendation that the time limit for bringing an application be set at 12 months from the date of death rather than 18 months from the date of death, which is the current time limit under the New South Wales legislation. Such a provision would complicate the scheme by adding uncertainty. A solicitor from the Public Trustee (NSW) has observed that:[78]

> This Section is hardly used, on the basis that applicants can use many means of legitimate delay putting the Administrator in a difficult position with both dealing with assets and beneficiaries.

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76 *Family Provision Act 1970* (NT) s9(4); *Family Provision Act 1969* (ACT) s9(4).

77 *Family Provision Act 1982* (NSW) s16(4) specifies that the Court may make an order extending the time whether or not: the prescribed period has expired; the application was made before the period expired; or, the application has been made. The Queensland legislation is silent. *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(2) enables the Court to extend the time if the Court is satisfied the justice of the case requires the applicant be given leave to file out of time. Subsection 7(3) provides that a motion for leave to file out of time may be made at any time notwithstanding that the statutory period has expired.

78 Submission to the New South Wales Law Reform Commission from Peter J Whitehead, solicitor to the Public Trustee (NSW).

The Public Trustee of New South Wales has had to put fairly firm guidelines in place to deal with distribution in cases where potential family provision applications are known because of Will Instructions and where actual notice of a potential claim has been received but no summons has been filed.

7. SPECIFIC ISSUES: DATE ON WHICH APPLICATION FOR FAMILY PROVISION MADE

Dickey has observed from the common law that:[79]

> Except in South Australia, an application for family provision is made on the date on which the originating process is filed in the registry (in other words, on the date on which it is sealed and issued), and not on the date on which it is served.

This position is confirmed in the Northern Territory and the Australian Capital Territory by legislative provisions which state that an application for family provision is deemed to be made on the day when the instituting process is filed.[80]

In South Australian, application is deemed to be made on the day when the summons by which it is instituted is served on the executor or administrator of the deceased person's estate. Subsection 8(6) of the *Inheritance (Family Provision) Act 1972* (SA) states:

> An application for the benefit of this Act shall be deemed to be made on the day when the summons by which it is instituted is served on the administrator of the estate.

The National Committee is in favour of the model legislation specifying that the application for family provision is deemed to have been made at the date of the filing in the registry of the originating process for a family provision application. That is a date which is certain. There may be difficulties involved in serving the process on the administrator of the estate - for example, where he or she cannot be located. In such a case it may be necessary to apply for an order for substituted service.

8. SPECIFIC ISSUES: APPLICATION ON BEHALF OF AN INFANT OR PERSON WITHOUT FULL CAPACITY

In Tasmania and Queensland, legislation provides that representatives of children or people without full mental capacity can apply to the Court for directions on whether to

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79 Dickey A *Family Provision After Death* (1992) 14 referring to *Brown v Holt* [1961] VR 435 at 438; *Re Jones: Noonan v Jones* [1978] VR 272 at 273; *Leue v Reynolds* (1986) 4 NSWLR 590 at 597.

80 *Family Provision Act 1970* (NT) s9(5); *Family Provision Act 1969* (ACT) s9(5).

make an application for family provision. In Queensland, representatives can also apply to the Court for advice. Provided such an application is made within the statutory time limit, the Court may treat any resulting application for family provision as having been made within the time limit.[81]

The National Committee is of the view that a provision along the lines of subsection 47(1) of the *Succession Act 1981* (Qld) should be included in the model legislation. Subsection 41(7) reads:

> The personal representative or the public trustee or the director within the meaning of the *Children's Services Act 1965*, or any person acting as the next friend of any infant or any patient (within the meaning of the *Mental Health Act 1974*), may apply on behalf of any person being an infant, or being a patient (within the meaning of the *Mental Health Act 1974*) in any case where such person might apply, or may apply to the court for advice or directions as to whether the person ought so to apply; and, in the latter case, the court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.

Obviously, the model legislation provision will have to leave reference to specific legislation in that provision to each jurisdiction to consider.

9. SPECIFIC ISSUES: PROTECTION OF SUBSEQUENT APPLICANTS

Dickey observes:[82]

> In Queensland and Western Australia, where an application for family provision has been filed by or on behalf of any person (in Queensland, only on behalf of any person), the application must be treated by the court so far as regards the question of limitation as an application on behalf of all persons on whom notice of the application is served and all persons whom the court has directed to be represented by persons on whom notice of the application is served (in Queensland, on all persons who might apply). There is a related provision in Tasmania, though here the other persons are protected only if the court so orders.

Subsection 41(6) of the *Succession Act 1981* (Qld) reads:

> Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.

The National Committee considers that a provision along the lines of subsection 41(6) of the *Succession Act 1981* (Qld) should be included in the model legislation.

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81 *Succession Act 1981* (Qld) s41(7); *Testator's Family Maintenance Act 1912* (Tas) s3(5).

82 Dickey A *Family Provision After Death* (1992) 15 referring to *Succession Act 1981* (Qld) s41(6); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s12(2) and *Testator's Family Maintenance Act 1912* (Tas) s3(4).

10. SPECIFIC ISSUES: TIME LIMIT FOR APPLICATION FOR DETERMINATION OF SPECIAL RESPONSIBILITY

If an application for family provision is made on the basis that the deceased person owed the applicant a "special responsibility" to provide for the applicant's maintenance, the determination of whether or not a "special responsibility" existed may need to be made early on in the Court's proceedings. However, the National Committee is of the opinion that there should be no other distinguishing feature in the application procedure between an application made on the basis of "special responsibility" and an application made on the basis of being a member of an automatically eligible class of applicant (spouse or non-adult child).

The National Committee did consider whether it would be worthwhile requiring a separate application for determination of "special responsibility" before an application for family provision could be made upon that basis. However, the National Committee believes that that would unduly complicate and possibly delay proceedings. If there are to be no separate proceedings, then there is no need for different time limits to apply.

11. SPECIFIC ISSUES: ASSUMPTION OF TRUSTEESHIP

There is a not uncommon case where it would be inappropriate to insist that a family provision application be brought within a specified and limited period after the death of the deceased person. This is where the estate or part of it is left upon trusts of long or indeterminate duration. It should be possible for the family provision application to be brought when the trust ends and before the estate is finally distributed in accordance with the mandate of the trust.

An example would be where an estate is left on trust for the surviving spouse of the deceased person for life with a gift over upon the death of the surviving spouse to a given person or persons or amongst a class such as the issue of the deceased person. Some of the gifts might even be contingent upon the survival of the beneficiary. There might be no-one who would wish to contest the gift of the life interest to the spouse; but there might be persons who would object to the manner of the gift over. It might be inappropriate to insist, as the law does at present, that any family provision application should be made within a relatively short time after the deceased person's death because, for example:

1. the Court should not be required to assess, at the death of the deceased person, what the needs of the applicants might be at the end of the life interest; and

2. insofar as family provision applications can incite disputes within the family, possible applicants might be deterred from making application so as not to

cause dissension during the lifetime of the life tenant whose life tenancy is acceptable to all of them.

At the present time it is impossible for the making of an application to be deferred until the time when the final distribution of assets of a trust created by or arising under the will should be made.

In Queensland, it has been held repeatedly that a family provision application cannot be brought after the estate has been distributed; and that the estate is distributed when the personal representative strikes the estate account, thereby assuming trusteeship of trusts created by the will or intestacy.[83] In *Easterbrook v Young*, the High Court of Australia felt that this distinction was unnecessarily technical:[84]

> It is, in our opinion, incongruous to deny jurisdiction so soon as executorial duties are complete. To import into the construction of this legislation the technical considerations applicable to the determination of a personal representative's powers is, in our opinion, an unwarranted development because it involves failure to give due weight to the purpose of the legislation and it results in a frustration, rather than a facilitation, of that purpose.

Queensland decisions later than these comments of the High Court have retained the strict view.

In New South Wales, from which jurisdiction the High Court case derived, the law might have been slightly changed by the *Family Provision Act 1982* (NSW), subsection 6(5), which provides that an estate is not to be treated as having been distributed unless it is vested in a beneficiary. However, this may not assist much because, on the dropping of a life interest, the interests of those entitled in remainder often vest immediately, arguably precluding the possibility of making a family provision application at that time.

The other impediment to the making of a family provision application upon the dropping of a life interest is that applications are required to be brought within a specified time limit. The Court has jurisdiction to extend the time; but that jurisdiction is only exercised for good reason, such as that the applicant's solicitor had failed to advise the applicant appropriately.[85] Although very late applications have been allowed in earlier times, for example 22 years,[86] such leniency is not to be expected today.[87] Even if the differences of approach can be explained by differences in the statutory language, it would be appropriate to eliminate any differences and to follow the more purposive course preferred by the High Court.

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83 *Re Donkin* [1966] QdR 96; *Re Burgess* [1984] 2 QdR 379; *Re McPherson* [1987] 2 QdR 394.

84 *Easterbrook v Young* (1977) 136 CLR 308 at 324.

85 *Shannon v Public Trustee* [1970] VR 876; *Re Prakash* [1981] QdR 189.

86 *Re Hill* [1967] NZLJ 49.

87 *Re Burgess* [1984] 2 QdR 379.

The National Committee is of the opinion that the law should be amended so that the argument that the estate has been distributed does not apply to the case where the estate or a part of it is held upon any trust, whether determinate or indeterminate, where in reality the final distribution of the estate or part of the estate is not made until the termination of the trust. In addition, a family provision application should be permitted to be made within a short period after the termination of a testamentary trust. It is only then that the extent of the estate and the needs and even the existence of possible applicants can be ascertained and a realistic order made in accordance with the purpose of family provision legislation.

The National Committee considered a possible exception to the above proposal in relation to trusts for minors upon their attaining majority and in relation to trusts for people with other disabilities on the basis that most of the estate may have been distributed except for the one part held on trust for the minor or for the incapacitated adult. As that would be the only undistributed part of the estate, it would bear the burden of any application for family provision (leaving aside the issue whether any part of the distributed estate could be reached by the New South Wales Notional Estate provisions which this Committee has recommended for inclusion in the model legislation).

The National Committee believes that such exceptions would complicate the proposed scheme unnecessarily. In relation to infancy - the trust will only last for a limited time - until the minor attains majority. Furthermore, such trusts would not be very common. If the balance of the estate has been distributed it would be unusual for others to want to claim on the minor's share - unless the minor had received an excessive amount.

The National Committee considered that the exceptions discussed above should not be included in the model legislation.

However, the National Committee did consider that where a testator leaves property by will to a pre-existing trust, such as a family trust, the gift should not be treated as a trust arising by virtue of the will. This only relates to gifts by will because an intestacy could not have the effect of pouring money into an existing trust.

12. THE NATIONAL COMMITTEE'S DECISION: TIME WITHIN WHICH AN APPLICATION MUST BE MADE

Time limit (page 6 of Drafting Instructions, Appendix 1 to this Report)

Applications for family provision should be made within 12 months from the date of the death of the deceased person.

The model legislation should include a provision imposing a time limit along the lines of subsection 16(2) of the *Family Provision Act 1982* (NSW), but which refers to 12

months from the date of the death of the deceased person.

The model legislation should include a provision to the effect that an application for family provision is deemed to have been made on the date that the originating process is filed.

Extension of time limit (pages 6-7 of Drafting Instructions, Appendix 1 to this Report)

The Court should have an unfettered discretion to extend the time for bringing an application for family provision.

The model legislation should include a provision along the lines of subsection 16(3) of the *Family Provision Act 1982* (NSW). However, the provision should be amended along the lines of the opening words of subsection 41(8) of the *Succession Act 1981* (Qld) which commences: "Unless the court otherwise directs ...", to indicate an unfettered discretion in the Court to extend the time limit.

Shortening of time limit (page 7 of Drafting Instructions, Appendix 1 to this Report)

Given the proposed shorter time for bringing an application for family provision, there is no need for an equivalent of subsection 17(1) of the *Family Provision Act 1982* (NSW) to be included in the model legislation. Such a provision would simply add uncertainty to the scheme.

The model legislation should not include a provision along the lines of subsection 17(1) of the *Family Provision Act 1982* (NSW).

Application on behalf of an infant or person without full capacity (page 7 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should enable representatives of children or people without full mental capacity to apply to the Court for directions on whether to make an application for family provision. Representatives should also be able to apply to the Court for advice. Provided such an application is made within the statutory time limit, the Court should be able to treat any resulting application for family provision as having been made within the time lime.

The model legislation should include a provision along the lines of subsection 41(7) of the *Succession Act 1981* (Qld).

Protection of subsequent applicants (page 8 of Drafting Instructions, Appendix 1 to this Report)

Where an application for family provision has been filed by or on behalf of any person, the application must be treated by the Court so far as regards the question of limitation as an application on behalf of all persons on whom notice of the application is served and all persons who might apply.

The model legislation should include a provision along the lines of subsection 41(6) of the *Succession Act 1981* (Qld).

The equivalent to that provision should be included in the model legislation in preference to a provision along the lines of section 10 of the *Family Provision Act 1982* (NSW).

Assumption of trusteeship (pages 8-10 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include a provision along the following lines:

(1) Where an estate or part of an estate becomes vested in personal representatives as trustees of any trust arising under or by virtue of a will or intestacy, or in successor trustees upon any such trust, and an eligible person wishes to make an application for provision from the estate or part of the estate held on any such trust upon the termination of the trust, an application under this Part may be made within three months after the termination of the trust.

(2) For the purposes of this Part the estate or part of the estate held upon trust is not to be treated as having been distributed either by reason of its vesting in trustees or by reason of the termination of the trusts or for any other reason.

(3) The trustees may distribute the estate or part of the estate held on any such trust to the persons entitled to it one month after the termination of the trust unless they have received written notice of an eligible person's intention to make an application.

(4) The notice must be received by the trustees not more than 12 months before or within 28 days after the termination of the trust.

(5) For the purpose of this section a gift by will to trustees of an existing trust is not a trust arising under or by virtue of the will.

Subclause (1) enables an application to be made for provision from any part of the estate held upon trusts arising under or by virtue of the will or an intestacy upon the termination of the trust. The application must be made within three months of the

termination of the trust. In the case of a trust of defined duration the applicant will be well able to give notice within 12 months before. Even in the case of a trust of indefinite duration, such as a life interest, the approaching death of the life tenant may be predictable and possible applicants should realise the need to act promptly upon the death of the life tenant. The provision requires the applicant to be vigilant and move promptly.

It is only where the eligible person chooses to defer making an application until the termination of the trust that this provision will be used. If the person wishes to seek immediate provision the application must be made within the usual time and the property the subject of the trust may be utilised to provide for the applicant.

Subclause (2) prevents any objection that the estate subject to trusts should be regarded as having been distributed as such upon the personal representatives' assumption of trusteeship of trusts; or upon the appointment of new trustees. It performs the same function as that of subsection 2(4) of the *Family Protection Act 1955* (NZ) which provides:

> ... 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 after he has ceased to be 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.

Subclause (3) enables the trustees to distribute the property subject to the trusts one month after the termination of the trust, unless they have received notice of an eligible person's intention to make an application. This reinforces the point that the applicant must be vigilant and take action promptly.

Subclause (4) provides that the notice must be received "not more than 12 months before or within 28 days after" the termination of the trust. It might be oppressive to expect trustees to remember a notice of intention to make an application given say within 6 months of the death of the deceased person, as that might have been many years before the termination of the trust. Otherwise intending applicants must keep themselves informed about the termination or impending termination of the trust.

Subclause (5) addresses the situation where a testator leaves property by will to a pre-existing trust (for example, a family trust). The subsection is confined to gifts by will because an intestacy could not have the effect of pouring money into an existing trust.

CHAPTER 4

THE DETERMINATION OF CASES: "ADEQUATE PROVISION" FOR "PROPER MAINTENANCE"

1. INTRODUCTION

In each jurisdiction the Court is given power to order family provision to be made from the estate of a deceased person. Generally, the legislation is in terms that if a person dies and, as a result of the distribution of his or her estate, an eligible person who has applied for family provision is left without adequate provision for his or her proper maintenance, the Court may order that such provision as it thinks fit may be made for the benefit of the applicant out of the estate of the deceased person.

Dickey has observed that the precise terms of the power-conferring provision vary from jurisdiction to jurisdiction; however, most use the same expressions in respect of the main elements:[88]

> the main elements of the various power-conferring provisions may be put together and presented in consolidated form as follows: if the court finds that as a result of the distribution of a deceased's estate an eligible applicant has been left without "adequate provision" for his or her "proper maintenance and support" (in South Australia, the Northern Territory and the Australian Capital Territory, for his or her proper maintenance, education or[89] advancement in life", and in Western Australia, for his or her "proper maintenance, support, education or advancement in life"), the court may order that "such provision as ... [it] thinks fit" (In Tasmania, "such provision as ... [it] thinks proper") be made for the benefit of the applicant "out of the estate of the deceased".[90]

In New South Wales there are a number of distinctive features. For example, the Court is empowered to make provision out of the deceased person's "notional estate" as well as out of his or her actual estate.[91]

Further, the New South Wales provisions require an applicant to have been left without adequate provision either from the deceased person's estate or from any *inter vivos* provision made by the deceased person.[92] Also, the New South Wales legislation sets

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88 Dickey A *Family Provision After Death* (1992) 66.

89 In the Northern Territory "and".

90 *Administration and Probate Act 1958* (Vic) s91; *Succession Act 1981* (Qld) s41(1); *Inheritance (Family Provision) Act 1972* (SA) s7(1); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s6(1); *Testator's Family Maintenance Act 1912* (Tas) s3(1); *Family Provision Act 1970* (NT) s8(1); *Family Provision Act* 1969 (ACT) s8(1).

91 See Chapter 6 of this Report for a discussion of the concept of "notional estate" in the context of anti-avoidance.

92 *Family Provision Act 1982* (NSW) s9(2)(a).

out a list of considerations for the Court to take into account in determining what provision it should make for an eligible applicant.[93] Dickey notes that these last two features simply put into statutory form principles established by the Courts under the general law of family provision, and further adds:[94]

> The provision with which the New South Wales Act is concerned is provision for an applicant's "proper maintenance, education and advancement in life".
>
> The Supreme Court has held that notwithstanding the distinctive features of the current New South Wales Act, some of which make important changes to the law under the superseded legislation, the present Act should be interpreted so far as reasonably possible in accordance with the principles established under the previous Act and thus in accordance with the principles established under the general law of family provision.[95]

2. THE LEGISLATION

New South Wales

Section 7 of the *Family Provision Act 1982* (NSW) confers power on the Court to make an order for family provision; subsection 9(2) imposes conditions on the exercise of that power:

Section 7 provides:

> Subject to section 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Subsection 9(2) provides:

> The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that:
>
> (a) the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate; or

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93 Id s9(3).

94 Dickey A *Family Provision After Death* (1992) 67.

95 *Lloyd v Nelson* [1985] 2 NSWLR 291 at 298. *Benney v Jones* (1990) 23 NSWLR 559 at 568-569.

(b) in the case of an order under section 8:

(i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person; or

(ii) the provision made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person ...

is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person.

Australian Capital Territory

Subsection 8(2) of the *Family Provision Act 1969* (ACT) requires the Court to be satisfied:

in consideration of the criteria set out in subsection (3), that as at the date of the order, adequate provision for the proper maintenance, education or advancement in life of the applicant is not available -

(a) under the will of the deceased;

(b) if the deceased died intestate - under the law applicable to that intestacy; or

(c) under that law and that will combined.

Northern Territory

Subsection 8(1) of the *Family Provision Act 1970* (NT) requires the Court to be satisfied that:

adequate provision is not available, under the terms of the will of a deceased person or under the law applicable on the death of the person as an intestate or under the will and that law, from the estate of the deceased person for the proper maintenance, education and advancement in life of the person by whom, or on whose behalf the application is made ...

Queensland

Subsection 41(1) of the *Succession Act 1981* (Qld) requires the Court to be satisfied that:

in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant ...

South Australia

Subsection 7(1)(b) of the *Inheritance (Family Provision) Act 1972* (SA) requires the Court to be satisfied that:

> by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life ...

Tasmania

Subsection 3(1) of the *Testator's Family Maintenance Act 1912* (Tas) requires the Court to be satisfied that:

> in terms of his will or as a result of his intestacy any person by whom or on whose behalf application for provision out of his estate may be made under this Act is left without adequate provision for his proper maintenance and support thereafter ...

Victoria

Section 91 of the *Administration and Probate Act 1958* (Vic) requires the Court to be satisfied that:

> the distribution of his estate effected by his will (if any), or by the operation of the provisions of Division 6 of Part I [Distribution of Intestate's Residuary Estate] of this Act or both by his will and the operation of the said provisions is such as not to make adequate provision for the proper maintenance and support of the deceased's widow widower or children ...

Western Australia

Subsection 6(1) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) requires the Court to be satisfied that:

> the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of the persons mentioned in section 7 of this Act as being persons by whom or on whose behalf application may be made under this Act ...

Subsection 6(2) adds:

> The Court in considering for the purposes of subsection (1) of this section whether the disposition of the deceased's estate effected by the law relating to intestacy, or by the combination of the deceased's will and that law, makes adequate provision for the purposes of this Act shall not be bound to assume that the law relating to intestacy makes adequate provision in all cases.

3. DIFFERENCE IN WORDING

The words "adequate" and "proper provision" recur in all States' and Territories' legislation. They are fundamental to the concept of family provision. There are, however, some differences in the drafting of the provisions in which these phrases occur. Some States and Territories refer only to support and proper maintenance of the applicant, while others refer to proper maintenance, education and advancement in life of the applicant. There is a significant difference; whereas support, maintenance and education are words traditionally associated with the expenditure of income, advancement has been associated with the expenditure of capital, such as setting a person up in business or upon marriage. Consistency requires the inclusion or exclusion of these words.

In *Bosch v Perpetual Trustee Company Limited*,[96] a case often referred to, the Privy Council said:[97]

> The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration ... Where, therefore, the testator's estate is a large one the Court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small.[98]

Hardingham, Neave and Ford say:[99]

> A condition precedent to the exercise of the court's discretion is that the will or the operation of the intestacy legislation is such as not to make adequate provision for the proper maintenance and support of the applicant. A court is not justified in making an order simply on the basis that the will achieves an unfair distribution if this condition precedent is not satisfied.

4. CIRCUMSTANCES AT DATE OF DEATH OR DATE OF ORDERS?

The National Committee considered whether the determination of adequate provision should be based upon the circumstances of the applicant and the deceased person at the date of death or at the date of the Court orders. Except in New South Wales, the

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96 [1938] AC 463.

97 Id 478.

98 This requirement is considered in detail in Hardingham IJ, Neave MA & Ford HAJ *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) (hereafter cited as "Hardingham, Neave & Ford") 490-497 and in De Groot and Nickel *Family Provision in Australia and New Zealand* (1993) para 204.4.

99 Hardingham, Neave & Ford 494.

question of whether adequate provision has been made is determined at the date of the death of the deceased person; but the Court may take into account circumstances existing at the time of the making of the order for the purposes of determining the amount of the order;[100] and the Court may take into account matters which the deceased person, during his or her lifetime, either knew of or could reasonably have foreseen.[101] In New South Wales the question of adequacy is dealt with at the time the Court is considering the application.[102]

To a certain extent this difference may have been obscured in practice by the device of allowing for consideration of what a person might reasonably have foreseen prior to his or her death; and by the rule that what may be allowed to the applicant is to be determined at the date of the application; although both these practices may have themselves been generated by the difficulty of the question.

The National Committee is of the view that whether adequate provision was made should be ascertained by reference to circumstances at the date of the order, particularly in the light of the National Committee's decision that it should be possible to defer making an application for family provision until the determination of a trust created by the will of the deceased person.

5. CRITERIA TO BE TAKEN INTO ACCOUNT IN DETERMINING ADEQUACY OF PROVISION FOR MAINTENANCE AND SUPPORT.

A number of jurisdictions have legislated a list of criteria for the Court to consider when determining whether the applicant was left without adequate provision for maintenance.

New South Wales

Section 9 of the *Family Provision Act 1982* (NSW) refers to a number of matters which the Court must take into account in determining the provision to be made for the maintenance, education or advancement in life of the applicant. Section 9 is set out:

> (1) Where an application is made for an order under section 7 by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of "eligible person" in section 6(1), the Court shall first determine whether, in its opinion, having regard to all the circumstances of the case (whether past or present), there are factors which warrant the making of the application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors.

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100 *Blore v Lang* (1960) 104 CLR 124 per Dixon CJ at 130.

101 Eg *White v Barron* (1980) 144 CLR 431 per Mason J at 445.

102 *Family Provision Act 1982* (NSW) s9(2).

(2) The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that:

(a) the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate; or

(b) in the case of an order under section 8:

(i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person; or

(ii) the provision made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person,

is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person.

(3) In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration:

(a) any **contribution made by the eligible person**, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to:

(i) the acquisition, conservation or improvement of property of the deceased person; or

(ii) the welfare of the deceased person, including a contribution as a homemaker;

(b) the **character and conduct of the eligible person** before and after the death of the deceased person;

(c) **circumstances existing before and after the death** of the deceased person; and

(d) **any other matter which it considers relevant** in the circumstances.

(4) Nothing in subsection (3) (a) limits the generality of subsection (3) (b), (c) and (d) and the Court may consider a contribution of the same nature as that referred to in subsection (3) (a) or of a different nature in so far as it considers it relevant under subsection (3) (b), (c) or (d).

(5) Subject to the foregoing provisions of this section, the Court may make an interim order for provision under section 7 in favour of an eligible person before it has fully considered the application for that provision where it is of the opinion that no less provision than that proposed to be made by the interim order would be made in favour of the eligible person after full consideration of the application.

(6) Where, on an application made in relation to a deceased person, the Court has made an interim order as referred to in subsection (5), it shall, in due course, proceed to make a final determination of the application, which determination shall confirm, revoke or alter the order so made. [emphasis added]

Australian Capital Territory

Subsection 8(3) of the *Family Provision Act 1969* (ACT) lists a number of criteria which the Court has to take into account in making an order that adequate provision was not available to the applicant:

(a) the **character and conduct of the applicant**;

(b) the **nature and duration of the relationship** between the applicant and the deceased;

(c) any **financial and non-financial contributions** made directly or indirectly by or on behalf of either or both the applicant and the deceased to the acquisition, conservation or improvement of any of the property or financial resources of either or both persons;

(d) **any contributions** (including any in the capacity of home-maker or parent) by either the applicant or the deceased to the welfare of the other, or of any child of either person;

(e) the **income, property and financial resources of the applicant and the deceased**;

(f) the **physical and mental capacity of the applicant, and the deceased** (during his or her life), for appropriate gainful employment;

(g) the **financial needs and obligations of the applicant and the deceased** (during the life of the deceased);

(h) the **responsibilities of either the applicant or the deceased (during his or her life) to support** any other person;

(i) the **terms of any order made under section 15 of the *Domestic Relationships Act 1994*** with respect to the property of the applicant or the deceased;

(j) any **payments made to either the applicant or the deceased by the other**, pursuant to an order of the Court or otherwise, in respect of the maintenance of the other person or any child of the other person;

(k) **any other matter** the Court considers relevant. [emphasis added]

This list of matters is very similar to the list found in the English legislation set out below (and in the discussion on general categories of eligible people in Chapter 2 of this Report).

Northern Territory

Subsections 8(2) and (3) of the *Family Provision Act 1970* (NT) refer to two matters to be taken into account - benefits conferred by the exercise of a power of appointment and the conduct and character of the applicant:

> (2) In considering the adequacy of the provision available from the estate of the deceased person for a person who has made an application for provision out of the estate of the deceased person, the Court shall regard **any benefits conferred upon that person or another person** by the exercise, whether expressly or otherwise, by the deceased person by his will of a general or special power of appointment as forming part of the provision available from the estate of the deceased person for the person upon whom those benefits are conferred.
>
> (3) The Court may refuse to make an order in favour of a person whose **character is such, or whose conduct** is or has been such, as, in the opinion of the Court, dis-entitles him to the benefit of an order. [emphasis added]

Queensland

Queensland legislation imposes very few restrictions on the Court to order what it considers appropriate in all the circumstances of the case. Subsection 41(1A) of the *Succession Act 1981* (Qld) reads:

> ...the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the **extent to which the dependant was being maintained or supported by the deceased person** before the deceased person's death, the **need of the dependant for the continuance of that maintenance and support** and the **circumstances of the case**, that it is proper that some provision should be made for the dependant. [emphasis added]

South Australia

Section 7 of the *Inheritance (Family Provision) Act 1972* (SA) is also very broad. Subsection 1 provides:

> ... the Court may in its discretion, upon application by or on behalf of a person so entitled, order that **such provision as the court thinks fit** be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled. [emphasis added]

Subsection 7(3) provides:

> The Court may refuse to make an order in favour of any person on the ground that his **character or conduct** is such as, in the opinion of the Court, to disentitle him to the benefit of this Act, or **for any other reason that the Court thinks sufficient**. [emphasis added]

Tasmania

Subsection 3(1) of the *Testator's Family Maintenance Act 1912* (Tas) simply refers to the Court "having regard to **all the circumstances of the case**". [emphasis added]

Victoria

The new section 91 of the *Administration and Probate Act 1958* as proposed by the *Wills Act 1997* (Vic) sets out a number of matters for the Court to take into account when determining whether or not the distribution of the estate of the deceased person makes adequate provision for the proper maintenance and support of the applicant. That same list of matters is to be taken into account when the Court determines: whether or not the deceased person had "responsibility" to provide for the applicant; the amount, if any, of the provision to award the applicant; and, any other matter related to an order for family provision.[103]

England

In England, the *Inheritance (Provision for Family and Dependants) Act 1975* provides that where an application is made for a share of a deceased person's estate the Court must, in determining whether the disposition of the deceased person's estate is such as to make **reasonable financial provision**[104] for the applicant and, if not, in determining what orders to make, have regard to a number of matters. These matters are relevant to all categories of applicant:[105]

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

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103 See Chapter 2 of this Report.

104 "reasonable financial provision" is defined in s1(2) of the *Inheritance (Provision for Family and Dependants) Act 1975* (UK) to mean:

(a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where, at the date of death, a separation order under the *Family Law Act 1996* was in force in relation to the marriage and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

105 Id s3.

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

Where an application is made by the wife or husband of the deceased person or by a former wife or husband of the deceased person who has not remarried, the Court must, in addition to the matters listed above, have regard to:[106]

(a) the age of the applicant and the duration of the marriage;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

These considerations are also relevant when considering *de facto* applicants.[107]

In relation to applications by children of the deceased person and children the deceased person treated as his or her own, other considerations are specified.[108]

In relation to applications by persons claiming to be covered by the general provision in subsection 1(1)(e) the Court is also to consider:[109]

> ... the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and the length of time for which the deceased discharged that responsibility.

6. MORAL DUTY AND MORAL CLAIM

The Courts have taken moral considerations into account in determining applications for family provision. Largely these considerations (apart from the applicant's character and conduct, referred to below in Part 7 of this Chapter) have not been specified by the

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106 Id s3(2). That section also refers to further considerations in the case of an application by a spouse for provision which the deceased person would have been likely to have made if the marriage had been terminated by divorce rather than death.

107 Id s3(2A).

108 Id s3(3).

109 Id s3(4).

legislation although they have been openly discussed by the Courts and academic commentators in the context of the legislation. The Courts have referred to the deceased person's "moral duty" to provide maintenance and support to certain people. Alternatively, they have referred to the "moral claim" of applicants on the estate of the deceased person.

The New South Wales Law Society in its submission to the National Committee noted:

> The majority in *Singer v Berghouse (No 2)* (1994) 68 ALJR 653 (High Court) criticised the approach to determining issues such as the "moral duty" of the testator or the "moral claim" of the applicant. After quoting from *Allen v Manchester* (1921) NZLR 218 in which the famous expression the 'just and wise' testator is used and in which reference to the "moral duty" of the father to protect financially his widow and children is made, the majority stated:
>
> > For our part, we doubt that this statement provides useful assistance in elucidating the statutory provisions. Indeed, references to "moral duty" or "moral obligation" may well be understood as amounting to a gloss on the statutory language. at p.656.
>
> They favoured the two tier approach of: firstly 'was the provision (if any) made for the applicant inadequate for his or her proper maintenance, education and advancement in life?; and secondly if so, what order should be made in favour of the applicant?' This 'back to basics' approach altered the method of approaching these type of matters since *Lloyd v Nelson* (1985) 2 NSWLR 291 in which questions of "moral duty" and "moral claim" have been paramount. One of the difficulties in the past for judges in New South Wales has been to find words within the legislation that require the court to consider moral duty and moral claim. In the New South Wales legislation, the words "moral obligation to make adequate provision" appear only once in Section 23(b)(ii). The New South Wales Equity Court has stretched the use of the word "ought" in Section 7 to mean a *moral duty and moral claim.*
>
> Any review of the law in this area should, we believe, consider whether the High Court's approach is to be preferred or whether moral duty and moral claim is to continue to have a significant role to play. If the latter, the legislation should make it clear that this is so.

Although the so-called "moral duty" is not expressly provided for in the legislation as a consideration for the Courts to take into account, Atherton has argued that it is not a mere "gloss" on the legislation such as to be likely to obscure rather than clarify the legislation:[110]

> ... in placing such a "gloss" on the key provision it is suggested that they were not confusing the basic principles of the Act, but rather recognising plainly its genesis: namely, the Family Provision legislation was developed in response to testamentary freedom, but not as a contradiction of it. Testamentary freedom was based upon moral duty: it was a power with a "moral responsibility", to judge the disposition of property on death on the basis of each particular case. Family Provision was introduced only to correct aberrant exercises of that power. To test the degree of "aberration" against a standard expressed in terms of "moral duty", therefore, was logical.

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110 Atherton R *Family Provision* (Victorian Attorney-General's Law Reform Advisory Council, Expert Report 1, 1997) para 2.59.

Thus, rather than a "gloss", Atherton believes that the moral duty approach distils its essence from words and phrases such as "proper","sufficient", "ought", "such provision as the Court thinks fit". As Atherton observes:[111]

> Such an approach brought to the surface the natural connection between "proper" or "sufficient" provision and the disentitling conduct proviso. Both were linked to moral duty: on the one hand conduct could assist in enhancing the moral obligation in a particular case, while disentitling conduct focused on a cancelling of the moral duty. "Moral duty" and "moral obligation" were nebulous concepts but were a consistent and familiar part of the framework of family and property relationships from which Family Provision legislation emerged. ... To see the background of the legislation in a framework of moral duty sets the context for a consideration of its operation at present. The moral duty approach was neither accidental nor was it a gloss. It was pivotal. The problem for law reformers is not just to recognise that context but to assess the continued relevance of it in relation to the task of considering alteration to the present law. **If it is seen as being of continued relevance, the difficulty will be as to how to render this legislatively in the context of family obligations in the late twentieth century**. [emphasis added]

The moral duty of the testator has been equated to the moral claim of the applicant. For example, Dickey observes that:[112]

> the notion of "moral claim" concerns those circumstances of any kind which made it right and proper according to ordinary community standards for the deceased to have made provision for a particular person from his or her estate and which thus justify a claim by this person for provision from the deceased's estate.

Dickey notes that the common law has treated the two notions - moral duty and moral claim - as equivalent:[113]

> This is, indeed, apparent from the definition of "moral claim" ... A deceased's "moral duty" accordingly involves no necessary overtones of morality in the narrow sense of virtue. Instead, it concerns simply those circumstances of any kind which, on the basis of ordinary standards of right and proper behaviour, should have led the deceased to make provision for a particular person from his or her estate.

The standard of morality involved is that of the community at large at the time of the deceased person's death:[114]

> This is a logical consequence of the established rule that in considering a claim for family provision, the relevant point of view to be considered is ordinarily that of the deceased as a reasonable man or woman, without regard to any of his or her idiosyncrasies, and that the relevant time to consider this matter is ordinarily the time of the deceased's death.

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111 Id para 2.60.

112 Dickey A *Family Provision After Death* (1992) 77.

113 Ibid.

114 Id 78.

In relation to his first point, Dickey[115] refers to the statement of the Privy Council in *Bosch v Perpetual Trustee Company Limited* referring to a deceased testator and in respect of applications by a surviving wife and children:[116]

> ... in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father.

Dickey observes that this statement clearly implies that the Court must take into account objective standards of what is right and proper in the circumstances and that these standards must undoubtedly be those recognised by the community at large at the time of the deceased person's death.[117]

7. CIRCUMSTANCES WHICH WOULD ADVERSELY AFFECT AN APPLICANT'S MORAL CLAIM

Dickey has noted that certain circumstances may detract from an applicant's moral claim to provision from a deceased person's estate, even to the extent of extinguishing it altogether:[118]

> However, just as the existence of a moral claim for provision does not necessarily depend upon any commendable or virtuous quality in an applicant, so its diminution or extinguishment does not necessarily depend upon any blameworthy or bad quality in an applicant.

In most jurisdictions there is an express provision in the legislation enabling the Courts to refuse to make an order for family provision if the applicant's "character or conduct" is such as to disentitle him or her to the benefit of the order. This does not necessarily mean though that a bad quality in the applicant would have to detract from the applicant's claim. Dickey has observed:[119]

> There was once a view that where there was a provision of this kind in the legislation, any factor (or at least any untoward factor) which might detract from an applicant's moral claim for provision had to be taken into account pursuant to this provision alone. This meant that where legislation contained a disentitling provision, factors detracting from a moral claim could only extinguish, and not merely diminish, a claim to provision from a deceased's estate. That exclusive view of the effect of a disentitling provision no longer has judicial support. **Cases now make it clear that the question of whether there are**

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115 Ibid.

116 [1938] AC 463 at 478-479.

117 Dickey A *Family Provision After Death* (1992) 78.

118 Id 93.

119 Ibid referring to *Re Dingle* (1921) 21 SR (NSW) 723 at 726; Re *Sinnott (Deceased)* [1948] VLR 279 at 281 and *Re S (Deceased); H v T* [1975] VR 47 at 54-55.

> **circumstances which diminish or extinguish an applicant's moral claim to provision from a deceased's estate, and whether there are any disentitling factors pertaining to the applicant, are two discrete matters for consideration in family provision proceedings.** [emphasis added]

All jurisdictions except New South Wales have provisions whereby the Court may refuse to make an order for family provision in favour of a person whose character or conduct is such as to disentitle him or her to the benefit of such an order.[120] Dickey has noted that the legislation in Queensland, South Australia and Western Australia goes further:[121]

> The Queensland Act also provides that the court may refuse to make an order for family provision where the circumstances of the applicant are such as to make a refusal reasonable. The South Australian and Western Australian Acts also provide that the court may refuse to make an order for any other reason that it thinks sufficient.

In New South Wales the character and conduct of the applicant **before and after** the death of the deceased person is simply a consideration to be taken into account by the Court in determining what provision, if any should be made in the applicant's favour. The relevant part of subsection 9(3) of the *Family Provision Act 1982* (NSW) reads:

> (3) In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration:
>
> ...
>
> (b) the character and conduct of the eligible person before and after the death of the deceased person;
>
> ...
>
> (c) circumstances existing before and after the death of the deceased person; and
>
> (d) any other matter which it considers relevant in the circumstances.

There has been some divergence of opinion as to the stage at which issues of the applicant's moral or other unfitness for relief should be considered by the Court. Should character and conduct be considered when the Court decides whether "adequate provision" has been made for the applicant's "proper maintenance", or should it be made afterwards, when considering whether an order should be made at all or whether the amount of the order should be affected?

Case law is tending to indicate that consideration of character and conduct should be made only at the later stage and not at the initial stage.

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120 *Administration and Probate Act 1958* (Vic) s96(1); *Succession Act 1981* (Qld) s41(2)(c); *Inheritance (Family Provision) Act 1972* (SA) s7(3); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s6(3); *Testator's Family Maintenance Act 1912* (Tas) s8(1); *Family Provision Act 1970* (NT), s8(3); *Family Provision Act 1969* (ACT) s8(3)(a).

121 Dickey A *Family Provision After Death* (1992) 96.

Thus in *Hughes v National Trustees, Executors and Agency Company of Australasia Limited*[122] Murphy J, referring to the adequate provision constraint in section 91 of the Victorian legislation, said:[123]

> Difficulty arises from the unwarranted introduction of the notion of moral claim into s.91, from which it follows that the appellant must establish his moral claim; in effect, his character and conduct must qualify him for the benefit of provision out of the estate ...
>
> In my opinion, this confuses the simple operation of the sections. Section 91 specifies the conditions of qualification; s.96 specifies the conditions of disentitlement of disqualification. To bring himself within s.91, the appellant does not have to establish any moral claim or qualification other than those specified in the section.

Murphy J adhered to this view in *Goodman v Windeyer*.[124] However, in the same case, Gibbs J took a rather broader view,[125] taking account of the many considerations which must be borne in mind when deciding whether an applicant has a *prima facie* case, including the applicant's conduct in relation to the deceased person. In *Hughes'* case Gibbs J had said:[126]

> The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but, also, to some extent, on the strength of his need or claim to provision from the estate of the testatrix. The stronger the applicant's case for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision.

8. EVIDENCE OF CHARACTER AND CONDUCT

(a) Introduction

Some States have no statutory provision regarding what evidence is admissible of an applicant's character and conduct. In case law, the admissibility of statements made by the deceased person during his or her lifetime has been impugned.

The practice of admitting such statements concerning the conduct of an applicant for provision under the legislation as evidence of that conduct was mentioned by Gibbs J in *Hughes v National Trustees, Executors and Agency Company of Australasia*

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122 (1979) 143 CLR 134.

123 Id 159-160.

124 (1980) 144 CLR 490 at 504-505.

125 Id 496-499.

126 *Hughes v National Trustees, Executors and Agency Company of Australasia Limited* (1979) 143 CLR 134 at 156.

Limited.[127] Having observed that "usage justifies its reception" Gibbs J said:[128]

> However, in general it is the duty of a judge to reach his decision on evidence that is legally admissible, and to put evidence only to those uses which the law allows. When a statement is admitted, not as evidence of its truth but simply as original evidence, the mere fact of its admission cannot enable it to be given an additional probative value which the law denies it.

This is the law in Queensland, South Australia and Victoria where the legislation makes no reference to this issue. But in other jurisdictions there has been some legislative response.

It is clear that the New South Wales provisions are the most considered of all the Australian provisions on the admissibility of statements made by a deceased person which affect the entitlement of an applicant for family provision. They are also specific. With respect to other legislation, particularly that of Western Australia, it may be said that the language is so general that it is impossible to say exactly what impact it has on the traditional rules of evidence.

(b) The legislation

New South Wales

In New South Wales there is a lengthy provision in section 32 of the *Family Provision Act 1982* (NSW) concerning the admissibility of evidence.

> (1) In this section:
> "document" includes any record of information;
> "statement" includes any representation of fact whether or not in writing.
>
> (2) In any proceedings under this Act, evidence of a statement made by a deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.
>
> (3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during the person's lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.
>
> (4) Where a statement was made by a deceased person during the person's lifetime while giving oral evidence in a legal proceeding (being a civil or criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the

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127 Id 150.

128 Id 153.

statement may be approved in any manner authorised by the Court.

(5) Where a statement made by a deceased person during the person's lifetime was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.

(6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances including, in the case of a statement contained in a document, the form or content of the document.

(8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.

(9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.

(10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.

(11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

(12) This section applies notwithstanding:

(a) the rules against hearsay;
(b) * * * * *

and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(13) The exceptions to the rules against hearsay set out in this section are in addition to the exceptions to the hearsay rule set out in the Evidence Act 1995.

Australian Capital Territory and Northern Territory

Section 22 of the *Family Provision Act* in each Territory[129] provides:

> **Relevance of testator's reasons** (ACT)
> **[The Court may have regard to the testator's reasons** (NT)]
>
> (1) The Court shall, in determining an application for an order under section 8 or 9A [section 8], have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by his will [,] or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Act.
>
> (2) The Court may receive in evidence a statement signed by the testator and purporting to bear the date on which it was signed and to set out reasons for making or not making provision or further provision by the will of the testator for a person as evidence of those reasons.
>
> (3) Where a statement of a kind referred to in subsection [sub-section] (2) is received in evidence, the Court shall, in determining what weight, if any, ought to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement.

Tasmania

Section 8A of the *Testator's Family Maintenance Act 1912* (Tas) provides:

> (1) On the hearing of an application under subsection (1) of section three, the Court or judge may have regard to the deceased person's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or further provision, as the case may be, for any person, and the Court or judge may accept such evidence of those reasons as it or he considers sufficient, whether that evidence would otherwise be admissible in a court of law or not.

Western Australia

Subsections 4(2) and (3) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provide:

> (2) In any proceedings under this Act a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.

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129 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provisions are signified in square brackets.

> (3) Where a provision of this Act requires the Court to be satisfied of the existence of any ground or fact or as to any other matter, it is sufficient if the Court is reasonably satisfied of the existence of that ground or fact or as to that other matter.

Subsection (4) is concerned with evidence establishing the relationship between a father and an illegitimate child.

9. THE NATIONAL COMMITTEE'S DECISION: ADEQUATE PROVISION FOR PROPER MAINTENANCE

Matters to be taken into consideration (page 11 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include provisions to the effect that the Court be required to have regard to so many of the matters as it considers relevant from the list of matters recommended for inclusion in the model legislation in Chapter 2 of this Report when determining whether the deceased person failed to provide adequate provision for the maintenance, education or advancement in life of the applicant. Thus, the same list of matters will be referred to when the Court determines the existence of a "special responsibility" and when it determines the adequacy of provision made for the applicant by the deceased person. That list of matters is set out on pages 27 and 28 of this Report.

These matters should be in lieu of the matters currently referred to in subsections 9(2)(a) and 9(3) of the *Family Provision Act 1982* (NSW).

"Education" and "advancement in life" (page 11 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include in its power conferring provision, reference to "the maintenance, education or advancement in life of the eligible person". This is the current wording used in section 7 of the *Family Provision Act 1982* (NSW).

Circumstances at date of order (page 11 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include a provision to the effect that the determination of adequate provision for the maintenance, education or advancement of life for the eligible person be based upon the circumstances of the eligible person and the deceased person at the date of the order. This is the current effect of section 7 of the *Family Provision Act 1982* (NSW).

The moral claim and the moral duty (pages 11-12 of Drafting Instructions, Appendix 1 to this Report)

The moral claim and moral duty, which are the bases of the family provision scheme, should not be spelt out in the model legislation although they are reflected in the list of matters which the National Committee has recommended should be taken into account in determining whether the deceased person owed the applicant "special responsibility" and whether adequate provision has been made by the deceased person for the applicant.

There may be a danger in further legislating the duty/claim factor, in that courts may feel restricted in their application of their very wide discretion because of the wording of the provision. Further, it would not be possible to legislate for the circumstances in which the Court should consider a moral claim - most cases will be different, and common perceptions of what gives rise to a moral claim for provision may change over time.

There is no longer any need to have a separate provision in family provision legislation to enable the Court to take character and conduct into account. The character and conduct of the applicant both before and after the death of the deceased person may be relevant to the Court's determinations relating both to "special responsibility" and to whether or not adequate provision has been made for the eligible person by the deceased person. For those reasons the issue of character and conduct has been included in the list of matters that the National Committee has recommended the Court take into account when deliberating on these issues (item (m) in the list of matters - see page 5 of the Drafting Instructions).

The model legislation should not include a provision equivalent to subsection 9(3)(b) of the *Family Provision Act 1982* (NSW).

Character and conduct of other people (page 12 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is of the view that the list of matters which the Court is to take into account in its deliberations should refer not only to the character and conduct of the applicant, but also to the character and conduct of any other person. This is reflected in item (m) of the list of matters the National Committee has recommended that the Court take into account (see page 5 of Drafting Instructions). The current disentitlement provisions do not go this far.

Admissibility of an applicant's character and conduct (page 12 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is of the view that ideally the admissibility of evidence relating to the applicant's character and conduct should be left to the law of evidence and should not be spelt out in the model legislation. Each jurisdiction should consider the matter in the light of its respective evidence legislation. Those jurisdictions which have adopted the uniform evidence legislation will most likely find that this provision is now otiose.

In the meantime, however, the National Committee was of the view that the model legislation should include a provision along the lines of section 32 of the *Family Provision Act 1982* (NSW).

The current legislation does not make it clear, although it appears to be the law, that conduct may result in a reduction of the amount of the award and not necessarily in a disentitlement. The National Committee believes that it is not necessary to spell this out as the Court's discretion would be wide enough to make the most appropriate award in all the circumstances.

CHAPTER 5

THE COURT'S DISCRETION TO ORDER PROVISION

1. INTRODUCTION

Subject to the constraints placed upon the Court referred to elsewhere in this Report,[130] the legislation in all States and Territories confers on the Court a virtually unfettered discretion to order provision to be made for the applicant out of the estate of the deceased person.

The decision of the legislatures to confer a broad discretion on the Court, in a context where a very wide variety of possible fact situations will inevitably present over the years, reflects confidence in the judicial process as a means of reconciling competing claims where moral as well as legal issues can be intertwined. It is unlikely that the words "having regard to all the circumstances of the case"[131] significantly restrict the Court's discretion. Rather, they underline legislative policy that the Court must take care in exercising so broad a discretion.

It is desirable to render uniform or consistent the wording of these sections. In doing so it is necessary to analyse the practical effect, if any, of words which may be seen as attempting to place some sort of indefinable limits upon the discretion and to consider the desirability of retaining these words.

2. THE LEGISLATION

New South Wales

Section 7 of the *Family Provision Act 1982* (NSW) reads:

> Subject to section 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, **if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.** [emphasis added]

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130 See, for example, Chapter 4 of this Report.

131 These words are not found in all the statutes.

Northern Territory

Subsection 8(1) of the *Family Provision Act* 1970 (NT) provides:

> ... the Court may, in its discretion and **having regard to all the circumstances of the case**, order that such provision **as the Court thinks fit** be made out of the estate of the deceased person. [emphasis added]

Australian Capital Territory

Subsection 8(1) of the *Family Provision Act 1969* (ACT) reads:

> ... the Court may order that such provision **as the Court thinks fit** be made for the applicant out of the estate. [emphasis added]

Queensland

Subsection 41(1) of the *Succession Act 1981* (Qld) provides that:

> ... the court may, in its discretion, ... order that such provision **as the court thinks fit** shall be made out of the estate of the deceased person ... [emphasis added]

South Australia

Subsection 7(1) of the *Inheritance (Family Provision) Act 1972* (SA) provides that:

> ... the Court may in its discretion ... order that such provision **as the Court thinks fit** be made out of the estate of the deceased person ... [emphasis added]

Tasmania

Subsection 3(1) of the *Testator's Family Maintenance Act 1912* (Tas) provides that:

> ... the Court or a judge may, in its or his discretion ... order that such provision **as the Court or judge, having regard to all the circumstances of the case, thinks proper** shall be made out of the estate of the deceased person ... [emphasis added]

Victoria

Section 91 of the *Administration and Probate Act 1958* (Vic) provides that:

> ... the Court may ... order that such provision **as the Court thinks fit** shall be made out of the estate of the deceased ... [emphasis added]

Western Australia

Subsection 6(1) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provides that:

> ... the Court may, at its discretion ... order that such provision **as the Court thinks fit** is made out of the estate of the deceased for that purpose. [emphasis added]

3. ADDITIONAL PROVISION

Section 8 of the *Family Provision Act 1982* (NSW) enables the Court, in its discretion, to order additional provision for a person in whose favour an order for family provision, or for additional provision, has already been made:

> Subject to section 9, on an application in relation to a deceased person made by or on behalf of an eligible person in whose favour an order for provision out of the estate or notional estate, or both, of the deceased person has previously been made, if the Court is satisfied that there has been, since an order for provision was last made by the Court in favour of the eligible person out of the estate or notional estate, or both, of the deceased person, a substantial detrimental change in the circumstances of the eligible person, it may order that such additional provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Dickey notes in relation to this provision:[132]

> The court may make an order for additional provision only if two conditions are satisfied. First, there must have been a substantial detrimental change in the circumstances of the applicant for additional provision since the time the existing order was made.[133] Secondly, the provision made in the existing order, together with any provision made for the applicant by the deceased either during his or her lifetime or out of his or her estate, must be inadequate for the applicant's proper maintenance, education and advancement in life. If these two conditions are satisfied, the court may order that additional provision be made out of the deceased's estate or notional estate for the applicant's maintenance, education or advancement in life.[134] The time for considering both whether the second condition has been met and the circumstances relevant to a decision on what order for additional provision should be made is the time of the hearing.[135]

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132 Dickey A *Family Provision After Death* (1992) 169.

133 *Family Provision Act 1982* (NSW) s9(2)(6).

134 Id s8.

135 Id s8, 9(2).

> An application for additional provision may be made only by, or on behalf of, the person in whose favour the existing order for provision was made.[136]

A solicitor to the Public Trustee (NSW) has noted that this provision has had little application, although the decision of the New South Wales Court of Appeal in *Wentworth v Wentworth*[137] is notable.[138] In that case Powell JA identified three jurisdictional facts to be established before an applicant can apply for an order for further provision:[139]

> 1. that the applicant has earlier had made in his, or her, favour an order for provision out of the estate, or notional estate, or both, of the deceased person;
>
> 2. that since the making of that order, or, if more than one, the last order, for provision, the applicant has suffered a substantial detrimental change in his or her circumstances; and
>
> 3. that by reason of that change in his or her circumstances, an order for further provision ought be made for the maintenance, education or advancement in life of the applicant.

Powell JA then went on to observe:[140]

> ... there can, I believe, be no doubt that, unless an earlier order for provision has been made, it is not open to a person to invoke the provisions of s 8. While it may be that there will be cases in which the absence of this "jurisdictional fact" will cause hardship, this was a matter which the Law Reform Commission clearly had in mind when it prepared its working paper (NSWLRC WP 12 1974) but nonetheless limited its proposal to cases in which such a prior order has been made.

In an earlier stage of the proceedings, Santow J in *Wentworth v Wentworth*[141] made the following observation concerning the requirement that the Court have regard "to the circumstances at the time the order is made":

> [Section] 8 of the Act ... cannot mean that the court is unable to deal with the orders it wishes to make, unless it take fresh evidence at the time of the orders as to whether every circumstance remains unaltered. That would make the Act unworkable. Rather, there must be a new circumstance which is of sufficient significance to have a material influence on the court's decision. Furthermore, this must not be a circumstance known to or available to any party at the time of the substantive hearing which would have advanced that party's case but which that party failed to bring before the court.

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136 *Family Provision Act 1982* (NSW) s8.

137 (1995) 37 NSWLR 703.

138 Submission to the New South Wales Law Reform Commission by Peter J Whitehead, solicitor to the Public Trustee (NSW).

139 *Wentworth v Wentworth* (1995) 37 NSWLR 703 at 724.

140 Ibid.

141 (Unreported) New South Wales Supreme Court, Equity Division, Santow J, 27 June 1994, 3748/89 at 23.

The solicitor to the Public Trustee (NSW) has observed that this provision is controversial in the eyes of other beneficiaries and:

> I have often wondered whether it would be better to list factors to be taken into account by the Court rather than "having regard to the circumstances at the time the order is made". See Section 27(1) for a guide.

4. COURT MAY DISREGARD PERSONS WHO HAVE NOT APPLIED FOR PROVISION

Section 20 of the *Family Provision Act 1982* (NSW) provides:

> (1) On an application in relation to a deceased person, the Court may disregard the interests of any eligible persons who have not made an application in relation to the deceased person.
>
> (2) The Court shall not disregard the interests of an eligible person unless:
>
> (a) notice of the application before it and of the Court's power to disregard those interests has been served upon the eligible person in the manner and form prescribed by rules of court; or
>
> (b) the Court has determined that service of such a notice on that person is unnecessary, unreasonable or impracticable.
>
> (3) * * * * *
>
> (4) The Court shall not revoke or alter an order for provision in favour of an eligible person to allow the making of a further order for provision in favour of another eligible person unless the other eligible person shows sufficient cause for not having applied for an order for provision in his or her favour before the first mentioned order was made.

This provision enables the Court to disregard the interests of any person who is eligible to apply for family provision but who has in fact failed to do so, namely, where the notice of both the application and the power of the Court to disregard the interests of non-applicants has been served upon the non-applicant (subsection (2)(a)); and, where the Court has determined that the service of such a notice is unnecessary, unreasonable or impracticable (subsection (2)(b)). The provision is a guide to the exercise of the Court's discretion.

The purpose of this section appears to be to overcome a problem caused by a decision of Street J in *Re Bourke*,[142] which considered that a court should take into account the deceased person's duty to all eligible persons even if they had not pursued a claim at

142 [1968] 2 NSWR 453.

the time of the hearing:[143]

> The duty to the present applicant is not to be considered remote from, or unrelated to, such testamentary duties as the testatrix may be seen to have owed to other members of her family. Whether or not the members of the family to whom such testamentary duties may have been owed come forward to propound their claims is, perhaps, irrelevant. In theory it is possible for the husband or any of the other children in the present case to make a claim under the statute, assuming, of course, he or she is within the period fixed by the Act for bringing of such a claim. The fact that none has presently come forward does not justify the Court in placing aside the necessity of considering the moral duty owed to such other persons, and the prospect, albeit in the present case remote, of such other claims coming forward and having to be met. This prospect is not the ground for the decision I have reached; but it exemplifies the validity of taking into account, when determining the existence of a duty on facts such as those before me, the existence of duties owed to other persons entitled in a moral sense to share in the distribution of the estate of a testator.

The consequence of this judgment was noted in the New South Wales Law Reform Commission Report on *Testator's Family Maintenance and Guardianship of Infants Act, 1916*[144] namely, that an eligible person, who could successfully claim the whole of the estate, may not claim and consequently other eligible persons, who might otherwise have been owed a duty by the deceased person, may be denied any provision at all because the person with the stronger case did not choose to make a claim:[145]

> The effect of this decision is that if a man leaves an estate of $10,000 to the Home for Homeless Cats and leaves a widow and two needy children and the widow for religious or other reasons declines to make an application, the children will be unsuccessful in their applications because had the widow made an application she would have obtained the whole estate and so the testator had no moral duty towards the children. The Home for Homeless Cats therefore takes the whole estate.

The proposals of the New South Wales Law Reform Commission sought to allow prescribed notice to be given to possible claimants so that, if they did not respond within time, the Court could then consider the competing claims of beneficiaries and such other eligible persons as may wish to make a claim for provision:[146]

> If, in the case mentioned in paragraph 2.9.11, one of the applicant children was to give the prescribed notice to the mother and the mother did not, within the time limited by the notice, apply for provision, the Court could deal with the children's applications on the footing that the mother had not been left without adequate provision. In this way, the competing claims of the children and the charity could be determined without regard to the complicating fact of the mother's failure to apply for provision.

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143 Id at 456.

144 New South Wales Law Reform Commission *Report on the Testator's Family Maintenance and Guardianship of Infants Act, 1916* (LRC 28, 1977).

145 Id para 2.9.11.

146 Id para 2.9.12.

In *Luciano v Rosenblum*[147] the widow of the testator made a claim for family provision on the grounds that sufficient provision had not been made for her. None of the other beneficiaries made an application, so the widow moved that the Court should disregard the interests of those beneficiaries who did not make application. Powell J after noting, amongst other things, that not all beneficiaries might be eligible persons under the Act observed:[148]

> More to the point, however, it seems to me that the submission misconceives the function of s 20 of the Act. Although, as enacted, s 20 does not, in terms, follow the draft provision (ss 9(3), 9(4)) contained in the Draft Bill provided by the Law Reform Commission with its *Report on the Testator's Family Maintenance and Guardianship of Infants Act* 1916 (the Report) it is, I believe, tolerably plain that s 20 is directed to fulfilling the same function as the draft provision contained in the report. That function, as the report (LRC 28 (1977) at 37-39) makes clear, is to overcome the problems which were likely to be caused, in any particular case, by the decision of Street J, as the Chief Justice then was, in *Re M A Bourke* [1968] 2 NSWR 453; it was not directed towards enabling the court to disregard the claims of those to whom a deceased may have had a moral obligation which obligation had been adequately discharged by the provision made for that person in the deceased's will.

In *Hill v Hill* [149] Young J made reference to the purpose of section 20 and to the earlier case law in dealing with the situation of two plaintiffs claiming provision against a defendant who was a widower of the deceased person and beneficiary of the deceased person's estate. In particular, he noted that subsection (2) "does not deal with the situation where the deceased person makes adequate provision for a person to whom she owed an obligation by her will or by operation of law".[150]

It seems that, while some attempts are made by claimants to use the provisions of section 20 to their own advantage, the Courts have been consistent in maintaining the limited (and proper) application of the section.

It is perhaps worth noting that the original draft bill attached to the New South Wales Law Reform Commission's Working Paper[151] provided instead for the joinder of parties:

> 30(1) Without limiting any power of the Court, where, in proceedings under this Act, the Court is satisfied that a person who is not a party is a person whose joinder as a party is necessary or desirable to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon, the Court, on application by him or by any party or of its own motion, may, on terms, order that he be added as a party and make orders for the further

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147 [1985] 2 NSWLR 65.

148 Id 69.

149 (Unreported) New South Wales Supreme Court, Equity Division, Young J, 19 May 1997.

150 Id 10.

151 New South Wales Law Reform Commission. *Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1916* (1974).

conduct of the proceedings.

(2) A person shall not be added as a plaintiff without his consent.

A provision along these lines is in section 8 of the *Inheritance (Family Provision) Act 1972* (SA) and discussed briefly in Chapter 3 of this Report.

5. THE NATIONAL COMMITTEE'S DECISION: COURTS DISCRETION TO ORDER PROVISION

Discretion (page 13 of Drafting Instructions, Appendix 1 to this Report)

The National Committee agrees that the Court's discretion should remain unfettered except that the Court should take into account the list of matters referred to earlier in this Report in the context of the determination of "special responsibility" and in the context of the determination of whether adequate provision was provided by the deceased person to the eligible person (Chapters 2 and 4 of this Report).

The model legislation should include a provision along the lines of section 7 of the *Family Provision Act 1982* (NSW) but the provision should refer to the list of matters to be taken into account by the Court when ordering provision to be made.

Additional provision (page 13 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include a provision along the lines of section 8 of the *Family Provision Act 1982* (NSW) to enable the Court to order additional provision to be made for the maintenance, education or advancement in life of the eligible person.

Court may disregard persons who have not applied for provision (page 13 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include a provision along the lines of section 20 of the *Family Provision Act 1982* (NSW).

CHAPTER 6

THE "ESTATE" FROM WHICH FAMILY PROVISION MAY BE MADE AND ANTI-AVOIDANCE PROVISIONS

1. INTRODUCTION

As mentioned in Chapter 1 of this Report, in most jurisdictions, assets other than property available to the administrator for distribution pursuant to a will or upon an intestacy are normally beyond the Court's control for family provision purposes. In particular, assets which the deceased person has, during his or her lifetime, disposed of in order to avoid those assets being used to satisfy family provision claims of otherwise potential claimants will be beyond the reach of the Court. In those jurisdictions, the Courts are powerless to make distribution orders in relation to such property.

The following scenario demonstrates the need for anti-avoidance provisions: A owned a house in his own name. He had been married for 20 years and had children. Shortly before his death A entered a *de facto* relationship with B and transferred the title to his house to B by deed of gift. The wife and children remained living in the house. When A died, B produced the deed of gift. The wife and the children, who knew nothing of the deed of gift, were evicted. A left no other significant assets. The gift of the house put it beyond the reach of a family provision application by the wife and children.

In New South Wales, an attempt has been made to deter people from avoiding their family provision responsibilities by divesting themselves of property during their lifetime. This was achieved by the legislative enactment in 1982 of the "notional estate" provisions of the *Family Provision Act 1982* (Part 2, Division 2).[152]

In England, similar provisions have been included in the *Inheritance (Provision for Family and Dependants) Act 1975*[153] and in the United States of America in the *Uniform Probate Code*.[154]

The New Zealand Law Commission has also recently recommended anti-avoidance provisions which, on their face, appear much simpler than the New South Wales provisions.[155]

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152 The New South Wales legislation is set out in Appendix 2 to this Report.

153 *Inheritance (Provision for Family and Dependants) Act 1975* (UK) ss10-13.

154 *Uniform Probate Code* (US) ss2-201 - 2-207, particularly s2-202 which covers augmented estates.

155 *Draft Succession (Adjustment) Act* (NZ) ss52-55 as proposed in Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLC R39, August 1997) 132-133. The New Zealand provisions are set out in Appendix 3 to this Report.

2. NEW SOUTH WALES

The New South Wales Law Reform Commission proposed the concept of "notional estate" in its 1977 Report on *The Testator's Family Maintenance and Guardianship of Infants Act, 1916.*[156] The concept was derived from anti-avoidance provisions in Canada, the United States of America and England.[157]

The New South Wales Law Reform Commission was concerned that if family provision could be evaded, its effectiveness as an instrument for providing for the support of surviving members of the deceased person's family would be limited:[158]

> If it (the legislation) does not contain provisions directed at some common arrangements of property, it will not concern those with the means and the determination to obtain and follow expert advice; only the poor or the inert will be affected by it. The Act (the pre 1982 New South Wales family provision legislation) can be evaded. Property can be put outside its application in a variety of ways and often without difficulty. In some circumstances, opening a joint bank account or taking out a policy of life assurance is sufficient. Indeed one volume of English precedents contains a form for a *Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Inheritance (Family Provision) Act* 1938. This form can be adapted for use in New South Wales and to situations not involving mistresses or illegitimate children. Moreover, the use of death and estate duty avoidance schemes is widespread. Many solicitors in this State have experience and expertise in estate planning. A disposition of property which has the effect of avoiding death and estate duty will mostly operate to defeat the Act, whether or not the person making the disposition intended that result.

The New South Wales Law Reform Commission recognised that some philosophical objections could be made to the introduction of anti-avoidance provisions into the family provision scheme. Objections arise from the following queries:

* should the Courts have the power to override what would otherwise be valid dispositions of property?

* what needs to be protected: the interests of a person in arranging his or her affairs in his or her own way and the interest of a transferee of property in securing his or her title **or** the interest of a family in being maintained from the estate of the deceased person?

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156 New South Wales Law Reform Commission *Report on the Testator's Family Maintenance and Guardianship of Infants Act, 1916* (LRC 28, 1977).

157 *Draft Canadian Uniform Family Relief Act* s21; *Uniform Probate* Code (US) ss2-201 - 2-207; *Inheritance (Provision for Family and Dependants) Act 1975* (UK) ss10-13.

158 New South Wales Law Reform Commission *Report on the Testator's Family Maintenance and Guardianship of Infants Act, 1916* (LRC 28, 1977) para 2.22.2.

The New South Wales Law Reform Commission was convinced that if all dispositions of property made by a person during his or her lifetime were valid against the surviving members of his or her family, the legislation would be providing incomplete protection to the family. Nevertheless, the Commission acknowledged that, if the surviving members of the deceased person's family could claim against property disposed of by the deceased person during his or her lifetime, the legislation would be recognising a potential interest in that property which would affect its alienability and thereby adversely affect its utility and value.

The New South Wales Law Reform Commission considered that the dilemma was particularly difficult when considered from the viewpoint of the person whose property transactions might become the subject of proceedings under the new Act:[159]

> He can say with truth that if he were a spendthrift the law would not control his extravagance in his own interests or in the interests of his family. In that circumstance, why should a new Act allow the Court to interfere with what he has chosen to do with his own? Indeed, he can say that although the law obliges him to provide for the present maintenance of his wife and children, it does not oblige him to conduct his affairs on the basis that their future maintenance will be secured. Why then in proceedings under the new Act should the Court be permitted to scrutinize property transactions carried out by him in his lifetime?

The Commission also recognised that a desire to evade family provision legislation may be either blameless or blameworthy:[160]

> It may, for example, be prompted by benevolence towards a child, or malice towards a wife, or both. And, until a court rules on the question of intent, uncertainty must be present. A person making a disposition of property cannot know in his lifetime whether the disposition is legally effective and any transferee from him cannot know whether he is free from attack under the new Act. These are factors which weigh heavily against any recommendation, related to intention, for bringing disposition of property made before death within the application of the new Act.

Nevertheless, the Commission considered that a recommendation to incorporate anti-avoidance provisions in the legislation was right in principle:[161]

> There is little value in a family provision statute if it is inefficient because it can be deliberately, and easily, evaded. In proceedings following the end of a marriage by breakdown, any disposition of property can be set aside because of an intention to defeat a claim under the Family Law Act 1975 (Cth). In proceedings following the end of a marriage by death, can it be said that a like ruling is wrong? We think not.

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159 Id para 2.22.4.

160 Id para 2.22.10.

161 Ibid.

The situations the Commission had in mind included, for example, **evasion** situations:[162]

> ... where a father seeks, in favour of the children of his first marriage, to defeat the claims of his second wife or, in favour of his second wife, to defeat the claims of the children of his first marriage or, in favour of his mistress, to defeat the claims of both his wife and his children. Family relationships can give rise to endless instances where well-based, or ill-based, motives prompt attempts to evade the law. In our view, we should try to defeat these attempts when they are directed at the new Act.

Also, there are situations where a gift is made by the deceased person before his or her death which is, in all the circumstances, **unjust**:[163]

> On the other hand, experience tells us that gifts made by a person shortly before his death, and made without undue influence or for the purpose of defeating a claim for provision, can cause hardship to a family or to one or more of its members. An elderly person suffering from, say, loneliness, depression or a terminal illness may lose his sense of values and duty. His reaction to a new friendship, an act of compassion or a concern for his spiritual wants may be an overreaction which vents itself in a generosity which heeds the present to the neglect of the past: a few months of institutional care is sometimes rewarded at the expense of many years of family devotion. We cannot say how often cases of this kind occur but we believe that their incidence is such that legislation is called for. In our view, the Court should be empowered to make an appointment for provision out of property comprised in an unjust gift. And, in our terms, a gift is unjust where it is made to a person who has substantially smaller claims to the donor's bounty than has an eligible person and has the result that adequate provision cannot be made for an eligible person.

(a) Security of title

To address the "social evils" of insecure titles, the New South Wales Law Reform Commission recommended time limits for the operation of the "notional estate" provisions. They recommended in the case of **gifts** made with an intention of defeating a claim for provision, a 3 year time limit, and, in the case of an **unjust gift**, a 1 year time limit.

Other property disposed of by the deceased person in his or her lifetime was also within the New South Wales Commission's concept of "notional estate". The test to determine if other property was part of the deceased person's "notional estate" considered whether the property was disposed of by a **will substitute**. For example:[164]

> ... the arrangement under which a person retains the enjoyment and disposal of property until his death, but controls its enjoyment and disposal after his death by settlement or contract, not by will. Where such an arrangement has in it an element of bounty towards

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162 Id para 2.22.11.

163 Id para 2.22.12.

164 Id para 2.22.15.

> those taking on or after his death, there is to that extent a will substitute. It does not matter how long before his death the arrangement is made because, until his death, it is open to him to withdraw property from the arrangement: no one's well-founded expectations are defeated.

A further example of a "will substitute" is a joint bank account on which any account holder may draw:[165]

> Although the effect of death is fixed by contract, a person may at any time before his death reduce the asset of his own exclusive ownership. If he does so he has it in his power to consume the property or to dispose of it by will. The arrangement is a will substitute so far as the asset represents his own property. Again, it **does not matter how long before his death the arrangement is made. [emphasis added]**

(b) The legislation

The New South Wales Law Reform Commission's recommendations were adopted and enacted by Part 2, Division 2 of the *Family Provision Act 1982* (NSW). Those provisions are set out in Appendix 2 to this Report.

The anti-avoidance provisions are complicated and not easy to understand. However, they have been very carefully worked out, and they form an efficient and effective means of ensuring that certain objectives are met. One commentator has described the provisions as:[166]

> ... like a full orchestral equity symphony. As such I would not complain that there are "too many notes" - the Emperor's criticism of (was it?) Don Giovanni.

On the one hand the anti-avoidance provisions must ensure that it will be very difficult even for a very determined person to prevent a family provision order being made in respect of her or his estate. On the other hand, the anti-avoidance provisions must not:

> impede the normal lifetime activities of people;
>
> impede the normal administration of estates; or
>
> affect people who have received property from the person in respect of whose estate family provision is being sought except where the Court is satisfied that it is necessary and just to designate property affected by such a transaction available to satisfy a family provision application.

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165 Id para 2.22.16.

166 WA Lee, consultant to the Queensland Law Reform Commission on the Uniform Succession Laws Project, by correspondence dated 2 September 1997.

In summary, the anti-avoidance provisions are designed to prevent avoidance while having the minimum possible collateral effects, and being fair to all concerned.[167]

- ***The structure of the provisions***

  The Court is given the power to designate property as notional estate, where property has been the subject of a prescribed transaction as defined, or a distribution.

  Even if there has been a prescribed transaction, the Court may not designate property as notional estate unless the transaction reduces the value of the estate, that is, is not for value or is not for full value.

  The Court is not empowered to designate property as notional estate unless the estate is insufficient to make the family provision order which the Court deems proper, or, if there are sufficient assets in the estate, there are particular reasons why the Court deems it proper to designate property as notional estate.

  When declared to be notional estate, the property affected immediately divests from the person holding it, and becomes part of the property awarded by the Court as the subject matter of the family provision order. Thus, even if there has been a prescribed transaction or distribution, there is no notional estate unless and until the Court designates property as notional estate. Further, there are no prohibitions or penalties or negative results which flow from making a prescribed transaction other than the fact that the Court has the power in the proper circumstances to declare property notional estate and the subject of a family provision order.

  The Court will designate property as notional estate only to the extent that property is required for the family provision order to be made. So, if a large amount of property is affected by a prescribed transaction, and only a small amount of such property is required to satisfy the family provision order to be made, only that small amount of property is designated as notional estate and passes to the applicant as subject matter of the family provision order while the rest of that property remains unaffected.

  The property designated as notional estate need not be the actual property which was the subject of the prescribed transaction or distribution.

  The provisions direct the Court to be very cautious and reluctant to designate property as notional estate. The provisions contain strong and far-reaching cautions and safeguards. Thus, the Court must not, except in special

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167 For discussion see: Atherton RF "Notional Estate and the Family Provision Act" (1987) 25(2) *Law Soc J* 37; Atherton RF "The Family Provision Act 1982 (NSW): A New Deal for the Family" (1984) 58 *ALJ* 274; Certoma GL *The Law of Succession in New South Wales* (2nd ed 1992) 228-234; Dickey A *Family Provision After Death* (1992) ch 4; Mason K and Handler L *Wills Probate and Administration New South Wales* (Looseleaf) para 9013.

circumstances, designate property as notional estate unless the Court is satisfied that it is necessary and just to do so in order to satisfy a family provision application. Further, the Court must take account of settled expectations before designating property as notional estate. The anti-avoidance sections contain machinery provisions to ensure that the purposes of the legislation are achieved effectively and without unnecessary inconvenience.

The sections which form the structure of the anti-avoidance provisions are outlined below.

- ***The main provisions***

1. The crucial, central sections are sections 23, 24 and 25 of the *Family Provision Act 1982* (NSW). These sections empower the Court to designate property as notional estate.

Section 23 — Where there has been a "prescribed transaction" as defined in section 22, section 23 empowers the Court to designate property as notional estate. "Prescribed transaction" refers to a transaction made during the lifetime of the person from whose estate or notional estate the family provision order is to be made. Subsection 23(b) provides that to be a prescribed transaction, the transaction:

* must have been made within three years before the deceased person's death if the transaction was intended, wholly or in part, to deny family provision out of the person's estate; or

* must have been made within one year before the death if the transaction took place at a time when the deceased person had a moral obligation to make adequate provision for an applicant; or

* must have taken effect or must take effect on or after the death of the deceased person.

Section 24 — The Court is given the power to designate as notional estate property which has already been distributed. Distribution here refers to property distributed out of the estate of a person after his or her death;

Section 25 — Where there has been a prescribed transaction or distribution, and then there has been a subsequent prescribed transaction, the Court is given the power to

designate property as notional estate. (The Court is not to make such an order in this case unless there are special circumstances - subsection 25(2)).

Sections 23, 24 & 25

Empower the Court to designate as notional estate property which was not the property actually disposed of, as well as the property disposed of itself. Further, the property designated as notional estate need not be the property which was the subject matter of the prescribed transaction or the property distributed. There are no penalties or adverse consequences attached to entering any of the transactions mentioned in sections 23, 24 or 25. In other words, there are no penalties or adverse consequences attached to entering a prescribed transaction or making a distribution. Such transactions are effective and proper. The only consequence of the legislation is that if the requirements of sections 23, 24 or 25 are met, the Court is given the power to designate property which is the subject of the transaction, or other property, to be notional estate and so to use it to satisfy a family provision order.

2. Subsection 28(2) Only property actually needed for the family provision order may be designated as notional estate. There is no notional estate unless and until the Court designates property to be notional estate. Until then there could only have been transactions which fall within the scope of sections 23, 24 or 25, and so make it possible for the Court to designate property as notional estate.

If the Court decides that no family provision should be awarded, there is no designation of notional estate. For example, the Court may decide that there was a prescribed transaction to the value of $200,000, and that family provision amounting to $50,000 should be made in respect of the prescribed transaction. The Court will designate only $50,000 as notional estate. No other property affected by the prescribed transaction will be affected at all.

3. Section 29 When designated as notional estate, the property so designated divests from the person holding it, and that any rights to the property that the current holder of the

property may have are extinguished. The property designated at that moment becomes available for, and is disposed of by, the Court as property forming part of the family provision order.

- ***Other major provisions***

1. Restraints and cautions which restrict the Court

Section 26 — There is to be no designation unless a relevant person or estate is disadvantaged by the prescribed transaction. Section 26 limits the power of the Court to make a designation of notional estate on the ground that a transaction is a prescribed transaction. Section 26 provides that there may be no designation of notional estate on the ground that a transaction is a prescribed transaction (that is, under sections 23 or 25) unless a relevant person or estate is disadvantaged. The relevant person or estate is the person deemed to be making the prescribed transaction or an applicant or, where the person deemed to be making the prescribed transaction was not the deceased person, the estate of the deceased person.

Subsection 28(1) — The Court is not to designate property as notional estate unless the estate is insufficient, or by reason of the existence of other applicants or special circumstances, provision should not be made wholly out of the estate. It follows that usually, if the estate is large enough to satisfy the family provision order then the order should be satisfied out of the estate, and there will be no need to designate notional estate.

Subsection 27(1) — The Court is to consider the importance of not disturbing settled expectations, and the justice and merits of the order.

2. Definition of "prescribed transaction"

Section 22 — This section describes the conduct which is deemed to be a "prescribed transaction". It tries to catch any type of transaction which has the effect of, or which could be used to reduce, the net estate available to the Court to provide the subject matter of a family provision order.

Subsection 22(1) is the general provision and provides that where a person causes property to be held by another person, or subject to a trust, and full valuable consideration is not given, the person is deemed to have entered a prescribed transaction.

Subsection 22(3) deals with the situation where a person causes property to be held by another person or subject to a trust, and then the first person causes the same property to be held by another person or subject to a trust. The subsection provides that the second transaction can be a prescribed transaction.

Subsection 22(4) provides examples of prescribed transactions:

- Failure to exercise a power of appointment - subsection 22(4)(a);

- Failure to sever a joint tenancy - subsection 22(4)(b). This provision needs to be reworded and clarified in the light of *Wade v Harding*[168] and *Cameron v Hills*;[169]

- Failure to extinguish an interest under a trust - subsection 22(4)(c);

- Failure to exercise a power to nominate a person as a person to whom money payable under a policy of assurance may be paid or failure to surrender a policy - subsection 22(4)(d);

- Death of a member or participant of a body, association, scheme, fund or plan - subsection 22(4)(e);

- Entering into a contract to dispose of property from the estate of the deceased person - subsection 22(4)(f).

Subsections 22(5) and (6) refer to when a transaction is deemed to have been entered into.

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168 (1987) 11 NSWLR 551.

169 (Unreported) New South Wales Supreme Court, Probate Division, Needham J, 26 October 1989, 3442/86.

Subsection 22(7) provides that the making of a will is not a prescribed transaction (in any event, the Court has the power, in making a family provision order, to override any will.)

3. No designation unless a relevant person or estate is disadvantaged.

Section 26 This section has been described above under restraints and cautions which restrict the Court. The section limits the power of the Court to make a designation of notional estate on the ground that a transaction is a prescribed transaction unless a relevant person or estate is disadvantaged. Section 26 could equally well have been drafted as part of the definition of prescribed transaction.

4. What property is to be designated as notional estate and what priority is to be given to potential notional estate property?

Subsection 27(2) This provision lists the matters to which the Court is to have regard in determining what property should be designated as notional estate. They are: the value and nature of the property; the value and nature of any consideration given; changes in value over time; whether relevant property could have been used to produce income; and, any other relevant matter.

Subsection 28(4) This provision protects trustees. The Court will not make an order under sections 23, 24 or 25 in relation to any property other than the trust property - so, for instance, the Court may not designate property which belongs to the trustee beneficially.

5. Late applications and applications for further provision

Subsection 28(5) In relation to an application made out of time or an application for further provision, the Court must not designate notional estate unless

(a) the property is held in trust and has not vested; or

(b) there are special circumstances for making the designation.

6. Substitution of property

Section 30 This section provides that where the Court is satisfied that it is proper to do so, it may approve an offer of other property in substitution for the property designated or to be designated as notional estate. (The section gives the same power in respect of property in the estate of the deceased person.)

7. Foreign property

Section 11 This provision of the Act (discussed in another context in Chapter 9 of this Report) forms part of the scheme of anti-avoidance provisions.

(c) Evaluation

Anecdotal evidence provided to the New South Wales Law Reform Commission in 1997 suggests that the "notional estate" provisions are working well. The fact that very few notional estate cases go to court may suggest that the anti-avoidance aspects of the legislation are having an effect. One significant concern is with the complex drafting of the provision which, to any one other than a person fully versed in equity law, is fairly daunting.

3. NEW ZEALAND

The New Zealand Law Commission has proposed the inclusion of anti-avoidance provisions in its *Succession (Adjustment) Act*.[170] The provisions are similar to, albeit apparently much simpler than, the New South Wales "notional estate" provisions. The provisions would apply as an anti-avoidance mechanism only where the "will-maker" has a clear duty to do something for a potential applicant. *"Any attempt to evade that responsibility should not be viewed favourably"*.[171]

The Law Commission proposed that courts have the power to include "non-probate assets" in the estate to meet family provision claims.[172] That Commission suggested:[173]

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170 Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLC R39, August 1997). The relevant provisions are set out in Appendix 3 to this Report.

171 Law Commission (NZ) *Succession Law: Testamentary Claims* (NZLC PP24, August 1996) at para 342.

172 Id para 340 and Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLR R39, August 1997) c177 and section 52 in the draft legislation incorporated therein.

173 Law Commission (NZ) *Succession Law: Testamentary Claims* (NZLC PP24, August 1996) para 340.

> Property comprised in the following arrangements, so far as it was (or could, at the will-maker's request, have been made) available to the will-maker immediately before death, should be actually or notionally available for claims (the"non-probate assets"):
>
> * *contracts to make (or not to revoke) a will*;
> * *contracts* with a bank or other financial institution providing that an account or policy is to pass to a co-owner or a nominated beneficiary on the death of the deceased person ...;
> * *deathbed gifts (donationes mortis causa)* which the deceased person has made in contemplation of death;
> * *trusts* set up by the deceased person expressed to be revocable by the deceased person before death;
> * *beneficial powers of appointment* exercisable by the will-maker during his or her lifetime; and
> * *joint tenancies* held by the will-maker with others.

The Commission observed that such assets are not currently available to the administrator to distribute pursuant to a will or intestacy:[174]

> unless it can be established in any particular case that the transaction, although arranged during the deceased person's lifetime, was in reality a form of will disposition which fails because the formalities required in the Wills Act 1837 (UK)[175] s 9 have not been complied with.

Property should only be regarded as a "non-probate asset" if the property could have been (if the deceased person had so desired or requested) available to the deceased person immediately before his or her death.

In the draft legislation[176] attached to its Report, the Law Commission makes the following comments about the provision enabling non-probate assets to be used to satisfy distribution orders:[177]

> This section deals with what the draft Act calls the non-probate assets of the will-maker. The non-probate assets are that part of the will-maker's property which he or she owns at the date of death, and which pass to another person otherwise than by will. ... It includes joint property (where the will-maker's interest passes automatically to the other joint tenant), nominated bank accounts and insurances (the rights pass to the person named in the bank account or insurance contract), and gifts made in contemplation of death (the gifted property passes to the donee).

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174 Id para 341.

175 Certain sections of this legislation still apply in New Zealand, namely ss1, 3, 6, 9, 10, 13-31 and 33. See *Imperial Laws Application Act 1988* (NZ) Sch 1.

176 *Draft Succession (Adjustment) Act* (NZ) ss52-55 are set out in Appendix 3 to this Report.

177 Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLC R39, August 1997) c177-179.

> In nearly all cases, the will-maker could at any time during his or her lifetime have reclaimed the property. It would then have come back into the estate and been available to meet claims or applications against the estate when the will-maker dies. It would also, in many cases, have been matrimonial property available for division under the Matrimonial Property Act 1976. The section allows non-probate assets to be made available to help meet the burden of the claim. If the administrator fails to take this step, any party to the proceeding may apply to have this done ...
>
> At present, property comprised in a gift in contemplation of death *(donatio mortis causa)* may be the only part of the non-probate estate which is available under the Family Protection Act 1955 ... Nominated account arrangements are limited to amounts not exceeding $6,000 ... and may, at least for the purposes of the 1955 Act, also be included in the estate ... Similarly, in *In Re Kensington (Deceased)*, property subject to a general power of appointment that a will-maker could exercise was ruled part of the will-maker's "estate" for the Family Protection Act 1908 s 33(1) when by his will the will-maker treated the property as part of his estate: [1949] NZLR 382. ... But in principle, all non-probate assets should be available to claimants, even though technically they no longer form part of the estate when the will-maker dies. This is required in fairness to claimants, since the will-maker's obligations apply irrespective of the technical arrangements used to dispose of property upon death. It is also required in fairness to the will or intestate beneficiaries, who may otherwise bear a disproportionate burden which cannot be passed on to the successors to the non-probate assets.

4. THE "ESTATE" AND ANTI-AVOIDANCE IN OTHER AUSTRALIAN JURISDICTIONS

(a) Anti-avoidance

In Queensland, South Australia, Tasmania, Victoria, Western Australia, the Australian Capital Territory and the Northern Territory,[178] the applicant may simply make application for provision "out of the estate" of the deceased person. There are no anti-avoidance provisions.

In Victoria, it is also made clear that it is the net value of the estate which is to be taken into account.[179]

(b) Meaning of "estate"

The word "estate" in the context of family provision legislation in jurisdictions other than New South Wales will, without legislative intervention, be given its usual succession law meaning, that is, the property which passes to the executor or administrator to be

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178 *Succession Act 1981* (Qld) s41(1); *Inheritance (Family Provision) Act 1972* (SA) s7(1); *Testator's Family Maintenance Act 1912* (Tas) s3(1); *Administration and Probate Act 1958* (Vic) s91; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s6(1); *Family Provision Act 1969* (ACT) s7(1); and *Family Provision Act 1970* (NT) s7(1).

179 *Administration and Probate Act 1958* (Vic) s95.

dealt with in accordance with the law of wills or intestacy as well as the law relating to the administration of estates with respect to such matters as the payment of debts. Property which cannot be considered to be part of the estate of a deceased person includes the following:

(1) Property given away by the deceased person before death. In New South Wales this can be designated as "notional estate".

(2) Property held by the deceased person on a joint tenancy which passes to the surviving joint tenant. That is a necessary incident of the tenure of joint tenancy. The placing of property in a joint tenancy can be a major way of circumventing family provision legislation. In New South Wales property held in a joint tenancy may be designated as "notional estate" of the deceased person.

(3) Property distributed in the ordinary course of the administration of the estate. This ceases to be a part of the estate of the deceased person. Particular difficulty has been encountered where an executor appropriates part of the estate towards a trust created by the will, the executor remaining trustee. It is arguably the law that the appropriation takes the property out of the estate and subjects it to the created trust thus becoming a distribution from the estate. Nevertheless, the High Court of Australia held otherwise in *Easterbrook v Young*[180] on the wording of the 1916 New South Wales Act. But the High Court decision was not followed in Queensland in the cases of *Re Burgess*[181] and *Re McPherson*,[182] the wording of the Queensland statute being slightly different from that of the New South Wales provision.

Under the New South Wales legislation, property held by a trustee is not to be treated as having been distributed unless it is vested in the beneficiary.[183] This appears to partially override *Easterbrook v Young*.[184] This matter has been dealt with in more detail by the National Committee in its discussion on "Assumption of Trusteeship" in the context of time limits for making application for family provision (see Chapter 3 of this Report).

(4) *Donationes mortis causa*, that is, gifts made conditionally upon the donor not seeking to recover the gift before death, and becoming absolute upon death. These gifts are anomalous and do not form part of the estate of the deceased person because they do not vest in the personal representative as such.

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180 (1977) 136 CLR 308 at 324.

181 [1984] 2 QdR 379.

182 [1987] 2 QdR 394.

183 *Family Provision Act 1982* (NSW) s6(5).

184 (1977) 136 CLR 308.

However, there are statutory provisions in New Zealand[185] and Queensland[186] which reverse the rule and a statutory provision in New South Wales[187] which can reverse the rule by enabling the gift to be designated as "notional estate" of the deceased person.

(5) Property the subject of a contract to leave a specific benefit by will. Such property is seen as caught by the contract and as a specifically enforceable obligation of the estate, even though the contract has been performed by the deceased person by way of the inclusion of a specific legacy or devise in a will. This was held by the Privy Council in *Schaefer v Schuhmann.*[188]

In New South Wales, the subject matter of such a contract can, in certain circumstances, be designated as notional estate of the deceased person although to maintain that such property should be declared part of the notional estate of the deceased person one would have to show that the consideration given for the promise was illusory or grossly inadequate. The New South Wales provisions seem to cover this.[189] But if the promise is to leave the residue of the estate then that residue would possibly mean residue after all claims have been made against the estate, including any family provision claims. It would be a surprise if a court held otherwise. A legacy of residue, even if made in conformity to a promise, could not deprive all creditors of the estate of their rights. Why should it deprive those to whom statute gives rights of maintenance and support?

(6) There are also situations where property which would normally be part of the estate is made unavailable for the purposes of a family provision claim. For example, in Queensland, there is a provision in subsection 44(1) of the *Succession Act 1981* which, in effect, removes from the ambit of a family provision claim property forming part of the estate which the personal representative has utilised for the maintenance or support of the wife, husband or any child of the deceased person who was totally or partially dependent on the deceased person immediately before the death of the deceased person. This provision enables the personal representative to look after the surviving spouse and issue of the deceased person during the period immediately after death. It is consistent with the underlying policy of the legislation. In Western Australia, there is a differently worded provision, but to the same effect.[190] In the

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185 *Family Protection Act 1955* (NZ) s2(5).

186 *Succession Act 1981* (Qld) s41(12).

187 *Family Provision Act 1982* (NSW) s22.

188 [1972] AC 572.

189 *Family Provision Act 1982* (NSW) s27(2)(b).

190 *Inheritance (Family and Dependants Provision) Act 1972* (WA) s11.

Australian Capital Territory and the Northern Territory, there is a not dissimilar provision in section 20 of each Territory's *Family Provision Act*.[191]

(7) If a potential applicant has consented to the distribution of property to a beneficiary, that property cannot form part of the estate from which that consenting applicant later applies for provision.

(c) Property the subject of a power of appointment exercisable by will

In New South Wales, property which is the subject of a power of appointment in the deceased person is embraced within the concept of "notional estate".[192]

When a testator exercises a power of appointment by will, the property appointed is not part of the testator's estate; it is the property of the person who conferred the power on the testator. The testator merely points out who is to take the property the subject of the power. If the power is of the kind described as general, that is, it can be exercised by the donee of the power in favour of anyone, then the testator can deal with that property by will virtually as if it were his or her own property.

Moreover, all wills legislation provides, to use the wording of subsection 28(d) of the *Succession Act 1981* (Qld), that:

> a general disposition of all the testator's property or of all the testator's property of a particular kind includes property or that kind of property over which the testator had a general power of appointment exercisable by will and operates as an execution of the power.

In substance, the same provision, which is derived from the English *Wills Act 1837,* is found in all States and Territories.[193]

The subject matter of such a general power of appointment might indeed be the most important asset passing by virtue of the exercise of the power (whether consciously or not). For instance, a husband may leave the family home to his wife for life and after her death to such person or persons as the wife may in her absolute discretion appoint. The wife's own estate, at her death, might not be substantial. However, if, by will, she leaves "all my estate" to a certain person, the general power of appointment of the family home, conferred upon the wife by the husband's will, would be exercised by the general provision of the wife's will, even if the wife were not aware of the operation of

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191 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

192 *Family Provision Act 1982* (NSW) s22.

193 *Wills Act 1968* (ACT) s26(2)(3); *Wills, Probate and Administration Act 1898* (NSW) s23(2)(3); *Wills Act 1938* (NT) s30(1)(2); *Wills Act 1936* (SA) s30; *Wills Act 1992* (Tas) s36; *Wills Act 1958* (Vic) s25; *Wills Act 1970* (WA) s26(d).

the rule.

Family provision legislation in the Territories and New South Wales makes property the subject of a general power of appointment available as if it were part of the estate of the deceased person. For example, subsection 13(1) of the *Family Provision Act* in the Australian Capital Territory and the Northern Territory[194] provides in part:

> (1) Where -
>
> (b) the deceased person has, by [his] will, exercised a general or a special power of appointment in respect of property, being a power under which the deceased person was, immediately before [his] death, entitled to appoint the property to himself or herself ...
>
> the Court may order that provision be made out of, or charged on, the property in respect of which the deceased person has exercised the general or special power of appointment.

The remainder of the section expands considerably on this provision.

In Queensland, South Australia, Tasmania, Victoria and Western Australia there is no specific provision enabling property which is the subject of a general power of appointment to be treated as part of the testator's estate for the purpose of the legislation; but the Court may take into account the effect of any exercise of a power of appointment by the deceased person in the way in which it orders the distribution of property which does form part of the estate.

It is arguable that the subject matter of a general power of appointment does form part of the estate of the deceased person to the extent that it is appointed by the will by virtue of the wills legislation in each jurisdiction. Nevertheless, it appears to be specifically covered by subsections 26(b) and 26(c) of the *Family Provision Act 1982* (NSW).[195]

5. THE NATIONAL COMMITTEE'S DECISION (Part 6 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is in favour of the inclusion of anti-avoidance provisions based on the New South Wales provisions in the model legislation. Although the New Zealand provisions are clear and easy to follow, they are not as comprehensive as the New South Wales provisions. The New South Wales provisions have also been in operation for seventeen years and by all accounts are now well regarded within that

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194 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provision are signified in square brackets.

195 The provisions are set out in Appendix 2 to this Report.

jurisdiction.

The New South Wales legislation is expertly drafted. However, although it would present a formidable task to any legislative drafter, the National Committee believes that the provisions should be redrafted in plain English and reorganised into a format more closely following the summary set out in this Chapter of the Report.

Specifically, the anti-avoidance provisions should cover *donationes mortis causa* and it should be made clear that the subject of a general power of appointment should be included.

CHAPTER 7

PROTECTION OF DISTRIBUTIONS

1. INTRODUCTION

Where a personal representative distributes a part or the whole of the deceased person's estate before a family provision application is made, it is necessary to provide for the protection of the personal representative and of the beneficiaries to whom the distribution has been made. The States and Territories all address one or both of these matters, but in different ways.

There are some differences of substance between the provisions (which are set out under point 2 below) but the main difference is a difference in drafting. The differences of substance include the following:

(1) In all States and Territories except Queensland the protection given is dependent upon the expiration of a limitation period, which period is calculated by reference to the grant of probate or letters of administration. In Queensland, the period is expressed by reference to the date of death;

(2) Protection is given to distributions made to dependants of the deceased person in some States and Territories but not all;

(3) All States and Territories, other than Tasmania,[196] provide that the Court may make an order against a distributed estate or property.

(4) Only in Western Australia is it provided, by the *Inheritance (Family and Dependants Provision) Act 1972* (WA) subsection 20(2), that an executor or administrator is not under an obligation to inquire as to the existence of possible applicants;

(5) In Western Australia, there is a limitation in the *Inheritance (Family and Dependants Provision) Act 1972* (WA) subsection 20(3) which may adversely affect persons whose relationship with the deceased person is not determined through lawful wedlock or adoption;

(6) There is a general question of whether these provisions could not be greatly simplified by a general limitation period with which applicants must comply. There is a potential inconsistency between the desire to ensure that the estate, and all applications made in respect of it under this legislation, should be distributed and all issues settled within a convenient period of time, and the desire to enable applicants who may not be aware of their entitlement to make

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196 *Testator's Family Maintenance Act 1912* (Tas) s9(5A).

a late application. Although the legislation attempts to bridge this gap, it may well be that very careful consideration of its implications could result in much simpler legislation.

2. THE LEGISLATION

New South Wales

In New South Wales, administrators are protected by notices of distributions. Section 35 of the *Family Provision Act 1982* (NSW) provides:

> (1) Where the administrator of the estate of a deceased person has given notices in the manner and form prescribed by rules of court of the administrator's intention to distribute the property in the estate after the expiration of a specified time, the administrator may, at the expiration of the time specified in the notices or, as the case may require, in the last of the notices, distribute that property having regard only to the applications in relation to the deceased person of which the administrator has notice at the time of the distribution.
>
> (2) An administrator who distributes property in the estate of a deceased person in accordance with subsection (1) is not liable in respect of that property to any person of whose application in relation to the deceased person the administrator did not have notice at the time of the distribution.

Part 77, Rule 62 of the New South Wales *Supreme Court Rules 1970* provides:

> A notice under section 35 of the subject Act may be in or to the effect of Form 121 Schedule F.

Form 121 Schedule F reads:

> *(Notice of Intended distribution of an estate under section 92 of the Wills, Probate and Administration Act, 1898, section 11 of the Testator's Family Maintenance and Guardianship pf Children Act, 1916, section 60 of the Trustee Act 1925, and section 35 of the Family Provision Act 1982.)*
>
> (No heading or title is necessary)
>
> Any person having any claim upon the estate of (*name in capitals*) late of (*place*) (*occupation*) who died on (*date*) must send particulars of his claim to the executor (*or as the case may be*) at (*address of executor*) (*or* care of *name of solicitor*, solicitor, *address*, *and, where applicable*, or their agents, *name*, *address*) within one calendar month (or more) from publication of this notice. After that time the executor (*or as the case may be*) may distribute the assets of the estate having regard only to the claims of which at the time of distribution he has notice. Probate was (*or* Letters of administration were) granted in NSW on (*date*).

Under Part 78 Rule 91 a notice of intended distribution is to be published, if the deceased person was resident at the date of his or her death in the State, in a

newspaper circulating in the district where he or she resided. Otherwise, the notice is to be published in a Sydney daily newspaper.

Australian Capital Territory

Protection of distributions

Section 20 of the *Family Provision Act 1969* (ACT) provides:

> (1) Subject to subsection (2), notwithstanding any distribution of property forming part of the estate of a deceased person made by the administrator of the estate, the Court may, in an order under section 8 or 9A in relation to that estate, direct that provision be made for a person out of that property.
>
> (2) In an order under section 8 or 9A, the Court shall not direct that provision be made for a person out of any property that has been the subject of a distribution referred to in subsection (1) if -
>
> (a) the distribution was properly made for the purpose of providing for the proper maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before the death of the deceased person; or
>
> (b) the distribution was made -
>
> (i) more than 12 months after the date on which administration of the estate was granted; and
>
> (ii) before the administrator had notice of the application for the order or, where an application was made under section 9 for an extension of time within which an application for an order under section 8 may be made, the application under section 9,
>
> and the property that was so distributed has vested in possession of any person.

Protection of administrator

Section 21 provides:

> An action does not lie against the administrator of the estate of a deceased person by reason of his or her having distributed the whole or any part of the estate of the deceased person if the distribution was a distribution referred to in subsection 20(2) or if -
>
> (a) the distribution was made before the administrator had notice of an application for an order under this Act or notice of an application to extend the time within which such an application may be made under this Act; and
>
> (b) before making the distribution, the administrator had given notices in accordance with section 64 of the *Administration and Probate Act 1929* and the time specified in the notice or in the last of the notices for sending in claims had expired.

Section 64 of the *Administration and Probate Act 1929* (ACT) provides that an administrator may distribute the assets of an estate after the expiration of a time given by published notices inviting persons having claims against the estate to notify the administrator of them.

Northern Territory

Protection of distributions

Section 20 of the *Family Provision Act 1970* (NT) provides:

> (1) Notwithstanding any distribution of the property of the deceased person made by the administrator of the estate of the deceased person before the administrator had notice of an application for an order under section 8 made within 12 months after the date on which administration was granted, the Court may, subject to subsection (2), order that provision be made under this Act out of any property of the deceased person that has been so distributed.
>
> (2) The Court shall not make an order under sub-section (1) if the making of that order would affect or disturb a distribution that was a proper distribution made for the purpose of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before his death.

Protection of administrator

Section 21 provides:

> An action does not lie against the administrator of the estate of a deceased person by reason of his having distributed the whole or any part of the estate of the deceased person if the distribution was a distribution referred to in section 20(2) or if -
>
> (a) the distribution was made before the administrator had notice of an application for an order under this Act or notice of an application to extend the time within which such an application may be made under this Act; and
>
> (b) before making the distribution, the administrator had given notices in accordance with section 96 of the *Administration and Probate Act* and the time specified in the notices or in the last of the notices for sending in claims had expired.

Queensland and Victoria

In Queensland and Victorian family provision legislation one section protects both personal representatives who distribute and distributions made to beneficiaries. The Queensland provision differs from the Victorian provision only in that the limitation period is expressed by reference to the death of the deceased person, whereas in Victoria it is expressed by reference to the date of the grant.

Protection of personal representative and distributions

Section 44 of the *Succession Act 1981* (Qld) is virtually identical to section 99A of the *Administration and Probate Act 1958* (Vic). Section 44 provides:

(1) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate and no application or order under this part shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance or support of the wife, husband or any child of the deceased person totally or partially dependent on the deceased person immediately before the death of the deceased person whether or not the personal representative had notice at the time of the distribution of any application or intended application under this part in respect of the estate.

(2) No person who may have made or may be entitled to make an application under this part shall be entitled to bring an action against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative after the person (being of full legal capacity) has notified the personal representative in writing that the person either -

(a) consents to the distribution; or

(b) does not intend to make any application that would affect the proposed distribution.

(3) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative -

(a) not earlier than 6 months after the deceased's death and without notice of any application or intended application under section 41(1) or 42 in relation to the estate; or

(b) if notice under section 41(1) or 42 has been received - not earlier than 9 months after the deceased's death, unless the personal representative receives written notice that the application has been commenced in the court or is served with a copy of the application. [in Victoria six months after the date of the grant of probate of the will or letters of administration (as the case may be)]

(4) For the purposes of this section notice to a personal representative of an application or intention to make any application under this part shall be in writing signed by the applicant or the applicant's solicitor.

(5) However, nothing in subsection (4) shall prevent the subsequent making of an application within any other period allowed by or pursuant to this part.

South Australia

Protection of administrator

Section 14 of the *Inheritance (Family Provision) Act 1972* (SA) provides:

> (1) An administrator of the estate of a deceased person who has lawfully distributed the estate or any part thereof shall not be liable to account for that estate or that part thereof, as the case may be, to any person claiming the benefit of this Act, unless the administrator had notice of the claim at the time of the distribution.
>
> (2) For the purposes of this section, notice of the claim -
>
> (a) shall be in writing signed by the claimant or his solicitor; and
>
> (b) shall lapse and be incapable of being renewed unless, before the expiration of three months after the administrator receives notice of the claim a copy of an application by the claimant for the benefit of this Act has been served on him.
>
> (3) Subsection (1) of this section shall not prevent the Court from ordering that any provision under this Act be made out of the estate, or any part thereof, after it has been distributed.

There is no separate provision protecting distributions.

Tasmania

Protection of distributions

Tasmanian legislation does not specifically protect administrators; and it has only a brief reference to the protection of distributions. Subsection 11(4) of the *Testator's Family Maintenance Act 1912* (Tas) provides:

> (4) An application under subsection (2) of this section shall be made before the final distribution of the estate of the deceased person, and no distribution of any part of the estate made before the making of an application under that subsection shall be disturbed by reason of that application or of any order made thereon or in consequence thereof.

Western Australia

Protection of administrator

Section 20 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) which is entitled Power of Administrator to distribute provides:

> (1) No action shall lie against the Administrator by reason of his having distributed any part of the estate, if the distribution was properly made without notice of any

application or intended application under this Act in respect of the estate.

(2) For the purposes of the administration or distribution of any estate or any property no executor or administrator or trustee shall be under any obligation to inquire as to the existence of any person who could claim an interest in the estate or the property by virtue only of the provisions of this Act.

(3) No action by any person whose relationship to the deceased is not determined through lawful wedlock or adoption shall lie against the Administrator, or any trustee appointed pursuant to this Act, by reason of his having prejudiced any claim of that person under this Act by distributing any part of any estate, or any property, if the distribution was made without notice of any application or intended application by that person under this Act in respect of that estate or property.

(4) A person who makes or is entitled to make an application under this Act and who, being of full legal capacity, advises the Administrator in writing that he -

(a) consents to a proposed distribution; or

(b) does not intend to make any application under this Act that would affect a proposed distribution,

shall not bring an action against the Administrator by reason of his having thereafter distributed any part of the estate.

(5) Notice to an Administrator of an intended application shall lapse and shall be incapable of being renewed, and the Administrator may act as if he had not received the notice, if, before the expiration of three months after the date on which he first receives notice of the intention to make the application or before the sooner expiration of twelve months from the date on which the Administrator became entitled to administer the estate of the deceased in Western Australia, the Administrator does not receive notice that the application has been made to the Court; but nothing in this subsection shall prevent the subsequent making of the application.

3. THE NATIONAL COMMITTEE'S DECISION (pages 22-23 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is in favour of adopting section 35 of the *Family Provision Act 1982* (NSW) as the basis of the model legislation protection provision, but with some modifications.

Notice from personal representative to potential applicants

The personal representative should be obliged to give **public** notice to potential applicants before distributing an estate. Such a requirement is particularly important given the National Committee's decision to recommend a wide eligibility provision in the form of "special responsibility". Specific notices to individuals who the personal representative believes may be potential applicants would not be sufficient in situations

where potential applicants may in fact have had no family relationship to the deceased person.

However, the National Committee does not believe that the giving of a notice would, by itself, be sufficient to facilitate potential applicants to bring an application before distribution takes place - particularly if the notice period is relatively short as it currently is in New South Wales (1 month).

Notice from potential applicants to personal representative

In Queensland, under subsection 44(3) of the *Succession Act 1981* (Qld), a personal representative is only protected from liability for distributing the estate after 6 months from the date of the death of the deceased person having received no notice of intended applications for family provision. The National Committee believes that such a provision would provide added protection to potential applicants. In Queensland, it is generally known that potential applicants have 6 months from the date of the death to give notice of an intention to apply for family provision and that a personal representative is not protected from liability if he or she distributes the estate before that time.

National Committee proposal

The National Committee recommends the adoption of a provision combining features of section 35 of the *Family Provision Act 1982* (NSW), the rules thereunder and subsection 44(3)(a) of the *Succession Act 1981* (Qld).

The model legislation should include a provision to the effect that:

> The personal representative is to give public notice[197] to potential family provision applicants, at least 1 month before the date of intended distribution, of his or her intention to distribute the estate.

The provision should also stipulate that the personal representative will only be protected from liability for distributing the estate after 6 months from the date of death of the deceased person, having received no notice of intention to apply for family provision. In any event a person will have 12 months from the date of the death of the deceased person to bring an application for family provision under the National Committee's recommendations relating to time limits discussed in Chapter 3 of this Report.

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197 Along the lines of Part 77, Rule 62 of the New South Wales *Supreme Court Rules 1970*, Form 121 Schedule F and Part 78 Rule 91 of the New South Wales *Supreme Court Rules 1970*. Obviously, the model legislation would refer to the capital city of the State or Territory in which the legislation is enacted rather than "Sydney", in the equivalent provision to Part 78 Rule 91.

The National Committee is also in favour of the introduction of a provision along the lines of subsection 44(1) *Succession Act 1981* (Qld) protecting personal representatives who make early payments for maintenance and support to certain dependants of the deceased person. The National Committee would like the persons to whom such payments could be made to be described in terms such as: persons who were wholly or substantially dependant upon the deceased person.

The Western Australian additional concerns referred to in part 1 of this Chapter are addressed by the protection of distribution provisions in the New South Wales legislation.

CHAPTER 8

CONTRACTING OUT

1. INTRODUCTION

It was held early on that the rights given by family provision legislation were inalienable and that it was contrary to public policy to hold a person disentitled to relief merely because that person had entered into some agreement with the deceased person.[198] Similarly, it is regarded as contrary to public policy to give effect to a provision in a will that a benefit will be forfeited if the beneficiary contests the will.[199] In New South Wales there is a specific provision enabling a person to contract out of the jurisdiction.[200]

A brief discussion of the New South Wales provision is set out below.

2. THE LEGISLATION

Section 31 of the *Family Provision Act 1982* (NSW) provides:

> (1) A reference in this section to a release by a person of the person's rights to make an application in relation to a deceased person is a reference to a release by a person of such rights, if any, as the person may have to make such an application and includes a reference to:
>
> (a) an instrument executed by the person which would be effective as a release of those rights if approved by the Court under this section; and
>
> (b) an agreement to execute such an instrument.
>
> (2) A release by a person of the person's rights to make an application in relation to a deceased person has no effect except as provided in subsection (3).
>
> (3) A release by a person of the person's rights to make an application in relation to a deceased person, being a release in respect of which the Court has given its approval under this section, shall have effect to the extent to which the approval has been given and not revoked and shall, for the purposes of this Act, be binding on the releasing party.
>
> (4) Proceedings for the approval of a release of rights to make an application in relation to a deceased person may be commenced before or after the death of the person.

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198 *Lieberman v Morris* (1944) 69 CLR 69.

199 *In Re Chester, Deceased* (1978) 19 SASR 247; *Shah v Perpetual Trustee Co* (1981) 7 Fam LR 97.

200 *Family Provision Act 1982* (NSW) s31.

> (5) **In proceedings for the approval of a release, the Court shall have regard to all the circumstances of the case, including whether:**
>
> **(a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release;**
>
> **(b) it is or was, at that time, prudent for the releasing party to make the release;**
>
> **(c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable; and**
>
> **(d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.**
>
> (6) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a deceased person.
>
> (7) Except as provided in subsections (8) and (9), the Court shall not revoke its approval of a release given under this section.
>
> (8) The Court may revoke its approval of a release given under this section if it is satisfied:
>
> (a) that its approval was obtained by fraud; or
>
> (b) that the release was obtained by fraud or undue influence.
>
> (9) The Court may revoke its approval of a release given under this section or that approval in so far as it affects the whole or part only of the estate or notional estate of a deceased person if it is satisfied that all such persons as, in the opinion of the Court would be sufficiently affected by the revocation of the approval, consent to the revocation. [emphasis added]

No other jurisdiction has a provision specifically recognising a contracting out agreement.

The gist of the New South Wales provision is that a person may release rights to make an application by instrument or by an agreement to execute an instrument.[201] The release must be approved by the Court and only has effect to the extent of the Court's approval.[202] Proceedings seeking the Court's approval for a release of rights to make an application may be commenced before or after the death of the deceased person - that is, the instrument or agreement may be made before death but approval of the Court left to be sought after death.[203]

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201 Id s31(1).

202 Id s31(2),(3).

203 Id s31(4).

The Court may approve of a release both in respect of the estate and the notional estate of the deceased person.[204]

The remainder of the section enables the Court to revoke its approval in given circumstances.

The New South Wales Law Reform Commission has consulted with experts in the area of family provision who indicate that the New South Wales contracting out provisions work well and are helpful in resolving disputes between relevant parties before death.

Atherton has noted that there have been few requests for approval of releases under section 31 of the *Family Provision Act 1982* (NSW).[205]

Atherton's conclusion is:[206]

> On balance, it is considered that the court *should* be able to review matters, notwithstanding an agreement and that the court should consider the agreement, if any, in assessing the question of the adequacy of provision. Therefore it is submitted that *no* power to release rights be included in the legislation. Instead it is recommended that it be made clear that an order can be made notwithstanding an agreement to the contrary and, if a list of criteria is included to assist the court in assessing an application, then the fact of any agreement ought to be included as a matter relevant to the assessment of the application.
>
> However, it is recognised that the question whether to include a power to contract out of the legislation may to some extent be influenced by decisions in relation to other issues. For example the wider the group of eligible applicants, and the wider the grounds for the assessment of applications, the more compelling may become arguments to include a power to contract out of the legislation in order to provide some mechanism for providing certainty. Examples of situations which most readily come to mind when such arrangements may be entered into include: the termination of relationships (lawful marriage, *de facto* relationships, including homosexual relationships), where the agreement is between the parties (as in *Gallagher v Gallagher*); the termination of relationships where the agreement includes the partners and the adult children (as in *McMahon v McMahon*); the commencement of new relationships (particularly second or later marriages) where the agreement is between the spouses (as in *Lieberman v Morris*); the commencement of new relationships, where the agreement is between one or both of the partners and the adult children of either or both partners.
>
> If the legislation is given a more limited role in relation to adults (apart from spouses) the question of certainty, it is suggested, is not such a problem. In such a case the principal area of concern is likely to be the termination of relationships and a limited power could be included, for example limited to dissolution of marriage (and the termination of *de facto* relationships).

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204 Id s31(6).

205 Atherton RF *Family Provision* (Victorian Attorney-General's Law Reform Advisory Council Expert Report 1, 1997) para 5.37.

206 Id paras 5.38-5.40.

Recommendations

- No power to contract out of the legislation should be included.
- An order should be capable of being made notwithstanding an agreement to the contrary;
- If a list of criteria is included to assist the court in assessing an application, then the fact of any agreement should be included as a matter relevant to the assessment of the application.

3. THE NATIONAL COMMITTEE'S DECISION (page 28 of Drafting Instructions, Appendix 1 to this Report)

The National Committee was conscious of the possibility of undue pressure being placed upon some people to contract out of future entitlements under family provision legislation. However, the significant advantages of such a procedure was seen to outweigh that possibility, particularly in light of the wider group of eligible applicants envisaged by the National Committee's proposed scheme. In particular, the advantages to parties in settling family affairs were acknowledged. Furthermore, the procedure could be very straightforward and inexpensive - with most approvals being done on the papers.

The National Committee is in favour of permitting court authorisation of contracting out and supports the inclusion of a provision along the lines of section 31 *Family Provision Act 1982* (NSW) in the model legislation.

CHAPTER 9

ORDERS AND VARIATIONS OF ORDERS

1. CONSEQUENTIAL AND ANCILLARY ORDERS

To give full effect to an order for family provision in New South Wales, section 15 of the *Family Provision Act 1982* (NSW) empowers the Court to make certain consequential or ancillary orders. These include an order for the transfer or sale of property, an order for the management of property in the deceased person's estate or notional estate, an order for the execution of documents, and "such other orders with respect to such other matters as the Court thinks necessary".

(a) The legislation

Section 15 of the *Family Provision Act 1982* (NSW) reads:

> (1) To enable effect to be given to an order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person), the Court may:
>
> (a) make orders for or with respect to all or any of the following matters:
>
> (i) the transferring of property in the estate or notional estate directly to the person in whose favour the order for provision is made or to any other person as trustee for that person;
>
> (ii) the constituting of a person by whom property in the estate or notional estate is held as a trustee of that property;
>
> (iii) the appointing of a trustee of property in the estate or notional estate;
>
> (iv) the powers and duties of any trustee of property in the estate or notional estate;
>
> (v) the vesting in any person of property in the estate or notional estate;
>
> (vi) the exercising of a right or power to obtain property for the estate or notional estate;
>
> (vii) the selling of, or other dealing with, property in the estate or notional estate;
>
> (viii) the disposing of the proceeds of any sale or other realising of property in the estate or notional estate;
>
> (ix) the securing, either wholly or partially, of the due performance of an order under this section;
>
> (x) the managing of property in the estate or notional estate;

(xi) the executing of any necessary conveyance, document or instrument, the producing of such documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of an order; and

(b) make such other orders with respect to such other matters as the Court thinks necessary.

(2) The provisions of section 78 (except subsection (1)) and 79 of the Trustee Act 1925 apply to and in relation to an order under subsection (1) for the vesting of the property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, in the case of section 78 (2) of that Act, as if the provisions of subsection (1) and the other provisions of this Act relating to the making of orders under this Act were contained in Part 3 of that Act.

(3) Where an order under subsection (1) provides for the payment of money, interest is not payable unless the Court specifically provides that the money shall bear interest.

A solicitor at the Public Trustee (NSW) has noted that concern has often been raised as to the oversight of the parties or Court in making orders attracting interest especially as to legacies.[207] In this respect there is an interplay with section 14 ("Effect of order for provision out of estate of deceased person"). The solicitor observes:[208]

> If a legacy is ordered and under Section 14 is deemed to be a Codicil to the Will, it is arguable that interest may run for an adult as from 1 year from date of death at the statutory rate of 8%. My recommendation would be that section 15(3) be made more clear to avoid arguments, or the current Section 15(3) be given more prominence by a separate Section and Heading.

(b) The National Committee's Decision: Consequential and ancillary orders (page 24 of Drafting Instructions, Appendix 1 to this Report)

Elsewhere in this Report the National Committee has recommended that the model legislation should not deal with the question of whether a family provision order should be treated as a legacy under the will and whether or not interest should be paid on a legacy (Chapter 10).

The model legislation should include a provision along the lines of section 15 of the *Family Provision Act 1982* (NSW) with the exception of subsection (3) which should not be included. The content of subsection 15(3) is adequately addressed by the National Committee's revised subsection 11(1)(d) (see ***Contents of orders*** below).

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207 Submission to New South Wales Law Reform Commission by Peter J Whitehead, solicitor to the Public Trustee (NSW).

208 Ibid.

2. CONTENTS OF ORDERS

Family provision legislation details matters such as the contents of an order which the Court may make (including from which beneficiaries' shares in the estate the provision is to be made), the effect of an order, the variation of orders, and, occasionally, refers to inter-State matters. The provisions quoted below encapsulate the difficulties attending those seeking uniformity of the law, because they often differ considerably in the expression of the legislative intent without differing greatly in substance. To choose the best provision is likely, therefore, to be a subjective exercise, dictated by preference for one drafting style over another, one's opinion concerning the appropriate amount of detail required, and perhaps merely a conviction that the legislation of one's own State should be adopted for uniformity purposes unless there is a convincing demonstration of its inadequacy.

(a) The legislation

The provisions referred to below differ mostly in the fact that some are drafted in greater detail than others. There is also the difference that in some States and Territories the Court is required to include certain matters in its order, whereas in other States the Court may include certain matters.

New South Wales

Section 11 of the *Family Provision Act 1982* (NSW) provides:

> (1) An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may:
>
> (a) require the provision to be made in any 1 or more of the following manners:
>
> (i) by way of a lump sum;
>
> (ii) by way of a periodic sum;
>
> (iii) by way of specified existing or future property;
>
> (iv) by way of an absolute interest, or a limited interest only, in property;
>
> (v) by way of property set aside as a class fund for the benefit of 2 or more persons;
>
> (vi) in any other manner which the Court thinks fit;
>
> (b) be in respect of property which is situated in or outside New South Wales at the time of, or at any time after, the making of the order, whether or not

the deceased person was, at the time of death, domiciled in New South Wales;

(c) specify the manner in which a sum of money or other property is to be paid or made available to the person in whose favour the order is made;

(d) where provision is required to be made by way of a sum of money, specify that the whole or any part of the sum shall bear interest at such rate as the Court thinks fit for such period as the Court thinks fit; and

(e) be made subject to such conditions as the Court thinks fit.

(2) * * * * *

Australian Capital Territory and Northern Territory

Subsection 11(1) of the *Family Provision Act* in each Territory[209] provides:

(1) An order under section 8 or 9A [section 8] shall specify the amount and nature of the provision, if any, to be made [provision to be made for the person in whose favour the order is made] and may specify such conditions, restrictions and limitations subject to which the provision is to be made as the Court thinks fit to impose.

Queensland

Subsection 41(2) of the *Succession Act 1981* (Qld) provides:

(2) The court may -

(a) attach such conditions to the order as it thinks fit; or

(b) if it thinks fit - by the order direct that the provision shall consist of a lump sum or a periodical or other payment; ...

South Australia

Subsections 7(4), (5) and (6) of the *Inheritance (Family Provision) Act 1972* (SA) provide:

(4) The Court may, in making any order under this Act, impose such conditions, restrictions and limitations as it thinks fit.

(5) If, in respect of an application under subsection (1) of this section, it appears to the Court that the matter would be more appropriately determined by proceedings outside the State, the Court may (without limiting the powers conferred on it by the

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209 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provisions are signified in square brackets.

preceding provisions of this section) refuse to make an order under this section or adjourn the hearing of the application for such period as the Court thinks fit.

(6) In making the order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments or a lump sum and periodic or other payments.

Tasmania

Subsection 9(1) of the *Testator's Family Maintenance Act 1912* (Tas) provides:

Every order under this Act making provision for any person shall specify, *inter alia* -

(a) the amount and nature of such provision;

(b) the manner in which such provision shall be made; or be raised or paid, out of some, and what, part of the estate of the deceased person;

... and

(d) any conditions, restrictions, or limitations imposed by the Court or judge.

Victoria

Subsection 97(1) of the *Administration and Probate Act 1958* (Vic) provides:

Every order under this Part making provision for any widow widower or child shall specify (inter alia) -

(a) the amount and nature of the provision;

(b) the manner in which the provision shall be raised or paid out of some and what part or parts of the estate of the deceased; and

(c) any conditions restrictions or limitations imposed by the Court.

Western Australia

Subsections 6(3) and (4) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provide:

(3) The Court may attach such conditions to the order as it thinks fit...

(4) In making any such order the Court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

(b) The National Committee's Decision: Contents of orders (pages 24-25 of Drafting Instructions, Appendix 1 to this Report)

The model legislation should include a provision along the lines of subsection 97(1) of the *Administration and Probate Act 1958* (Vic) which provides that an order for family provision **shall** include certain matters, namely:[210]

* the amount and nature of the provision;

* the manner in which the provision shall be raised and paid out of some and what part or parts of the estate of the deceased person; and

* any conditions restrictions or limitations imposed by the Court;

The same model legislation provision should include a list of matters which the Court **may** include in an order, based upon section 11 of the *Family Provision Act 1982* (NSW) except that subsections 11(1)(c) and (d) should be matters which the Court **must** specify.

Such a provision should assist the Court and practitioners and will ensure that the Court addresses significant matters which it otherwise may have disregarded. For example, unless such a list is included, Courts may be reluctant to make periodic orders or orders on terms.

The provision to be included in the model legislation should be along the following lines:

an order for family provision **shall** specify certain matters, namely:

* the amount and nature of the provision

* the manner in which the provision shall be raised and paid out of some and what part or parts of the estate of the deceased person;

* any conditions restrictions or limitations imposed by the Court;

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210 Subsection 97(2) of the *Administration and Probate Act 1958* (Vic) reads:

> Unless the Court otherwise orders the burden of any such provision shall as between the person beneficially entitled to the estate of the deceased be borne by those persons in proportion to the values of their respective estates and interests in such estate:
>
> Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this sub-section be separately valued but the proportion of the provision made under this Part to be borne by such property shall be raised out of or charged against the corpus of such property.

* the manner in which a sum of money or other property is to be paid or made available to the person in whose favour the order is made; and

* where provision is required to be made by way of a sum of money, the whole or any part of the sum which is to bear interest at such rate as the Court thinks fit for such period as the Court thinks fit.

an order for family provision **may** specify certain matters, namely:

* that the provision is to be made in any 1 or more of the following manners:

  (i) by way of a lump sum;

  (ii) by way of a periodic sum;

  (iii) by way of specified existing or future property;

  (iv) by way of an absolute interest, or a limited interest only, in property;

  (v) by way of property set aside as a class fund for the benefit of 2 or more persons;

  (vi) in any other manner which the Court thinks fit;

* that in respect of property which is situated in or outside [insert jurisdiction] at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of death, domiciled in [insert jurisdiction].

3. CLASS FUNDS

Detailed provisions respecting orders made in favour of a class of beneficiaries are found in States and Territories other than Queensland, South Australia and Victoria. The class funds appear to have as their factual focus the infant children of the deceased person.

The provisions are all very similar in intent with just variations in wording. It may be possible to abridge the provisions substantially.

It is unlikely that the Courts in jurisdictions where there is no similar provision cannot create by order appropriate trusts for classes of beneficiaries.

The language of the provisions derives from traditional trust precedents and is perhaps not as broad as it might be. For example, the insistence of the legislation that the beneficiaries of the class fund must be specified, rather than described as a class, could place an unnecessary limitation on the order, for instance if there were a member of the class not known about at the time of making the order, for instance a child believed to be dead, or an illegitimate child of whose existence the legitimate children of the deceased person were unaware. A larger issue is whether such detailed provisions are needed. The legislation could be expressed in detailed terms, or it might be expressed in much shorter, more abstract, terms.

(a) The legislation

New South Wales

Section 12 of the *Family Provision Act 1982* (NSW) provides:

> (1) Where the Court makes an order for provision requiring the provision to be made by way of property set aside as a class fund, it shall specify a trustee of the property so set aside.
>
> (2) The trustee of property set aside as a class fund may, subject to such directions and conditions as the Court gives or imposes, but otherwise as the trustee thinks fit, apply from time to time the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life of the persons for whose benefit the fund is held, or any one or more of them to the exclusion of the other or others of them, in such shares and in such manner as the trustee, from time to time, determines.

Australian Capital Territory and Northern Territory

Section 12 of the *Family Provision Act* in each Territory[211] provides:

> (1) Without limiting the powers of the Court under this Act, the Court may order that an amount specified in the order be set aside out of the estate of the deceased person and held on trust as a class fund for the benefit of 2 or more persons specified in the order in whose favour orders for provision out of the estate of the deceased person have been made.
>
> (2) Where an amount is ordered to be held in trust as a class fund, the trustee of the fund shall invest so much of the amount as is not applied [he does not apply] in accordance with this subsection and may, subject to such directions or conditions as the Court gives or imposes, but otherwise as the trustee [he] thinks fit, apply the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life [for the benefit] of the persons for whose benefit the class fund is held, or any 1 or more of them to the exclusion of the other or others of them in such shares and in such manner as the trustee,

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211 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provisions are signified in square brackets.

from time to time, determines.

(3) Where 1 or more of the persons for whose benefit moneys are held in trust as a class fund dies, a reference in subsection (2) to the persons for whose benefit moneys are held in trust as a class fund shall, after the death of that person, be read as a reference to the survivor or survivors of those persons.

(4) Where an amount is set aside as a class fund, the administrator of the estate of the deceased person shall, unless the Court otherwise orders, be the trustee of the class fund.

Tasmania

Section 10 of the *Testator's Family Maintenance Act 1912* (Tas) provides:

(1) Without prejudice to the powers conferred on the Court or a judge under any other provision of this Act, the Court or a judge may order that any amount specified in an order made on an application under subsection (1) of section three shall be set aside out of the estate to which the order relates and held on trust as a class fund for the benefit of two or more persons specified in the order (being persons who are entitled under section three A to make an application under that subsection).

(2) Where an amount is ordered to be held on trust as a class fund for any persons, pursuant to this section, that amount shall be invested, and the trustee may -

(a) in his discretion but subject to such directions and conditions as the Court or judge may give or impose, apply the income and capital of that amount, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance or education (including past maintenance or education provided after the death of the deceased person), or the advancement or benefit, of those persons or of any one or more of them to the exclusion of the other or others of them, in such shares and proportions, and generally in such manner, as the trustee thinks fit; and

(b) so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.

(3) For the purposes of this section, the expression "trustee" means the executor or administrator of the estate of the deceased person unless the Court or judge appoints any other trustee (whether by the order creating the class fund or subsequently), in which case it means the trustee so appointed.

(4) If the trustee is not the executor or administrator of the estate of the deceased person, the Court or judge may give such directions as it or he thinks fit relating to the payment to the trustee of the amount that is to be held on trust as a class fund, and may exercise any power conferred on the Court by section forty-seven of the *Trustee Act 1898*, either on the creation of the class fund or at any time during the continuance of the trusts thereof.

Western Australia

Section 13 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provides:

> (1) The Court may, if it thinks fit, order that an amount specified in the order shall be set aside out of the estate and held on trust as a class fund for the benefit of two or more persons specified in the order, being persons for whom provision may be made under this Act.
>
> (2) Where an amount is ordered to be held on trust as a class fund for any persons under subsection (1) of this section, that amount shall be invested and the trustee may at his discretion, but subject to such directions and conditions as the Court may give or impose, apply the income and capital of that amount, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance, support or education (including past maintenance, support or education provided after the death of the deceased) or the advancement or benefit of those persons, or any one or more of them to the exclusion of the other or others of them in such shares and proportions and generally in such manner as the trustee from time to time thinks fit; and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.
>
> (3) For the purposes of this section the term "trustee" means the Administrator, unless the Court appoints any other trustee, whether by the order creating the class fund or subsequently, in which case it means the trustee so appointed.
>
> (4) If the trustee is not the Administrator, then the Court may give such directions as it thinks fit relating to the payment to the trustee of the amount which is to be held on trust as a class fund and may exercise any power under section 89 of the Trustees Act, 1962, either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

(b) **The National Committee's Decision: Class funds** (page 25-26 of Drafting Instructions, Appendix 1 to this Report)

The National Committee was in favour of leaving orders in favour of classes of beneficiaries to the discretion of the Court. In jurisdictions other than New South Wales which do not have a provision similar to section 12 of the *Family Provision Act 1982* (NSW) there do not appear to be any difficulties faced by the Courts in making orders appropriate to classes. The terms of section 11 (as discussed and amended in ***Contents of orders*** (above)) would be sufficient to allow the Court to make an order in favour of a class of beneficiaries. Therefore there is no need for a provision along the lines of section 12 of the *Family Provision Act 1982* (NSW).

4. WHICH BENEFICIARIES' SHARES MUST BEAR THE BURDEN OF THE ORDER?

The legislation specifies which beneficiaries' shares must bear the burden of any order.

It is arguable that some of the provisions referred to in (a) below are over lengthy and perhaps reflect very particular issues which preoccupied the minds of the legislators concerned with the legislation in its early days. For instance, life interests are probably not found as often these days as they used to be, and it may be the case that orders against life tenants and remaindermen are so infrequent that it is hardly worth making a specific provision for the apportionment between them of the burden of the order. The Court could be given power expressed in sufficiently general language to cover that situation and other cases.

It could also be argued that there is no longer any need to include a provision that the burden be borne proportionately by beneficiaries unless the Court otherwise orders. These provisions were inserted into the legislation in early years in order to counter Court decisions in New Zealand to the effect that the burden of the order should fall on the residue of the estate. The statutory rule involves valuing the share of every beneficiary and is therefore a rule which is unlikely to be applied often. Existing provisions about the effect of a Court order seem to imply that the order must attend to the entire scheme of benefits created by any will, intestacy and order.

(a) The legislation

New South Wales

Section 13 of the *Family Provision Act 1982* (NSW) provides:

> **Where the Court makes an order for provision out of the estate of a deceased person it may specify the beneficial entitlements in that estate which shall bear the burden of that provision and, in relation to each of those entitlements, the part of the burden which it shall bear.**

Australian Capital Territory and Northern Territory

Subsections 11(2) and (3) of the *Family Provision Act* in each Territory[212] provide:

> (2) **Unless the Court otherwise orders, the burden of the provision ordered by the Court to be made for the benefit of a person shall, subject to subsection (3) [subsection (1)] be borne between the persons beneficially entitled to the estate**

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212 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provisions are signified in square brackets.

of the deceased person (other than the person or persons in whose favour an order or orders under this Act is or are made), in proportion to the values of their respective interests in the estate.

(3) Where persons are successively entitled to estates or interests in any property that is settled by the will of the deceased person, those estates and interests shall not, unless the Court otherwise orders, be valued separately but the proportion of the provision required by subsection (2) to be borne by those persons out of those estates and interests shall be raised or charged against the corpus of that property.

Section 15 goes on to provide:

(1) The Court may, when making, [an order under section 8 or at any time after having made an order under that section] or at any time after having made, an order under section 8 or 9A order a person who is entitled to a share in the estate of the deceased person as a legatee, devisee or beneficiary to pay a lump sum or periodical payments, or a lump sum and periodical payments, to represent, or in commutation of, such proportion of the provision ordered to be made for the person in whose favour the order is made as falls upon the legatee, devisee or beneficiary, and may exonerate the property or a specified part of the property to which the legatee, devisee or beneficiary is entitled from further liability in respect of that provision.

(2) Where the Court makes an order under subsection (1), the Court may direct -

(a) the manner in which a lump sum or periodical payment is to be secured;

(b) the person to whom such a lump sum or periodical payment is to be made; and

(c) in what manner, if any, the lump sum or periodical payment is to be invested for the benefit of the person in whose favour the order under section 8 or 9A [section 8] has been made.

Queensland

Subsections 41(3), (4) and (5) of the *Succession Act 1981* (Qld) provide:

(3) The incidence of the payment or payments ordered shall, unless the court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the court.

(4) The court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.

(5) The court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which the beneficiary is interested ...

South Australia

Subsections 9(2) and (3) of the *Inheritance (Family Provision) Act 1972* (SA) provide:

> (2) Subject to subsection (3) of this section and unless the Court otherwise orders, the burden of any such provision shall, as between the persons beneficially entitled to the estate of the deceased person, be borne by those persons in proportion to the values of their respective interests in the estate.
>
> (3) Where the deceased person died leaving a will under which two or more persons are successively entitled to any property, the successive interests shall not, unless the Court otherwise orders, be separately valued for the purposes of subsection (2) of this section, but the proportion of the provision to be borne by that property shall be raised or charged against the *corpus* thereof.

Tasmania

Section 10A of the *Testator's Family Maintenance Act 1912* (Tas) provides:

> (1) The incidence of any payment directed to be made by an order under this Act shall, unless the Court or a judge otherwise orders, fall ratably upon the whole estate of the deceased person, or, where the authority of the Court does not extend or cannot be made to extend to the whole estate, ratably upon such part of the estate as is subject to the authority of the Court.
>
> (2) The Court or a judge may exonerate any part of the estate of a deceased person from the incidence of an order under this Act, after hearing such of the parties who may be affected by the exoneration as the Court or judge thinks necessary, and may, for that purpose, direct any executor or administrator to represent, or appoint any person to represent, any of those parties.
>
> (3) The Court or a judge may, at any time, fix a periodical payment or lump sum to be paid by any beneficiary in the estate of the deceased person to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which that beneficiary is interested, and may exonerate that portion from further liability, and may direct in what manner the periodical payment shall be secured, and to whom the lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment is payable.

Victoria

Subsection 97(2) of the *Administration and Probate Act 1958* (Vic) provides:

> (2) Unless the Court otherwise orders the burden of any such provision shall as between the person beneficially entitled to the estate of the deceased be borne by those persons in proportion to the values of their respective estates and interests in such estate:

> Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this sub-section be separately valued but the proportion of the provision made under this Part to be borne by such property shall be raised out of or charged against the corpus of such property.

Western Australia

Subsections 14(2) and (3) and section 17 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provide:

> 14(2) Subject to subsection (3) of this section, and unless the Court otherwise orders, the burden of any provision shall, as between the persons beneficially entitled to the estate of the deceased, be borne by those persons in proportion to the value of their respective interests in such estate.
>
> 14 (3) The estates and interests of persons successively entitled to any property which is settled by the will of a testator shall not, for the purposes of this section, be separately valued, but the proportion of the provision to be borne by such property shall be raised or charged against the corpus of such property.
>
> 17 Where the burden of any provision ordered to be made falls upon the portion of the estate to which any person would, apart from that order, be entitled under the will or on intestacy, the Court may determine that a periodic payment or a lump sum shall be set aside or appropriated to represent or in commutation of such proportion of the provision ordered to be made as falls upon that portion of the estate, and thereupon -
>
> (a) the Court may exonerate such portion from all or any further liability;
>
> (b) the Court may direct in what manner the periodic payment shall be secured and to whom any lump sum shall be paid;
>
> (c) the Court may give directions as to the manner in which any moneys accruing shall be invested for the benefit of the person in whose favour the provision is made.

(b) **The National Committee's Decision: Which beneficiaries' shares?** (page 26 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is in favour of the model legislation including a provision along the lines of section 13 of the *Family Provision Act 1982* (NSW) enabling the Court to make a general order about the distribution and a minor order about who is to bear the burden of the distribution. All would not then depend on a general order of the Court.

5. EFFECT OF THE ORDER

All jurisdictions except Queensland currently contain provisions as to the effect of the order.

(a) The legislation

New South Wales

Section 14 of the *Family Provision Act 1982* (NSW) provides:

> (1) An order made by the Court for provision out of the estate of a deceased person (whether or not an order made in favour of an eligible person) shall, except in so far as the Court otherwise directs, take effect as if the provision had been made:
>
> (a) where the deceased person died leaving a will - in a codicil to the will; or
>
> (b) where the deceased person died intestate - in a will of the deceased person.
>
> (2) The Court shall not direct that an order for provision out of the estate of a deceased person shall take effect otherwise than in the manner referred to in subsection (1) unless it is satisfied that compliance with the order will not adversely affect any creditor of the deceased person.

Australian Capital Territory and Northern Territory

Section 16 of the *Family Provision Act* in each Territory[213] provides:

> (1) Subject to subsection (2), an order under section 8 operates as if it were a codicil to the will of the deceased person executed by the deceased person immediately before his death.
>
> (2) An order under section 8 in relation to property of a deceased person who died intestate operates as a modification of the provisions of Part IIIA of the *Administration and Probate Act 1929* in its application to that property. [Division 4 of Part III of the *Administration and Probate Act* in their application to that property].

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213 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provisions are signified in square brackets.

South Australia

Section 10 of the *Inheritance (Family Provision) Act 1972* (SA) provides:

> Every provision made by an order shall, subject to this Act, operate and take effect as if it had been made -
>
> (a) if the deceased person died leaving a will, by a codicil to that will executed immediately before his death; or
>
> (b) if the deceased person died intestate, by a will executed immediately before his death.

Victoria

Subsection 97(4) of the *Administration and Probate Act 1958* (Vic) provides:

> Every order made by the Court under this Part shall subject to the provisions of this Part operate and take effect -
>
> (a) where the deceased dies leaving a will disposing of the whole or any part of his estate - as if the provision made by the order had been made by the deceased by executing a codicil to his will immediately before his death; or
>
> (b) where the deceased dies without leaving a will - as a modification of the provisions of Division 6 of Part I of this Act in respect of so much of the estate of the deceased as is affected by the order.

Western Australia

Section 10 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) provides:

> Every provision made by an order shall, subject to this Act, operate and take effect either as if the same had been made by a codicil to the will of the deceased executed immediately before his death or, in the case of intestacy, as a modification of the applicable rules of distribution.

(b) The National Committee's Decision: Effect of order (page 26 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is in favour of the inclusion in the model legislation of a provision along the lines of subsection 14(1) of the *Family Provision Act 1982* (NSW) in relation to the effect of the order. The provision will be particularly useful in relation to the order of the payment of debts. Only Queensland is currently without such a provision.

Subsection 14(2) of the *Family Provision Act 1982* (NSW) draws attention to the rules which govern how creditors of a deceased person are to be paid. For instance, if a deceased person devised mortgaged property, the making of a family provision order with respect to that property could not adversely affect the lender's security interest in that property. It is hard to see how a family provision order could affect a secured or an unsecured creditor's rights. The payment of creditors cannot be deferred - but the payment of legacies can. Creditors can be paid out of the general legatees' fund. The provision appears to be misconceived although it might have been intended to read along the following lines:

> In making an order the Court must take into account the manner in which any asset the subject of an order may be liable for the payment of any debt of the deceased person.

Nevertheless, the National Committee sees no need to retain subsection 14(2). It should not be included in the model legislation.

6. PROBATE AND LETTERS OF ADMINISTRATION

In some jurisdictions, a certified copy of the order is endorsed on, or annexed to, the grant of probate or letters of administration.

It is sometimes said that the family provision jurisdiction does not enable the Court to make a new will for a person. The provisions referred to below may give the superficial appearance that the Court can make a new will; but it is clear that the order which the Court may make is constrained by many factors. However, the provisions represent a convenient way of encapsulating the Court's order in the context of any will or intestacy.

The jurisdictions differ in the context of intestacy in that the effect of the order in some jurisdictions is that a will is created, whereas in others the intestacy rules are merely varied. It is doubtful whether this difference in wording is of practical significance, although some may perceive one as jurisprudentially more justifiable than the other. The will approach arguably imposes a fiction.

(a) The legislation

New South Wales

Section 41A of the *Wills, Probate and Administration Act 1898* (NSW) provides:

> (1) The Court shall have jurisdiction to grant administration in respect of a deceased person in order to permit an application to be made under the *Family Provision Act 1982* where it is satisfied that it is proper to make the grant, whether or not the deceased person left property in New South Wales.

(2) A grant of administration made as referred to in subsection (1) shall be for the purposes only of making an application under the *Family Provision Act 1982.*

(3) The Court may grant administration in respect of a deceased person as referred to in subsection (1) to any person who it is satisfied is an eligible person within the meaning of the *Family Provision Act 1982* or to any person who it is satisfied intends to make application under that Act on behalf of such an eligible person.

(4) The granting of administration or probate in respect of a deceased person under this or any other provision of this Act shall not prevent the Court from making a grant of administration as referred to in subsection (1) or, unless expressly provided by the Court, affect any such grant previously made.

(5) Except in so far as the context or subject - matter otherwise indicates or requires:

(a) a reference in this Act to a grant of administration of the estate of a deceased person shall include a reference to a grant of administration made as referred to in subsection (1), and

(b) a reference in this Act to an administrator of the estate of a deceased person shall include a reference to a person to whom administration has been granted as referred to in subsection (1).

Australian Capital Territory and Northern Territory

Section 18 of the *Family Provision Act* in each Territory[214] provides:

> The Court shall, where it makes an order [for provision out of the estate of a deceased person, an order under section 15 or 17] under section 8, 9A or 15 in relation to the estate of a deceased person, direct that a certified copy of the order be endorsed on, or annexed to, the probate of the will or letters of administration with the will annexed or letters of administration of the estate of the deceased person, as the case may be, and, for that purpose, may require the production of the probate or letters of administration.

Victoria

Subsection 97(3) of the *Administration and Probate Act 1958* (Vic) reads:

> The Court shall in every case in which provision is made under this Part direct that a certified copy of such order be attached to the probate of the will or letters of administration and for that purpose shall retain in its custody such probate or letters of administration until such copy is attached.

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214 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT). Differences in the Northern Territory provisions are signified in square brackets.

Western Australia

Subsection 14 (4) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) reads:

> The Court, in every case in which an order is made or altered or in which an Administrator is appointed in accordance with section 18 of this Act, shall direct that a certified copy of the order or alteration be made upon the probate of the will or the letters of administration of the estate of the deceased, as the case may be, and for that purpose may require the production of the probate or letters of administration.

(b) The National Committee's Decision: Probate and letters of administration (page 26 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is in favour of the inclusion in the model legislation of a provision along the lines of section 41A of the *Wills, Probate and Administration Act 1898* (NSW) to enable a person to obtain a grant of probate for family provision purposes. There have been difficulties in jurisdictions requiring a grant of probate for family provision purposes where a person entitled to a grant of probate has refused to take it. If there is no grant of probate there is no one to sue.

The provision will not be strictly necessary in jurisdictions such as Queensland which do not require a grant of probate before an application for family provision can be made and considered.[215]

7. VARIATIONS OF ORDER

All the enactments include provisions about varying orders. The inherent difficulty is that a power to vary can be seen as trenching against the desirability of settling the distribution of the estate once and for all in the one process. On the other hand, a person entitled to an ongoing benefit, such as a periodical payment, may, after a time, become possessed of other means so that the order for periodic payment might justifiably be varied, suspended or discharged; or, if the person's circumstances have changed for the worse, the person may need to seek additional provision.

With respect to the discharge, variation and suspension of orders, the provisions referred to below differ in drafting and detail and are preoccupied sometimes by different considerations. It is difficult to resist the temptation to suggest that, to a certain extent, some of these provisions are overstated and that a more general power to vary, discharge, suspend, increase and decrease provision already made could be conferred on the Court, as it has been in South Australia. It is significant that in the

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215 The distinction between the formal and informal administration of estates will be considered in the National Committee's forthcoming Report on *The Administration of Estates*.

Australian Capital Territory, the detailed variation power has been repealed. The Court, if given a general power, would be unlikely to exercise it except within the general purposes of the Act, and would have greater freedom to move with the times and to try different formulae of provision.

(a) The legislation

New South Wales

Section 19 of the *Family Provision Act 1982* (NSW) provides:

> (1) An order for provision made under this Act may not be revoked or altered except in accordance with this Act.
>
> **(2) Subject to section 20(4), the Court may, by order, revoke or alter an order for provision in favour of a person made in respect of property in the estate or notional estate of a deceased person so as to allow an order for provision to be made under this Act in favour of another person wholly or partly in respect of all or any of that property.**
>
> (3) Where, following the making of an order for provision under this Act, the grant of administration made in respect of the person out of whose estate or notional estate the provision was made is revoked or rescinded, the order for provision is revoked, unless the Court otherwise provides upon the revocation or rescission of the grant.
>
> **(4) Where an order for provision is revoked or altered pursuant to section 9(6) or subsection (2) or (3) or is altered pursuant to section 30, the Court may:**
>
> > **(a) revoke or alter any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the revocation or alteration; and**
> >
> > **(b) make such additional orders (other than an order for provision) as may be so necessary.** [emphasis added]

Further, section 8 of the *Family Provision Act 1982* (NSW) enables an eligible person for whom provision has been made, to seek additional provision if there has been a "substantial detrimental change" in that person's circumstances:

> Subject to section 9, on an application in relation to a deceased person made by or on behalf of an eligible person in whose favour an order for provision out of the estate or notional estate, or both, of the deceased person has previously been made, if the Court is satisfied that there has been, since an order for provision was last made by the Court in favour of the eligible person out of the estate or notional estate, or both, of the deceased person, **a substantial detrimental change in the circumstances of the eligible person**, it may order that such additional provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person. [emphasis added]

Australian Capital Territory

Section 9A of the *Family Provision Act 1969* (ACT) provides in part:

> (2) ... the Court may, in its discretion and having regard to all the circumstances of the case, by order -
>
> (a) vary a previous order relating to that estate by reducing the amount of the provision made by that previous order;
>
> (b) suspend a previous order relating to that estate for a specified period; or
>
> (c) discharge a previous order relating to that estate.

Subsection 9A(3) enables the Court to **increase** a benefit where the previous provision was by way of periodical payments or the benefit of the investment of a lump sum.

A provision dealing specifically with the variation of orders has been repealed, although it is retained in the almost identical Northern Territory legislation.[216]

Northern Territory

Subsection 17 of the *Family Provision Act 1970* (NT) provides, in part:

> (1) ... the Court may, at any time and from time to time ... discharge, vary or suspend an order made by it under section 8 or any other order made by it under this Act.
>
> (2) Where the Court has ordered periodical payments, or has ordered that a lump sum be invested for the benefit of a person, the Court may, if it is satisfied ... that the person for whose benefit the order was made has otherwise become possessed of or entitled to means for his proper maintenance, education or advancement in life, discharge, vary or suspend its order or make such other order as is just in the circumstances.
>
> (3) An order shall not be made under subsection (1) increasing a provision made by an order under this Act.

Queensland

Section 42 of the *Succession Act 1981* (Qld) is even more comprehensive:

> (1) Where ... the court has ordered a periodical payment or has ordered any part of an estate or a lump sum to be invested for the benefit of any person, it may from time to time ... inquire whether any party deriving benefit under the order is still living or has become possessed of or entitled to provision for the party's proper

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216 Section 17 of the *Family Provision Act 1969* (ACT) was repealed by s15 of the *Family Provision (Amendment) Act 1981* (ACT) (No 38 of 1981). The Northern Territory legislation is set out below .

> maintenance or support and into the adequacy of the provision, or whether the provision made by the order for any such party remains adequate, and may increase or reduce the provision so made or discharge, vary or suspend the order, or make such other order as is just in the circumstances.
>
> (1A) However, the court shall not increase the provision so made unless the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned in pursuance of the original order is considered by the court to be sufficient for the purposes of such increase and all other lawful payments (if any) therefrom.
>
> (2) Without derogating from the provisions of subsections (1) and (1A), where the court has increased the provision so made for the benefit of any person and at any subsequent date the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned is considered by the court to be insufficient for the purposes of such provision and all other lawful payments (if any) therefrom, the court may reduce or suspend any increase or discharge, vary or suspend the original order, or make such other order as is just in the circumstances.

This provision indicates the types of factual situations which may require a Court to vary an order. The scenario appears to be that of a fund set aside in a previous order to meet the needs of one or more persons, probably the widow or infant children of the deceased person. Nevertheless, it is overly lengthy when compared with the South Australian provision.

South Australia

Subsection 9(5) of the *Inheritance (Family Provision) Act 1972* (SA) provides:

> The Court may at any time, and from time to time, on the application of the administrator or of any person beneficially entitled to or interested in any part of the estate of the deceased person, rescind or alter any order.

Section 12 provides:

> Where the Court has ordered periodic payments, or has ordered a lump sum to be invested for the benefit of any person, it shall have power to inquire whether at any subsequent date the party benefited by the order has otherwise become possessed of, or entitled to, provision for his proper maintenance, education and advancement, and into the adequacy of that provision, and may discharge, vary, or suspend the order, or make such other order as is just in the circumstances.

Tasmania

Subsections 9(5) and (5A) of the *Testator's Family Maintenance Act 1912* (Tas) provide:

> (5) The Court or a judge may, at any time, on the application of the executor or administrator of the estate of a deceased person or of any person who is

beneficially entitled to, or interested in, any part of that estate -

(a) rescind any order making any provision under this Act out of that estate or any part thereof; or

(b) alter any such order by increasing or reducing the amount of any provision made thereby or by varying such order in such manner as the Court or judge thinks proper.

(5A) The Court or a judge shall not, in the exercise of the power conferred on it or him by paragraph (b) of subsection (5) of this section, alter an order under this Act so as to disturb a distribution of any part of the estate that was lawfully made before the making of the application for the alteration.

Victoria

Subsection 97(5) of the *Administration and Probate Act 1958* (Vic) provides differently:

(5) The Court may at any time and from time to time on the application of the executor or administrator of the testator's estate or of any person beneficially entitled to or interested in any part of the estate of the testator rescind or alter any order making provision for any widow widower or child ...

Western Australia

Sections 15 and 16 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) make separate provision for the rescission or suspension or reduction of an order (section 15) and the increase of an order (section 16). They provide:

15(1) On the application by or on behalf of -

(a) the Administrator;

(b) any person beneficially entitled to or interested in the estate of the deceased; or

(c) a person for whom provision may be made under this Act,

and having regard to the hardship that would be caused to any person taking benefit under the order and to all the circumstances of the case, the Court may rescind or suspend any order, or reduce the provision made under it.

16(1) Where it would not be inequitable to grant relief having regard to all possible implications in respect to other persons, and an application for increased provision is made by or on behalf of a person in respect of whom an order has been made under this Act on the ground that since the date of that order circumstances have so changed that undue hardship will be caused if increased provision is not made, the Court may make an order for increased provision.

(b) The National Committee's Decision: Variations of order (page 26 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is in favour of inserting in the model legislation a provision along the lines of section 19 of the *Family Provision Act 1982* (NSW) relating to the variation of orders.

CHAPTER 10

OTHER PROVISIONS

1. MORTGAGING, CHARGING AND ASSIGNING AN INTEREST ARISING FROM AN ORDER OF THE COURT

In some jurisdictions, there is a specific provision which prevents a person in whose favour an order has been made from mortgaging, charging or assigning the right given by the order.[217]

An issue for consideration is whether the provision should be retained.

(a) The legislation

New South Wales

New South Wales does not have a specific provision.

Australian Capital Territory and Northern Territory

Section 19 of the *Family Provision Act* in each Territory[218] provides:

> A mortgage, charge or assignment of any kind whatsoever, of or over the provision made, or to be made, by an order under this Act, is of no force or effect unless that mortgage, charge or assignment is made with the permission of the Court.

Queensland

Subsection 41(11) of the *Succession Act 1981* (Qld) provides:

> No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the court.

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217 See also s96(2) of the *Administration and Probate Act 1958* (Vic).

218 *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

South Australia

Section 13 of the *Inheritance (Family Provision) Act 1972* (SA) provides:

> No mortgage, charge, or assignment of any kind whatsoever of or over the provision made by an order under this Act shall, unless made with the prior permission of the Court, be of any force, validity or effect.

Tasmania

There is no such provision in Tasmania.

Western Australia

Section 19 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) is in slightly different terms.

> No mortgage, charge, or assignment of any kind whatsoever which is given of or over any provision out of the estate of any deceased person granted by any order of the Court under this Act and which is given before the order of the Court is made shall be of any force, validity or effect; and no such mortgage, charge or assignment given after the order of the Court is made shall be of any force, validity, or effect unless it is given with the permission of the Court or the Court at the time of making the order otherwise directs.

(b) The National Committee's Decision: Mortgaging, charging and assigning an interest arising from an order of the Court

It is significant that there is no similar provision in New South Wales, the State which has the most comprehensively revised family provision legislation.

It is clear that an applicant cannot charge or assign rights to make an application, or indeed prospective rights to a Court order. If a Court creates a trust of which an applicant is a life tenant, it appears that the applicant cannot assign or charge the life interest without the consent of the Court. On the other hand, it is equally clear that if the Court makes a final order and beneficial title to property is vested in the applicant following the order, the applicant has the same rights as any beneficial title owner and can do as he or she pleases with the property. Thus, if the matrimonial home is ordered by the Court to be transferred to the surviving spouse without limitation, the surviving spouse is not prevented from selling or mortgaging the home.

The National Committee recommends that there be no such provision in the model legislation.

2. "PRESUMPTION OF DEATH"

In New South Wales, the Australian Capital Territory and the Northern Territory, there are provisions, the gist of which are that where an order of the Court has been made although evidence of the death of the deceased person is presumptive only, and in fact the deceased person turns out to be alive, the Court may order a person in whose favour an order is made to undertake to restore property received in pursuance of the order, or to repay any amount of money received.

The issue for consideration is whether the model legislation should include such a provision.

(a) The legislation

New South Wales

Section 18 of the *Family Provision Act 1982* (NSW) provides:[219]

> Where the Court makes an order for provision in favour of a person out of the estate or notional estate of a person, the Court may, if it thinks fit, make the order subject to an undertaking being entered into or security being given by the person in whose favour the order is made that, in the event of the revocation of the order by reason of the person out of whose estate or notional estate the provision was made having been alive at the time the order was made, the person will, in accordance with any order made by the Court as a result of the revocation, restore any property received pursuant to the order or otherwise make restitution.

Australian Capital Territory and Northern Territory

Section 14 of the *Family Provision Act* in each Territory[220] reads:

> Where the Court makes an order under section 8 or 9A that provision [section 8 for provision to] be made out of the estate of a person of which the Court has granted administration upon being satisfied by evidence supporting the presumption that the person may be presumed to be dead, the Court may direct that the provision shall not be made unless the person in whose favour the order is made gives an undertaking or security that he or she [he] will, if the grant of administration is revoked on the ground that the person was living at the time of the grant -
>
> (a) where he or she [he] has received property other than money under the order, restore the property or, at his or her [his] option, pay an amount equal to the value of the property at the time he or she [he] receives [received] the property to the

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219 This section is entitled "Court may require undertakings to restore property if deceased found to have been alive".

220 *Family Provision Act 1969* (ACT) s14; *Family Provision Act 1970* (NT) s14. Differences in the Northern Territory provisions are signified in square brackets.

person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person; or

(b) where he or she [he] has received money under the order, pay an amount equal to the amount of the money received by him or her [him] under the order to the person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person.

(b) The National Committee's Decision: Presumption of Death (page 27 of Drafting Instructions, Appendix 1)

The National Committee is in favour of including in the model legislation a provision along the lines of section 18 of the *Family Provision Act 1982* (NSW) relating to presumption of death of the person from whose estate a family provision distribution has been made. It was considered that such a provision, though rarely used, may be particularly relevant in times of war or community dislocation.

3. COSTS

One significant problem with family provision schemes is the question of costs. In the case of smaller estates, the cost of making an application for family provision is often prohibitive. Family provision schemes are probably not reasonably accessible in cases where the estate is worth less than $50,000. Worse than that, persons who may be formally eligible to apply for provision, but who may have no justifiable claim, can use their formal eligibility to threaten action as a means of forcing a beneficiary to settle out of Court for fear of the costs.

The New South Wales legislation is the only legislation that deals specifically with the costs of an application brought by an unworthy applicant, although it is apparent in all jurisdictions that the Court has the ability to make appropriate orders as to costs.[221]

The issue of costs is extremely sensitive. New South Wales has made a start in identifying possible cases where the making of an application could constitute an abuse. Nevertheless, it is confined to certain classes of applicants, who in some States and Territories have no right to bring an application at all. Whether the legislation should be realistic and give the Court jurisdiction to deny access if, having regard to the possible costs involved, the litigation cannot be economically justified, is another matter, perhaps not appropriate for consideration in the context of a project which is primarily concerned with rendering the existing legislation uniform or consistent.

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221 Section 59 *Wills Act 1997* (Vic) purports to amend section 97 *Administration and Probate Act 1958* (Vic) to enable the Court to order costs against applicants for frivolous or vexatious applications or applications with no reasonable chance of success. The *Wills Act 1997* (Vic) is not yet in force.

(a) The legislation

New South Wales

Subsection 33(1) of the *Family Provision Act 1982* (NSW) empowers the Court to order that costs be paid out of the estate or notional estate of the deceased person:

> (1) Except as provided in subsections (2) and (3), the Court may order that the costs, charges and expenses of or incidental to proceedings under this Act in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

However, subsections 33(2) and (3) provide:

> (2) The Court shall not order that the whole or any part of the costs, charges or expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of "eligible person" in section 6(1) be paid out of the estate or notional estate of the deceased person unless:
>
> (a) the Court has made an order for provision in favour of the eligible person on the application; or
>
> (b) there are special circumstances which make it just and equitable for the Court to do so.
>
> (3) The Court shall not order that the whole or any part of the costs, charges and expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person be paid out of the estate or notional estate of the deceased person by reason only of the fact that the eligible person is a person described in paragraph (a) or (b) of the definition of "eligible person" in section 6(1) or the fact that the Court has made an order for provision in favour of the eligible person on the application.

Subsection 33(2) refers to an eligible person under paragraph (c) or (d) of the definition of "eligible person" in subsection 6(1):

> (c) a former wife or husband of the deceased person; or
>
> (d) a person:
>
> (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
>
> (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member.

In other words, these persons may not be awarded costs out of the estate or notional estate of the deceased person unless they are successful in their application for provision or there are special circumstances.

Section 59 of the *Wills Act 1997* (Vic) seeks to substitute a new subsections 97(6) and 97(7) for subsection 97(6) of the *Administration and Probate Act 1958* (Vic) as follows:

> (6) Subject to sub-section (7), the Court may make any order as to the costs of an application under section 91 that is, in the Court's opinion, just.
>
> (7) If the Court is satisfied that an application for an order under section 91 has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant.

The Victorian *Wills Act 1997* is not yet in force.

(b) The National Committee's Decision: Costs (page 27 of Drafting Instructions, Appendix 1)

In jurisdictions other than New South Wales, there is nothing preventing a Court ordering that costs be awarded against an unworthy applicant under the general powers of the Court.

One suggestion has been made that if litigants do not attempt to settle matters or use alternative forms of resolving their disputes, then those litigants should be penalised in costs. In its submission to the National Committee, the Public Trustee of Queensland advised:[222]

> The other aspect to mention concerns the phenomenon, observed often within this office, of persons whose actions when viewed objectively amount to an unreasonable prolongation of family provision litigation. This has the inevitable result of reducing the size of the estate through legal costs. While we have faith in the ability of Courts to be the arbiter of all matters arising out of family provision litigation, the impetus should be given, either through legislation or amendment of Court Rules, or both, to make greater use of case management and Alternative Dispute Resolution mechanisms to achieve quicker resolution to matters. Indeed, in perhaps all cases but especially in the case of small estates, mediation or other ADR techniques should be a prerequisite prior to commencement of court action.
>
> Once litigation is commenced, although the matter of costs should be left to the Court, rule changes could be used to penalise in costs those litigants who persevere in matters when settlement or use of ADR techniques would have produced a better result for those litigants than by continuing the litigation to its curial conclusion.

In relation to the use of alternative forms of dispute resolution the Alternative Dispute Resolution Division of the Queensland Department of Justice[223] recommended:

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222 The submission was made in response to the Queensland Law Reform Commission's *Uniform Succession Laws for Australian States and Territories: Issues Paper No 2: Family Provision* (WP47, June 1995).

223 A similar submission was received from the National Alternative Dispute Resolution Advisory Council.

Before Court Proceedings are commenced.

1. **We recommend that a legislative mechanism be introduced obliging an executor or legal representative to advise parties in dispute of the availability of mediation and ADR processes before they commence litigation with respect to testamentary disputes.** Such a mechanism would target disputants and guarantee their awareness of the availability of all ADR processes.

Promotion.

2. **It would be appropriate for service providers, particularly government agencies and offices to make information available with respect to such processes.** Appropriate points for promotion of ADR processes would include the office of legal practitioners and the Legal Aid Office, Titles Office, Office of the Public Trustee and Courts. It will be necessary to advertise and promote ADR services in addition to any statutory requirement to advise potential litigants.

   The Courts Legislation Amendment Act 1995 provides ADR processes when proceedings are commenced. A family provision claim or any other dispute arising under the Uniform Succession Legislation may be ordered to ADR with or without the consent of the parties. The ADRD believes that parties should be encouraged to attend at the earliest opportunity for the advantages referred to herein.

Limitation Periods.

3. **If disputants choose to participate in mediation, the limitation period for testamentary actions should cease to run while mediation processes are proceeding.** Under Section 8 of the Supreme Court Amendment Rule (No. 1) 1995 a dispute is stayed until the ADR process is finalised or the Supreme Court otherwise orders. Similar principles should apply if a potential litigant chooses to participate in mediation processes prior to commencement of an action. If the limitation period for a testamentary action has expired, a disputant should not be disadvantaged or denied the right to court proceedings because commencement of the action was delayed until mediation processes had been finalised. Disputants' rights should not be prejudiced because of attempts to resolve a dispute, where court proceedings are not commenced, through ADR processes. The philosophical basis for encouraging the use of ADR processes has been argued elsewhere in this paper.

Status and Enforceability of Agreements.

4. **It is suggested that the status or enforceability of mediation agreements reached prior to commencement of proceedings be the same as those reached pursuant to the Courts Legislation Amendment Act 1995, that is, able to be ratified by the court by consent order.**

   Outcomes or agreements determined within the mediation process are likely to be mutually satisfying and long lasting as a result of the disputants being responsible for the resolution of the matter. Under Section 100N of the Courts Legislation Amendment Act 1995, if parties to a dispute agree on a resolution of their dispute or part of it, the agreement must be written down and signed by the parties and the mediator. The agreement has the same effect as any other compromise. Under Section 100Q the parties may apply to the court for an order giving effect to an agreement reached after mediation.

Conclusion:

Whilst recognising that not all disputes can be resolved by ADR processes, it is the belief of the ADRD that these processes have demonstrated positive and successful outcomes for participants and the legal fabric of citizens rights.

Early intervention of ADR processes in testamentary disputes provide an opportunity for disputants to communicate and negotiate towards a solution within a framework that offers fast, effective service with as little formality and technicality as possible.

In Queensland both the Supreme Court and the District Court have issued Practice Directions which promote the use of alternative dispute resolution in the context of family provision applications.[224] The objects of the Practice Directions are stated to be:

> ... to reduce cost and delay by -
>
> (a) making information available at the earliest practical date so that a realistic assessment of prospects can be made by all parties;
>
> (b) encouraging the early consensual resolution of applications;
>
> (c) minimising the number of appearances necessary to dispose of Family Provision Applications.

The National Committee is of the view that the model legislation should not include specific reference to costs but that each jurisdiction should be strongly encouraged to consider the most appropriate method for reducing the costs to the estate and the costs to parties of applications for family provision. Courts currently have the ability to award costs against unworthy applicants even though this is not specified in the legislation. However, pre-trial procedures to reduce costs and to encourage settlements should be promoted to deter these matters from going to court. It might also be considered appropriate in some jurisdictions to have the Registrar of the Court handle minor matters or matters involving estates valued at less than a certain amount. Again this is a procedural matter which would not be appropriate to insert in the model legislation.

Consequently, subsection 33(1) of the *Family Provision Act 1982* (NSW) should not be included in the model legislation.

4. STAMP AND ESTATE DUTY

In some jurisdictions there are specific provisions which deal with the stamp and estate duty implications of family provision matters. It is unlikely that such provisions could be rendered uniform or even consistent because they refer to other revenue legislation.

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224 Supreme Court Practice Direction (No. 2 of 1997) Family Provision Applications (published in *Queensland Law Reporter* February 15, 1997 114-117); District Court Practice Direction (No. 2 of 1997) Family Provision Applications (published in *Queensland Law Reporter* June 28, 1997 582-585).

They are not part of the mechanics of family provision law.

(a) The legislation

New South Wales

Section 34 of the *Family Provision Act 1982* (NSW) provides:

> An instrument executed pursuant to an order made under section 15, being an instrument relating to property in the notional estate of a deceased person, is not liable to stamp duty under the Stamp Duties Act 1920.

Queensland

Section 43 of the *Succession Act 1981* (Qld) provides:

> Manner of computing duty on estate
>
> (1) Where an order is made by the court under this part, all duties payable in consequence of the death of the deceased person shall be computed in the following manner -
>
> (a) where the deceased person leaves a will - as if the provisions of such order had been part of the will;
>
> (b) where the deceased person did not leave a will - as if the provisions of such order had been part of the law governing the distribution of the estates of persons dying intestate.
>
> (2) Any duty paid in excess of the amount required to be paid under this section shall, on application and without further appropriation than this part, be refunded to the person entitled to receive the same.

South Australia

Section 15 of the *Inheritance (Family Provision) Act 1972* (SA) provides:

> Method of apportioning duty on estate
>
> (1) For the purpose of apportioning the duty payable on the estate of the deceased person, any provision made under this Act by an order of the Court shall be deemed to be a bequest made by the deceased person -
>
> (a) if he died leaving a will, by a codicil to that will executed immediately before his death;
>
> or
>
> (b) if he died intestate, by a will executed immediately before his death.

(2) Notwithstanding the provisions of any other Act, where an order is discharged, rescinded, altered or suspended, a due adjustment of the duty payable on the estate of the deceased person shall be made.

Tasmania

Section 10B of the *Testator's Family Maintenance Act 1912* provides:

For the purpose of apportioning the duty payable on the estate of a deceased person, any provision directed to be made by an order under this Act shall -

(a) if the deceased person died testate, be deemed to be a bequest made by the deceased person by a codicil executed immediately before his death; or

(b) if the deceased person died intestate, be deemed to be a bequest made by the deceased person as if effected by a will made by him immediately before his death.

Victoria

Section 98 of the *Administration and Probate Act 1958* (Vic) provides:

Adjustment of probate duty

For the purpose of apportioning the duty payable on the estate of any deceased person any provision made under this Part shall be deemed to have been made -

(a) where the deceased dies leaving a will disposing of the whole or part of his estate - by a codicil to the will of the testator executed immediately before his death; or

(b) where the deceased dies without leaving a will - by a will executed immediately before his death.

(b) The National Committee's Decision: Stamp and Estate Duty (page 27 of Drafting Instructions, Appendix 1 to this Report)

The National Committee is of the view that the model legislation should not refer to stamp duty or estate duty implications of family provision matters. Such matters should be left to individual jurisdictions' laws relating to such taxes. The model legislation should not therefore adopt section 34 of the *Family Provision Act 1982* (NSW).

5. INTEREST PAID ON LEGACIES

An issue raised by the Public Trustee of Queensland is that of interest paid on legacies under subsection 52(1)(e) of the Queensland *Succession Act 1981*. The section states

that interest is to be paid on legacies and has the inference that the legacies are under the "will". It does not refer to any legacies which may be created under the order of the Court.

Similarly the Act sets the rate of interest at 8%, which in the current market place may be too high for an executor to achieve on most investments.

The National Committee's Decision: Interest paid on Legacies

The National Committee is of the view that the model legislation should not deal with this matter. The question of whether a family provision order should be treated as a legacy under the will is a matter within the Court's general discretion. It will be up to the Court to decide if interest should be paid on a family provision order as interest on a legacy.

6. APPLICATION

Section 4 of the *Family Provision Act 1982* (NSW) reads:

> This Act applies:
>
> (a) in relation to a deceased person who has died on or after the appointed day; and
>
> (b) in relation to a deceased person where it is uncertain when the person died except:
>
> (i) where it is certain that the person died before the appointed day; or
>
> (ii) where the Court is satisfied that, on the balance of probabilities, the person died before the appointed day.

This section is procedural and, if adopted by the model legislation, will need to be drafted by each jurisdiction. A solicitor to the Public Trustee (NSW) has commented that this section has not presented any problem "and reflects the proper approach to application of law".[225]

In some other jurisdictions there is also a provision along the following lines:[226]

> Where the whole or any part of the estate of a deceased person has been lawfully distributed before [date of Act] a person is not entitled to make application under this Act

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225 Submission to the New South Wales Law Reform Commission by Peter J Whitehead, solicitor to the Public Trustee (NSW).

226 *Family Provision Act 1969* (ACT) s5. See also: *Family Provision Act 1970* (NT) s5; *Inheritance (Family Provision) Act 1972* (SA) s5; *Administration and Probate Act 1958* (Vic) s4; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s5.

> for provision out of that estate or the part of the estate that has been so distributed, as the case may be, unless the person would have been entitled to make an application for provision out of the estate or that part of the estate under [the previous family provision legislation in force] if that [legislation] had continued in force.

The National Committee's Decision: Application (page 1 of Drafting Instructions, Appendix 1 to this Report)

The National Committee agreed that there was no need for such a provision in the model legislation. This is a matter which will need to be addressed by each jurisdiction in light of the current law in each jurisdiction.

The National Committee recommends that section 4 of the *Family Provision Act 1982* (NSW) not be included in the model legislation.

7. ACT BINDS CROWN

Section 5 of the Family Provision Act 1982 (NSW) reads:

> This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

The National Committee's Decision: Act binds Crown (page 1 of Drafting Instructions, Appendix 1 to this Report)

This provision will need to be considered by each jurisdiction and is not a matter for uniformity. A provision along the lines of section 5 of the *Family Provision Act 1982* (NSW) should not be included in the model legislation.

8. DEFINITIONS

Section 6 of the *Family Provision Act 1982* (NSW) reads:

> (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:
>
> "administration", in respect of a deceased person, means:
>
> (a) probate of the will of the deceased person granted in New South Wales or granted outside New South Wales but sealed in pursuance of section 107(1) of the Wills, Probate and Administration Act 1898; or

(b) letters of administration of the estate of the deceased person or in respect of the deceased person granted in New South Wales or granted outside New South Wales but so sealed, whether the letters of administration were granted with or without a will annexed and whether for general, special or limited purposes,

and includes an order under section 18(2) or 23(1) of the Public Trustee Act 1913 in respect of the estate of the deceased person and an election by the Public Trustee under section 18A of that Act in respect of the estate of the deceased person;

"administrator", in relation to the estate of a deceased person, means:

(a) a person to whom administration (not being an order under section 18(2) or 23(1), or an election under section 18A, of the Public Trustee Act 1913) has been granted in respect of that estate or any part of that estate;

(b) where an order under section 18(2) or 23(1), or an election under section 18A, of the Public Trustee Act 1913 has been made or filed in respect of that estate or any part of that estate, the Public Trustee;

(c) a person who holds that estate or any part of that estate upon a trust which arises out of the will or on the intestacy of the deceased person; or

(d) a person who is otherwise entitled or required to administer that estate or any part of that estate;

"appointed day" means the day appointed and notified under section 2(2);

"Court" means the Supreme Court of New South Wales;[227]

"deceased person" includes any person in respect of whom administration has been granted;

"eligible person", in relation to a deceased person, means:

(a) a person who:

(i) was the wife or husband of the deceased person at the time of the deceased person's death;

(ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or

(iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;

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227 The *District Court Amendment Act 1997* (NSW) (No. 58 of 1997), which is yet to commence, will insert a new definition of "Court" as follows:

(a) in relation to a matter in which the District Court has jurisdiction in accordance with section 134 of the *District Court Act 1973* - the District Court; or

(b) in relation to any other matter - the Supreme Court.

(b) a child of the deceased person;

(c) a former wife or husband of the deceased person; or

(d) a person:

(i) who was, at any particular time, wholly or partly dependent upon the deceased person; and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member;

"estate", in relation to a person dying leaving a will, includes property which would, on a grant of probate of the will, vest in the executor of the will or, on a grant of administration with the will annexed, vest in the administrator appointed under that grant;

"notional estate", in relation to a deceased person, means property designated by the Court under section 23, 24 or 25 as notional estate of the deceased person;

"property" includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property, and any valuable benefit;

"will" includes a codicil.

(2) A reference in this Act to an application in relation to a deceased person is a reference to an application to the Court for an order for provision in favour of an eligible person out of the estate or notional estate, or both, of the deceased person.

(3) A reference in this Act to an order for provision in favour of an eligible person is a reference to an order under section 7 or 8 in favour of the eligible person.

(4) A reference in this Act to the estate of a deceased person is, where any property which was in the estate of the deceased person at the time of death has been distributed, a reference to so much of the property in the estate as has not been distributed.

(5) Where property in the estate of a deceased person is held by the administrator of that estate as trustee for a person or for a charitable or other purpose, the property shall be treated, for the purposes of this Act, as not having been distributed unless it is vested in interest in that person or for that purpose.

(6) Except in so far as the context or subject-matter otherwise indicates or requires, a reference in this Act to property held by a person includes a reference to property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

(7) A reference in this Act to a person entitled to exercise a power is a reference to a person entitled to exercise the power whether the power is absolute or conditional and whether or not the power arises under a trust, and includes a reference to a person entitled to exercise the power together with one or more other persons, whether jointly or severally.

(8) The Court may, for the purpose of giving effect to any provision of this Act, determine in relation to the provision that the date or time of death of a person the date or time of whose death is uncertain shall be treated as being such date or time, as the case may be, as the Court thinks reasonable for the purposes of the provision.

The National Committee's Decision: Definitions (page 1 of Drafting Instructions, Appendix 1 to this Report)

The definitions which will need to be included in the model legislation will need to be in jurisdiction-neutral terms (that is, not to mention New South Wales legislation). It may be appropriate simply to leave the definitions which refer to other legislation blank - for each jurisdiction to consider in the light of its own relevant legislation).

For example, in relation to the definition of **"Court"**, the model legislation should make provision for a definition that can be completed by each jurisdiction depending on the monetary or other limits applicable to different courts in each jurisdiction.

In relation to the definition of **"deceased person"**, a solicitor with the Public Trustee (NSW) has noted that the requirement for a grant is positive, although delays in obtaining a grant within the 18 month period have led to some concern. "There is, however, Section 41A of the *Wills, Probate & Administration Act 1898* (NSW) to resolve this problem."[228]

In jurisdictions where a grant is not required for family provision applications to be made, such as Queensland, such a definition would not be appropriate. Furthermore, the National Committee has recommended that the time for an application for family provision to be made should be 12 months from the date of death. Procedures for obtaining a grant in that time in New South Wales may have to be addressed to ensure that this happens.

The National Committee agreed that the definition of **"deceased person"**should read "includes, but is not restricted to any person in respect of whom administration has been granted". This will cover the situation in some jurisdictions where family provision applications can be made without a grant being obtained.

The definition of **"eligible person"** will have to be revisited in light of the Committee's decisions in relation to eligibility.

In relation to the definition of **"property"** in subsection 6(1), in the New South Wales

228 *Wills, Probate and Administration Act 1898* (NSW) s41A enables the Court to grant administration in respect of a deceased person in order to permit a family provision application to be made under the *Family Provision Act 1982* (NSW).

Court of Appeal case of *Schaeffer v Schaeffer*[229] Handley JA[230] affirmed the decision of Bryson J in *Wentworth v Wentworth* where he said:[231]

> To my mind the inclusion of "any valuable benefit" after the enumeration in fairly full terms of every concept that would usually be thought of as property shows that "property" is used in the Act so as to extend widely to new concepts ... In relation to a valuable benefit it is clear that there can be a prescribed transaction, the valuable benefit can become held by a person and the prescribed transaction can take effect without any assignment, vesting or disposition of any property falling within the very extensive range of the earlier expressions in the definition of "property". That is, it is within the intention explicitly expressed in the Act that the taking effect of a valuable benefit (and its) becoming held by a person can occur although there has been no change at all in the ownership of any real or personal property.

It is clear that the definition of "property" is relevant and appropriate to the concept of "notional estate" which the National Committee has endorsed.

In relation to subsection 6(5) of the *Family Provision Act 1982* (NSW) the National Committee is of the view that this provision has been overtaken by the National Committee's recommendations in relation to assumption of trusteeship and can be left out of the model legislation.

9. CONSEQUENTIAL PROVISION

Section 10 of the *Family Provision Act 1982* (NSW) reads:

> Where, on an application in relation to a deceased person, the Court makes an order for provision in favour of an eligible person out of the estate or notional estate of the deceased person, the Court may make an order in favour of any other eligible person or any other person by whom, or any purpose for which, property in the estate or notional estate of the deceased person is held or would, but for the order for provision in favour of the eligible person, be held that provision be made in such manner and to such extent as the Court thinks necessary to adjust all the interests concerned and to do justice in all the circumstances.

In all jurisdictions except Victoria and South Australia there are provisions which, according to Dickey,[232] "appear to give the Court the power in proceedings for family provision to make an order in favour of any person who is eligible to apply for provision, whether or not he or she is a party to the proceedings".

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229 (1994) 36 NSWLR 315.

230 Id 318.

231 (Unreported) Supreme Court of New South Wales Equity Division, Bryson J, 14 June 1991, 3748/89, 107. This decision was affirmed in *Wentworth v Wentworth* (unreported) New South Wales Court of Appeal, 3 March 1992, 40370/91.

232 Dickey A *Family Provision After Death* (1992) 160.

The provision in New South Wales has been described as "obscure":[233]

> It states that if the court makes an order for provision in favour of an applicant, it may also make an order for provision in favour of any other person who is eligible to apply for relief under the Act or any other person by whom, or any purpose for which, property in the deceased's estate or notional estate is held or would be held but for the family provision order. The order that the court can make in these circumstances is an order "that provision be made in such manner and to such extent as the Court thinks necessary to adjust all the interests concerned and to do justice in all the circumstances".
>
> Although this provision may appear to give the court in family provision proceedings the power to make an order in favour of any person who is eligible to apply for provision even though he or she is not a party to the proceedings, the Supreme Court of New South Wales has held that this is not so.

In *Shaw v Lambert* [234] the plaintiff who had cared for and lived in the house of her father, the testator, together with her two children, argued that the effect of section 10 was that the Court could "make an order in favour of the family group consisting of [the plaintiff] and her two children even if the two children are not the plaintiffs". Young J made the following observation about the purpose of section 10:[235]

> To my mind the purpose of s10 is to avoid the problem that used to exist that if a court made an order in favour of X which affected Y's property and Y was not an applicant, there may be no jurisdiction to make a compensating order benefiting Y to soften the effect of X's order on Y. The section does not extend however to empowering the Court to confer some additional benefit on Y where Y has not been affected by X's order. Accordingly it seems to me that s10 does not operate to enable the Court to make any order in favour of [the plaintiff's children] in this case.

The judge was not convinced, although the plaintiff's children were dependent on her and she was in part dependent upon the testator, that the plaintiff's children could be said to have been dependent on the testator.

Dickey observes in relation to the other States and Territories:[236]

> In Queensland, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory, where an application for family provision has been filed by or on behalf of any person (in Queensland, simply on behalf of any person, in the two Territories, merely by a person), it may be treated by the court as an application made on behalf of all persons who might apply (in Tasmania and the two Territories, on behalf of all persons who are entitled to apply).[237]

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233 Ibid.

234 (Unreported) Supreme Court of New South Wales, Equity Division, Young J, 9 October 1987, 4126/86.

235 Id 7.

236 Dickey A *Family Provision After Death* (1992) 160-161.

237 *Succession Act 1981* (Qld) s41(6); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s12(2); *Testator's Family Maintenance Act 1912* (Tas) s3(4); *Family Provision Act 1970* (NT) s8(4); *Family Provision Act 1969* (ACT) s8(4).

> In *Official Receiver in Bankruptcy v Schultz*[238], the High Court briefly referred to the Queensland provision but declined to express an opinion on whether the court can thereby make an order for the benefit upon a person who is not an applicant for relief. In the earlier Queensland case of *Re Deist*[239], however, Master Lee Q.C. intimated that by virtue of this State's provision, the court can make an order for the benefit of a person who is not an applicant provided an application has been filed by someone, who need not in fact even be an eligible applicant.

A solicitor to the Public Trustee (NSW) has observed that a provision along these lines is important to maintain as it has been used in the gift over provisions in orders creating life estates, or other limited interests. The phrase "to do justice", according to the solicitor, sums up the importance to other eligible persons. He also noted that section 20 of the New South Wales legislation ("Court may disregard persons who have not applied") is also relevant in that if "eligible persons" other than the claimant are concerned they must also commence action for the benefit to be increased.[240]

The National Committee's Decision: Consequential provision[241]

The National Committee believes that subsection 41(6) of the *Succession Act 1981* (Qld) is preferable to section 10 of the *Family Provision Act 1982* (NSW). Subsection 41(6) of the Queensland legislation reads:

> Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.

A provision in the terms of subsection 41(6) of the *Succession Act 1981* (Qld) should be included in the model legislation. Section 10 of the *Family Provision Act 1982* (NSW) should not be included in the model legislation. The Queensland provision fits more comfortably within the Committee's philosophy that the scheme should enable the courts to do what is just in all the circumstances of the case.

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238 (1990) 170 CLR 306 at 319.

239 [1981] QdR 317 at 318, 319. Compare *Re Milanovic* [1973] QdR 205 at 206-207.

240 Submission to the New South Wales Law Reform Commission from Peter J Whitehead, solicitor to the Public Trustee (NSW).

241 See further discussion on the provisions referred to below in Chapter 3 of this Report.

10. DISCHARGE OF PROPERTY FROM LIABILITY AS ESTATE OR NOTIONAL ESTATE

Section 30 of the *Family Provision Act 1982* (NSW) reads:

> (1) Where an order for provision has been, or is proposed to be, made affecting property in the estate of a deceased person, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property in the estate, alter the order made or, as the case may require, make the order proposed as if, in either case, the other property were in the estate.
>
> (2) Where an order under section 23, 24 or 25 has been, or is proposed to be, made designating as notional estate of a deceased person property held by a person (whether or not as trustee) or subject to a trust, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property so designated or proposed to be designated, alter the order made by substituting the other property as notional estate or, as the case may require, make an order designating the other property as notional estate.
>
> (3) Where, pursuant to subsection (1), an order is altered or made as if property which is not in the estate of a deceased person were in that estate, the order so altered or made shall thereafter be deemed, for the purposes of this Act (except section 14), to be an order with respect to property in the estate of the deceased person.

Dickey has described the operation of this section:[242]

> If a person wishes to prevent property that forms part of a deceased's estate from being made the subject of an order for family provision, or wishes to prevent property being designated or remaining as notional estate, he or she may offer other property in substitution. If the court is satisfied that this other property can properly be substituted, it may make an order for family provision as if it were part of the deceased's estate, or designate or substitute this property as notional estate, as the case may be.

Although the solicitor to the Public Trustee (NSW) has not seen this section used, he believes that it facilitates a proper result so as **not** to affect some parties' actual position or expectation. It may also encourage settlement.

However, the solicitor considers the heading of this section to be misleading and suggested that a more appropriate heading would be "Substitution of other property to meet order".[243]

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242 Dickey A *Family Provision After Death* (1992) 57.

243 Submission to the New South Wales Law Reform Commission from Peter J Whitehead, solicitor to the Public Trustee (NSW).

There are related provisions in other jurisdictions, except Victoria, by which the Court may relieve property of the burden of being subject to an order for family provision by requiring the beneficiary of the property to make a periodic or lump sum payment (in South Australia, alternatively a periodic and a lump sum payment instead).[244]

Subsection 41(5) of the *Succession Act 1981* (Qld) reads:

> **The court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which the beneficiary is interested, and exonerate such portion from further liability, and direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.**

The National Committee's Decision: Discharge of property (pages 27-28 of Drafting Instructions, Appendix 1 of this Report)

The National Committee is of the view that a provision along the lines of section 30 of the *Family Provision Act 1982* (NSW) be included in the model legislation but so too should a provision along the lines of subsection 41(5) of the *Succession Act 1981* (Qld). Both provisions should be included in the model legislation's equivalent to section 11 *Family Provision Act 1982* (NSW), as amended by the National Committee.

If the provision is to remain separate, the heading to the provision should be changed to read: "Substitution of other property to meet order".

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244 *Succession Act 1981* (Qld) s 41(5); *Inheritance (Family Provision) Act 1972* (SA) s11(1); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s17; *Testator's Family Maintenance Act 1912* (Tas) s10A(3); *Family Provision Act 1970* (NT) s15(1); *Family Provision Act 1969* (ACT) s15(1).

APPENDIX 1

DRAFTING INSTRUCTIONS

ON BEHALF OF

THE NATIONAL COMMITTEE FOR UNIFORM SUCCESSION LAWS

FAMILY PROVISION

Queensland Law Reform Commission

DRAFTING INSTRUCTIONS
ON BEHALF OF
THE NATIONAL COMMITTEE
FOR UNIFORM SUCCESSION LAWS

FAMILY PROVISION

INSTRUCTIONS TO DRAFTER

The National Committee for Uniform Succession Laws has used the *Family Provision Act 1982* (NSW) as the basis for its deliberations on the law of family provision.

These instructions reflect the decisions reached by the National Committee in relation to the provisions which it would like to see in the model legislation. All provisions of the *Family Provision Act 1982* (NSW) have been considered as well as a number of other provisions from the Australian States and Territories and from New Zealand.

Although many of the existing New South Wales provisions have been adopted by the National Committee, the National Committee is aware of a need to have those provisions drafted in Plain English. Further, in relation to the set of provisions covering "notional estate" (Part 2, Division 2) there is a need to re-order the provisions in a way suggested by the National Committee in order to make them more comprehensible.

In relation to the National Committee's provisions concerning "eligible persons", the National Committee has been assisted by the provisions of the *Wills Act 1997* (Vic) which, at the time of preparing these instructions, has received Royal Assent but is yet to commence.

Should you require further information or have any queries in relation to these instructions, please feel free to contact either Wayne Briscoe (Commissioner) or Claire Riethmuller (Senior Research Officer) at the Queensland Law Reform Commission.

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PART 1

PRELIMINARY

Application

The model legislation **should not** include a provision relating to "application".

A provision along the lines of section 4 of the *Family Provision Act 1982* (NSW) **should not be included** in the model legislation.

Act binds Crown

This provision will need to be considered by each jurisdiction and is not a matter for uniformity.

A provision along the lines of section 5 of the *Family Provision Act 1982* (NSW) **should not be included** in the model legislation. Perhaps a heading only could be included.

Definitions

The definitions which will need to be included in the model legislation will need to be in jurisdiction-neutral terms (that is, not to mention New South Wales legislation). It may be appropriate simply to leave the definitions which refer to other legislation blank - for each jurisdiction to consider in the light of its own relevant legislation.

The model legislation **should include** a provision along the lines of section 6 of the *Family Provision Act 1982* (NSW) with the following changes:

The definition of **"Court"** is not relevant to other jurisdictions and will need to be drafted in such a way as to enable each jurisdiction to insert appropriate details relevant to their courts' jurisdiction.

The definition of **"deceased person"** should read "includes, but is not restricted to, any person in respect of whom administration has been granted." This will cover the situation in some jurisdictions where family provision applications can be made without a grant being obtained.

The definition of **"eligible person"** will have to be revised in light of the National Committee's decisions in relation to eligibility (see Part 2 below)

Subsection 6(5) has been overtaken by the National Committee's recommendations in relation to assumption of trusteeship (see Part 3 below) and **should not be included** in the model legislation.

PART 2

ELIGIBILITY TO APPLY FOR FAMILY PROVISION

The National Committee has adopted a different approach to eligibility from the *Family Provision Act 1982* (NSW). The new approach would enable a surviving (married) spouse and non-adult children of the deceased person to be automatically entitled to apply for family provision. Anyone else who can establish that the deceased person owed him or her a special responsibility to provide for his or her maintenance etc will also be eligible to apply for family provision. The application for family provision will therefore be made either on the basis of automatic eligibility or on the basis of special responsibility. If it is made on the basis of special responsibility the Court will need to determine whether in fact special responsibility existed. That determination will be made at a time to be determined by the Court but may very well be at the same hearing that all other matters relating to the application are heard.

The Court will need to take into account a list of matters when determining the existence of a special responsibility. The same list of matters will need to be taken into account by the Court in a number of other contexts (eg determining whether the deceased person provided adequate maintenance etc for the eligible person, and determining what provision to make for the eligible person). That list will be in lieu of a number of criteria taken into account by the Court in various contexts under the current legislation.

The National Committee's recommendations in relation to "special responsibility" and the legislated list of matters to be taken into account are quite similar to provisions found in the *Wills Act 1997* (Vic), the relevant sections of which are yet to commence.

The model legislation **should include** provisions along the lines of the following:

1. "Eligible person", in relation to a deceased person, means

   (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death;

   (b) a non-adult child of the deceased person [to be defined to refer to people who were under the age of 18 years at the date of the deceased person's death; the definition should not include step-children of the deceased person, but would include natural and adopted children];

   (c) a person to whom the deceased person owed a special responsibility to provide maintenance, education or advancement in life. ["special responsibility" is not to be defined].

2. The Court may, having regard to all the circumstances of the case (whether past or present) order that provision be made out of the estate of a deceased person for the proper maintenance, education and advancement in life of an eligible person.

3. The Court must not make an order under subsection (2) in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person effected by -

(a) his or her will (if any); or

(b) the operation of the provisions of the intestacy rules; or

(c) both the will and the operation of the intestacy rules

does not make adequate provision for the proper maintenance, education or advancement in life of the person.

4. The Court in determining -

(a) whether or not the deceased person had special responsibility to make provision for a person; and

(b) whether or not the distribution of the estate of the deceased person as effected by -

(i) the deceased person's will; or

(ii) the operation of the intestacy rules; or

(iii) both the will and the operation of the intestacy rules

makes adequate provision for the proper maintenance, education or advancement in life; and

(c) the amount of the provision (if any) which the Court may order for the person; and

(d) any other matter related to an application for an order under subsection (1)

must have regard to so many of the following matters as the Court considers relevant -

(a) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;

(b) the nature and extent of any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

(c) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;

(d) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;

(e) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;

(f) the age of the applicant;

(g) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased person or the family of the deceased person. "Adequate consideration" is not to include the payment of a carer's pension;

(h) the provision (if any) made in favour of the applicant by the deceased person either during the person's lifetime or out of the person's estate;

(i) the date of any will of the deceased person and the circumstances in which the will was made;

(j) whether the applicant was being maintained by the deceased person before the deceased person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased person had assumed that responsibility;

(k) any relevant Aboriginal or Torres Strait customary law or any other customary law;

(l) the liability of any other person to maintain the applicant;

(m) the character and conduct of the applicant or any other person both before and after the death of the deceased person;

(n) any other matter the Court considers relevant.

5. In considering the matters listed in 4 the Court must have regard to the facts as known to the Court at the date of the order.

PART 3

THE TIME WITHIN WHICH AN APPLICATION MUST BE MADE

Time limit

Applications for family provision should be made within 12 months from the date of the death of the deceased person.

The model legislation **should include** a provision imposing a time limit along the lines of subsection 16(2) of the *Family Provision Act 1982* (NSW), but which refers to 12 months from the date of the death of the deceased person.

The model legislation **should include** a provision along the lines of subsection 9(5) of the *Family Provision Act 1969* (ACT) to the effect that an application for family provision is deemed to have been made on the date that the originating process is filed.

Subsection 9(5) of the *Family Provision Act 1969* (ACT) reads:

> An application for provision out of the estate of a deceased person shall, for the purposes of this section, be deemed to have been made on the day upon which the notice of motion or other document instituting the application has been filed.

Compare to subsection 8(6) of the *Inheritance (Family Provision) Act 1972* (SA)[1] which refers to the date when the summons is served. The model legislation is to refer to the date when the originating process is filed.

Extension of time limit

The Court should have an unfettered discretion to extend the time for bringing an application for family provision. The unfettered discretion should be worded along the lines of the Queensland extension provision.

The model legislation **should include** a provision along the lines of subsection 16(3) of the *Family Provision Act 1982* (NSW). However, the provision **should be amended** along the lines of the opening words of subsection 41(8) of the *Succession Act 1981*(Qld) which commences: "Unless the court otherwise directs ..." to indicate an unfettered discretion in the Court to extend the time limit.

Subsection 41(8) of the *Succession Act 1981* (Qld) reads:

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[1] Subsection 8(6) of the *Inheritance (Family Provision) Act 1972* (SA) reads:

> An application for the benefit of this Act shall be deemed to be made on the day when the summons by which it is instituted is served on the administrator of the estate.

> **Unless the court otherwise directs,** no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made. [emphasis added].

Shortening of time limit

Given the proposed shorter time for bringing an application for family provision, there is no need for an equivalent of subsection 17(1) of the *Family Provision Act 1982* (NSW) to be included in the model legislation. Such a provision would simply add uncertainty to the scheme.

The model legislation **should not include** a provision along the lines of subsection 17(1) of the *Family Provision Act 1982* (NSW).

Application on behalf of an infant or person without full capacity

The model legislation **should enable** representatives of children or people without full mental capacity to apply to the Court for directions on whether to make an application for family provision. Representatives should also be able to apply to the Court for advice. Provided such an application is made within the statutory time limit, the Court should be able to treat any resulting application for family provision as having been made within the time lime.

The model legislation **should include** a provision along the lines of subsection 41(7) of the *Succession Act 1981* (Qld).

Subsection 41(7) of the *Succession Act 1981* reads:

> The personal representative or the public trustee or the director within the meaning of the *Children's Services Act 1965*, or any person acting as the next friend of any infant or any patient (within the meaning of the *Mental Health Act 1974*), may apply on behalf of any person being an infant, or being a patient (within the meaning of the *Mental health Act 1974*) in any case where such person might apply, or may apply to the court for advice or directions as to whether the person ought so to apply; and, in the latter case, the court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.

The model legislation should not refer to any one jurisdiction's legislation - perhaps blank spaces could be left in the provision for each jurisdiction to complete when appropriate.

Protection of subsequent applicants

Where an application for family provision has been filed by or on behalf of any person, the application must be treated by the Court so far as regards the question of limitation as an application on behalf of all persons on whom notice of the application is served and all persons who might apply.

The model legislation **should include** a provision along the lines of subsection 41(6) of the *Succession Act 1981* (Qld).

Subsection 41(6) of the *Succession Act 1981* (Qld) reads:

> Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.

The equivalent to that provision should be included in the model legislation **in preference to** a provision along the lines of section 10 of the *Family Provision Act 1982* (NSW).

Assumption of trusteeship

The model legislation **should include** a provision to the effect that an estate is not distributed to the extent that the estate or a part of it is held upon any trust, whether determinate or indeterminate (where in reality the final distribution of the estate or part of the estate is not made until the termination of the trust). In addition, a family provision application should be permitted to be made within a short period after the termination of a testamentary trust. It is only then that the extent of the estate and the needs and even the existence of possible applicants can be ascertained and a realistic order made in accordance with the purpose of family provision legislation.

Note, subsection 6(4) of the *Family Provision Act 1982* (NSW) provides that an estate is not to be treated as having been distributed unless it is vested in a beneficiary. This may not assist because on the dropping of a life interest the interests of those entitled in remainder often vest immediately, arguably precluding the possibility of making a family provision application at that time.

The model legislation **should include** a provision along the following lines:

(1) Where an estate or part of an estate becomes vested in personal representatives as trustees of any trust arising under or by virtue of a will or intestacy, or in successor trustees upon any such trust, and an eligible person wishes to make an application for provision from the estate or part of the estate held on any such trust upon the termination of the trust, an application under this Part may be

made within three months after the termination of the trust.

(2) For the purposes of this Part the estate or part of the estate held upon trust is not to be treated as having been distributed either by reason of its vesting in trustees or by reason of the termination of the trusts or for any other reason.

(3) The trustees may distribute the estate or part of the estate held on any such trust to the persons entitled to it one month after the termination of the trust unless they have received written notice of an eligible person's intention to make an application.

(4) The notice must be received by the trustees not more than 12 months before or within 28 days after the termination of the trust.

(5) For the purpose of this section a gift by will to trustees of an existing trust is not a trust arising under or by virtue of the will.

Subsection (1) enables an application to be made for provision from any part of the estate held upon trusts arising under or by virtue of the will or an intestacy **upon the termination of the trust**. The application must be made within three months of the termination of the trust. In the case of a trust of defined duration the applicant will be well able to give notice within 12 months before. Even in the case of a trust of indefinite duration, such as a life interest, the approaching death of the life tenant may be predictable and possible applicants should realise the need to act promptly upon the death of the life tenant. The provision requires the applicant to be vigilant and move promptly.

It is only where the eligible person chooses to defer making an application until the termination of the trust that this provision will be used. If the person wishes to seek immediate provision the application must be made within the usual time and the property the subject of the trust may be utilised to provide for the applicant.

Subsection (2) prevents any objection that the estate subject to trusts should be regarded as having been distributed as such upon the personal representatives' assumption of trusteeship of trusts; or upon the appointment of new trustees. It performs the same function as that of subsection 2(4) of the *Family Provision Act 1955* (NZ) which provides:

> ... 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 after he has ceased to be 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.

Subsection (3) enables the trustees to distribute the property subject to the trusts one month after the termination of the trust, unless they have received notice of an eligible

person's intention to make an application. This reinforces the point that the applicant must be vigilant and take action promptly.

Subsection (4) provides that the notice must be received "not more than 12 months before or within 28 days after" the termination of the trust. It might be oppressive to expect trustees to remember a notice of intention to make an application given say within 6 months of the death of the deceased person, as that might have been many years before the termination of the trust. Otherwise intending applicants must keep themselves informed on the termination or intending termination of the trust.

Subsection (5) addresses the situation where a testator leaves property by will to a pre-existing trust (for example, a family trust). The subsection is confined to gifts by will because an intestacy could not have the effect of pouring money into an existing trust.

The National Committee would like to see a note in the legislation to the effect that the above provisions were developed from subsection 2(4) of the *Family Provision Act 1955* (NZ).

PART 4

ADEQUATE PROVISION FOR PROPER MAINTENANCE

Matters to be taken into consideration

The model legislation **should include** provisions to the effect that the Court be required to refer to one list of matters when:

> determining whether a "special responsibility" existed to enable a person who does not fall within one of the two classes of persons who the Committee believed should be automatically entitled to apply for family provision, to apply for family provision; and
>
> determining whether the deceased person failed to provide adequate provision for the maintenance, education or advancement in life of the applicant.

The list of matters is set out at pages 4 and 5 of these instructions.

The model legislation **should not include** a provision along the lines of subsection 9(2)(a) of the *Family Provision Act 1982* (NSW).

The model legislation **should not include** a provision along the lines of subsection 9(3) of the *Family Provision Act 1982* (NSW).

"Education" and "advancement in life"

The model legislation **should include** in its power conferring provision, reference to "the maintenance, education or advancement in life of the eligible person". This is the current wording used in section 7 of the *Family Provision Act 1982* (NSW).

Circumstances at date of order

The model legislation **should include** a provision to the effect that the determination of adequate provision for the maintenance, education or advancement of life for the eligible person be based upon the circumstances of the eligible person and the deceased person **at the date of the order.** This is the current effect of section 7 of the *Family Provision Act 1982* (NSW).

The moral claim and the moral duty

The moral claim and moral duty, which are the bases of the family provision scheme, should not be spelt out in the model legislation although they are reflected in the list of

matters which the Court must have regard to when determining "special responsibility" and whether adequate provision has been made by the deceased person.

There may be a danger in further legislating the duty/claim in that courts may feel restricted in their application of their very wide discretion because of the wording of the provision. Further, it would not be possible to legislate for the circumstances in which the Court should consider a moral claim - most cases will be different, and common perceptions of what gives rise to a moral claim for provision may change over time.

There is no longer any need to have a separate provision in the legislation to enable the Court to take character and conduct into account. The character and conduct of the applicant both before and after death may be relevant to the Court's determination relating both to "special responsibility" and whether or not adequate provision has been made for the eligible person by the deceased person and for that reason. The issue of character and conduct has, therefore, been included in the list of matters that the Court must have regard to when exercising its discretion (set out on pages 3 and 4 of these instructions, item (m)).

The model legislation **should not include** a provision equivalent to subsection 9(3)(b) of the *Family Provision Act 1982* (NSW).

Character and conduct of other people

The list of matters **should refer** to the character and conduct of the eligible person and also to the character and conduct of any other person. This is reflected in item (m) of the list of matters the Court must have regard to when exercising its discretion (set out on page 4 of these instructions, item (m)). The current disentitlement provisions do not go this far.

Admissibility of an applicant's character and conduct

The admissibility of evidence relating to the eligible person's character and conduct ideally should be left to the to the law of evidence and should not be spelt out in the model legislation. Each jurisdiction should consider the matter in the light of their respective evidence legislation.

In the meantime, however, the model legislation **should include** a provision along the lines of section 32 of the *Family Provision Act 1982* (NSW).

PART 5

THE COURT'S DISCRETION TO ORDER PROVISION

Discretion

The Court's discretion to order provision to be made for the applicant out of the estate of the deceased person should remain unfettered except that the Court must have regard to the list of matters referred to on pages 4 and 5 of these instructions.

The model legislation **should include** a provision along the lines of section 7 of the *Family Provision Act 1982* (NSW) but the provision **should refer** to the list of matters to be taken into account by the Court when ordering provision to be made.

Additional provision

The model legislation **should include** a provision along the lines of section 8 of the *Family Provision Act 1982* (NSW) to enable the Court to order additional provision to be made for the maintenance, education or advancement in life of the eligible person.

Court may disregard persons who have not applied for provision

The model legislation **should include** a provision along the lines of section 20 of the *Family Provision Act 1982* (NSW).

PART 6

THE ESTATE FROM WHICH FAMILY PROVISION MAY BE MADE AND ANTI-AVOIDANCE PROVISIONS

The model legislation **should include** anti-avoidance provisions based on sections 21 to 26 (inclusive) of the *Family Provision Act 1982* (NSW).

The New South Wales legislation is expertly drafted. However, the National Committee believes that the provisions **should be redrafted** in Plain English and **should be reorganised** into a format more closely following the summary set out below.

Specifically, the anti-avoidance provisions **should cover** *donationes mortis causa* and it should be made clear that the subject of a general power of appointment is included.

Summary of and recommended format for notional estate/anti-avoidance provisions

The anti-avoidance provisions are complicated and not easy to understand. However, they have been very carefully worked out, and they form an efficient and effective means of ensuring that certain objectives are met.

On the one hand the anti-avoidance provisions must ensure that it will be very difficult even for a very determined person to prevent a family provision order being made in respect of her or his estate. On the other hand, the anti-avoidance provisions must not:

> impede the normal lifetime activities of people;
>
> impede the normal administration of estates; or
>
> affect people who have received property from the person in respect of whose estate family provision is being sought at all except in one situation: where the Court is satisfied that it is necessary and just to designate property affected by such a transaction available to satisfy a family provision application.

In sum, the anti-avoidance provisions are designed to prevent avoidance while having the minimum possible collateral effects, and being fair to all concerned.[2]

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[2] For discussion see: RF Atherton "Notional Estate and the Family Provision Act" (1987) 25(2) *Law Soc J* 37; RF Atherton "The Family Provision Act 1982 (NSW): A New Deal for the Family" (1984) 58 *ALJ* 274; GL Certoma *The Law of Succession in New South Wales* (2nd ed, 1992) pp 228-234; A Dickey *Family Provision After Death* (1992) ch 4; K Mason and L Handler *Wills, Probate and Administration Service* (NSW) (Butterworths, looseleaf, Sydney) para 9013.

- ***The structure of the provisions***

The Court is given the power to designate property as notional estate, where property has been the subject of a prescribed transaction as defined, or a distribution.

However, even if there has been a prescribed transaction, the Court may not designate property as notional estate unless the transaction reduces the value of the estate, that is, is not for value or is not for full value.

The Court is not empowered to designate property as notional estate unless the estate is insufficient to make the family provision order which the Court deems proper, or, if there are sufficient assets in the estate, there are particular reasons why the Court deems it proper to designate property as notional estate.

When declared to be notional estate, the property affected immediately divests from the person holding it, and becomes part of the property awarded by the Court as the subject matter of the family provision order. Thus, even if there has been a prescribed transaction or distribution, there is no notional estate unless and until the Court designates property as notional estate. Further, there are no prohibitions or penalties or negative results which result from making a prescribed transaction except one: the Court has the power in the proper circumstances to declare property notional estate and the subject of a family provision order.

The Court will designate property as notional estate only to the extent that property is required for the family provision order to be made. So, if a large amount of property is affected by a prescribed transaction, and only a small amount of such property is required to satisfy the family provision order to be made, only that small amount of property is designated as notional estate and passes to the applicant as subject matter of the family provision order while the rest of that property remains unaffected.

The property designated need not be the actual property which was the subject of the prescribed transaction or distribution.

The provisions direct the Court to be very cautious and reluctant to designate property as notional estate. The provisions contain strong and far-reaching cautions and safeguards. Thus, the Court must not, except in special circumstances, designate property as notional estate unless the Court is satisfied that it is necessary and just to designate property affected by such a transaction available to satisfy a family provision application. Further, the Court must take account of settled expectations before designating property as notional estate. The anti-avoidance sections contain machinery provisions to ensure that the purposes of the legislation are achieved effectively and without unnecessary inconvenience.

The sections which form the structure of the anti-avoidance provisions are outlined below.

- ***The main provisions***

1. The crucial, central sections are sections 23, 24 and 25 of the *Family Provision Act 1982* (NSW). These sections empower the Court to designate property as notional estate.

Section 23	Where there has been a "prescribed transaction" as defined in section 22, section 23 empowers the Court to designate property as notional estate. "Prescribed transaction" refers to a transaction made during the lifetime of the person from whose estate or notional estate the family provision order is to be made. Subsection 23(b) provides that to be a prescribed transaction, the transaction: * must have been made within three years before the deceased person's death if the transaction was intended, wholly or in part, to deny family provision out of the person's estate; or * must have been made within one year before the death if the transaction took place at a time when the deceased person had a moral obligation to make adequate provision for an applicant; or * must have taken effect or must take effect on or after the death of the deceased person.
Section 24	The Court is given the power to designate as notional estate property which has already been distributed. Distribution here refers to property distributed out of the estate of a person after his or her death;
Section 25	Where there has been a prescribed transaction or distribution, and then there has been a subsequent prescribed transaction, the Court is given the power to designate property as notional estate. (The Court is not to make such an order in this case unless there are special circumstances - subsection 25(2)).
Sections 23, 24 & 25	Empower the Court to designate as notional estate property which was not the property actually disposed

of, as well as the property disposed of itself. Further, the property designated as notional estate need not be the property which was the subject matter of the prescribed transaction or the property distributed. There are no penalties or adverse consequences attached to entering any of the transactions mentioned in sections 23, 24 or 25. In other words, there are no penalties or adverse consequences attached to entering a prescribed transaction or making a distribution. Such transactions are effective and proper. The only consequence of the legislation is that if the requirements of sections 23, 24 or 25 are met, the Court is given the power to designate property which is the subject of the transaction, or other property, to be notional estate and so to use it to satisfy a family provision order.

2. Subsection 28(2) Only property actually needed for the family provision order may be designated as notional estate. There is no notional estate unless and until the Court designates property to be notional estate. Until then there could only have been transactions which fall within the scope of sections 23, 24 or 25, and so make it possible for the Court to designate property as notional estate.

If the Court decides that no family provision should be awarded, there is no designation of notional estate. For example, the Court may decide that there was a prescribed transaction to the value of $200,000, and that family provision amounting to $50,000 should be made in respect of the prescribed transaction. The Court will designate only $50,000 as notional estate. No other property affected by the prescribed transaction will be affected at all.

3. Section 29 When designated as notional estate, the property so designated divests from the person holding it, and that any rights to the property that the current holder of the property may have are extinguished. The property designated at that moment becomes available for, and is disposed of by, the Court as property forming part of the family provision order.

- ***Other major provisions***

1. Restraints and cautions which restrict the Court

Section 26 — There is to be no designation unless a relevant person or estate is disadvantaged by the prescribed transaction. Section 26 limits the power of the Court to make a designation of notional estate on the ground that a transaction is a prescribed transaction. Section 26 provides that there may be no designation of notional estate on the ground that a transaction is a prescribed transaction (that is, under sections 23 or 25) unless a relevant person or estate is disadvantaged. The relevant person or estate is the person deemed to be making the prescribed transaction or an eligible person or, where the person deemed to be making the prescribed transaction was not the deceased person, the estate of the deceased person.

Subsection 28(1) — The Court is not to designate property as notional estate unless the estate is insufficient, or because of the existence of other persons eligible for family provision, or because of special circumstances, provision should not be made wholly out of the estate. It follows that usually, if the estate is large enough to satisfy the family provision order then the order should be satisfied out of the estate, and there will be no need to designate notional estate.

Subsection 27(1) — The Court is to consider the importance of not disturbing settled expectations, and the justice and merits of the order.

2. Definition of "prescribed transaction"

Section 22 — This section contains the definition of "prescribed transaction". The section describes the conduct which is deemed to be a "prescribed transaction". The section tries to catch any type of transaction which has the effect of, or which could be used to reduce, the net estate available to the Court to provide the subject matter of a family provision order.

Subsection 22(1) is the general provision; it provides that where a person causes property to be held by

another person, or subject to a trust, and full valuable consideration is not given, the person is deemed to enter a prescribed transaction.

Subsection 22(3) deals with the situation where a person causes property to be held by another person or subject to trust, and then the first person causes the same property to be held by another person or subject to a trust. The subsection provides that the second transaction can be a prescribed transaction.

Subsection 22(4) provides examples of prescribed transactions:

- Failure to exercise a power of appointment - subsection 22(4)(a);

- Failure to sever a joint tenancy - subsection 22(4)(b). This provision needs to be reworded and clarified in the light of *Wade v Harding*[3] and *Cameron v Hills*;[4]

- Failure to extinguish an interest under a trust - subsection 22(4)(c);

- Failure to exercise a power to nominate a person as a person to whom money payable under a policy of insurance may be paid of appointment or failure to surrender a policy - subsection 22(4)(d);

- Death of a member or participant of a body, association, scheme, fund or plan - subsection 22(4)(e);

- Entering into a contract to dispose of property from the estate of the deceased person - subsection 22(4)(f).

Subsections 22(5) and (6) refer to when a transaction is deemed to have been entered into.

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3 (1987) 11 NSWLR 551.

4 (Unreported) NSW SC, Needham J 26 October 1989.

Subsection 22(7) provides that the making of a will is not a prescribed transaction (in any event, the Court has the power, in making a family provision order, to override any will.)

3. No designation unless a relevant person or estate is disadvantaged.

Section 26 This section has been described above under restraints and cautions which restrict the Court. The section limits the power of the Court to make a designation of notional estate on the ground that a transaction is a prescribed transaction. As noted above, section 26 could equally well have been drafted as part of the definition of prescribed transaction.

4. What property to be designated as notional estate and priority among available potential notional estate

Subsection 27(2) This provision lists the matters to which the Court is to have regard to in determining what property should be designated as notional estate. In determining whether to designate property as notional estate the Court is to have regard to: the value and nature of the property; the value and nature of any consideration given; changes over time; whether relevant property could have been used to produce income; and, any other relevant matter.

Subsection 28(4) This provision protects trustees. The Court will not make an order under sections 23, 24 or 25 in relation to any property other than the trust property - so, for instance, the Court may not designate property which belongs to the trustee beneficially.

5. Late applications and applications for further provision

Subsection 28(5) In relation to an application made out of time or an application for further provision, the Court must not designate notional estate unless

(a) the property is held in trust and has not vested; or

(b) there are special circumstances for making the designation.

6. Substitution of property

Section 30	This section provides that where the Court is satisfied that it is proper to do so, it may approve an offer of other property in substitution for the property designated or to be designated as notional estate. (The section gives the same power in respect of property in the estate of the deceased person.)

7. Foreign property

Section 11	This provision of the Act forms part of the scheme of anti-avoidance provisions.

PART 7

PROTECTION OF DISTRIBUTIONS

The model legislation **should include** a provision along the lines of section 35 of the *Family Provision Act 1982* (NSW) as the basis of the model legislation's protection provision.

The provision will be to the effect that:

> The personal representative is to give public notice[5] to potential family provision applicants, at least 1 month before the date of intended distribution, of his or her intention to distribute the estate.

The provision **should not** refer to Rules of Court but should incorporate words to the same effect as the rules and associated form. The provision should not be jurisdiction specific.

The provision **should also stipulate** that the personal representative will only be protected from liability for distributing the estate after 6 months from the date of death of the deceased person, having received no notice of intention to apply for family provision.[6] This is based on subsection 44(3) of the *Succession Act 1981* (Qld).

Subsection 44(3)(a) of the *Succession Act 1981* (Qld) reads:

> **No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative -**
>
> **(a) not earlier than 6 months after the deceased's death and without notice of any application or intended application under section 41(1) or 42 in relation to the estate**

The model legislation **should also include** a provision along the lines of subsection 44(1) of the *Succession Act 1981* (Qld), with the amendments recommended below. That provision protects personal representatives who make early payments for maintenance and support to certain dependants of the deceased person. The persons to whom such payments could be made should be described in terms such as "persons who were wholly or substantially dependant upon the deceased person" instead of "wife, husband or any child of the deceased". The revised subsection 44(1) would then read:

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5 Along the lines of Part 77, Rule 62 of the New South Wales *Supreme Court Rules 1970*, Form 121 Schedule F and Part 78 Rule 91 of the New South Wales *Supreme Court Rules 1970*. Obviously, the model legislation would refer to the capital city of the State or Territory in which the legislation is enacted rather than "Sydney", in the equivalent provision to Part 78 Rule 91.

6 In any event a person will have 12 months from the date of the death of the deceased person to bring an application for family provision under the instructions in Part 3 of these Drafting Instructions.

No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate and no application or order under this part shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance or support of persons who were wholly or substantially dependant upon the deceased person immediately before the death of the deceased person whether or not the personal representative had notice at the time of the distribution of any application or intended application under this part in respect of the estate.

PART 8

ORDERS AND VARIATIONS OF ORDERS

Consequential and ancillary orders

The model legislation **should include** a provision along the lines of section 15 of the *Family Provision Act 1982* (NSW) with the exception of subsection (3) which **should not be included**. Subsection 15(3) is adequately addressed by the National Committee's revised subsection 11(1)(d) (see ***Contents of orders*** below).

Contents of orders

The model legislation **should include** a provision along the lines of subsection 97(1) of the *Administration and Probate Act 1958* (Vic) which provides that an order for family provision **shall** include certain matters, namely:[7]

* the amount and nature of the provision;

* the manner in which the provision shall be raised and paid out of some and what part or parts of the estate of the deceased person; and

* any conditions restrictions or limitations imposed by the Court;

The same model legislation provision **should include** a list of matters which the Court **may** include in an order, based upon section 11 of the *Family Provision Act 1982* (NSW) except that subsections 11(1)(c) and (d) should be matters which the Court **must** specify.

Such a provision should assist the Court and practitioners and will ensure that the Court addresses significant matters which it otherwise may have disregarded. For example, unless such a list is included, Courts may be reluctant to make periodic orders or orders on terms.

The provision to be included in the model legislation should be along the following lines:

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7 Subsection 97(2) of the *Administration and Probate Act 1958* (Vic) reads:

> Unless the Court otherwise orders the burden of any such provision shall as between the persons beneficially entitled to the estate of the deceased be borne by those persons in proportion to the values of their respective estates and interests in such estate:
>
> Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this sub-section be separately valued but the proportion of the provision made under this Part to be borne by such property shall be raised out of or charged against the corpus of such property.

an order for family provision **shall** specify certain matters, namely:

* the amount and nature of the provision;

* the manner in which the provision shall be raised and paid out of some and what part or parts of the estate of the deceased person;

* any conditions restrictions or limitations imposed by the Court;

* the manner in which a sum of money or other property is to be paid or made available to the person in whose favour the order is made; and

* where provision is required to be made by way of a sum of money, the whole or any part of the sum which is to bear interest at such rate as the Court thinks fit for such period as the Court thinks fit.

an order for family provision **may** specify certain matters, namely:

* that the provision is to be made in any 1 or more of the following manners:

  (i) by way of a lump sum;

  (ii) by way of a periodic sum;

  (iii) by way of specified existing or future property;

  (iv) by way of an absolute interest, or a limited interest only, in property;

  (v) by way of property set aside as a class fund for the benefit of 2 or more persons;

  (vi) in any other manner which the Court thinks fit;

* that in respect of property which is situated in or outside [insert jurisdiction] at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of death, domiciled in [insert jurisdiction].

Class funds

In jurisdictions other than New South Wales which do not have a provision similar to section 12 of the *Family Provision Act 1982* (NSW) there do not appear to be any

difficulties faced by the Courts in making orders appropriate to classes.

Orders in favour of classes of beneficiaries should be left to the discretion of the Court. The recommended provision referred to under Section 11 (discussed in ***Contents of orders*** (above)) would be sufficient.

The model legislation **should not** include a provision along the lines of section 12 of the *Family Provision Act 1982* (NSW).

Which beneficiaries' shares must bear the burden of the order?

The model legislation **should include** a provision along the lines of section 13 of the *Family Provision Act 1982* (NSW) enabling the Court to make a general order about the distribution and a minor order about who is to bear the burden of the distribution. All would not then depend on a general order of the Court.

Effect of order

The model legislation **should include** a provision along the lines of subsection 14(1) of the *Family Provision Act 1982* (NSW) in relation to the effect of the order.

Subsection 14(2) of the *Family Provision Act 1982* (NSW) appears to be misconceived. Creditors cannot be adversely affected. The payment of creditors cannot be deferred - but legacies can. Creditors can be paid out of the general legatees' fund.

A provision along the lines of subsection 14(2) of the *Family Provision Act 1982* (NSW) **should not** be included in the model legislation.

Probate and letters of administration

The model legislation **should include** a provision along the lines of section 41A of the *Wills, Probate and Administration Act 1898* (NSW) to enable a person to obtain a grant of probate for family provision purposes.

Variations of order

The model legislation **should include** a provision along the lines of section 19 of the *Family Provision Act 1982* (NSW) relating to the variation of orders.

PART 9

OTHER MATTERS

Presumption of death

The model legislation **should include** a provision along the lines of section 18 of the *Family Provision Act 1982* (NSW) relating to presumption of death of the person from whose estate a family provision distribution has been made.

Costs

The model legislation **should not include** specific provisions relating to costs. This should be a matter for the Court's discretion and for individual jurisdictions to address by way of alternative dispute resolution, etcetera.

A provision along the lines of subsection 33(1) of the *Family Provision Act 1982* (NSW) **should not be included** in the model legislation.

Stamp and estate duty

The model legislation should not refer to stamp duty or estate duty implications of family provision matters. Such matters should be left to individual jurisdictions' laws relating to such taxes.

The model legislation **should not include** a provision along the lines of section 34 of the *Family Provision Act 1982* (NSW).

Discharge of property from liability as estate or notional estate

A provision along the lines of section 30 of the *Family Provision Act 1982* (NSW) **should be included** in the model legislation. In addition, a provision along the lines of subsection 41(5) of the *Succession Act 1981* (Qld) **should be included**. Both provisions should be included in the model legislation's equivalent to section 11 of the *Family Provision Act 1982* (NSW), as amended by the National Committee.

Subsection 41(5) of the *Succession Act 1982* (Qld) reads:

> The court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which the beneficiary is interested, and exonerate such portion from further liability, and direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

If the equivalent provision to section 30 of the *Family Provision Act 1982* (NSW) is to remain separate, the **heading to the provision should be changed** to read: "Substitution of other property to meet Order".

Contracting out

The model legislation **should include** a provision along the lines of section 31 of the *Family Provision Act 1982* (NSW).

Court officer determining family provision matters

The model legislation **should include** a provision enabling the Court, in appropriate circumstances, to authorise an appropriate court officer, such as the Registrar, to hear family provision matters.

APPENDIX 2

FAMILY PROVISION ACT 1982 No. 160
NEW SOUTH WALES

TABLE OF PROVISIONS

PART 1 - PRELIMINARY

PART 2 - FAMILY PROVISION

Division 1 - Orders for provision

Division 2 - Notional estate

An Act to amend the law relating to the assurance to the family of a deceased person and certain other persons of adequate provision from the estate of the deceased person and certain other property.

PART 1 - PRELIMINARY

Short title

1. This Act may be cited as the Family Provision Act 1982.

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day, being a day not earlier than 6 months after the date of assent to this Act, as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Arrangement

3. This Act is divided as follows:

Application

4. This Act applies:

(a) in relation to a deceased person who has died on or after the appointed day; and

(b) in relation to a deceased person where it is uncertain when the person died except:

(i) where it is certain that the person died before the appointed day;

or

(ii) where the Court is satisfied that, on the balance of probabilities, the person died before the appointed day.

Act binds Crown

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Definitions

6. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

"administration", in respect of a deceased person, means:

(a) probate of the will of the deceased person granted in New South Wales or granted outside New South Wales but sealed in pursuance of section 107 (1) of the Wills, Probate and Administration Act 1898; or

(b) letters of administration of the estate of the deceased person or in respect of the deceased person granted in New South Wales or granted outside New South Wales but so sealed, whether the letters of administration were granted with or without a will annexed and whether for general, special or limited purposes,

and includes an order under section 18 (2) or 23 (1) of the Public Trustee Act 1913 in respect of the estate of the deceased person and an election by the Public Trustee under section 18A of that Act in respect of the estate of the deceased person;

"administrator", in relation to the estate of a deceased person, means:

(a) a person to whom administration (not being an order under section 18 (2) or 23 (1), or an election under section 18A, of the Public Trustee Act 1913) has been granted in respect of that estate or any part of that estate;

(b) where an order under section 18 (2) or 23 (1), or an election under section 18A, of the Public Trustee Act 1913 has been made or filed in respect of that estate or any part of that estate, the Public Trustee;

(c) a person who holds that estate or any part of that estate upon a trust which arises out of the will or on the intestacy of the deceased person; or

(d) a person who is otherwise entitled or required to administer that estate or any part of that estate;

"appointed day" means the day appointed and notified under section 2 (2);

"Court" means the Supreme Court of New South Wales;

"deceased person" includes any person in respect of whom administration has been granted;

"eligible person", in relation to a deceased person, means:

(a) a person who:

(i) was the wife or husband of the deceased person at the time of the deceased person's death;

(ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or

(iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;

(b) a child of the deceased person;

(c) a former wife or husband of the deceased person; or

(d) a person:

(i) who was, at any particular time, wholly or partly dependent upon the deceased person; and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member;

"estate", in relation to a person dying leaving a will, includes property which would, on a grant of probate of the will, vest in the executor of the will or, on a grant of administration with the will annexed, vest in the administrator appointed under that grant;

"notional estate", in relation to a deceased person, means property designated by the Court under section 23, 24 or 25 as notional estate of the deceased person;

"property" includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property, and any valuable benefit;

"will" includes a codicil.

(2) A reference in this Act to an application in relation to a deceased person is a reference to an application to the Court for an order for provision in favour of an eligible person out of the estate or notional estate, or both, of the deceased person.

(3) A reference in this Act to an order for provision in favour of an eligible person is a reference to an order under section 7 or 8 in favour of the eligible person.

(4) A reference in this Act to the estate of a deceased person is, where any property which was in the estate of the deceased person at the time of death has been distributed, a reference to so much of the property in the estate as has not been distributed.

(5) Where property in the estate of a deceased person is held by the administrator of that estate as trustee for a person or for a charitable or other purpose, the property shall be treated, for the purposes of this Act, as not having been distributed unless it is vested in interest in that person or for that purpose.

(6) Except in so far as the context or subject-matter otherwise indicates or requires, a reference in this Act to property held by a person includes a reference to property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

(7) A reference in this Act to a person entitled to exercise a power is a reference to a person entitled to exercise the power whether the power is absolute or conditional and whether or not the power arises under a trust, and includes a reference to a person entitled to exercise the power together with one or more other persons, whether jointly or severally.

(8) The Court may, for the purpose of giving effect to any provision of this Act, determine in relation to the provision that the date or time of death of a person the date or time of whose death is uncertain shall be treated as being such date or time, as the case may be, as the Court thinks reasonable for the purposes of the provision.

PART 2 - FAMILY PROVISION

Division 1 - Orders for provision

Provision out of estate or notional estate of deceased person

7. Subject to section 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the

deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Additional provision

8. Subject to section 9, on an application in relation to a deceased person made by or on behalf of an eligible person in whose favour an order for provision out of the estate or notional estate, or both, of the deceased person has previously been made, if the Court is satisfied that there has been, since an order for provision was last made by the Court in favour of the eligible person out of the estate or notional estate, or both, of the deceased person, a substantial detrimental change in the circumstances of the eligible person, it may order that such additional provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Provisions affecting Court's powers under secs. 7 and 8

9. (1) Where an application is made for an order under section 7 by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of "eligible person" in section 6 (1), the Court shall first determine whether, in its opinion, having regard to all the circumstances of the case (whether past or present), there are factors which warrant the making of the application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors.

(2) The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that:

(a) the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate; or

(b) in the case of an order under section 8:

(i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person; or

(ii) the provision made in favour of the eligible person by the deceased person either during the person's lifetime or out

of the person's estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person,

is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person.

(3) In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration:

(a) any contribution made by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to:

(i) the acquisition, conservation or improvement of property of the deceased person; or

(ii) the welfare of the deceased person, including a contribution as a homemaker;

(b) the character and conduct of the eligible person before and after the death of the deceased person;

(c) circumstances existing before and after the death of the deceased person; and

(d) any other matter which it considers relevant in the circumstances.

(4) Nothing in subsection (3) (a) limits the generality of subsection (3) (b), (c) and (d) and the Court may consider a contribution of the same nature as that referred to in subsection (3) (a) or of a different nature in so far as it considers it relevant under subsection (3) (b), (c) or (d).

(5) Subject to the foregoing provisions of this section, the Court may make an interim order for provision under section 7 in favour of an eligible person before it has fully considered the application for that provision where it is of the opinion that no less provision than that proposed to be made by the interim order would be made in favour of the eligible person after full consideration of the application.

(6) Where, on an application made in relation to a deceased person, the Court has made an interim order as referred to in subsection (5), it shall, in due course, proceed to make a final determination of the application, which determination shall confirm, revoke or alter the order so made.

Consequential provision

10. Where, on an application in relation to a deceased person, the Court makes an order for provision in favour of an eligible person out of the estate or notional estate of the deceased person, the Court may make an order in favour of any other eligible person or any other person by whom, or any purpose for which, property in the estate or notional estate of the deceased person is held or would, but for the order for provision in favour of the eligible person, be held that provision be made in such manner and to such extent as the Court thinks necessary to adjust all the interests concerned and to do justice in all the circumstances.

Orders for provision

11. (1) An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may:

(a) require the provision to be made in any 1 or more of the following manners:

(i) by way of a lump sum;

(ii) by way of a periodic sum;

(iii) by way of specified existing or future property;

(iv) by way of an absolute interest, or a limited interest only, in property;

(v) by way of property set aside as a class fund for the benefit of 2 or more persons;

(vi) in any other manner which the Court thinks fit;

(b) be in respect of property which is situated in or outside New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of death, domiciled in New South Wales;

(c) specify the manner in which a sum of money or other property is

to be paid or made available to the person in whose favour the order is made;

(d) where provision is required to be made by way of a sum of money, specify that the whole or any part of the sum shall bear interest at such rate as the Court thinks fit for such period as the Court thinks fit; and

(e) be made subject to such conditions as the Court thinks fit.

(2) * * * * *

Class fund

12. (1) Where the Court makes an order for provision requiring the provision to be made by way of property set aside as a class fund, it shall specify a trustee of the property so set aside.

(2) The trustee of property set aside as a class fund may, subject to such directions and conditions as the Court gives or imposes, but otherwise as the trustee thinks fit, apply from time to time the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life of the persons for whose benefit the fund is held, or any one or more of them to the exclusion of the other or others of them, in such shares and in such manner as the trustee, from time to time, determines.

Burden of provision out of estate

13. Where the Court makes an order for provision out of the estate of a deceased person it may specify the beneficial entitlements in that estate which shall bear the burden of that provision and, in relation to each of those entitlements, the part of the burden which it shall bear.

Effect of order for provision out of estate of deceased person

14. (1) An order made by the Court for provision out of the estate of a deceased person (whether or not an order made in favour of an eligible person) shall, except in so far as the Court otherwise directs, take effect as if the provision had been made:

(a) where the deceased person died leaving a will - in a codicil to the will; or

(b) where the deceased person died intestate - in a will of the deceased person.

(2) The Court shall not direct that an order for provision out of the estate of a deceased person shall take effect otherwise than in the manner referred to in subsection (1) unless it is satisfied that compliance with the order will not adversely affect any creditor of the deceased person.

Consequential and ancillary orders

15. (1) To enable effect to be given to an order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person), the Court may:

(a) make orders for or with respect to all or any of the following matters:

(i) the transferring of property in the estate or notional estate directly to the person in whose favour the order for provision is made or to any other person as trustee for that person;

(ii) the constituting of a person by whom property in the estate or notional estate is held as a trustee of that property;

(iii) the appointing of a trustee of property in the estate or notional estate;

(iv) the powers and duties of any trustee of property in the estate or notional estate;

(v) the vesting in any person of property in the estate or notional estate;

(vi) the exercising of a right or power to obtain property for the estate or notional estate;

(vii) the selling of, or other dealing with, property in the estate or notional estate;

(viii) the disposing of the proceeds of any sale or other realising of property in the estate or notional estate;

(ix) the securing, either wholly or partially, of the due performance of an order under this section;

(x) the managing of property in the estate or notional estate;

(xi) the executing of any necessary conveyance, document or

instrument, the producing of such documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of an order; and

(b) make such other orders with respect to such other matters as the Court thinks necessary.

(2) The provisions of section 78 (except subsection (1)) and 79 of the Trustee Act 1925 apply to and in relation to an order under subsection (1) for the vesting of the property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, in the case of section 78 (2) of that Act, as if the provisions of subsection (1) and the other provisions of this Act relating to the making of orders under this Act were contained in Part 3 of that Act.

(3) Where an order under subsection (1) provides for the payment of money, interest is not payable unless the Court specifically provides that the money shall bear interest.

Time for application for provision

16. (1) In this section, "prescribed period" in respect of an application in relation to a deceased person, means:

(a) where the Court has, in an order made under section 17, specified a period in relation to the application - that period; or

(b) in any other case - the period of 18 months after the death of the deceased person.

(2) An order under section 7 shall not be made unless the application for the order is made within the prescribed period in respect of that application or within such further period as the Court may, having regard to all the circumstances of the case but subject to subsection (3), by order, allow.

(3) The Court shall not make an order under subsection (2) allowing an application in relation to a deceased person to be made after the expiration of the prescribed period unless sufficient cause is shown for the application not having been made within that period.

(4) The Court may make an order under subsection (2) with respect to an application in relation to a deceased person whether or not:

(a) the prescribed period in respect of the application in relation to the deceased person has expired;

(b) the application for the order under that subsection was made before that period expired; or

(c) the application in relation to the deceased person has been made.

(5) Notwithstanding subsections (2) and (3), where administration has been granted in respect of a person whose date of death is so uncertain as to make it impossible to apply subsections (2) and (3) with respect to an application in relation to the person, the Court may, whether or not the application in relation to the person has been made, by order, allow the application in relation to the person to be made within such period as it thinks reasonable and such an order has effect according to its tenor.

Shortening of time for applications for provision

17. (1) On an application made to the Court by the administrator of the estate of a deceased person or by any other person who, in the opinion of the Court, has a sufficient interest in proceedings in respect of the estate or notional estate of a deceased person, the Court may, if it is satisfied that, having regard to all the circumstances of the case, it is reasonable to make an order under this section, order that, in respect of an application in relation to the deceased person by a specified person, the period within which the application shall be made shall be such period (being a period expiring before the expiration of the period of 18 months after the death of the deceased person) as the Court specifies.

(2) An application by a person under this section shall not be deemed to be an admission by the person of any matter for any purpose.

(3) An administrator shall not be regarded as being under any duty to make an application under this section.

Court may require undertakings to restore property if deceased found to have been alive

18. Where the Court makes an order for provision in favour of a person out of the estate or notional estate of a person, the Court may, if it thinks fit, make the order subject to an undertaking being entered into or security being given by the person in whose favour the order is made that, in the event of the revocation of the order by reason of the person out of whose estate or notional estate the provision was made having been alive at the time the order was made, the person will, in accordance with any order made by the Court as a result of the revocation, restore any property received pursuant to the order or otherwise make restitution.

Revocation or alteration of orders for provision

19. (1) An order for provision made under this Act may not be revoked or altered except in accordance with this Act.

(2) Subject to section 20 (4), the Court may, by order, revoke or alter an order for provision in favour of a person made in respect of property in the estate or notional estate of a deceased person so as to allow an order for provision to be made under this Act in favour of another person wholly or partly in respect of all or any of that property.

(3) Where, following the making of an order for provision under this Act, the grant of administration made in respect of the person out of whose estate or notional estate the provision was made is revoked or rescinded, the order for provision is revoked, unless the Court otherwise provides upon the revocation or rescission of the grant.

(4) Where an order for provision is revoked or altered pursuant to section 9 (6) or subsection (2) or (3) or is altered pursuant to section 30, the Court may:

(a) revoke or alter any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the revocation or alteration; and

(b) make such additional orders (other than an order for provision) as may be so necessary.

Court may disregard persons who have not applied for provision

20. (1) On an application in relation to a deceased person, the Court may disregard the interests of any eligible persons who have not made an application in relation to the deceased person.

(2) The Court shall not disregard the interests of an eligible person unless:

(a) notice of the application before it and of the Court's power to disregard those interests has been served upon the eligible person in the manner and form prescribed by rules of court; or

(b) the Court has determined that service of such a notice on that person is unnecessary, unreasonable or impracticable.

(3) * * * * *

(4) The Court shall not revoke or alter an order for provision in favour of an

eligible person to allow the making of a further order for provision in favour of another eligible person unless the other eligible person shows sufficient cause for not having applied for an order for provision in his or her favour before the first-mentioned order was made.

Division 2 - Notional estate

Definitions

21. In this Division, except in so far as the context or subject-matter otherwise indicates or requires:

"disponee", in relation to a prescribed transaction, means:

(a) where, as a result of the prescribed transaction, property becomes held by a person (whether or not as trustee) - the person; or

(b) where, as a result of the prescribed transaction, property becomes held subject to a trust - the object of the trust;

"disponer", in relation to a prescribed transaction, means the person deemed by section 22 to have entered into the prescribed transaction.

Prescribed transactions

22. (1) A person shall be deemed to enter into a prescribed transaction if:

(a) on or after the appointed day the person does, directly or indirectly, or omits to do, any act, as a result of which:

(i) property becomes held by another person (whether or not as trustee); or

(ii) property becomes subject to a trust,

whether or not the property becomes in either case so held immediately; and

(b) full valuable consideration in money or money's worth for the firstmentioned person's doing, or omitting to do, that act is not given.

(2) Except as provided in subsections (5) and (6), a prescribed transaction referred to in subsection (1) shall, for the purposes of this Act, be deemed to take effect at the time property becomes held by a person or subject to a trust as referred to in subsection (1) (a).

(3) The fact that a person has done, or omitted to do, an act as a result of which property became held by another person or subject to a trust shall not prevent a later act or omission by the firstmentioned person (as a result of which the same property becomes held by another person or subject to a trust) constituting a prescribed transaction.

(4) In particular and without limiting the generality of subsection (1), a person shall, for the purposes of subsection (1) (a), be deemed to do, or omit to do, an act, as a result of which property becomes held by another person or subject to a trust if:

(a) the person is entitled, on or after the appointed day, to exercise a power to appoint, or dispose of, property which is not in the person's estate but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of the person's death or the occurrence of the other event:

(i) the property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or

(ii) another person becomes (whether or not immediately) or, if the person was previously entitled, continues to be, entitled to exercise the power;

(b) holding an interest in property which would, on the person's death, become, by survivorship, held by another person (whether or not as trustee) or subject to a trust, the person is entitled, on or after the appointed day, to exercise a power to prevent the person's interest in the property becoming, on the person's death, so held or subject to that trust but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled;

(c) holding an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, the person is entitled, on or after the appointed day, to exercise a power to extinguish the other interest in the property but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of the person's death or the occurrence of the other event, the other interest in the property continues to be so held or subject to that trust;

(d) the person is entitled, on or after the appointed day, in relation to a policy of assurance on the person's life under which money is payable in consequence of the person's death or, as the case may require, in consequence of the occurrence of any other event to a person other than the executor or administrator of the person's estate, to exercise a power:

(i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy of assurance; or

(ii) to surrender or otherwise deal with such a policy of assurance on the person's life,

but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled;

(e) being, on or after the appointed day, a member of, or participant in, a body (corporate or unincorporate), association, scheme, fund or plan, the person dies and, as a result of the person being such a member or participant and of the person's death or the occurrence of any other event, property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or

(f) on or after the appointed day, the person enters into a contract providing for a disposition of property out of the person's estate (whether the disposition is to take effect before, on or after the person's death and whether in pursuance of the person's will or otherwise).

(5) Except as provided in subsection (6), a prescribed transaction involving the doing of, or omitting to do, an act as referred to in subsection (4) (paragraph (f) excepted) shall be deemed to be entered into immediately before, and to take effect on, the death or the occurrence of the other event referred to in that subsection in relation to that act or omission.

(6) Where:

(a) a prescribed transaction involves any kind of contract; and

(b) valuable consideration, although not full valuable consideration, in money or money's worth is given for the disponer's becoming a party to the contract,

the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into.

(7) Notwithstanding subsections (1) and (4), the making by a person of, or the omitting by a person to make, a will is not an act or omission referred to in subsection (1) (a) except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in the person's estate.

Notional estate - prescribed transactions

23. On an application in relation to a deceased person made by or on behalf of an eligible person, if the Court is satisfied:

(a) that an order for provision ought to be made on the application; and

(b) that, at any time before death, the deceased person entered into a prescribed transaction:

(i) which took effect within the period of 3 years before death and was entered into with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of the deceased person's estate or otherwise;

(ii) which took effect within the period of 1 year before death, and was entered into at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the deceased person to enter into the prescribed transaction; or

(iii) which took effect or is to take effect on or after the death of the deceased person,

the Court may, subject to sections 26, 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for the disponee or, where there is more than one disponee, any of the disponees, whether or not that property was the subject of the prescribed transaction.

Notional estate - distributed estate

24. On an application in relation to a deceased person, if the Court:

(a) is satisfied that an order for provision ought to be made on the application; and

(b) finds that, as a result of a distribution from the estate of the deceased person, property became held by a person (whether or not as trustee) or subject to a trust,

the Court may, subject to sections 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the person or the object of the trust, whether or not that property is the property distributed.

Notional estate - subsequent prescribed transactions

25. (1) On an application in relation to a deceased person, if the Court:

(a) is satisfied that an order for provision ought to be made on the application;

(b) has power, under this or any other provision of this Act, to make an order designating as notional estate of the deceased person property which is held by, or on trust for, a person; and

(c) is satisfied that, since the prescribed transaction or distribution in respect of which that power arises was entered into or made, the person referred to in paragraph (b) entered into a prescribed transaction,

the Court may, subject to sections 26, 27 and 28, make, instead of or in addition to the order referred to in paragraph (b), an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the disponee in relation to the prescribed transaction entered into by the person referred to in paragraph (b), or where there is more than one such disponee, any of those disponees, whether or not that property was the subject of the prescribed transaction.

(2) The Court shall not make an order under subsection (1) unless it is of the opinion that there are special circumstances which warrant the making of the order.

Property not to be designated as notional estate by reason of certain prescribed transactions

26. On an application in relation to a deceased person, the Court shall not, by reason of a prescribed transaction having been entered into, make an order

under section 23 or 25 designating property as notional estate unless the prescribed transaction or the holding of property as a result of the prescribed transaction:

(a) directly or indirectly disadvantaged the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death);

(b) involved the exercise by the disponer or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction which:

(i) if not exercised, could have resulted in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death); or

(ii) could, at the time the prescribed transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death); or

(c) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction which could, at the time the prescribed transaction was entered into or at a later time, have been exercised by the disponer or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death).

Designation of property as notional estate - matters to be considered

27. (1) On an application in relation to a deceased person, the Court shall not make an order designating property as notional estate of the deceased person unless it has considered:

(a) the importance of not interfering with reasonable expectations in relation to property;

(b) the substantial justice and merits involved in making or refusing to make the order; and

(c) any other matter which it considers relevant in the circumstances.

(2) In determining what property should be designated as notional estate of a deceased person, the Court shall have regard to:

(a) the value and nature of property the subject of any relevant prescribed transaction or distribution from the estate of the deceased person;

(b) where, in relation to any such prescribed transaction, consideration was given, the value and nature of the consideration;

(c) any changes over the time which has elapsed since any such prescribed transaction was entered into, any such distribution was made or any such consideration was given in the value of property of the same nature as the property the subject of the prescribed transaction, the distribution or the consideration, as the case may be;

(d) whether property of the same nature as the property the subject of any such prescribed transaction, any such distribution or any such consideration could, during the time which has elapsed since the prescribed transaction was entered into, the distribution was made or the consideration was given, as the case may be, have been applied so as to produce income; and

(e) any other matter which it considers relevant in the circumstances.

Designation of property as notional estate - powers and restrictions

28. (1) On an application in relation to a deceased person for an order for provision in favour of an eligible person, the Court shall not make an order designating property as notional estate of the deceased person unless the deceased person left no estate or unless it is satisfied:

(a) that the estate of the deceased person is insufficient to allow the making of provision that, in its opinion, should be made; or

(b) that, by reason of the existence of other eligible persons or the existence of special circumstances, provision should not be made wholly out of the estate.

(2) On an application in relation to a deceased person, the Court shall not make an order designating as notional estate of a deceased person property in excess of that necessary to allow the making of provision that, in its opinion, should be made.

(3) The exercise by the Court of its power under section 23, 24 or 25 to make an order designating as notional estate of a deceased person property held by, or on trust for, a person does not limit or restrict any further exercise by the Court of that power.

(4) Where, as a result of a prescribed transaction or a distribution made from the estate of a deceased person, property becomes held by a person as a trustee only, the Court shall not make an order under section 23, 24 or 25 by reason of the prescribed transaction or distribution in respect of any property (other than the trust property) held by, or on trust for, the person.

(5) On an application in relation to a deceased person, being an application:

(a) made pursuant to an order under section 16 allowing the application to be made; or

(b) for an order under section 8 for additional provision,

the Court shall not make an order designating property as notional estate of the deceased person by reason of a prescribed transaction or a distribution unless it is satisfied:

(c) that:

(i) the property was the subject of the prescribed transaction or distribution;

(ii) the person by whom it is held holds the property as a result of the prescribed transaction or distribution as trustee only; and

(iii) the property is not vested in interest in any beneficiary under the trust; or

(d) that there are other special circumstances (including, in the case of an application made as referred to in paragraph (a), the incapacity, during any relevant period, of the person by or on whose behalf the application is made) which justify the making of an order so designating the property.

Effect of order designating property as notional estate

29. To the extent that a person's rights are affected by an order made under section 23, 24 or 25, those rights are extinguished.

Division 3 - General

Discharge of property from liability as estate or notional estate

30. (1) Where an order for provision has been, or is proposed to be, made affecting property in the estate of a deceased person, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property in the estate, alter the order made or, as the case may require, make the order proposed as if, in either case, the other property were in the estate.

(2) Where an order under section 23, 24 or 25 has been, or is proposed to be, made designating as notional estate of a deceased person property held by a person (whether or not as trustee) or subject to a trust, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property so designated or proposed to be designated, alter the order made by substituting the other property as notional estate or, as the case may require, make an order designating the other property as notional estate.

(3) Where, pursuant to subsection (1), an order is altered or made as if property which is not in the estate of a deceased person were in that estate, the order so altered or made shall thereafter be deemed, for the purposes of this Act (except section 14), to be an order with respect to property in the estate of the deceased person.

Release of right to apply for provision

31. (1) A reference in this section to a release by a person of the person's rights to make an application in relation to a deceased person is a reference to a release by a person of such rights, if any, as the person may have to make such an application and includes a reference to:

(a) an instrument executed by the person which would be effective as a release of those rights if approved by the Court under this section; and

(b) an agreement to execute such an instrument.

(2) A release by a person of the person's rights to make an application in relation to a deceased person has no effect except as provided in subsection (3).

(3) A release by a person of the person's rights to make an application in relation to a deceased person, being a release in respect of which the Court has given its approval under this section, shall have effect to the extent to which the approval has been given and not revoked and shall, for the purposes of this Act, be binding on the releasing party.

(4) Proceedings for the approval of a release of rights to make an application in relation to a deceased person may be commenced before or after the death of the person.

(5) In proceedings for the approval of a release, the Court shall have regard to all the circumstances of the case, including whether:

(a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release;

(b) it is or was, at that time, prudent for the releasing party to make the release;

(c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable; and

(d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.

(6) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a deceased person.

(7) Except as provided in subsections (8) and (9), the Court shall not revoke its approval of a release given under this section.

(8) The Court may revoke its approval of a release given under this section if it is satisfied:

(a) that its approval was obtained by fraud; or

(b) that the release was obtained by fraud or undue influence.

(9) The Court may revoke its approval of a release given under this section or that approval in so far as it affects the whole or part only of the estate or notional estate of a deceased person if it is satisfied that all such persons as, in the opinion of the Court would be sufficiently affected by the revocation of the approval, consent to the revocation.

PART 3 - MISCELLANEOUS

Evidence

32. (1) In this section:

"document" includes any record of information;

"statement" includes any representation of fact whether or not in writing.

(2) In any proceedings under this Act, evidence of a statement made by a deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.

(3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during the person's lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.

(4) Where a statement was made by a deceased person during the person's lifetime while giving oral evidence in a legal proceeding (being a civil or criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the statement may be approved in any manner authorised by the Court.

(5) Where a statement made by a deceased person during the person's lifetime was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.

(6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the

circumstances in which the statement was made or from any other circumstances including, in the case of a statement contained in a document, the form or content of the document.

(8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.

(9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.

(10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.

(11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

(12) This section applies notwithstanding:

(a) the rules against hearsay;

(b) * * * * *

and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(13) The exceptions to the rules against hearsay set out in this section are in addition to the exceptions to the hearsay rule set out in the *Evidence Act 1995*.

Costs, charges and expenses

33. (1) Except as provided in subsections (2) and (3), the Court may order that

the costs, charges and expenses of or incidental to proceedings under this Act in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

(2) The Court shall not order that the whole or any part of the costs, charges or expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of "eligible person" in section 6 (1) be paid out of the estate or notional estate of the deceased person unless:

(a) the Court has made an order for provision in favour of the eligible person on the application; or

(b) there are special circumstances which make it just and equitable for the Court to do so.

(3) The Court shall not order that the whole or any part of the costs, charges and expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person be paid out of the estate or notional estate of the deceased person by reason only of the fact that the eligible person is a person described in paragraph (a) or (b) of the definition of "eligible person" in section 6 (1) or the fact that the Court has made an order for provision in favour of the eligible person on the application.

Certain documents exempt from stamp duty

34. An instrument executed pursuant to an order made under section 15, being an instrument relating to property in the notional estate of a deceased person, is not liable to stamp duty under the Stamp Duties Act 1920.

Protection of administrator

35. (1) Where the administrator of the estate of a deceased person has given notices in the manner and form prescribed by rules of court of the administrator's intention to distribute the property in the estate after the expiration of a specified time, the administrator may, at the expiration of the time specified in the notices or, as the case may require, in the last of the notices, distribute that property having regard only to the applications in relation to the deceased person of which the administrator has notice at the time of the distribution.

(2) An administrator who distributes property in the estate of a deceased person in accordance with subsection (1) is not liable in respect of that

property to any person of whose application in relation to the deceased person the administrator did not have notice at the time of the distribution.

Rules of court

36. (1) For the purpose of regulating any proceedings under this Act in or before the Court, rules of court may be made under the Supreme Court Act 1970 for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act 1970.

NOTES

Table of Acts

Family Provision Act 1982 No. 160. Assented to, 24.12.1982. Date of commencement, secs. 1 and 2 excepted, 1.9.1983, sec. 2 and Gazette No. 120 of 26.8.1983, p. 3935. This Act is reprinted as amended by:

Statute Law (Miscellaneous Provisions) Act 1985 No. 231. Assented to, 18.12.1985. Date of commencement of Sch. 6, 11.4.1986, sec. 2 (4) and Gazette No. 60 of 11.4.1986, p. 1562.

Statute Law (Miscellaneous Provisions) Act (No. 2) 1987 No. 209. Assented to, 9.12.1987. Date of commencement of Sch. 44, except as provided by sec. 2 (4) and (6), assent, sec. 2 (1).

Family Provision (Foreign Land) Amendment Act 1989 No. 191. Assented to, 19.12.1989. Date of commencement, 5.10.1990, sec. 2 and Gazette No. 120 of 28.9.1990, p. 8638.

Evidence (Consequential and Other Provisions) Act 1995 No. 27. Assented to, 19.6.1995. Date of commencement, 1.9.1995, sec. 2 and Gazette No. 102 of 25.8.1995, p. 4355.

Statute Law (Miscellaneous Provisions) Act 1996 No. 30. Assented to, 21.6.1996. Date of commencement of Sch. 3, 3 months after assent, sec. 2 (3).

Table of Amendments

(No reference is made to certain amendments made by Sch. 3 (replacing gender-specific language) to the Statute Law (Miscellaneous Provisions) Act 1996 No. 30.)

Sec. 9 - Am. 1987 No. 209, Sch. 44.
Sec. 11 - Am. 1989 No. 191, Sch. 1.
Sec. 20 - Am. 1985 No. 231, Sch. 6.
Sec. 32 - Am. 1995 No. 27, Sch. 1.

APPENDIX 3

THE NEW ZEALAND ANTI-AVOIDANCE PROPOSALS[245]

Draft Succession (Adjustment) Act (NZ)

Availability of certain assets to meet claims

52(1) Subject to section 55, the non-probate assets of a deceased person are to be available to satisfy property division orders and claims under this Act, but no award or order is to be made in relation to any non-probate asset unless the holder of that asset has been joined as a party to the claim or application.

(2) For the purposes of this Subpart, the **non-probate assets** of a deceased consist of all property passing on the death of the deceased by reason of any of the following transactions:

(a) contracts to make or not to revoke a will; and

(b) contracts with a bank or other financial institution providing for the property in an account or policy to pass to a co-owner or nominated beneficiary on the death of the deceased; and

(c) gifts that the deceased made in contemplation of death (*donationes mortis causa*); and

(d) trusts settled by the deceased that were revocable by the deceased in his or her lifetime; and

(e) beneficial powers of appointment that were exercisable by the deceased in his or her lifetime; and

(f) joint tenancies held by the deceased and any other person.

(3) Property is to be regarded as a non-probate asset for the purposes of this Subpart only if that property was or could have been (if the deceased had so desired or requested) available to the deceased immediately before his or her death.

(4) If property needs to be valued for the purposes of this Act, the valuation is to be carried out as if the deceased had made the property available to himself or herself immediately before death.

Recovery of non-probate assets

53(1) A person who commences a proceeding for a property division order or an award against the estate of a deceased person must, if that person is aware that the determination of the proceeding is likely to involve recourse to non-probate assets, disclose that fact when applying to the court for directions.

(2) Following a disclosure to the court under subsection (1), a copy of the application

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245 See Law Commission (NZ) *Succession Law: A Succession (Adjustment) Act* (NZLC R39, August 1997) 126-134.

or claim must be served on the holders of non-probate assets and those owners must be joined as parties to the proceeding.

(3) An administrator who is aware that the determination of the proceeding is likely to involve recourse to non-probate assets must apply to join the holders of those assets as parties to the proceeding.

(4) If at any time before the determination of a proceeding it becomes apparent to any party to the proceeding or to the court that the determination of the proceeding is likely to involve recourse to non-probate assets, that party may apply to the court for the holders of the non-probate assets to be joined as a party or the court may join those holders on its own initiative.

(5) If the holder of a non-probate asset has been joined as a party to the proceeding, the court may order that the holder in favour of whom the transaction was made, or that person's personal representative, or any person claiming through that person

(a) must transfer to the administrator the property, or any part of it or interest in it retained by that person;

(b) must pay to the administrator such sum, not exceeding the value of the property as the court thinks proper,

and the powers in sections 49 and 50 of the *Administration Act 1969* are available to and may be exercised by the court subject to any necessary modifications.

(6) The court may make any further order that it thinks necessary in order to give effect to an order made under subsection (5).

Rights in respect of prior transactions and non-probate assets

54(1) A person who has commenced a proceeding to initiate a property division or to claim an award against the estate of a deceased person may apply to the court in the course of that proceeding for an order under this section and the court may make such an order if the court is satisfied that the exercise of the powers conferred by this section would facilitate the making of appropriate orders or awards under this Act which cannot otherwise be made equitably from the estate of the deceased and if further satisfied

(a) that there are non-probate assets of the deceased which have not been called in under section 53; or

(b) that the deceased, with the intention of removing property from the reach of proceedings under this Act or otherwise with an intention of prejudicing the interests of persons claiming awards or initiating a property division under this Act, made a disposition of property; or

(c) that less than 3 years before the death of the deceased, the deceased, made a disposition of property and that full valuable consideration for that disposition was not given by the person to whom the disposition was made ("the donee") or by any other person.

(2) On an application under this section, the powers conferred by sections 49 to 51 of the *Administration Act 1969* are available to and may be exercised by the court subject to any necessary modifications.

(3) If the court makes an order under subsection (1), the court may give such consequential directions as it thinks appropriate for giving effect to the order or for the fair adjustment of the rights of the persons affected by the order.

(4) In deciding whether and how to exercise its powers under this section, the court must have regard to the circumstances in which any disposition was made and any valuable consideration which was given for it, the relationship (if any) of the donee to the deceased, the conduct and financial resources of the donee, the availability of other assets within the estate of the deceased to meet claims and orders under this Act, and all the other circumstances of the case.

Denial of recovery

55(1) The court must not make an order under section 53 or 54 against a person if that person proves that he or she

(a) acquired the property for valuable consideration and in good faith without knowledge of the fact that the property is subject to a claim or application under this Act; or

(b) acquired the property through a person who acquired it in the manner described in paragraph (a).

(2) The court may decline to make an order under section 53 or 54, or may make such an order subject to conditions or with limited effect, against a person if that person proves that

(a) he or she received the property in good faith without knowledge of the fact that the property is subject to a claim or application under this Act; and

(b) his or her circumstances have so changed since the receipt of the property that it is unjust to order that the property be transferred or compensation paid.

APPENDIX 4

SPECIFIC CATEGORIES OF PERSONS CURRENTLY AUTOMATICALLY ENTITLED TO MAKE APPLICATION FOR A FAMILY PROVISION ORDER

Set out below is a description of the specific categories of persons automatically entitled to apply for family provision under the various family provision schemes currently operating in the Australian States and Territories. The National Committee has also referred to a number of problems with, or limitations to, those categories.

The categories of "child of the deceased person" (including non-adult child and adult child) and "spouse" are not referred to here as they have been discussed in some detail in the body of this Report.[246]

This Appendix is included in the Report simply for information purposes. It should not be regarded as an expression of support for, or rejection of, any category by the National Committee. Nevertheless, individual jurisdictions which intend to retain, implement or amend provisions in their respective family provision schemes in relation to particular categories of applicants may find the discussion set out below useful.

1. FORMER SPOUSE

(a) Introduction

"Spouse" in this context refers to a lawfully married as opposed to a *de facto* spouse.[247] A former, that is divorced, spouse of a deceased person may apply in all States and Territories for family provision from the deceased person's estate. However, in Victoria, it appears that only a former wife, and not a former husband, may apply.[248]

In Queensland[249] a former spouse's eligibility to apply is limited by a requirement that the spouse has not remarried, and in Queensland,[250] the Northern Territory,[251]

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246 The National Committee has recommended that spouses and non-adult children should be automatically entitled to apply for family provision. See Chapter 2 of this Report.

247 For a discussion on *de facto* spouses and family provision see Part 5 of this Chapter and page 14 of this Report.

248 *Administration and Probate Act 1958* (Vic) s91. This will change with the commencement of the *Wills Act 1997* (Vic).

249 *Succession Act 1981* (Qld) s40 (definition of spouse).

250 Ibid.

251 *Family Provision Act 1970* (NT) s7(2).

Tasmania,[252] Victoria [253] and Western Australia [254] by a requirement that the former spouse was receiving or entitled to receive maintenance at the date of the deceased person's death. The language of this requirement differs from State to State and there is accompanying case-law.[255]

In New South Wales[256] and South Australia[257] no restriction is placed on the eligibility of a former spouse to make application. However, in New South Wales the Court has to be satisfied of a variety of matters under section 9 of the *Family Provision Act 1982* (NSW), relating to the adequacy of, and need for, provision.[258]

de Groot and Nickel[259] have noted the following factors which have been considered to warrant eligibility for former spouses in New South Wales:

> [where] there has been a divorce and a spouse has died before property matters have been resolved by the Family Court (except where the Family Court itself gives relief);
>
> [where] the husband and wife have not finally settled all their property matters at the time of the divorce;
>
> [where] maintenance was being paid to the ex-spouse as at the date of the deceased's death and the orders for maintenance were inadequate to provide for the ex-spouse after the deceased's death;
>
> [where] despite the divorce, there was some dependency on the deceased as at the date of death; (an example of this would be where some years after the divorce, the ex-spouse fell grievously ill and because of a residue of affection, the now deceased spouse provided moneys for medical treatment or living expenses);
>
> where persons whose marriage had become problematical had signed separation deeds or had maintenance orders against them or had had a decree nisi made which had not become absolute by the date of death;
>
> where the provision made for a former wife by way of property settlement or divorce had been found to be inadequate in the light of facts which subsequently emerged concerning an asset considered in the property settlement.

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252 *Testator's Family Maintenance Act 1912* (Tas) s3A(d).

253 *Administration and Probate Act 1958* (Vic) s91.

254 *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(b).

255 See *Re HJ Mayo (deceased)* [1968] 2 NSWR 709; *Re Lack* [1981] QdR 112; *Dobelle v Van Damme* [1982] VR 425; *Re Blood* [1983] 1 QdR 104; and *Sarich v Erceg* [1984] WAR 11.

256 See *Family Provision Act 1982* (NSW) s6(1)(c) set out in Appendix 2 to this Report.

257 *Inheritance (Family Provision) Act 1972* (SA) s6(6).

258 See *Family Provision Act 1982* (NSW) s9 set out in Appendix 2 to this Report.

259 de Groot JK and Nickel BW *Family Provision in Australia and New Zealand* (1993) para 307.

The authors noted that these cases are examples only of factors warranting eligibility. An attempt to provide a non-exhaustive list has been disapproved.[260]

Rather than considering whether remarriage should disqualify a former spouse from being able to make a family provision application, the question could be asked whether it would be appropriate to permit a former spouse to apply for family provision in circumstances where that former spouse has no right to apply for an order in respect of maintenance or property under the *Family Law Act 1975* (Cth). Under this approach the first two issues can be considered together.

If the rights of a former spouse to maintenance and property orders under the *Family Law Act 1975* (Cth) have been exhausted or no longer exist, it is arguably anomalous for that former spouse to retain a right to apply for family provision (whether that former spouse has remarried or not). If the former spouse retains a right to apply to the Family Court for an order for monetary provision, then justice suggests that he or she should also have the right to apply for family provision.

The *Family Law Act 1975* (Cth) generally provides that, where a decree for dissolution of marriage has been made, certain classes of proceedings shall not be instituted after the expiration of 12 months after the date of the making of the decree except by leave of the Court in which the proceedings are instituted.[261] The classes of proceedings include maintenance and property proceedings. Specifically excepted are declarations of interest in property under section 78 and the variation or setting aside of a property order under section 79A, or proceedings seeking the discharge suspension, revival or variation of a previous maintenance order. Section 44(3A), however, permits a new 12 month time period to run from the date of the revocation of approval to a section 87 maintenance agreement, where this happens after divorce.

A court may grant leave for the institution of proceedings for spousal maintenance or an alteration of property interests out of time only if it is satisfied either that hardship would be caused to a party to the marriage or to a child if leave were not granted, or in the case of an application for leave to institute proceedings for spousal maintenance, that at the end of the relevant 12 months' limitation period the applicant would have been unable to support himself or herself without an income tested social welfare benefit. This is the effect of section 44(4) which states:

> **The court shall not grant leave under subsection (3) or (3A) unless it is satisfied:**
>
> **(a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or**
>
> **(b) in the case of proceedings in relation to the maintenance of a party to a marriage - that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were**

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260 *Dijkhuijs v Barclay* (1988) 13 NSWLR 639.

261 *Family Law Act 1975* (Cth) s44(3A).

> such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit.

In addition to the above, there is a separate provision in relation to spousal maintenance. Subsection 82(4) of the *Family Law Act 1975* (Cth) provides as follows:

> An order with respect to the maintenance of a party to a marriage ceases to have effect upon the re-marriage of the party unless in special circumstances a court having jurisdiction under this Act otherwise orders.

There appears to be no similar limitation in the Act relating to property proceedings.

This matter was considered by the New South Wales Law Reform Commission in 1977. The Commission made the following comments:[262]

> **2.6.23 A former spouse: Remarriage**
> Should the remarriage of one of the parties to a divorce destroy the eligibility of that party to apply, on the death of the other party, for an appointment for provision out of his or her estate? Under section 1(1)(b) of the *Inheritance (Provision for Family and Dependants) Act* 1975 (U.K.), only a former wife or husband "who has not remarried" may so apply. The reason for this provision, as stated by the Law Commission in England,[263] is that where a marriage is ended by a decree of divorce or nullity, the principle is that if one of the parties remarries during their joint lives his claims against the other party come to an end.[264] If remarriage destroys any claim against a former spouse, it should, it is argued, also destroy any claim against his estate. But in Australia, by force of section 82(4) of the *Family Law Act 1975* (Cth), an order with respect to the maintenance of a party to a marriage ceases to have effect upon the remarriage of the party "unless in special circumstances the court having jurisdiction otherwise orders". Hence, in this country, the principle is that remarriage does not necessarily destroy all claims against a former spouse. In this circumstance, we say that the remarriage of a party to a divorce should not, of itself, bar a claim under the new Act against the estate of the other party. In saying this we appreciate that in many cases, if not in most cases, the remarriage will be regarded by the Court as an abandonment of all claims against the estate of the other party. But this will not always be so. If, for example, an application under the new Act by a former spouse discloses facts of the kind considered in *O'Regan (formerly Douglass) v. Douglass*[265] the Court may well make an appointment for provision. In that case, a husband, a wealthy man, deserted his wife and 3 young children. He had established and maintained a high standard of living for his wife during 12 years of marriage and he expected her to bring up his children according to that standard. Neither she nor her second husband had substantial capital or income. In order to maintain the standard to which she was accustomed as the mother of these children, she needed continued and substantial support from the former husband. In that circumstance, in the event of the death of the former husband, we would see justification for an appointment that provision be made for her out of his estate. Hence the new Act does not draw any distinction

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262 New South Wales Law Reform Commission Report on *Testators Family Maintenance and Guardianship of Infants Act, 1916* (LRC R28, 1977) 2.6.23.

263 Law Commission (UK) Family Law: Second Report on *Family Property: Family Provision on Death* (Law Com No. 61, 1974) paragraph 57.

264 *Matrimonial Causes Act 1973* (UK) s28.

265 (1969) 13 FLR 417.

> between a former spouse who has remarried and one who has not: if he or she satisfies the conditions of section 6, he or she is an eligible applicant.

The effect of tailoring family provision to equate with the *Family Law Act 1975* (Cth) would be:

1. *prima facie* to exclude the making of an application by a former spouse who may not, as of right, institute the relevant class of proceedings in the Act, and

2. to confer on the Court the power to grant leave to institute proceedings on the basis of the same considerations referred to in section 44(4) of the *Family Law Act 1975* (Cth).

(b) Discussion

If former spouses are dealt with as a specific category of persons automatically entitled to apply for family provision, the following should be considered:

- whether remarriage should disqualify a former spouse from eligibility to make an application for family provision;

- whether a former spouse's right to eligibility to apply for family provision should be coextensive with the *existence* (but not the *content)* of his or her right to apply under the *Family Law Act 1975* (Cth) for maintenance from the deceased person prior to his or death;

- whether the law should apply equally to former wives and former husbands.

A number of additional matters would also need to be resolved. For example:

(i) in determining whether a former spouse is eligible to apply, what restrictions (other than receipt of or entitlement to receive maintenance, and other than remarriage) should specifically apply?

  - Australian Capital Territory has **no restrictions.**[266]

  - In the Northern Territory the spouse **must be maintained at date of death**. A nominal contribution by the deceased person to the former spouse's maintenance is specifically excluded. A present entitlement to

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266 *Family Provision Act 1969* (ACT) s7(1)(a). Section 4(1) defines spouse to include past spouses.

apply for a maintenance order if the deceased person were still alive is included.[267]

- In the Northern Territory a **former partner through a traditional Aboriginal marriage** is recognised as a former spouse for the purposes of an application under the *Family Provision Act 1970* (NT).[268]
- New South Wales courts must be satisfied there are **factors which warrant the application.**[269]
- In Queensland the former spouse must not have remarried and **must be receiving or be entitled to receive maintenance.**[270]
- South Australia has **no restrictions.**[271]
- In Tasmania the former spouse **must have been receiving or be entitled to receive maintenance** from the deceased person pursuant to an order of a court, or to an agreement or otherwise.[272]
- In Victoria the former wife of the deceased person must be **in receipt or entitled to receive payments of alimony or maintenance** whether pursuant to an order of any court or otherwise.[273]
- In Western Australia the former spouse of the deceased person must have been **receiving or entitled to receive maintenance** from the deceased person, whether pursuant to an order of any court, or to an agreement or otherwise.[274]

(ii) In relation to the phrase "court order, agreement or otherwise" used in a number of the jurisdictions, de Groot and Nickel note that:[275]

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267 *Family Provision Act 1970* (NT) s7(1)(b), (2), (7).

268 Id s7(1A). "Aboriginal" is defined in s4(1).

269 *Family Provision Act 1982* (NSW) s9.

270 *Succession Act 1981* (Qld) s40.

271 *Inheritance (Family Provision) Act 1972* (SA) s6(6).

272 *Testator's Family Maintenance Act 1912* (Tas) s3A(d).

273 *Administration and Probate Act 1958* (Vic) s91. This will change when the *Wills Act 1997* (Vic) comes into force.

274 *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(b).

275 de Groot JK and Nickel BW *Family Provision in Australia and New Zealand (1993)* para 306.1.

> It is difficult to know what is meant by the words "or otherwise" because it is hard to conceive of such a right. The restriction would seem now to have little effect as the court could entertain, for example, an application based only on a verbal agreement which would be difficult to disprove

It is unclear whether the words "or otherwise" add anything. Perhaps they refer to maintenance payable by way of an enduring power of attorney or as beneficiary of a trust.

(iii) Whether a person is "receiving or entitled to receive maintenance" will often depend on the status of the parties' property settlement and will also depend upon the deceased person's assets at the time of divorce or separation. In life the deceased person may not have been able to pay maintenance at an appropriate rate because of his or her limited available funds. On his or her death, the estate may be more able to fulfill moral or other obligations to the surviving former spouse. One proposal is to provide that:

- if the deceased person died before the property settlement then the surviving former spouse should be entitled to apply for family provision.
- if the deceased person died after the property settlement, then the surviving former spouse should have to establish that the deceased person owed him or her a "special responsibility" before being entitled to apply for family maintenance.

(iv) In an attempt to avoid unworthy claims on the estate it may be appropriate to set a time limit on the former spouse's entitlement to apply for family provision. For example, it may be appropriate to limit the application of the provision to situations where the deceased person and the applicant had been divorced for less than 5 years prior to the death. In most cases a person's moral obligation to maintain another would diminish the greater the time from separation or divorce.

2. STEP CHILDREN

(a) Introduction

A stepchild of the deceased person is made specifically eligible to apply for family provision in the Australian Capital Territory, the Northern Territory, Queensland, South Australia and Tasmania.[276] In the Australian Capital Territory and the Northern Territory the stepchild must have been maintained by the deceased person immediately

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276 *Family Provision Act 1969* (ACT) s7(1)(d) & (2); *Family Provision Act 1970* (NT) s7(1)(d) & (2)(b); *Succession Act 1981* (Qld) s40 (definition of "child"); *Inheritance (Family Provision) Act 1972* (SA) s6(g); *Testator's Family Maintenance Act 1912* (Tas) s2(1).

before his or her death. In South Australia the step-child must be a person who was maintained or legally entitled to be maintained by the deceased person immediately before his or her death.[277] In Tasmania and Queensland a "child" of the deceased person is defined to include "a stepchild". There is no specific provision in New South Wales covering step children, although they could come within the New South Wales legislation's general provision relating to dependants.[278]

Definition of step-child

In 1997, the *Succession Act 1981* (Qld) was amended to rectify what had been considered a significant shortcoming of the Queensland legislation - that is, that the relationship of step-child and step-parent ceased to subsist after the termination of the marriage which created it, by divorce or death of the natural parent.[279] In *Re Burt*[280] McPherson J said:

> the applicant must be the child by a former marriage of one who is the husband or wife of that person at the date of death of the latter.

The decision overruled earlier cases, namely *Re Trackson (Deceased)*,[281] *Re Nielsen, Deceased* [282] and *Re Burt* at first instance.[283] This decision, which was reiterated by the Full Court in 1989 in *Re Marstella*,[284] greatly restricted the ability of step-children to make application as the following example shows.

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277 *Family Provision Act 1969* (ACT) s7(2); *Family Provision Act 1970* (NT) s7(2); *Inheritance (Family Provision) Act 1972* (SA) s6(g).

278 *Family Provision Act 1982* (NSW) s6(1)(d).

279 *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld).

280 [1988] 1 QdR 23 at 29.

281 [1967] QdR 124.

282 [1968] QdR 221.

283 [1985] 2 QdR 335.

284 [1989] 1 QdR 638; *sub nom Glover v Executors, Estate of Marstella (deceased)* (1988) 12 Fam LR 787.

Example

A and B marry and have a child Janice.
A and B divorce. A marries C and B marries D.
C and D are both step-parents of Janice.

If the step-parents predecease the parents, Janice will be able to make a family provision application against four estates, that is, those of her parents A and B and her step-parents C and D.

But if the parents predecease the step-parents Janice will have to make application on the death of each of her parents. She cannot wait and apply on the subsequent death of the former step-parent, even though the former step-parent may have inherited her parent's estate. She will have to compete with the step-parent in the application.

If Janice could defer making an application until the death of the step-parent, entirely different considerations would govern the application, including how much the parent had left the step-parent and the other obligations of the step-parent at the time of the step-parent's death. She would not have to compete with the step-parent.

If C and D have children of previous marriages their rights to apply will be the other way around.

Practitioners had frequently criticised the limited meaning placed on the term step-child by the Queensland Full Court which was binding in Queensland, but not elsewhere.

Thus de Groot and Nickel said:[285]

> Macrossan J (as he then was) has highlighted the arbitrary result produced by the current definition in that, whatever the length of the relevant marriage, the step-child might have a claim if his or her natural parent dies a short time after but not if such parent dies a short time before the day on which the deceased, the spouse of such parent, dies. Clearly, considerable injustice can result from this interpretation of "stepchild", and the intervention of the legislature is warranted.

The Queensland Law Reform Commission had received correspondence from a leading firm of Brisbane solicitors criticising the narrowness of the Full Court's definition.

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285 de Groot JK and Nickel BW *Family Provision in Australia and New Zealand* (1993) para 319.1.

It was arguable that the Queensland decision was incorrect, on the ground that it significantly impaired (even if it did not nullify) rather than enhanced what is, after all, a jurisdiction traditionally characterised by the breadth of the discretion which it confers on the judiciary.

In any case it would have been undesirable to leave matters where they were because of the uncertainty of the law. There was always the possibility of an appeal from Queensland to the High Court of Australia.

Consideration of the same question in other States could lead to divergent interpretations because of the criticism to which the Queensland cases have been subject.

In Queensland a person under the age of eighteen years, who was being wholly or substantially maintained or supported (otherwise than for full and valuable consideration) by the deceased person at the time of the deceased person's death, may make an application for provision.[286] This could include a former step-child.

The *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld) replaced the definition of "stepchild" in section 40 of the *Succession Act 1981* with a new section 40A which reads:

> **Meaning of "stepchild"**
>
> (1) A person is a "stepchild" of a deceased person for this part if -
>
> (a) the person is the child of a spouse of the deceased person; and
>
> (b) a relationship of stepchild and stepparent between the person and the deceased person did not stop under subsection (2).
>
> (2) The relationship of stepchild and stepparent stops on the divorce of the deceased person and the stepchild's parent.
>
> (3) To remove any doubt, it is declared that the relationship of stepchild and stepparent does not stop merely because -
>
> (a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or
>
> (b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died.

286 *Succession Act 1981* (Qld) s40 (definition (c) of "dependant").

(b) Discussion

If step children were to be included in the legislation as a specific category of eligible persons, a number of matters would need to be resolved. For example:

(i) Should a definition of "stepchild" along the lines of the Queensland provision be adopted?

(ii) If so, should that definition be included in a wider definition of child of the deceased person or should it be a separate definition and be the basis of a separate class of persons entitled to claim family maintenance?

(iii) Is it appropriate to exclude the children of divorced spouses from the definition given that in some cases the former spouse and the child of his or her former partner would have maintained a close relationship?

(iv) Should there be restrictions on the eligibility of stepchildren? Namely:

- that they were being maintained or at least eligible to be maintained by the deceased person at the time of his or her death? (South Australia)
- that they were being maintained by the deceased person at the time of his or her death? (Australian Capital Territory, Northern Territory)
- that they were at any particular time wholly or partly dependent upon the deceased person and a member of the deceased person's household? (New South Wales).

3. GRANDCHILDREN

Specific provision is made for grandchildren of a deceased person to apply for family provision in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Western Australia.[287] In Queensland a grandchild may apply as a dependant of the deceased person.[288]

In all jurisdictions except South Australia various restrictions are placed upon applicants.

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287 *Family Provision Act 1969* (ACT) s7(1)(e)(3); *Family Provision Act 1982* (NSW) s6(1) (definition (d) of "eligible person"); *Family Provision Act 1970* (NT) s7(1)(e)(3); *Inheritance (Family Provision) Act 1972* (SA) s6(h); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(d).

288 *Succession Act 1981* (Qld) s40 (definition of "dependant").

In the Australian Capital Territory[289] and the Northern Territory[290] the grandchild cannot make application unless -

> (a) the parent of the grandchild who was a child of the deceased person died before the deceased person died; or
>
> (b) one or both of the parents of the grandchild was [was or were] alive at the date of the death of the deceased person and the grandchild was not maintained by that parent or by either of those parents immediately before the death of the deceased person.[291]

In New South Wales[292] the grandchild is required to have been, at any particular time, wholly or partly dependent upon the deceased person.

In Queensland a grandchild is eligible to apply (as a dependant) if he or she is under the age of 18 years and a person who:[293]

> was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

In Western Australia there is a combination of the other restrictions. Eligibility to apply is conferred on a grandchild:[294]

> who at the time of death of the deceased was being wholly or partly maintained by the deceased or whose parent the child of the deceased had predeceased the deceased living at the date of the death of the deceased, or then *en ventre sa mere*.

4. OTHER YOUNG PERSONS

(a) Introduction

In New South Wales a young person may apply as a dependant member of the household of the deceased person.[295] In Queensland a person under the age of 18

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289 *Family Provision Act 1969* (ACT) s7(3).

290 *Family Provision Act 1970* (NT) s7(3).

291 Differences in the Northern Territory provisions are signified in square brackets.

292 *Family Provision Act 1982* (NSW) s6(1) (definition (d) of "eligible person").

293 *Succession Act 1981* (Qld) s40 (definition (c) of "dependant").

294 *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(d).

295 *Family Provision Act 1982* (NSW) s6(1) (definition (d) of "eligible person").

years may apply as a dependant if he or she:[296]

> was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

No other jurisdiction has a general or specific category of eligible persons which would enable a young person who was not a child or grandchild of the deceased person to apply.[297]

(b) Discussion

If other young people are to be included in the legislation in a specific category of eligible persons a number of matters would need to be resolved. For example, should there be a restriction on the eligibility of other young people:

- that they were being maintained or at least eligible to be maintained by the deceased person at the time of his or her death?
- that they were being maintained by the deceased person at the time of his or her death?
- that they were at any particular time wholly or partly dependent upon the deceased person and, at that particular time or any other time, a member of the deceased person's household (New South Wales)?

5. *DE FACTO* SPOUSES

(a) Introduction

A *de facto* spouse may make a family provision application in all jurisdictions except Victoria.[298] Eligibility is restricted in different jurisdictions by various criteria.

The Australian Capital Territory has adopted the most liberal definitions relating to *de facto* spouses in the context of family provision legislation. Those definitions would enable surviving partners from: relationships based on domestic ties; same sex

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296 *Succession Act 1981* (Qld) s40 (definition (c) of "dependant").

297 South Australia includes brothers and sisters in the list of who is entitled to claim but such a person would have to satisfy the Court that he or she cared for, or contributed to the maintenance of, the deceased person during his or her lifetime. See *Inheritance (Family Provision) Act 1972* (SA) s6(j).

298 Recent amendments to s91 of the *Administration and Probate Act 1958* (Vic) proposed by the *Wills Act 1997* (Vic) will allow *de facto* spouses to make claims under the general responsibility provision when the legislation comes into force. The *Wills Act 1997* (Vic) is not yet in force.

couples; and, heterosexual "marriage like" relationships, to apply for family provision. There are no restrictions on eligibility to apply based on dependency or entitlement to maintenance.

"Spouse" is defined in such a way as to include *de facto* spouses and other partners of the deceased person. So too is the term "domestic partner." Both categories of people are regarded as eligible persons under the *Family Provision Act 1969* (ACT).

Section 4 of the *Family Provision Act 1969* (ACT) provides that the word "spouse":

> in relation to a deceased person, means -
>
> (a) a legal spouse of the deceased; or
>
> (b) an eligible partner of the deceased.

An "eligible partner" is defined in the same provision in the following terms:

> in relation to a deceased person, means a person other than the person's legal spouse who -
>
> (a) whether or not of the same gender as the deceased - lived with the deceased at any time as a member of a couple on a genuine domestic basis; and
>
> (b) either -
>
> (i) had lived with the deceased in that manner for 2 or more years continuously; or
>
> (ii) is a parent of a child of the deceased.

"Domestic partner" in section 4 of the *Family Provision Act 1969* (ACT) reads:

> in relation to a deceased person, means a person who lived with the deceased in a domestic relationship for 2 years continuously at any time during the life of the deceased.

"Domestic relationship" is defined in the same provision as:

> a personal relationship between 2 adults (other than a relationship between spouses) in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other.

In the Northern Territory a *de facto* partner:[299]

> in relation to a deceased person means -
>
> (a) where the deceased was a man - a woman who, immediately before the man's death, was living with him as his wife on a bona fide domestic basis although not married to him; and

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299 *Family Provision Act 1970* (NT) s4.

> (b) where the deceased was a woman - a man who, immediately before the woman's death, was living with her as her husband on a bona fide domestic basis although not married to her.

To be eligible to make an application in the Northern Territory the *de facto* spouse must show that he or she was "maintained by the deceased person immediately before his or her death".[300]

In New South Wales the applicant who is a *de facto* spouse is defined in a similar way to the definition in the Northern Territory - again without any legislated requirements as to periods of cohabitation.[301]

In Queensland a *de facto* spouse must show that he or she:[302]

> (i) has lived in a connubial relationship with that deceased person for a continuous period of 5 years at least terminating on the death of that deceased person; or
>
> (ii) within the period of 6 years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating 5 years at least including a period terminating on the death of that deceased person.

Since a *de facto* spouse can only apply as a dependant it must also be shown that he or she:[303]

> was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death ...

In South Australia a "spouse" is an eligible person.[304] "Spouse" is defined, in relation to a deceased person, to include:[305]

> a person adjudged under the *Family Relationships Act, 1975*, to have been a putative spouse of the deceased either on the date of his death, or at some earlier date ...

A "putative spouse" is defined in section 11 of the *Family Relationships Act 1975* (SA) which provides that:

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300 *Family Provision Act 1970* (NT) s7(2).

301 *Family Provision Act 1982* (NSW) s6 (definitions (a)(ii) and (iii) of "eligible person").

302 *Succession Act 1981* (Qld) s40 (definition (d) of "dependant"). This section has recently been amended by the *Succession Amendment Act 1997*. When the amendment comes into force, paragraph (d) of the definition in s40 will be replaced by the term "*de facto* spouse" which will be defined in s5 in almost identical terms to the current definition.

303 Ibid.

304 *Inheritance (Family Provision) Act 1972* (SA) s6(a).

305 Id s4.

(1) A person is, on a certain date, the putative spouse of another if he is, on that date, cohabiting with that person as the husband or wife *de facto* of that other person and -

(a) he -

(i) has so cohabited with that other person continuously for the period of five years immediately preceding that date; or

(ii) has during the period of six years immediately preceding that date so cohabited with that other person for periods aggregating not less than five years; or

(b) a child, of which he and that other person are the parents, has been born (whether or not the child is still living at the date referred to above).

...

(3) Subject to the provisions of any other Act, a person shall not be recognised under the law of this State as the putative spouse of another unless a declaration of the relationship has been made under this section.

There is no requirement that the "putative" or *de facto* spouse was being maintained by the deceased person at the time of the death.

In Tasmania a *de facto* spouse of the deceased person at the date of the deceased person's death is eligible to apply for family provision.[306] A "*de facto* spouse" is defined in subsection 2(1) of the Tasmanian Act as a person:

(a) who cohabited with another person of the opposite sex as the spouse of that other person, although not legally married to that other person, for at least 3 years immediately before the death of that other person; and

(b) who was principally dependent on that other person for financial support at the time of the death of that other person -

and includes a person who is to be treated as having been a *de facto* spouse by virtue of an order of the Court made under subsection (5);

Section 2 further provides:

...

(3) A person may apply to the Court to be treated as having been the *de facto* spouse of a deceased person if that person would have been the *de facto* spouse of the deceased person but for the period during which the persons cohabited.

(4) The executor or administrator of the estate of the deceased person may apply to the Court for a determination that a person referred to in subsection (3) is to be treated as having been the *de facto* spouse of the deceased person.

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306 *Testator's Family Maintenance Act 1912* (Tas) s3A(e) and definition of "*de facto* spouse" in s2 inserted by *Testator's Family Maintenance Amendment Act 1995* (Tas).

> (5) The Court may determine that a person is to be treated as having been the *de facto* spouse of another person if satisfied that, taking into account the circumstances of the case, it is proper to do so.

In Western Australia there are different provisions again. For a *de facto* spouse to qualify as an eligible person he or she must have been maintained by the deceased person at the time of his or her death, must have been a member of the deceased person's household and must have been a person to whom the deceased person owed a "special moral responsibility to make provision". Subsection 7(1)(f) of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) reads:

> (1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons -
>
> (f) a *de facto* widow or widower of the deceased who at the time of the death of the deceased was being wholly or partly maintained by the deceased, who was ordinarily a member of the household of the deceased, and for whom the deceased, in the opinion of the Court, had some special moral responsibility to make provision.

A "*de facto* widow or widower" is not defined.[307]

(b) Discussion

If *de facto* spouses are dealt with in any way by the legislation, the following matters should be considered:

- should there be a consistent definition of "*de facto* spouse"?
- is it necessary for there to be a dependency requirement?
- would it be preferable to have a general definition of "*de facto* spouse" or "*de facto* relationship" based upon criteria rather than time periods?

If the term "*de facto* spouse" is used, the following matters would also need to be resolved:

(i) Should a *de facto* spouse be defined in such a way as to include same-sex partners and/or partners in other domestic relationships (as per Australian Capital Territory)?

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307 Other legislation in Western Australia tends to define "*de facto* spouse" in terms of heterosexual domestic relationships although with no time limits on the length of the relationships. For example, s3 of the *Minimum Conditions of Employment Act 1993* (WA) defines "*de facto* spouse" as "a person who is co-habiting with another person as that person's spouse, although not actually married to that person"; s4 of the *Equal Opportunity Act 1984* (WA) defines "*de facto* spouse" in relation to a person as "a person of the opposite sex to the first-mentioned person, who lives with the first-mentioned person as a husband or wife of that person on a *bona fide* domestic basis, although not legally married to that person".

(ii) Should a person qualify as a *de facto* spouse if he or she is a parent of the deceased person's child (South Australia, Australian Capital Territory)?

6. PARENTS

(a) Introduction

All States, except Victoria and New South Wales, specifically allow parents to apply for family provision. Once again their eligibility is restricted by requirements of dependency.

In the Australian Capital Territory and the Northern Territory the parent must show that he or she was being maintained by the deceased person immediately before the death of the deceased person, or that the deceased person was not survived by a spouse or children.[308]

In Queensland a parent of the deceased person may make an application as a dependant if he or she:[309]

> was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

In South Australia a parent may apply if the parent:[310]

> satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime.

It has been held that this is not restricted to a period immediately before the death of the deceased person.[311] Most parents would be able to show that they come within this test.

In Tasmania the parents of a deceased person may apply if the deceased person dies without leaving a widow or any children.[312]

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308 *Family Provision Act 1969* (ACT) s7(4); *Family Provision Act 1970* (NT) s7(4).

309 *Succession Act 1981* (Qld) s40 (definition (a) of "dependant").

310 *Inheritance (Family Provision) Act 1972* (SA) s6(i).

311 *In the Estate of Terry, Deceased* (1980) 25 SASR 500.

312 *Testator's Family Maintenance Act 1912* (Tas) s3A(c). Note that s2 defines "widow" to include "widower".

In Western Australia a parent, including an adoptive parent, may apply without restriction.[313]

In New South Wales, the definition of eligible person includes:[314]

> a person:
>
> (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
>
> (ii) who ... was, at that particular time or at any other time, a member of a household of which the deceased person was a member.

This class of eligible persons can include parents as well as other persons not related by blood to the deceased. However, the Court has to be satisfied of a variety of matters under section 9 of the *Family Provision Act 1982* (NSW) reinforcing underlying criteria of adequacy and need. The extensively written provisions of section 9 largely relate to the matters which the Court should take into account in exercising its discretion in making an order.

(b) Discussion

If parents were to be included in the legislation as a separate category of eligible persons a number of matters would need to be resolved, such as, what criteria should apply: dependency on the deceased person prior to his or her death; having been maintained by the deceased person prior to his or her death; absence of surviving spouse and children?

7. OTHER ADULTS

(a) Introduction

In New South Wales, a person is eligible to apply:[315]

> (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
>
> (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member.

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313 *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(e).

314 *Family Provision Act 1982* (NSW) s6(1) (definition (d) of "eligible person").

315 Ibid.

(b) Discussion

No other Australian legislature has eligibility criteria as broad as the New South Wales dependency provision although, as described in this Report, proposals have been made in New Zealand and in Victoria for general categories of eligible persons defined by reference to duties owed to others by the deceased person and contributions made by others to the estate of the deceased person.[316]

316 See Chapter 2 of this Report.