

**NATIONAL COMMITTEE
FOR UNIFORM SUCCESSION LAWS**

FAMILY PROVISION

Supplementary Report
to
the Standing Committee of Attorneys General

Queensland Law Reform Commission
Report No 58
July 2004

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Legal Officers: **Miss M T Collier
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Administrative Officer: **Ms T L Bastiani**

The Commission's premises are located on the 7th Floor, 50 Ann Street, Brisbane.

The postal address is PO Box 13312, George Street Post Shop, Qld 4003.

Telephone (07) 3247 4544. Facsimile (07) 3247 9045

E-mail address: LawReform.Commission@justice.qld.gov.au

Internet home page address: <http://www qlrc.qld.gov.au>

**MEMBERS OF THE NATIONAL COMMITTEE
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1

Although South Australia does not have a representative on the National Committee, an officer of the South Australian Attorney-General's Department holds a watching brief in relation to the project.

2

The Tasmania Law Reform Institute has replaced Professor Don Chalmers as the Tasmanian representative on the National Committee. Professor Chalmers was a member of the National Committee from its inception until August 2003. The National Committee acknowledges the valuable contribution made by Professor Chalmers to this project.

Previous publications in this project:

Issues Paper, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (QLRC MP 10, July 1994, reissued as QLRC WP 46, June 1995; NSWLRC IP 10, February 1996)

Issues Paper, *Uniform Succession Laws for Australian States and Territories: Family Provision* (QLRC WP 47, June 1995; NSWLRC IP 11, February 1996)

Miscellaneous Paper, *Uniform Succession Laws: Wills* (QLRC MP 15, February 1996)

Miscellaneous Paper, *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (QLRC MP 16, February 1996)

Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills (QLRC MP 29, December 1997; NSWLRC R 85, April 1998)

Report to the Standing Committee of Attorneys General on Family Provision (QLRC MP 28, December 1997)

Discussion Paper, *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999, NSWLRC DP 42, October 1999)

Discussion Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (QLRC WP 55, December 2001)

Issues Paper, *Uniform Succession Laws: Recognition of interstate and foreign grants of probate and letters of administration* (IP 21, May 2002)

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Commentary on model family provision legislation

This Report includes, as Appendix 2, the National Committee's model family provision legislation for the Australian States and Territories. A comparative table, which indicates the legislative provisions on which the various model provisions have generally been based, is set out in Appendix 1 to this Report.

This commentary outlines the main provisions of the model legislation, with an emphasis on those provisions that would, if adopted, result in a change to the existing law in most Australian jurisdictions.

ELIGIBILITY TO APPLY FOR A FAMILY PROVISION ORDER

Clause 6 provides that the following persons may apply for a family provision order in respect of the estate of a deceased person:

- the wife or husband of the deceased person at the time of the deceased person's death;
- a person who was, at the time of the deceased person's death, the de facto partner³ (or equivalent, as may be applicable in the enacting jurisdiction) of the deceased person;
- a non-adult child of the deceased person.

Clause 7 provides, in addition, that a person to whom a deceased person owed a responsibility to provide maintenance, education or advancement in life may apply for a family provision order in respect of the estate of the deceased person.

Clause 11 provides that, for the purpose of determining whether a person is entitled to apply for a family provision order under clause 7, the court may have regard to various specified matters.

TIME LIMIT FOR APPLICATIONS

Clause 9 provides that, unless the court directs otherwise, an application for a family provision order must be made not later than 12 months after the death of the deceased person.

3

See cl 3(1) (definition of "de facto partner").

DETERMINATION OF APPLICATIONS

When family provision orders may be made

Clause 10(1) provides that the court may make a family provision order in favour of a person if it is satisfied that, at the time the court is determining whether or not to make the order, adequate provision is not made for the person's maintenance, education or advancement in life.

Clause 10(2) provides that the court may make such order for provision as it thinks ought to be made for the maintenance, education or advancement in life of the person in whose favour the order is made, having regard to the facts known to the court at the time the order is made.

Additional provision

Clause 10(3) provides that the court may make a family provision order in favour of a person in whose favour a family provision order has previously been made if:⁴

- the court is satisfied that there has been a substantial detrimental change in the person's circumstances since a family provision order was last made in favour of the person;⁵ or
- when a family provision order was last made in favour of the person, the evidence did not reveal the existence of certain property (the *undisclosed property*) and the court would have considered the deceased person's estate to be substantially greater in value if the evidence had revealed the existence of the undisclosed property.⁶

Matters to be considered by the court

Clause 11 specifies various matters to which the court may have regard for the purpose of determining whether to make a family provision order and the nature of any such order.

Other possible applicants

Clause 12 provides that in specified circumstances the court may, in determining an application for provision, disregard the interests of any other person by whom, or on whose behalf, an application may be made (other than a

⁴ Note that cl 41 provides that, where an application is made for additional provision, the court must not make a notional estate order in the proceedings unless it is satisfied of certain matters.

⁵ See cl 10(3)(a).

⁶ See cl 10(3)(b).

beneficiary of the deceased person's estate), but who has not made an application.

Interim family provision orders

Clause 13 provides that, in specified circumstances, the court may make an interim family provision order in favour of a person.

PROPERTY THAT MAY BE USED FOR FAMILY PROVISION ORDERS

Clause 14 provides that a family provision order may be made in relation to:

- the estate of a deceased person; or
- property that is not part of the estate of a deceased person, or that has been distributed, if the property is designated as notional estate of the deceased person by an order under Part 3.

Clause 15 provides that a family provision order may be made in respect of property situated in or outside the enacting jurisdiction, whether or not the deceased person was, at the time of death, domiciled in the enacting jurisdiction.

NOTIONAL ESTATE ORDERS

Provisions enabling the designation of property as notional estate

Part 3 of the model legislation contains four provisions under which the court may designate specified property as notional estate of a deceased person:

- clause 30 (Notional estate order may be made where property of estate distributed);
- clause 31 (Notional estate order may be made where estate affected by relevant property transaction);⁷
- clause 32 (Notional estate order may be made where estate affected by subsequent relevant property transaction);
- clause 33 (Notional estate order may be made where property of deceased transferee's estate held by administrator or distributed).

7

Relevant property transactions are described in cll 25-27.

Effect of a notional estate order

Clause 35 provides that a person's rights are extinguished to the extent that they are affected by a notional estate order.

Restrictions and protections in relation to notional estate orders

The making of a notional estate order is subject to various restrictions:

- clause 38 specifies matters that the court must consider before making a notional estate order;
- clause 39 specifies matters of which the court must be satisfied before it may make a notional estate order;
- clause 40 specifies matters to which the court must have regard in determining what property should be designated as notional estate of a deceased person; and
- clause 41 specifies matters of which the court must be satisfied before it may make a notional estate order where an application for provision is made out of time or where an application is made for additional provision.

PROTECTION OF ADMINISTRATOR IN RESPECT OF DISTRIBUTION OF THE DECEASED PERSON'S ESTATE

Clauses 44 and 45 deal with the circumstances in which the administrator of the estate of a deceased person will not be liable in respect of a distribution of property in the estate. They provide that an administrator will not be liable in respect of a distribution of property properly made in any of the following circumstances:

- if the administrator has complied with the requirements to give notice of his or her intention to distribute the estate and the property is distributed not earlier than six months after the deceased person's death and, at the time of distribution, the administrator does not have notice of any application or intended application for a family provision order affecting the deceased person's estate;⁸
- if the distribution is for the purpose of providing those things immediately necessary for the maintenance, education or advancement in life of a person who was wholly or substantially dependent on the deceased person immediately before his or her death;⁹

8 See cl 44.

9 See cl 45(1), (2).

- if the distribution is made by the administrator after the person (being of full legal capacity) has notified the administrator in writing that the person either:
 - (a) consents to the distribution; or
 - (b) does not intend to make any application under the Act that would affect the proposed distribution.¹⁰
- where the administrator received notice of an intended application for family provision, if the distribution is made not earlier than 12 months after the deceased person's death and, at the time the distribution is made, the administrator has not received written notice that an application for provision has been commenced and has not been served with a copy of the application.¹¹

RELEASE OF RIGHTS TO APPLY FOR A FAMILY PROVISION ORDER

Clause 46 provides that a person who is, or who may be, eligible to apply for a family provision order may apply to the court for the approval of a release of such rights, if any, as the person may have to apply for a family provision order.

Clause 47 provides that the court may, in specified circumstances, revoke its approval of such a release.

¹⁰ See cl 45(3).

¹¹ See cl 45 (4), (5).

Chapter 1

Introduction

BACKGROUND TO THIS REPORT

1.1 This Report concludes the second stage of the National Uniform Succession Laws Project, and deals with the law in relation to family provision.¹²

1.2 In December 1997, the National Committee presented its Report on *Family Provision* to the Standing Committee of Attorneys General.¹³ That Report contained the National Committee's recommendations for model family provision legislation for the Australian States and Territories.

1.3 This Report contains model legislation that gives effect to the recommendations made in the earlier Report, and to the further recommendations made in this Report.¹⁴ A commentary on the model family provision legislation is included at pages i to v of this Report.

1.4 The National Committee wishes to record its thanks to the New South Wales Parliamentary Counsel's Office, which drafted the model family provision legislation that is included in this Report.

1.5 In the course of finalising the terms of the model legislation, several issues arose that were not specifically addressed by the National Committee in its earlier Report. In addition, the drafting process led to a refinement of the National Committee's original recommendations in respect of several other issues. These matters are explained in this Report.

1.6 Further, since the completion of the earlier Report in December 1997, the family provision legislation in several jurisdictions has been amended. In particular, the legislation in New South Wales, the Northern Territory, Queensland, Tasmania and Western Australia has been amended to broaden the range of persons who are eligible to apply for provision.¹⁵ In the light of those developments, the National Committee was of the view that it was desirable to consider whether its original recommendations, including those in

¹² The first stage of the project dealt with the law of wills: see National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, December 1997) and the model wills legislation contained in that Report. That Report was tabled in the Queensland Parliament on 27 January 1998.

¹³ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997). That Report was tabled in the Queensland Parliament on 27 January 1998.

¹⁴ Appendix 1 to this Report contains a comparative table of provisions, which identifies the origins of each provision of the model legislation. The model legislation is set out in Appendix 2 to this Report.

¹⁵ See para 2.10 of this Report.

relation to eligibility to apply for provision,¹⁶ should stand or whether those recommendations should be modified.

1.7 This Report states the law as at 30 June 2004.

NEXT STAGE OF THIS PROJECT

1.8 The National Committee anticipates finalising the third stage of this project, which deals with the administration of deceased estates¹⁷ (including the resealing and recognition of foreign grants¹⁸), by mid-2005.

1.9 During the coming year, the National Committee will also commence work on the fourth and final stage of the project, which concerns a review of the law in relation to intestacy.

¹⁶ Eligibility to apply for family provision is considered in Chapter 2 of this Report.

¹⁷ See Queensland Law Reform Commission, Discussion Paper, *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999); New South Wales Law Reform Commission, Discussion Paper, *Administration of Estates of Deceased Persons* (DP 42, October 1999).

¹⁸ See Queensland Law Reform Commission, Discussion Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (QLRC WP 55, December 2001); New South Wales Law Reform Commission, Issues Paper, *Uniform Succession Laws: Recognition of interstate and foreign grants of probate and letters of administration* (IP 21, May 2002).

Chapter 2

Eligibility to apply for family provision

INTRODUCTION

2.1 In each Australian jurisdiction other than Victoria, the family provision legislation specifies various categories of persons who are entitled to apply for provision out of the estate of a deceased person.¹⁹ In each case, the legislation includes as an eligible applicant a person who was the de facto partner²⁰ of the deceased person.²¹

2.2 In Victoria, the relevant legislation no longer includes a list of specific categories of persons who are eligible to apply for family provision. Instead, the legislation provides that the court may order that provision be made “for the proper maintenance and support of a person for whom the deceased had responsibility to make provision”.²² The legislation specifies the various matters to which the court must have regard in determining whether the deceased had responsibility to make provision for a particular person.²³

FAMILY PROVISION REPORT

2.3 The National Committee’s recommendation about eligibility to apply for family provision combined the Victorian approach of a general criteria-based category with a restricted form of the traditional approach, under which

19 *Family Provision Act 1969* (ACT) s 7; *Family Provision Act 1982* (NSW) ss 6(1) (definition of “eligible person”), 7; *Family Provision Act* (NT) s 7; *Succession Act 1981* (Qld) s 41(1); *Inheritance (Family Provision) Act 1972* (SA) s 6; *Testator’s Family Maintenance Act 1912* (Tas) s 3A; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(1).

20 In this context, the expression “de facto partner” is used generically to describe the various categories of persons referred to in note 21 of this Report.

21 *Family Provision Act 1969* (ACT) s 7(1)(a), (9), *Legislation Act 2001* (ACT) s 169 (References to *domestic partner* and *domestic partnership*); *Family Provision Act 1982* (NSW) ss 6(1) (definition of “eligible person” para (a)(iii)), 7, *Property (Relationships) Act 1984* (NSW) ss 4, 5(1)(a); *Family Provision Act* (NT) s 7(1)(a), *Interpretation Act* (NT) s 19A(3), *De Facto Relationships Act* (NT) ss 3(1) (definitions of “de facto partner”, “de facto relationship”), 3A (De facto relationships); *Succession Act 1981* (Qld) ss 5AA(2)(b), (c)(i), 41(1); *Inheritance (Family Provision) Act 1972* (SA) ss 4 (definition of “spouse”), 6(a), *Family Relationships Act 1975* (SA) s 11; *Testator’s Family Maintenance Act 1912* (Tas) ss 2(1) (definition of “spouse”), 3A(a), *Relationships Act 2003* (Tas) s 4 (Significant Relationships); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(1)(a), *Interpretation Act 1984* (WA) s 13A.

22 *Administration and Probate Act 1958* (Vic) s 91(1). A new s 91 of the *Administration and Probate Act 1958* (Vic) was inserted by s 55 of the *Wills Act 1997* (Vic). Previously, s 91 provided that the court could order that provision be made for the widow, widower or child of a deceased person.

23 *Administration and Probate Act 1958* (Vic) s 91(4). The court must also have regard to the same matters to determine whether adequate provision has been made for the proper maintenance and support of the person, and to determine the amount of any provision to be ordered: *Administration and Probate Act 1958* (Vic) s 91(4). The matters specified under the Victorian legislation are discussed in National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 17-18, 20-24.

particular categories of persons are specified. It recommended that there be three categories of persons who would be eligible to apply for provision out of the estate of a deceased person.

2.4 These were:²⁴

- a person who was the wife or husband²⁵ of the deceased person at the time of the deceased person's death;
- a child of the deceased person who was under the age of 18 at the date of the deceased person's death; and
- a person for whom the deceased person had responsibility to provide for the person's maintenance, education or advancement in life.²⁶

2.5 In relation to the last of these categories, the National Committee recommended that the model legislation should specify various matters, based largely on the Victorian legislation, to which the court should have regard in determining whether the deceased had responsibility to make provision for a particular person.²⁷

2.6 The National Committee was of the view that, by including as a separate category of eligible applicants those persons for whom the deceased had responsibility to make provision, the model legislation would enable applications to be made by persons who might not necessarily fall within one of the specific categories found in the legislation of the various jurisdictions, but who might nevertheless have a legitimate claim on the estate of a deceased person.²⁸ At the same time, this approach would simplify the legislation by significantly reducing the number of categories of eligible applicants. As the National Committee observed, there is considerable diversity among the various jurisdictions in relation to the existing categories.²⁹

24 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 26.

25 Some jurisdictions may wish to use slightly different terminology, when implementing the National Committee's recommendations, in order to maintain consistency with other legislation in the particular jurisdiction. For example, in Western Australia s 5 of the *Interpretation Act 1984* (WA) defines "spouse", in relation to a person, to mean a person who is lawfully married to that person.

26 In the Family Provision Report, the National Committee referred to a person for whom the deceased had a "special responsibility" to provide for the person's maintenance, education or advancement in life. However, for consistency with the Victorian legislation, the model legislation uses the term "responsibility", rather than "special responsibility". The term "responsibility" is therefore used in this discussion of the National Committee's original recommendation. The concept of "responsibility" as used in s 91 of the *Administration and Probate Act 1958* (Vic) has been considered in *Coombes v Ward* [2004] VSCA 51.

27 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 20-24.

28 *Id* at 20.

29 *Id* at 8.

2.7 Under the National Committee's original proposals, the de facto partner of a deceased person would be eligible to apply for family provision if, having regard to the various matters specified in the model legislation, the court was satisfied that he or she was a person for whom the deceased had responsibility to make provision. The decision not to include the de facto partner of a deceased person as a separate category within the list of eligible applicants was not the result of any view that such a person should not be eligible for family provision. On the contrary, the National Committee acknowledged the difficulties of drawing a distinction between formal marriages and de facto relationships in this context.³⁰

2.8 Nevertheless, the National Committee was of the view that the de facto partner of a deceased person should not constitute a separate category within the list of eligible applicants. The National Committee considered it unlikely, given the divergent approaches taken with respect to the eligibility of de facto partners under the then existing legislation, that governments in all Australian jurisdictions would agree on a single definition of de facto partner or on the relevant qualifying period (if any).³¹ In particular, the Australian Capital Territory was, at that time, the only Australian jurisdiction in which the legislation enabled the surviving partner of a same-sex de facto relationship to apply for provision out of the estate of the deceased partner.³²

ISSUE FOR CONSIDERATION

Specific inclusion of de facto partners

2.9 Since the completion of the Family Provision Report, legislation has been enacted in most Australian jurisdictions to assimilate, to a large degree, the rights and obligations of de facto partners with those of married couples, and to provide that the gender of the parties to a de facto relationship is irrelevant.³³ The general approach within the various jurisdictions has been to adopt a single definition of "de facto partner" or "de facto relationship" (or another equivalent term), which is then used across the range of legislation

30 Id at 14.

31 Ibid.

32 *Family Provision Act 1969* (ACT) ss 4(1) (definitions of "spouse" and "eligible partner"), 7(1)(a). That Act has since been amended by the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) so that the terminology used to describe particular relationships is consistent with that used in other legislation in the Australian Capital Territory. See now *Family Provision Act 1969* (ACT) s 7(1)(a), (9) (definition of "partner"), *Legislation Act 2001* (ACT) s 169.

33 *Property (Relationships) Legislation Amendment Act 1999* (NSW); *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); *Discrimination Law Amendment Act 2002* (Qld); *Relationships Act 2003* (Tas); *Relationships (Consequential Amendments) Act 2003* (Tas); *Statute Law Amendment (Relationships) Act 2001* (Vic); *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA). In the Australian Capital Territory, the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) has had a similar effect. However, as noted at para 2.8 of this Report, the surviving partner of a same-sex de facto relationship was already eligible to apply for provision, as such a person fell within the definition of "eligible partner", since omitted, in s 4(1) of the *Family Provision Act 1969* (ACT).

within the particular jurisdiction concerning the rights or obligations of de facto partners.³⁴ The definitions enacted in the individual jurisdictions are similar, although not identical, and set out a number of factors to which regard may be had to determine whether two people are, or have been, in a de facto relationship (or in another equivalent relationship).³⁵ As a result, at least within individual jurisdictions, there is now consistency in relation to the terminology used to refer to de facto partners, as well as in relation to the definitions of the terms used.

2.10 As part of these reforms, amendments have been made to the eligibility provisions of the family provision legislation in New South Wales,³⁶ the Northern Territory,³⁷ Queensland,³⁸ Tasmania³⁹ and Western Australia,⁴⁰ with the result that the surviving partner of a same-sex de facto relationship is now eligible to apply for family provision in these jurisdictions.⁴¹

34

Legislation Act 2001 (ACT) s 169 (References to *domestic partner* and *domestic partnership*); *Property (Relationships) Act 1984* (NSW) s 4 (De facto relationships); *Interpretation Act* (NT) s 19A(3), *De Facto Relationships Act* (NT) ss 3(1) (definitions of “de facto partner”, “de facto relationship”), 3A (De facto relationships); *Acts Interpretation Act 1954* (Qld) s 32DA (Meaning of “de facto partner”); *Relationships Act 2003* (Tas) s 4 (Significant relationships); *Property Law Act 1958* (Vic) s 275(1) (definition of “domestic partner”), (2); *Interpretation Act 1984* (WA) s 13A (References to de facto relationship and de facto partner).

35

Legislation Act 2001 (ACT) s 169(2); *Property (Relationships) Act 1984* (NSW) s 4(2); *De Facto Relationships Act* (NT) s 3A(2); *Acts Interpretation Act 1954* (Qld) s 32DA(2); *Relationships Act 2003* (Tas) s 4(3); *Property Law Act 1958* (Vic) s 275(2); *Interpretation Act 1984* (WA) s 13A(2). The factors set out in the New South Wales provision, which is typical of most of these provisions, are:

- (a) the duration of the relationship,
- (b) the nature and extent of common residence,
- (c) whether or not a sexual relationship exists,
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,
- (e) the ownership, use and acquisition of property,
- (f) the degree of mutual commitment to a shared life,
- (g) the care and support of children,
- (h) the performance of household duties,
- (i) the reputation and public aspects of the relationship.

Note, however, that Part 2 of the *Relationships Act 2003* (Tas) makes provision for the registration of a deed of relationship. If a significant relationship is registered, proof of registration is proof of the relationship: *Relationships Act 2003* (Tas) s 4(2). In those circumstances, it is not necessary to have regard to the factors set out in s 4(3) of the Act to determine whether two people are in a significant relationship.

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Family Provision Act 1982 (NSW) ss 6(1) (definitions of “domestic relationship” and “eligible person” para (a)(ii)), 7, *Property (Relationships) Act 1984* (NSW) ss 4, 5(1)(a).

37

Family Provision Act (NT) s 7(1)(a), *Interpretation Act* (NT) s 19A(3).

38

Succession Act 1981 (Qld) ss 5AA (Who is a person’s “spouse”), 41(1), *Acts Interpretation Act 1954* (Qld) s 32DA.

39

Testator’s Family Maintenance Act 1912 (Tas) ss 2(1) (definition of “spouse”), 3A(a), *Relationships Act 2003* (Tas) s 4 (Significant relationships).

40

Inheritance (Family and Dependents Provision) Act 1972 (WA) s 7(1)(a), *Interpretation Act 1984* (WA) s 13A.

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The position in the Australian Capital Territory is discussed at note 32 of this Report. As explained at para 2.2 of this Report, s 91 of the *Administration and Probate Act 1958* (Vic) provides for only one category of applicant, and does not include a reference to a person who was the domestic partner of the deceased. Such a person will be eligible to apply for provision if he or she was a person for whom the deceased had a responsibility to make provision.

2.11 The issue that arises is whether, in the light of these legislative developments, the model legislation should still have only the three categories of eligible applicants that were originally recommended or whether the model legislation should, in addition, provide expressly that an application for family provision may be made by a person who was the de facto partner of the deceased person.⁴²

The means by which de facto partners should be included

2.12 Although the amendments discussed above have resulted in greater consistency in relation to the eligibility of de facto partners to apply for family provision, the various jurisdictions still use a range of terms to refer to de facto partners and de facto relationships. The various jurisdictions also have slightly different provisions for determining whether two people have been in a de facto relationship (however described).

2.13 In addition, there are some differences in relation to whether a qualifying period is required to establish a de facto relationship for the purposes of the family provision legislation.

2.14 In New South Wales, the Northern Territory, Tasmania and Western Australia, the length of the relationship is relevant to the question of whether a person was in a de facto relationship with the deceased person.⁴³ However, the family provision legislation in these jurisdictions does not impose any qualifying period for a de facto partner to be eligible to apply for provision.

2.15 In contrast, a qualifying period applies under the legislation in the Australian Capital Territory and Queensland. In the Australian Capital Territory, there is a requirement that a “partner” lived with the deceased at any time for a continuous period of two or more years, or is the parent of a child of the deceased person.⁴⁴ In Queensland, the person must have been the deceased person’s de facto partner, as defined in section 32DA of the *Acts Interpretation Act 1954* (Qld) and, in addition, must have lived with the deceased person as a couple on a genuine domestic basis within the meaning of that section of the

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As a result of the reforms made in New South Wales by the *Property (Relationships) Legislation Amendment Act 1999* (NSW), the *Family Provision Act 1982* (NSW) also enables an application for provision to be made by a person who was living with the deceased in a “close personal relationship” (other than marriage or a de facto relationship): *Family Provision Act 1982* (NSW) s 6(1) (definitions of “domestic relationship” and “eligible person” para (a)(ii)), *Property (Relationships) Act 1984* (NSW) s 5(1)(b). The legislation in the Australian Capital Territory also enables a similar category of persons to apply for provision: *Family Provision Act 1969* (ACT) s 7(1)(b), (9) (definition of “domestic relationship”). The National Committee does not propose that such a category of persons should be included specifically among the list of eligible applicants. However, in the absence of specific inclusion, such a person may nevertheless be able to apply for provision if he or she was a person for whom the deceased had a responsibility to make provision. In that regard, see para 2.3-2.4 of this Report.

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Property (Relationships) Act 1984 (NSW) s 4(2)(a); *De Facto Relationships Act* (NT) s 3A(2)(a); *Relationships Act 2003* (Tas) s 4(3)(a); *Interpretation Act 1984* (WA) s 13A(2)(a).

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Family Provision Act 1969 (ACT) s 7(1)(a), (9).

Acts Interpretation Act 1954 (Qld) for a continuous period of at least two years ending on the deceased person's death.⁴⁵

2.16 In South Australia, the eligibility of a de facto partner remains as it was when the Family Provision Report was published.⁴⁶ In order to be eligible for provision as the "putative spouse" of the deceased person, an applicant must be of the opposite gender to the deceased person, and must either have co-habited with the deceased person for five years or for a total of five of the six years immediately preceding the deceased person's death or be the parent of a child of the deceased person.⁴⁷

THE NATIONAL COMMITTEE'S VIEW

Specific inclusion of de facto partners

2.17 The National Committee is conscious that, since the publication of its Family Provision Report, the legislation in New South Wales, the Northern Territory, Queensland, Tasmania and Western Australia has been amended to broaden the range of de facto partners who may apply for family provision.⁴⁸ The eligibility of de facto partners to apply for family provision is also being considered in South Australia as part of a broader review that is examining areas of the law in which same-sex couples are treated differently from opposite-sex couples.⁴⁹

2.18 As noted earlier, the National Committee considered it unlikely, at the time its Family Provision Report was published, that the governments in all Australian jurisdictions would agree on a single definition of de facto partner or on the relevant qualifying period (if any).⁵⁰ However, in view of the fact that the recent legislative trend has been in favour of removing distinctions between

⁴⁵ *Succession Act 1981* (Qld) s 5AA(2)(b), (c)(i). Section 32DA of the *Acts Interpretation Act 1954* (Qld) specifies a number of factors that may be taken into account in deciding whether two people are living together as a couple on a genuine domestic basis. Even if a person had not lived with the deceased as a couple on a genuine domestic basis for a period of two years ending on the deceased's death and does not therefore qualify as the de facto partner of the deceased, the person may nevertheless be eligible to apply as a "dependant" of the deceased if he or she was, at the time of the deceased's death, the parent of a surviving child under the age of 18 years of the deceased: *Succession Act 1981* (Qld) ss 40 (definition of "dependant" para (b)), 41(1).

⁴⁶ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 201-202. See, however, Attorney General's Department (SA), Discussion Paper, *Removing Legislative Discrimination Against Same-sex Couples* <<http://www.sacentral.sa.gov.au/agencies/agd/samesexdiscrim.pdf>> (at 5 March 2003). That paper examined a number of areas, including eligibility to apply for family provision, in which the partners of a same-sex relationship are treated differently from the partners of an opposite-sex relationship, and considered a range of options for removing those differences.

⁴⁷ *Inheritance (Family Provision) Act 1972* (SA) ss 4 (definition of "spouse"), 6(a), *Family Relationships Act 1975* (SA) s 11.

⁴⁸ See para 2.9-2.10 of this Report.

⁴⁹ See note 46 of this Report.

⁵⁰ See para 2.8 of this Report.

married persons and de facto partners and of broadening the range of de facto partners who are eligible to apply for family provision, the National Committee doubts that Australian governments would, in the interests of uniformity, agree to adopt a scheme under which the de facto partner of a deceased person must establish that he or she was a person for whom the deceased had a responsibility to make provision, rather than being specifically referred to among the categories of eligible persons.

2.19 The National Committee is therefore of the view that the model legislation should now specifically provide that a person who was the de facto partner of a deceased person is eligible to apply for provision out of the deceased person's estate.

The means by which de facto partners should be included

2.20 It is apparent from the preceding discussion that there is still some variation in the terminology used in the legislation of the States and Territories to refer to a person who was the de facto partner of a deceased person, as well as in the definitions of the relevant terms. In the light of these differences, the National Committee is of the view that the model legislation should not attempt to include a uniform definition of "de facto partner".

2.21 As noted previously, most Australian jurisdictions now use a single definition of "de facto partner" or "de facto relationship" (or other equivalent terms) throughout the legislation of the particular jurisdiction.⁵¹ This approach is designed to achieve consistency across the range of legislation within the individual jurisdiction concerning the rights or obligations of de facto partners.

2.22 The National Committee is of the view that the model legislation should provide that an application for provision may be made by a person who was, at the time of a deceased person's death, the de facto partner (or equivalent) of the deceased person according to the relevant legislation in the enacting jurisdiction.

2.23 This means that the differences in the terminology used in the various jurisdictions will be maintained. For example, in Tasmania, the legislation would refer to a person who was, at the time of the deceased person's death, in a significant relationship with the deceased person, within the meaning of the *Relationships Act 2003* (Tas), whereas in Western Australia the legislation would refer to a person who was, at the time of the deceased person's death, the de facto partner of the deceased person, within the meaning of the *Interpretation Act 1984* (WA). It also means that, in all jurisdictions other than South Australia, an application for provision could be made by a de facto partner who was of the same sex as the deceased. However, in South Australia, pending legislation to assimilate the rights of same-sex couples with

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See para 2.9 of this Report.

those of opposite-sex couples,⁵² eligibility would be framed in terms of a person who was the “putative spouse” of the deceased person, which would not include a person who had been living with the deceased as a couple in a same-sex relationship.

2.24 The National Committee acknowledges that this approach will not achieve uniformity throughout Australia in relation to the persons who will be eligible to apply for provision on the basis of having been the de facto partner of a deceased person. However, this approach meets the objective of placing the eligibility of a de facto partner on the same footing as that of a husband or wife of a deceased person, while accommodating the existing differences in relation to the various definitions of de facto partner. A person who does not fall within the definition of “de facto partner” (or other applicable term) for a particular jurisdiction may nevertheless be eligible to apply for provision out of the estate of a deceased person if he or she was a person for whom the deceased person had a responsibility to make provision.⁵³

RECOMMENDATIONS

2-1 The model legislation should provide that an application for family provision may be made by a person who was, at the time of the deceased person’s death, the de facto partner (or equivalent, as may be applicable in the enacting jurisdiction) of the deceased person, within the meaning of the relevant legislation of the enacting jurisdiction.⁵⁴

52 See note 46 of this Report.

53 See para 2.3-2.4 of this Report.

54 This recommendation is implemented by cl 3(1) (definition of “de facto partner”) and 6(1)(b) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 26.

Chapter 3

Property that may be the subject of a family provision order

INTRODUCTION

3.1 Under the existing legislation in all Australian jurisdictions except New South Wales, the court may generally order that provision be made only out of what is regarded as the “estate” of a deceased person.⁵⁵ This has two important consequences in terms of the property that may be the subject of a family provision order. In the first place, provision may usually be ordered only out of property that, on the making of a grant of representation, vests in the deceased’s personal representative.⁵⁶ As a result, property disposed of by the deceased before death will not usually be able to be affected by such an order.⁵⁷ In the second place, where an application is made out of time, property that has been distributed cannot be the subject of a family provision order as it has ceased to be part of the deceased’s estate.⁵⁸

3.2 In New South Wales, quite different principles apply under the *Family Provision Act 1982* (NSW). Under that Act, the court may order that provision be made not only out of the estate of a deceased person, but also out of property designated by the court as “notional estate” of a deceased person.⁵⁹ An order designating property as notional estate of a deceased person may be made where:⁶⁰

55 See National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 7.

56 *Easterbrook v Young* (1977) 136 CLR 308 per Barwick CJ, Mason and Murphy JJ at 316. In some Australian jurisdictions, legislation also enables an order for provision to be made out of property in respect of which the deceased was entitled to exercise a general or special power of appointment, even though such property does not normally vest in the deceased’s personal representative. For an explanation of general and special powers of appointment and a discussion of the extent to which property the subject of either type of power may be made the subject of a family provision order, see Dickey A, *Family Provision After Death* (1992) at 53-55.

57 In some jurisdictions, there is an exception in relation to *donationes mortis causa* (gifts made in anticipation of the donor’s death). For an explanation of *donationes mortis causa* and a discussion of the extent to which they may be made the subject of a family provision order, see Dickey A, *Family Provision After Death* (1992) at 53.

58 See para 3.59 of this Report. In Queensland, even if the application is made within time, provision cannot be ordered out of property that has been distributed: *Re McPherson* [1987] 2 Qd R 394.

59 *Family Provision Act 1982* (NSW) s 7. The term “notional estate” is defined in s 6(1) of the Act.

60 The court must not make an order designating property as notional estate of a deceased person unless it has considered certain specified matters: *Family Provision Act 1982* (NSW) s 27(1). In addition, the Act imposes a number of restrictions on the exercise of the court’s power to designate property as notional estate of a deceased person: *Family Provision Act 1982* (NSW) ss 26-28. For a discussion of these restrictions, see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 83-84.

- the deceased person entered into a “prescribed transaction”⁶¹ that took effect within the relevant period;⁶²
- property became held by a person, or subject to a trust, as the result of a distribution from the deceased person’s estate;⁶³ or
- a person by whom property became held, or for whom property became held on trust, as the result of a prescribed transaction or distribution enters into a prescribed transaction.⁶⁴

3.3 When the court makes a notional estate order under the New South Wales legislation, it is not restricted to designating as notional estate the actual property that was the subject of the prescribed transaction or distribution. The court may designate as notional estate of a deceased person any property that is held by, or on trust for:

- the person by whom property became held (whether or not as trustee) as a result of a prescribed transaction or distribution;⁶⁵ or
- the object of the trust for which property became held on trust as a result of a prescribed transaction or distribution,⁶⁶

whether or not that property was the subject of the prescribed transaction or distribution.⁶⁷

61 *Family Provision Act 1982* (NSW) s 23. The circumstances that constitute “prescribed transactions” are set out in s 22 of the Act. Broadly, a person enters into a prescribed transaction if he or she does, or omits to do, an act that adversely affects his or her estate (because either property passes out of the estate or does not accrue to the estate) and the person does not receive full valuable consideration for doing or not doing the act. Prescribed transactions are discussed in more detail at para 3.11-3.12 of this Report.

62 Under s 23 of the *Family Provision Act 1982* (NSW) the court may designate property as notional estate of a deceased person only if it is satisfied that the prescribed transaction took effect:

- within the period of three years before the deceased person’s death and was entered into with the intention of depriving an eligible person of his or her rights under the Act; or
- within the period of one year before the deceased person’s death and was entered into at a time when the deceased person’s moral obligation to make provision for an eligible person was substantially greater than any moral obligation to enter into the prescribed transaction; or
- on or after the death of the deceased person.

63 *Family Provision Act 1982* (NSW) s 24.

64 *Family Provision Act 1982* (NSW) s 25.

65 Where as a result of a prescribed transaction or distribution, property becomes held by a person as trustee only, the court may designate as notional estate only the property that was the subject of the prescribed transaction or distribution: *Family Provision Act 1982* (NSW) s 28(4).

66 The object of a trust will usually be a person or persons (whether natural or body corporate) or a charitable purpose. Trusts for non-charitable purposes have generally been held to be invalid. See Ford HAJ and Lee WA, *Principles of the Law of Trusts* (looseleaf) at para 5230-5260.

67 *Family Provision Act 1982* (NSW) ss 21 (definition of “disponnee”), 23-25.

3.4 The rationale for enabling the court to designate as notional estate property other than the property that was the subject of the prescribed transaction or distribution has been explained in the following terms:⁶⁸

Particular property which has been distributed from a deceased's estate or which could otherwise be designated as notional estate may no longer exist in specie at the time of the hearing of an application for family provision. Alternatively, it may be neither practicable nor reasonable for the court to deal with this property.

3.5 The New South Wales legislation does not place a limit on the value of the other property held by, or on trust for, the relevant person or object of the trust that may be designated as notional estate of a deceased person. The legislation does, however, stipulate a number of factors to which the court must have regard in determining what property should be designated as notional estate of a deceased person. These factors are:⁶⁹

- (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.

3.6 The legislation also provides that the court must not designate 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.⁷⁰

⁶⁸ Dickey A, *Family Provision After Death* (1992) at 56-57. For example, in *Weston v Public Trustee* (Unreported, Supreme Court of New South Wales, Macready M, 13 March 1996), by the time the plaintiff's application for provision was heard, the defendant had spent the bulk of the funds she had received as the deceased's sole beneficiary and as a result of the various prescribed transactions entered into by the deceased. The Court therefore ordered that the defendant's interest in her family home, which she owned jointly with her husband, be designated as notional estate of the deceased to the extent necessary to enable a legacy to be paid to the plaintiff.

⁶⁹ *Family Provision Act 1982* (NSW) s 27(2).

⁷⁰ *Family Provision Act 1982* (NSW) s 28(2).

3.7 The main purpose of the “notional estate” provisions of the New South Wales legislation is to deter people from avoiding their family provision responsibilities by divesting themselves of property during their lifetime, or by failing to take steps that would have caused property to accrue to their estates. The provisions also ensure that, in exceptional circumstances, an order for family provision can be made in relation to distributed property.

3.8 In the Family Provision Report, the National Committee recommended that provisions to the effect of the notional estate provisions of the *Family Provision Act 1982* (NSW) should be included in the model legislation.⁷¹

PROPERTY HELD UNDER A JOINT TENANCY

Introduction

3.9 A joint tenancy is one of the main forms of co-ownership of property. An important feature of a joint tenancy is that, on the death of a joint tenant, the interest of that joint tenant passes by operation of the right of survivorship (the *jus accrescendi*) to the remaining joint tenant or joint tenants.⁷² Because a joint tenant’s interest in property does not vest, on death, in his or her personal representative, it does not form part of the estate out of which family provision may be ordered.

3.10 Although a joint tenant cannot dispose of his or her interest by will, a joint tenant may sever his or her interest during his or her lifetime.⁷³ This has the result of converting the joint tenant’s interest into an interest as tenant in common with the other co-owners.⁷⁴ There is no right of survivorship among tenants in common. Consequently, a person’s interest in property as a tenant in common vests, on the person’s death, in his or her personal representative, and forms part of the person’s estate out of which family provision may be ordered.

New South Wales legislation

3.11 As explained earlier, the New South Wales legislation provides that where, at any time before death, a deceased person entered into a prescribed transaction that took effect within the relevant period⁷⁵ the court may designate specified property as notional estate of the deceased person. Section 22(1) of

⁷¹ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93. This recommendation was qualified in relation to the manner in which the New South Wales legislation dealt with property that had been held by the deceased under a joint tenancy. That issue is discussed at para 3.9-3.31 of this Report.

⁷² Megarry, Sir Robert and Wade, Sir William, *The Law of Real Property* (6th ed, 2000) at para 9-003.

⁷³ For a discussion of how a joint tenancy in respect of Torrens land may be severed, see Bradbrook A, MacCallum S and Moore AP, *Australian Real Property Law* (3rd ed, 2002) at paras 10.43, 10.54.

⁷⁴ Megarry, Sir Robert and Wade, Sir William, *The Law of Real Property* (6th ed, 2000) at para 9-003.

⁷⁵ See note 62 of this Report.

the *Family Provision Act 1982* (NSW) provides that a person is deemed to enter into a prescribed transaction if:

- the person does or omits to do an act, as a result of which property becomes held by another person or subject to a trust; and
- the person does not receive full valuable consideration for doing, or not doing, the act in question.

3.12 In addition, the legislation specifies a number of situations in which a person is deemed to have done, or to have omitted to do, an act, as a result of which property becomes held by another person or subject to a trust.⁷⁶ Section 22(4)(b) of the legislation provides:⁷⁷

- (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:

...

- (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,

...

3.13 Although the drafting of section 22(4)(b) has been criticised,⁷⁸ it is well-established that the provision applies to the situation where a deceased person

⁷⁶ *Family Provision Act 1982* (NSW) s 22(4).

⁷⁷ In *Smeaton v Pattison* [2002] QSC 431 (18 December 2002) the Court upheld a claim for damages for negligence brought by the deceased's children against the solicitor who had prepared their father's will. The deceased held several properties under joint tenancies with his second wife, and sought advice from the defendant about the steps he would need to take in order to leave his interest in those properties to his children. The defendant incorrectly advised the deceased about how to sever his interest as joint tenant, with the result that, on the deceased's death, his interest in those properties passed to his widow by operation of the right of survivorship. If this situation had arisen in New South Wales, the deceased's omission to sever his interest as joint tenant would have amounted to a prescribed transaction. Consequently, the deceased's children, instead of suing the solicitor, could have sought an order designating property held by, or on trust for, the deceased's widow as the deceased's notional estate, out of which the court could have made a family provision order in favour of the deceased's children.

⁷⁸ In *Cameron v Hills* (Unreported, Supreme Court of New South Wales, Needham J, 26 October 1989) Needham J (at 5) commented:

It is submitted for the plaintiff that s 22(4)(b) includes the case of a joint tenant failing ... to sever the tenancy. The only feature of the subsection which raises any question as to the correctness of that submission is the use of the expression "to exercise a power". The word "power" has a particular meaning in property law, and I would not, myself, have used that word to describe the right of a joint tenant to sever the tenancy, but it seems to me that, unless the word has been so used, the subsection would have no effect.

held an interest in property as a joint tenant, and omitted to sever that interest before his or her death.⁷⁹

3.14 As explained previously,⁸⁰ the court must, in determining what property should be designated as notional estate of a deceased person, have regard to certain specified matters, including the value and nature of property the subject of the relevant prescribed transaction.⁸¹

3.15 However, the omission to sever a person's interest as joint tenant will constitute a prescribed transaction only if the person does not receive full valuable consideration in respect of that omission.⁸² As a result of the decision in *Wade v Harding*⁸³ as to what constitutes full valuable consideration in these circumstances, the operation of section 22(4)(b) of the New South Wales legislation may not be as wide as it might at first appear. That case concerned an application brought by an adult son for provision out of his mother's estate.

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See for example *Wade v Harding* (1987) 11 NSWLR 551; *Cameron v Hills* (Unreported, Supreme Court of New South Wales, Needham J, 26 October 1989); *Kinkade v Kinkade* (Unreported, Supreme Court of New South Wales, McLaughlin M, 24 April 1998); *Sinclair v Griffiths* [1999] NSWSC 491 (27 May 1999); *Barker v Magee* [2001] NSWSC 563 (28 September 2001); *Petschelt v Petschelt* [2002] NSWSC 706 (12 August 2002); *Golan v Frey* [2002] NSWSC 848 (16 September 2002).

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See para 3.5 of this Report.

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Family Provision Act 1982 (NSW) s 27(2)(a). Where the deceased person, immediately before his or her death, held an interest in property under a joint tenancy with another person and the relevant prescribed transaction consists of the circumstances described in s 22(4)(b), the court has generally treated the interest previously held by the deceased person as liable to be designated as the deceased's notional estate, and ordered that provision be made out of the property in an amount of not more than half the value of the property: see *Kinkade v Kinkade* (Unreported, Supreme Court of New South Wales, McLaughlin M, 24 April 1998) at 14, 19; *Sinclair v Griffiths* [1999] NSWSC 491 (27 May 1999) at [39], [49]; *Petschelt v Petschelt* [2002] NSWSC 706 (12 August 2002) at [72], [73], [77]; *Golan v Frey* [2002] NSWSC 848 (16 September 2002) at [42].

However, in some circumstances, it may be appropriate for the court to make an order that affects more than half the value of the property the subject of the joint tenancy. For example, in *Barker v Magee* [2001] NSWSC 563 (28 September 2001), an application for provision was made by the children of the deceased's first marriage and a former wife of the deceased. The defendant, who was the de facto partner of the deceased, was the sole beneficiary of the deceased's estate and, on the deceased's death, received a substantial superannuation payment. She and the deceased had also owned two properties as joint tenants (one being the family home). By the time the plaintiffs' application was heard, the deceased's estate had been distributed, so that provision could be made only if property held by the defendant were designated as notional estate of the deceased. The Court held at [42]-[45] that the deceased had entered into a prescribed transaction by omitting to sever his interest in the family home. Since the distribution of the deceased's estate, the defendant had made a number of investments, which, given their unsecured nature, the Court did not consider suitable to be designated as notional estate. The Court, therefore, made a notional estate order in relation to a property that the defendant had purchased, in part, with the proceeds of sale of the family home. Out of that property, the Court ordered that the plaintiffs receive legacies totalling \$65,000. Given that the defendant cleared only \$50,000 on the sale of the family home, the notional estate order that was made was well in excess of the value of the interest that the deceased, immediately before his death, had held in that property.

Note also that, in some circumstances, the interest that was held by the surviving joint tenant before the death of the deceased may itself be primarily liable to be designated as notional estate of the deceased person. For example, where A transfers property owned by A into the names of A and B as joint tenants, and then dies, A's act in creating the joint tenancy results in property becoming held by B. Unless B gives full valuable consideration for the transaction, A's act will constitute a prescribed transaction under s 22(1). However, the court may make an order designating property as notional estate on the basis of such a transaction only if the court is satisfied that A entered into the transaction within the time frame and in the circumstances specified by s 23 of the legislation.

82

Family Provision Act 1982 (NSW) s 22(1), (4)(b).

83

(1987) 11 NSWLR 551.

The deceased's estate was very small and had in fact been left in its entirety to the applicant. Accordingly, the application could succeed only if the Court designated as the deceased's notional estate certain property that had been held by the deceased and her husband as joint tenants.

3.16 As the deceased had not severed the joint tenancy before her death, the property passed, by operation of the right of survivorship, to her husband. Young J observed, however, that under the legislation an omission to sever a joint tenancy would not form the basis of a prescribed transaction if full valuable consideration was received for not exercising that right.⁸⁴ His Honour therefore proceeded to consider the question of what would, in the circumstances, amount to "full valuable consideration" and, in particular, whether there flowed to the deceased, as the result of her not exercising her right to sever the joint tenancy, a fair equivalent for what she would have received if she had severed it.

3.17 Young J was of the view that, if the deceased had severed the joint tenancy, she "would have had all the rights of a joint tenant other than the benefit of the *jus accrescendi*".⁸⁵ In other words, if the deceased had converted her interest from a joint tenancy to a tenancy in common, she would still have been entitled to possession of the whole of the property, but would have lost the opportunity to take by survivorship if her husband had predeceased her.

3.18 On the facts, Young J found that, immediately before the deceased's death, it was an even chance whether the deceased or her husband would die first.⁸⁶ Consequently, his Honour held that the deceased had received full valuable consideration in respect of her omission to sever the joint tenancy, with the result that the omission to do so did not amount to a prescribed transaction within the meaning of section 22 of the New South Wales legislation.⁸⁷

3.19 It is fundamental to the decision in *Wade v Harding* that there may be situations where, immediately before the death of a joint tenant, it could be said to be an even chance as to whether that person would survive the other joint tenant. Two later cases have expressed doubts about whether this situation could ever really occur.

3.20 In *Cameron v Hills*,⁸⁸ Needham J commented in relation to the view expressed by Young J in *Wade v Harding*:⁸⁹

84 Id at 554.

85 Id at 556.

86 Ibid. The deceased's husband survived her for only twenty days.

87 Ibid.

88 Unreported, Supreme Court of New South Wales, Needham J, 26 October 1989.

89 Id at 9.

With great respect to his Honour, I find it difficult to see how a joint tenant, about to die immediately, can be said to have an equal chance of surviving the other joint tenant. The Court must look at the position the moment before death.

3.21 A similar view was expressed by Macready J in *Barker v Magee*:⁹⁰

Provided that a deceased has suffered some injury, had a medical problem or set in train some sequence of events as a result of which death ensues then, like His Honour Justice Needham, I would normally conclude that there was no rational prospect of the deceased surviving his co-tenant.

3.22 In both *Cameron v Hills* and *Barker v Magee*, the court distinguished *Wade v Harding* on the basis that, on the facts of the particular cases, there was no prospect that the deceased would survive the other joint tenant.⁹¹ However, it is still open that, in some situations, it might be held to be an even chance whether a deceased person would survive the other joint tenant, with the result that an omission to sever a joint tenancy would not constitute a prescribed transaction.

Family Provision Report

3.23 In the Family Provision Report, the National Committee expressed the view that, although it generally favoured the adoption of the New South Wales notional estate provisions, section 22(4)(b) of the *Family Provision Act 1982* (NSW) would need to be “reworded and clarified” in light of the existing case law.⁹² The National Committee did not, however, recommend what form the new provision should take.

Issues for consideration

3.24 Two issues arise from an examination of the cases that have been decided in relation to section 22(4)(b) of the *Family Provision Act 1982* (NSW):

- whether the provision to be based on this section should be redrafted to refer expressly to a person’s omission to sever an interest in property held as a joint tenant; and
- how the model legislation should negate the effect of the decision in *Wade v Harding*⁹³ as to what constitutes full valuable consideration for a person’s omission to sever an interest in property held as a joint tenant.

⁹⁰ [2001] NSWSC 563 (28 September 2001) at [45].

⁹¹ *Cameron v Hills* (Unreported, Supreme Court of New South Wales, Needham J, 26 October 1989) at 9; *Barker v Magee* [2001] NSWSC 563 (28 September 2001) at [45]. In the latter case, the deceased had committed suicide.

⁹² National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 85.

⁹³ (1987) 11 NSWLR 551.

The National Committee's view

Application of the notional estate provisions where a person omits to sever an interest in property held as a joint tenant

3.25 As noted previously, although section 22(4)(b) of the New South Wales legislation has been held to apply to the situation where a deceased person held an interest in property as a joint tenant, and omitted to sever that interest before his or her death, the section does not refer expressly to this situation.⁹⁴ It is likely that this is a very common instance of a prescribed transaction.

3.26 The National Committee is therefore of the view that the provision that is to be based on section 22(4)(b) should refer expressly to a person's omission to sever a joint tenancy.

What should constitute consideration for not severing an interest in property held as a joint tenant

3.27 The model legislation should include a provision to negative the effect of the decision in *Wade v Harding*⁹⁵ as to what constitutes full valuable consideration for a person's omission to sever an interest in property held as a joint tenant.⁹⁶

3.28 The effect of that decision would be overcome if the model legislation were to provide that a person who dies without having severed an interest in property held as a joint tenant is not given "full valuable consideration" for not severing that interest merely because the person thereby retained, until his or her death, the benefit of the right of survivorship in respect of that property.

94 See para 3.13 of this Report.

95 (1987) 11 NSWLR 551.

96 The National Committee considered, as an alternative to this approach, omitting from the model legislation a provision to the effect of s 22(4)(b) of the *Family Provision Act 1982* (NSW), and instead including a separate provision based on s 9 of the *Inheritance (Provision for Family and Dependents Act) 1975* (UK) to deal with property previously held under a joint tenancy. That section provides that, where "a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property" the court may order that the deceased's severable share of that property be treated as part of the net estate of the deceased. The court's power to make such an order does not depend on its being established that the deceased did not receive full valuable consideration for not severing the joint tenancy before his or her death.

However, the English provision is not consistent with the overall operation of the other New South Wales notional estate provisions. If the model legislation included a provision based on s 9 of the English legislation, instead of a provision based on s 22(4)(b) of the New South Wales legislation, the omission to sever an interest held as a joint tenant would no longer constitute a prescribed transaction. As a result, many of the New South Wales notional estate provisions (for example, ss 23, 25(1), 26, 27(2)(a), (b), (c), (d), 28(4), (5)) could not simply be included in the model legislation in their present form, but would have to be modified to ensure that they retained their original effect.

The National Committee is therefore of the view that the better solution is to include a provision based on s 22(4)(b) of the *Family Provision Act 1982* (NSW), drafted in more direct terms, and to include a separate provision to deal with the issue of consideration. This approach has the advantage that the case law that has developed in New South Wales over the last twenty years will continue to provide assistance in the interpretation of the provisions of the model legislation dealing with joint tenancies. It also has the further advantage that the notional estate provisions of the model legislation, which are undoubtedly complex, need not be made more complex by attempting to incorporate a provision that is inconsistent with the operation of the notional estate provisions as a whole.

3.29 However, the issue of consideration also arises under section 27(2)(b) of the New South Wales legislation. That section provides that, in determining what property should be designated as notional estate, the court must have regard to the value and nature of any consideration given in relation to the prescribed transaction. It is open on the approach adopted in *Wade v Harding*⁹⁷ that, if there were some possibility, but less than an even chance, that the deceased person would survive the other joint tenant, it might be held that the deceased person received some consideration, although not full valuable consideration, in respect of the omission to sever his or her interest in the joint tenancy. In those circumstances, the person's omission would still constitute a prescribed transaction. However, section 27(2)(b) arguably would require the court to attribute some value to what was received by the deceased in respect of the omission to sever his or her interest as joint tenant.

3.30 As a provision to the effect of section 27(2) of the *Family Provision Act 1982* (NSW) is to be included in the model legislation,⁹⁸ the National Committee is of the view that the model legislation should provide that, where a person who holds an interest in property as a joint tenant dies without severing that interest, the person is not given "full or any valuable consideration" in respect of that omission merely because the person thereby retained, until his or her death, the benefit of the right of survivorship in respect of that property.

3.31 A provision in these terms will prevent the mere retention of the right of survivorship from constituting full or any valuable consideration for not severing an interest in property held under a joint tenancy. However, where something in addition to the retention of the right of survivorship flows to the joint tenant from not severing that interest, the proposed provision will not prevent that additional benefit from amounting to valuable consideration.

97 (1987) 11 NSWLR 551.

98 See cl 40 of the model legislation set out in Appendix 2 to this Report.

EFFECT OF THE DEATH OF A PERSON WHOSE PROPERTY COULD HAVE BEEN THE SUBJECT OF A NOTIONAL ESTATE ORDER

Issue for consideration

3.32 As explained earlier,⁹⁹ the New South Wales legislation provides that, in specified circumstances, the court may designate as notional estate of a deceased person property that is held by, or on trust for:

- the person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on trust, as a result of a prescribed transaction;¹⁰⁰
- the person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on trust, as a result of a distribution of the deceased person's estate.¹⁰¹

3.33 The reference in the legislation to property that "is held by, or on trust for," a specified person raises the issue of whether the court has the power to make an order designating property as notional estate if the person by whom property became held, or for whom property became held on trust,¹⁰² as the result of a prescribed transaction or distribution, has died.

3.34 This issue was recently considered in *Prince v Argue*.¹⁰³ In that case, the applicants sought leave to apply out of time for provision from their father's estate. The deceased had owned a property with his second wife (the applicants' step-mother) as joint tenants and, on the death of the deceased, that property passed to her by survivorship. The deceased's widow died some fifteen months later, leaving her estate to her children from a previous marriage. The applicants argued that their father's omission to sever the joint tenancy before his death constituted a prescribed transaction under section 23 of the *Family Provision Act 1982* (NSW). However, Macready AJ, on a strict interpretation of the provision, held that, as the deceased's widow had herself died, the Court did not have the power to make a notional estate order affecting her property.¹⁰⁴

99 See para 3.3 of this Report.

100 *Family Provision Act 1982* (NSW) ss 23, 25.

101 *Family Provision Act 1982* (NSW) s 24.

102 As explained at note 66 of this Report, the object of a trust may be a natural person.

103 [2002] NSWSC 1217 (20 December 2002). This issue does not appear to have been raised in *Wade v Harding* (1987) 11 NSWLR 551, which is discussed at para 3.15-3.19 of this Report. In that case, the son applied for provision out of his mother's estate. In particular, he sought an order that property that had passed by survivorship to his step-father on the death of his mother be designated as his mother's notional estate. However, the applicant's step-father survived his wife for only twenty days, and had died more than a year before the application was heard. The application was refused on grounds other than that there was no longer any property held "by, or on trust for" the applicant's step-father.

104 [2002] NSWSC 1217 (20 December 2002) at [88].

In the present circumstances the donee was, of course, Irene [the deceased's widow] and she is now dead. There is now no property held by or on trust for her and thus the Court does not have power to make an order in respect of notional estate.

3.35 This interpretation of the notional estate provisions of the New South Wales legislation significantly limits the utility of those provisions. The court is effectively precluded from exercising a power that, but for the death of a person, it could have exercised in relation to that person's property.

3.36 In addition, this interpretation may, in certain circumstances, prevent the court from making a notional estate order in respect of property held by, or on trust for, a person who is still alive. At present, section 25 of the New South Wales legislation enables the court to make an order designating property as notional estate of a deceased person if it is satisfied that:

- it has the power under that or any section of the Act to make a notional estate order in respect of property held by, or on trust for, a person;
- since the prescribed transaction or distribution that gave rise to that power was entered into or made, that person has entered into a prescribed transaction; and
- there are special circumstances that warrant the making of the order.

3.37 In these circumstances, the court may make a notional estate order in relation to property held by, or on trust for, the person by whom property became held, or the object of the trust for which property became held on trust, as a result of the subsequent prescribed transaction.

3.38 Suppose a testator, in the year before his death, makes a gift of property to A, who subsequently makes a gift of property to B. A dies before a notional estate order is made in relation to property held by, or on trust for, him. The gift by A to B is a prescribed transaction that was entered into by A after the prescribed transaction that gave rise to the court's power to make a notional estate order in relation to A's property was entered into. However, under section 25 of the New South Wales legislation, the court may not make a notional estate order in relation to property held by, or on trust for, B unless it is satisfied that it "has power" to make such an order in relation to property held by, or on trust for, A. In the light of the decision in *Prince v Argue*,¹⁰⁵ the court could not be satisfied that it still has that power. In effect, A's death breaks the chain that would otherwise have enabled the court to make an order under section 25 of the legislation designating, as notional estate of the deceased person, property held by, or on trust for, B.

3.39 These issues were not considered in the Family Provision Report.

105

[2002] NSWSC 1217 (20 December 2002).

The National Committee's view

3.40 In view of the decision in *Prince v Argue*,¹⁰⁶ the National Committee considers it important that the model legislation does not restrict the court to designating as notional estate of a deceased person property that "is held by, or on trust for," a person by whom property became held, or for whom property became held on trust, as the result of a prescribed transaction or as the result of a distribution of the deceased person's estate.

3.41 If the restriction presently found in the New South Wales legislation is imported into the model legislation, an application for family provision that requires the designation of property as the deceased's notional estate will fail if the person who received property as the result of a prescribed transaction or distribution dies before a notional estate order is made in relation to his or her property.

3.42 The National Committee is therefore of the view that the notional estate provisions of the model legislation should not simply be based on the notional estate provisions of the existing New South Wales legislation, but should also give effect to the proposals discussed below.

Property forming part of a "deceased transferee's" estate

Property that may be designated as the deceased person's notional estate

3.43 The model legislation should address the situation where, immediately before the death of a person (the *deceased transferee*), the court had the power to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person whose estate is the subject of the application for provision. The model legislation should provide that, in these circumstances, the court may make an order designating the following property as notional estate of the deceased person:

- where administration has been granted in respect of the estate of the deceased transferee - property that is held by the personal representative of the deceased transferee in that capacity;
- where all or part of the estate of the deceased transferee has been distributed - property that is held by, or on trust for:
 - a person by whom property became held (whether or not as trustee) as the result of a distribution of the deceased transferee's estate, or
 - the object of a trust for which property became held on trust as the result of a distribution of the deceased transferee's estate.

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Ibid. This decision is discussed at para 3.34-3.35 of this Report.

3.44 However, where the distribution of the deceased transferee's estate results in property being held by a person as trustee only,¹⁰⁷ the model provision should provide that the court must not designate as notional estate any property held by the person other than property held by the person as trustee as a consequence of the distribution of the deceased transferee's estate.¹⁰⁸

3.45 The model provision should be expressed to apply where the court's power to designate property held by the deceased transferee did not arise because property became held by the deceased transferee as a trustee only. Where the deceased transferee held property as a sole trustee or as a sole surviving trustee, the trust property would vest, on the death of the deceased transferee, in a new trustee,¹⁰⁹ who would hold the property on trust for the original objects of the trust. Accordingly, the court would still retain the power under the provisions based on sections 23, 24 and 25 of the New South Wales legislation to designate, as notional estate of the deceased person, property that is held by, or on trust for, the object of a trust for which property became held on trust as the result of a prescribed transaction or as the result of a distribution of the deceased's estate.

Whether special circumstances should be required

3.46 The National Committee has considered whether the court should be required to be satisfied of the existence of special circumstances before making a notional estate order under the proposed provision.

3.47 In the National Committee's view, the court must be satisfied of the existence of special circumstances in order to be able to make a notional estate order in relation to property that is held by, or on trust for, a beneficiary of the deceased transferee's estate. However, such a requirement should not apply to

107 This would occur where, for example, property was held on trust for a beneficiary who was a minor.

108 This recommendation is modelled on s 28(4) of the *Family Provision Act 1982* (NSW).

109 In Queensland, property held on trust by a sole trustee or a sole surviving trustee vests, on the trustee's death, in the public trustee and remains so vested until either a new trustee is appointed or, if no such appointment is made, a grant of probate or letters of administration of the estate of the deceased trustee is made: *Trusts Act 1973* (Qld) s 16(2). If the personal representative who is appointed notifies the public trustee of that appointment and of his or her intention to assume the trust of the trust property, the trust property then devolves to and vests in the personal representative: *Trusts Act 1973* (Qld) s 16(2)(a). In the other Australian jurisdictions, property held on trust by a sole trustee or a sole surviving trustee vests, on the trustee's death, "in the manner prescribed by law for the devolution of all the property of the deceased trustee": Ford HAJ and Lee WA, *Principles of the Law of Trusts* (looseleaf) at para 8600. Consequently, the trust property will vest in the personal representative of the deceased trustee, although, depending on the jurisdiction concerned, that vesting will occur on either the death of the trustee or the making of a grant in relation to the estate of the deceased trustee. For a discussion of the vesting of property, see *Administration of Estates Discussion Paper* (1999) QLRC at 168-178; NSWLRC at para 12.1-12.31.

the making of a notional estate order in relation to property that is held by the deceased transferee's administrator.¹¹⁰

3.48 The reason for not requiring special circumstances to be established in the latter situation is that an order in respect of property held by the deceased transferee's administrator is simply being made instead of the order that could have been made in respect of property held by, or on trust for, the deceased transferee if the deceased transferee had still been alive.

Property not forming part of a "deceased transferee's" estate

3.49 The provision outlined above would, to a large extent, overcome the effect of the decision in *Prince v Argue*.¹¹¹ Where a person in respect of whose property the court could have made a notional estate order had died, the proposed provision would enable the court to make a notional estate order in relation to property held by the person's personal representative or by, or on trust for, the person's beneficiaries.

3.50 However, as explained earlier in this chapter, where a person holds an interest in property as a joint tenant, that interest accrues, on the person's death, to the surviving joint tenant or joint tenants, rather than vesting in the person's personal representative. Suppose an application is made for provision out of the estate of a deceased person and the court could have made an order designating, as notional estate of the deceased person, property held by, or on trust for, A, but A dies before any order is made. Immediately before A's death, A and B held property as joint tenants. On A's death, the interest held by A in the property accrues to B. The provision proposed above would not necessarily enable the court to designate as notional estate of the deceased person property held by, or on trust for, B.¹¹²

3.51 In the National Committee's view, the model legislation should ensure that where:

- immediately before the death of a person (the *deceased transferee*), the court had the power to make an order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person; and

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The National Committee notes that there are differing requirements in relation to special circumstances under the *Family Provision Act 1982* (NSW). The court must not make a notional estate order under s 25 of the Act (Notional estate - subsequent prescribed transactions) unless it is of the opinion that there are special circumstances that warrant the making of the order. However, there is no similar requirement in relation to the making of a notional estate order under ss 23 (Notional estate - prescribed transactions) or 24 (Notional estate - distributed estate). Provisions to the effect of ss 23, 24 and 25 of the *Family Provision Act 1982* (NSW) have been included in the model legislation as, respectively, cll 31, 30 and 32.

111

[2002] NSWSC 1217 (20 December 2002).

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The surviving joint tenant may, however, also be a beneficiary of the deceased person's estate.

- since the relevant property transaction or distribution that gave rise to the court's power to make the order was entered into or made, the deceased transferee entered into a prescribed transaction; and
- there are special circumstances that warrant the making of the order,

the court may make a notional estate order, designating as notional estate of the deceased person, property that is held by, or on trust for:

- a person by whom property became held (whether or not as trustee) as the result of the subsequent prescribed transaction; or
- the object of a trust for which property became held on trust as the result of the subsequent prescribed transaction.

3.52 Under such a provision, if the court could have made a notional estate order in relation to property held by, or on trust for, A, and A died without severing a joint tenancy held with B, A's omission to sever the joint tenancy before his or her death would constitute a prescribed transaction, which would enable the court to make a notional estate order in relation to property held by, or on trust for, B (B being a person by whom property became held as a result of the prescribed transaction entered into by A).

Preservation of chain of transactions

3.53 As explained above, section 25 of the New South Wales legislation enables the court to make a notional estate order where it has the power to make a notional estate order in respect of property held by, or on trust for, a person, and that person subsequently enters into a prescribed transaction.

3.54 In the National Committee's view, the model provision that is to be based on section 25 should ensure that the death of a person in respect of whose property the court could have made a notional estate order (the *deceased transferee*) does not prevent the court from designating, as notional estate of a deceased person, property that is held by, or on trust for:

- a person by whom property became held (whether or not as trustee) as the result of the subsequent prescribed transaction entered into by the deceased transferee; or
- the object of a trust for which property became held on trust as the result of the subsequent prescribed transaction entered into by the deceased transferee.

3.55 In the absence of provisions to this effect, the death of a person whose property could have been the subject of a notional estate order has the potential to produce an arbitrary and unfair result. If an order is made in relation to property held by, or on trust for, a person, who dies shortly after the order is made, the person's beneficiaries will not be entitled to the property that is the

subject of the order. However, if the person dies before a notional estate order is made, under the present law, no order can be made in relation to property that was held by, or on trust for, that person. This has the effect of producing what might be regarded as a windfall for the person's beneficiaries.

APPLICATION FOR PROVISION OUT OF CERTAIN TRUST PROPERTY

The existing law

3.56 Under the family provision legislation in all Australian jurisdictions, the court may order that provision be made out of the "estate" of a deceased person.¹¹³ The question of what constitutes the estate of a deceased person, especially in circumstances where part of the estate is held on trust for a beneficiary, has been considered by the courts on a number of occasions.

3.57 In *Easterbrook v Young*,¹¹⁴ the High Court considered whether, under the previous New South Wales family provision legislation,¹¹⁵ the Court could order that provision be made out of property that was still held by a personal representative on trust for the various beneficiaries.¹¹⁶ The deceased had died intestate, leaving the family home as the principal asset of his estate. Letters of administration were granted to one of the deceased's sons, and title to the property was subsequently registered in his name as administrator. Under the intestacy provisions of the *Wills, Probate and Administration Act 1898* (NSW), the administrator held the property as trustee for himself, his mother (the deceased's widow) and his brother in equal shares. None of the beneficiaries sought a transfer of his or her share of the property. Fourteen years after the deceased's death, his widow applied for an extension of time in which to apply for provision out of the estate.

¹¹³ *Family Provision Act 1969* (ACT) s 8(1); *Family Provision Act 1982* (NSW) s 7; *Family Provision Act* (NT) s 8(1); *Succession Act 1981* (Qld) s 41(1); *Inheritance (Family Provision) Act 1972* (SA) s 7(1); *Testator's Family Maintenance Act 1912* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 91(1); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 6(1). In New South Wales, the court may also order that provision be made out of the notional estate of a deceased person: see para 3.2-3.7 of this Report.

¹¹⁴ (1977) 136 CLR 308.

¹¹⁵ The *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) was replaced by the *Family Provision Act 1982* (NSW), which applies in relation to a deceased person who has died on or after 1 September 1983: *Family Provision Act 1982* (NSW) ss 2(2), 6 (definition of "appointed day"). The *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) continues to apply in relation to a person who died before that date: The *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 1A.

¹¹⁶ Even though a will may not create any express trusts of which the personal representative is appointed as trustee, a personal representative who has completed the executorial or administrative duties - namely, the collection of the assets and the payment of any debts - undergoes a change in capacity. Pending distribution, the personal representative holds the assets of the estate as trustee for the various beneficiaries: see Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at para 1011. The change in capacity from personal representative to trustee is referred to as the assumption of trusteeship.

3.58 The Court considered that, under the terms of the legislation, where an application was made within time, the Court could order that provision be made out of any of the deceased's assets that had vested in the personal representative on the making of the grant, even if the assets had since been distributed.¹¹⁷ It was critical to the Court's decision that, under the relevant legislation, an order for provision took "effect as a codicil in the case of a testate estate and as a variation of the statutory trusts in the case of an intestacy":¹¹⁸

The court, by the effect of its order, can alter the operation of the very dispositions of the will which might otherwise determine the capacity or power of the personal representative as well as the beneficial interests which would otherwise arise. As a codicil, the court's order operates as on the death of the deceased ... Because the court's order has effect as a codicil, the property out of which provision may be ordered includes property which, but for the order, would have been beneficially owned either wholly or partly by donees under the will or next of kin under an intestacy.

3.59 However, the Court was of the view that, where an application was made out of time, an order for provision could not be made under the legislation if there had been a final distribution of the estate.¹¹⁹ It was therefore necessary for the Court to decide whether the property that was held by the administrator on trust for the intestacy beneficiaries had been distributed. The Court held that the assumption of trusteeship by the administrator¹²⁰ did not amount to a distribution of the estate, and that the Court could therefore make an order for provision:¹²¹

... the words "distribute" and "distribution" are used in the Act itself, not in the sense of a change in the capacity in which the personal representative held the asset, but clearly in the sense of a physical parting with that asset and its placing in the hands or name of an intended beneficiary ... It is, in our opinion, only when the personal representative has parted with all the assets which came into his hands by the grant or probate or letters of administration that there has been a final distribution of the estate of the testator or intestate.

3.60 The High Court suggested in *Easterbrook v Young*¹²² that, because the legislation in the Australian jurisdictions was "in relevant respects in common form", its decision would determine this question elsewhere in Australia.¹²³ In Queensland, however, the legislation does not provide that a family provision order operates as a codicil to the deceased's will or as a variation of the

117 (1977) 136 CLR 308 per Barwick CJ, Mason and Murphy JJ at 315-316.

118 Ibid.

119 Id at 316.

120 See note 116 of this Report.

121 (1977) 136 CLR 308 at 317.

122 (1977) 136 CLR 308.

123 Id per Barwick CJ, Mason and Murphy JJ at 315. See the reference to this comment in *Re McPherson* [1987] 2 Qd R 394 at 398.

statutory trusts created on an intestacy.¹²⁴ As a result of this and other differences between the Queensland legislation and the legislation under consideration in *Easterbrook v Young*, the courts in Queensland have held that a family provision order cannot be made in respect of property that has been distributed,¹²⁵ and that distribution occurs when the personal representative assumes trusteeship of the trusts created by the will or intestacy.¹²⁶ In *Re Donkin*,¹²⁷ Gibbs J commented:¹²⁸

If a will requires the executors to hand over the residuary estate to other persons to hold it as trustees, once the estate has been so handed over it ceases to be the estate of the testator and is beyond the power of the Court to effect [sic] by an order under *The Testator's Family Maintenance Acts*.¹²⁹ If however the executors are themselves the trustees, once the estate has assumed the character of a trust estate it equally ceases to be part of the testator's estate; in equity it belongs to the beneficiaries and the Court is not empowered to divest what has been vested in them. [note added]

3.61 The present New South Wales legislation deals expressly with the issue of whether property that is held on trust by the administrator of the estate of a deceased person still forms part of that estate. Section 6 of the *Family Provision Act 1982* (NSW) provides, in part:

- (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.

3.62 The effect of these provisions is that, even though the personal representative of a deceased person may hold property on trust for the beneficiaries of the deceased's estate, it will not necessarily be the case that the trust property will form part of the "estate" out of which provision may be

¹²⁴ In this respect, the Queensland legislation differs from the legislation in the other Australian jurisdictions: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 122-123.

¹²⁵ *Re Donkin* [1966] Qd R 96; *Re Burgess* [1984] 2 Qd R 379; *Re McPherson* [1987] 2 Qd R 394; *Holmes v Webb* (Unreported, Supreme Court of Queensland, Court of Appeal, Fitzgerald P, Davies JA and Demack J, 18 August 1992). In *Re McPherson* [1987] 2 Qd R 394 the Court held that this principle applies even where the application is made within time. A personal representative who distributes an estate with notice of a claim for family provision may, however, be liable in respect of a breach of trust: *Re Faulkner* [1999] 2 Qd R 49.

¹²⁶ *Re Donkin* [1966] Qd R 96 per Hanger J at 111-112 and per Gibbs J at 123; *Re Burgess* [1984] 2 Qd R 379.

¹²⁷ [1966] Qd R 96.

¹²⁸ *Id* at 117.

¹²⁹ *The Testator's Family Maintenance Acts 1914-1952* (Qld) were repealed by s 11(1) of the *Succession Acts Amendment Act of 1968* (Qld). The latter Act was subsequently repealed by s 3 and the First Schedule of the *Succession Act 1981* (Qld).

ordered. The question of whether property held on trust by a personal representative has, in a particular case, been distributed, so that it no longer forms part of the deceased's estate, turns on whether the property is vested in interest in the beneficiary or whether the beneficiary has merely a contingent interest in the property.¹³⁰

3.63 If, for example, a testator left his house on trust for his wife for life and, on her death, for such of his nieces as survived him, the gift of the remainder¹³¹ would vest in interest in the nieces immediately on their uncle's death,¹³² even though the remainder would not vest in possession until the death of the life tenant. In such a situation, even though the property would be held on trust for the nieces, their interest in the property would, as a result of section 6(5) of the New South Wales legislation, be treated as distributed property. Consequently, it would not form part of the deceased's estate out of which provision could be ordered.¹³³

3.64 However, if a testator left his house on trust for his wife for life and, on her death, for such of his nieces as survived his wife, the gift of the remainder would not vest in interest until the testator's wife died.¹³⁴ Until that time, it could not be ascertained which of the nieces, if any, would satisfy the condition that they survive the testator's wife.¹³⁵ Consequently, while the life tenant was alive, the nieces' interest in the property would form part of the deceased's estate out of which provision could be ordered.¹³⁶

130 A gift made by will may confer either a vested or contingent interest in the property concerned. A gift that is vested may in turn be vested in possession or in interest. A gift is vested in possession where the beneficiary has an entitlement to present possession. A gift is vested in interest where the beneficiary has a present entitlement to take possession upon the determination of all the preceding estates and interests in the property, such as on the termination of a life tenancy. On the other hand, a gift is contingent where the beneficiary's interest "is grounded upon the presence of a condition precedent, with which the beneficiary must comply before the interest can become vested in possession or in interest": Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at para 1720.

131 A remainder is an estate in land that is granted to a person in succession to a present limited interest that is created by the same instrument. For example, where A owns land in fee simple and makes a grant to B for life and on B's death, to C in fee simple, C has a fee simple estate in remainder: Megarry, Sir Robert and Wade, Sir William, *The Law of Real Property* (6th ed, 2000) at paras 3-017, 7-008.

132 Consequently, if any niece survived her uncle, but predeceased the life tenant, the interest of that niece would vest in her personal representative and form part of her estate.

133 *Family Provision Act 1982* (NSW) s 6(4). However, the court has the power to designate distributed property as "notional estate" of a deceased person and to order that provision be made out of property so designated: *Family Provision Act 1982* (NSW) s 24.

134 On the death of the testator's wife, the gift of the remainder would also vest in possession.

135 *Re Dawson* [1987] 1 NZLR 580. However, the courts lean in favour of holding that a person has a vested, rather than a contingent, interest in property where the words of the will allow such a construction: *Re Blackwell* [1926] Ch 223. For example, where there is a gift to X "if" or "when" or "as soon as" X attains a specified age or fulfils some other condition, with a gift over to Y if X fails to attain the specified age or fulfil the other condition, the gift in favour of X is vested in interest, but is subject to being divested if X does not fulfil the relevant condition: *Phipps v Akers* (1842) 9 Cl & F 583, 8 ER 539. The rule in *Phipps v Akers* also extends to gifts of personalty: *Re Heath* [1936] Ch 259. See Ford HAJ and Lee WA, *Principles of the Law of Trusts* (looseleaf) at para 7300; Martyn JGR, Bridge S and Oldham M, *Theobald on Wills* (16th ed, 2001) Chapter 43.

136 *Family Provision Act 1982* (NSW) s 6(4).

3.65 If the fact situation in *Easterbrook v Young*¹³⁷ arose for consideration under the *Family Provision Act 1982* (NSW), the property held on trust for the deceased's wife and two sons would be held to have been distributed, given that they acquired a vested interest in the property on the death of the deceased. Accordingly, the property would not form part of the deceased's estate out of which the court could order provision. However, because the New South Wales legislation also enables the court to order provision out of the notional estate of a deceased person,¹³⁸ a family provision order might nevertheless be able to be made with respect to the distributed property, provided the court was satisfied of the matters necessary to designate it as notional estate of the deceased.¹³⁹

Family Provision Report

3.66 In the Family Provision Report, the National Committee recommended that an application for family provision should ordinarily be made within twelve months of the death of a deceased person.¹⁴⁰ It expressed the view, however, that this requirement would be inappropriate in some circumstances:¹⁴¹

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.

3.67 The National Committee referred to the situation where an estate was left on trust for the surviving spouse of a deceased person for life, with a gift over upon the death of the surviving spouse to a given person or persons or among a class, such as the children of the deceased person. It suggested that "there might be no-one who would wish to contest the gift of the life tenant to the spouse; but there might be persons who would object to the manner of the gift over".¹⁴² The National Committee expressed the view that, in such a case:¹⁴³

137 (1977) 136 CLR 308. This case is discussed at para 3.57-3.60 of this Report.

138 *Family Provision Act 1982* (NSW) s 7.

139 See *Family Provision Act 1982* (NSW) s 24.

140 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 42. The National Committee also recommended that the court should have an unfettered discretion to extend the time in which an application for provision may be made. That discretion is considered at para 5.15-5.34 of this Report.

141 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 40.

142 *Ibid.*

143 *Ibid.*

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.

3.68 The National Committee identified two hurdles that would need to be overcome to enable the court to make an order for family provision on an application made possibly years after the deceased's death. In the first place, it observed that, under the existing legislation in all jurisdictions, an application must be made within a specified period. Although the court may extend the time in which an application may be made, its power to do so is discretionary and would not necessarily be exercised in an applicant's favour.¹⁴⁴ Secondly, the National Committee outlined the difficulties that have arisen in determining what constitutes the estate of a deceased person once property is held by a personal representative on trust for the beneficiaries.¹⁴⁵ The National Committee was conscious that there was little point in enabling an application to be made some years after the death of the deceased if, by that time, there was unlikely to be any "estate" left in respect of which an order for provision could operate.

3.69 The National Committee concluded that it should be possible for an eligible person to apply "within a short period after the termination of a testamentary trust" for provision out of the trust property.¹⁴⁶ Its recommendation was expressed as follows:¹⁴⁷

- (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.

144 Id at 41. See para 5.17 of this Report for a discussion of the requirement that an applicant must provide a satisfactory explanation for the failure to apply within time.

145 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 41.

146 Id at 42.

147 Id at 44.

- (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.

3.70 This recommendation would not prevent an order from being made with respect to property that was the subject of a "trust arising under or by virtue of a will or intestacy" where an application was made within twelve months of the deceased's death. Its effect would be to create an additional period within which an application could be made without having to apply for an extension of time - namely, within three months of the termination of the trust. For the purposes of such an application, the trust property would be treated as if it had not been distributed and was still part of the deceased's estate.¹⁴⁸

3.71 The recommendation would extend the principle in *Easterbrook v Young*¹⁴⁹ about what property is to be treated as part of the deceased's estate for the purpose of making a family provision order. Provided an application was made within three months of the termination of a trust, the property the subject of that trust would be treated as part of the deceased's estate not only where the property was held on trust by the personal representative, but also where it was held on trust by a trustee in whom the property had subsequently vested.¹⁵⁰

3.72 In the light of this recommendation, the National Committee was of the view that it was not necessary for the model legislation to include a provision to the effect of section 6(5) of the *Family Provision Act 1982* (NSW).¹⁵¹

148 Where an application for provision was made outside the three month period, it would still be necessary to determine whether or not the trust property had been distributed.

149 (1977) 136 CLR 308.

150 It is implicit in the decision in *Easterbrook v Young* (1977) 136 CLR 308 that, if a personal representative transferred an asset to another trustee to hold that asset on trust for a beneficiary, the personal representative would be treated as having "parted" with the asset, with the result that it would no longer form part of the deceased's estate.

151 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 147. Section 6(5) of the *Family Provision Act 1982* (NSW) is set out at para 3.61 of this Report.

Issues for consideration

3.73 In the course of finalising the terms of the model family provision legislation, the National Committee has given further consideration to the scope of, and basis for, its original recommendation.

Scope of the original recommendation

3.74 The National Committee's original recommendation was expressed in quite broad terms, applying whenever property was vested in the trustee of any "trust arising under or by virtue of a will or intestacy". Obviously, it would apply where a will expressly created a trust.

3.75 In addition, however, it would apply where a trust arose by operation of law because a beneficiary under a will or under the relevant intestacy rules was under a legal disability.¹⁵² In these circumstances, the recommendation could produce what is arguably an anomalous result. Suppose a testator left her estate to be divided equally between her two sons, one aged 15 and the other 20. The property left to the younger son would be held on trust for him until he turned 18. At that time, an eligible applicant would have three months within which to apply for provision out of the trust property.

3.76 If provision were also sought at the same time out of property left to the older son, that property would not necessarily be beyond the reach of the court. However, different principles would determine whether provision was ordered out of that property. As that property would be held absolutely by the older son, rather than on trust for him, it would not fall within the National Committee's recommendation. Accordingly, an eligible applicant would not be able to make the application as of right, but would first have to apply for an order allowing the application to be made out of time. This would entail having to provide a satisfactory explanation for the delay in making the application.¹⁵³ Even if that application were successful, the court's power to designate the distributed property as notional estate would be subject to the various restrictions presently found in the New South Wales legislation.¹⁵⁴

3.77 In the situation just described, it is difficult to point to any feature of the disposition in favour of the younger son that provides a compelling argument for treating the property left to him differently from the property left to his brother, or for providing an additional period within which an application may be made with respect to that property. It is really only the circumstances of the particular

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Where a beneficiary under a will or under the relevant intestacy rules is under a legal disability, such as minority, the personal representative becomes the trustee of the relevant property, holding it on trust for the beneficiary until such time as the beneficiary ceases to be under the disability. The National Committee specifically recommended that trusts for minors or other persons under a legal disability should not be exempted from its recommendation about an additional application period with respect to trust property: National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 42.

153

See para 5.17 of this Report.

154

See *Family Provision Act 1982* (NSW) ss 27, 28(1), (2), (5).

beneficiary - in this case, the minority of the younger son - that would bring the property held on trust for him within the terms of the National Committee's recommendation.

3.78 The National Committee's recommendation would also be broad enough to apply where the administration of an estate had reached the stage where, even briefly, the personal representative held assets as trustee, rather than as executor or administrator.¹⁵⁵ Where such a trust was to terminate, say, ten months after the deceased's death, the recommendation would seem to allow an application for provision to be made within thirteen months of the deceased's death. Because of the potential for the recommendation to extend the initial application period beyond twelve months, it could give rise to disputes about the point at which a personal representative assumed the trusteeship of property and when the relevant trust was to terminate.

Basis for the original recommendation

3.79 As mentioned above, one of the National Committee's principal concerns was that, where an application for provision was made some years after the death of the deceased person, there might be no "estate" left in respect of which an order for provision could operate.¹⁵⁶ However, in specified circumstances, the model legislation will enable an order for family provision to be made out of property that has been distributed. As a result, the issue of whether property is regarded as having been distributed is less important than it would be in a scheme that did not enable provision to be ordered out of distributed property.

3.80 The National Committee's other concern was that, where, for example, a testator left property on trust for his or her spouse for life, with a gift of the remainder to the testator's children, the court should not have to determine, at the death of the testator, what the needs of an applicant might be when the life tenant's interest terminated.¹⁵⁷ Because the National Committee's recommendation would enable an application to be made, as of right, within three months of the termination of the testamentary trust (that is, within three months of the death of the life tenant), it is possible that an application could be made many years after the testator's death. Although this would enable the court to consider the circumstances of the applicant and other relevant persons at the time the application was made, this must be weighed against the risk of possible prejudice to the parties arising from loss of evidence during the intervening years.

155 See the discussion of the assumption of trusteeship at note 116 of this Report.

156 See para 3.68 of this Report.

157 See para 3.67 of this Report.

3.81 The effect of possible prejudice arose for consideration in *Re Burgess*,¹⁵⁸ where an application for an extension of time was made more than 24 years after the testator's death. The testator had bequeathed the bulk of his estate, the major asset of which was the family farm, to his wife for life, and on her death to his son. By the time the testator's daughter applied for an extension of time, both her mother and brother had died, and the farm was vested in her brother's widow. The Court stated that a proper consideration of the applicant's claim might well raise facts about which the applicant's brother and mother might have been able to give evidence. The Court considered that, as a result of the death of these witnesses, the respondent (the brother's widow) may well be prejudiced in her defence of the claim. It therefore exercised its discretion not to grant an extension of time.¹⁵⁹

Undistributed property

3.82 Section 6(5) of the *Family Provision Act 1982* (NSW) provides that, where property in the estate of a deceased person is held on trust for a person or for a charitable or other purpose, the property is to be treated as not having been distributed, unless it is vested in interest in that person or for that purpose.¹⁶⁰

3.83 In the Family Provision Report, the National Committee expressed the view that it was not necessary for the model legislation to include a provision to the effect of section 6(5) of the *Family Provision Act 1982* (NSW), as that provision had been overtaken by its recommendation about applications that may be made on the termination of a trust arising under a will or as a result of an intestacy.¹⁶¹ As explained above, the effect of the National Committee's recommendation would be that, where an application was made within three months after the termination of such a trust, the property held on trust would be treated as not having been distributed.¹⁶²

3.84 However, in all other situations where property was held on trust, it would still be relevant to determine whether the property so held had been distributed or whether it still formed part of the estate. The National Committee has recommended that the model legislation include provisions to the effect of the notional estate provisions of the New South Wales legislation.¹⁶³ Those provisions enable family provision to be ordered out of distributed property that has been designated as notional estate of a deceased person, provided the court is satisfied of various specified matters before making such an order. It is

158 [1984] 2 Qd R 379.

159 *Id* at 383.

160 See the discussion of s 6(5) of the *Family Provision Act 1982* (NSW) at para 3.61-3.64 of this Report.

161 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 147.

162 See para 3.70 of this Report.

163 See para 3.8 of this Report.

therefore desirable for the model legislation to provide certainty as to whether or not property held on trust has been distributed.

The National Committee's view

Application for provision on the termination of a trust arising under a will or on an intestacy

3.85 The National Committee has referred above to the anomalies that could arise under its proposal that, where an application is made within three months after the termination of a testamentary trust or a trust arising on an intestacy, the trust property is to be treated as not having been distributed. Upon further consideration, the National Committee is of the view that the mere fact that property is held on trust by a personal representative or by a trustee does not, on its own, justify treating the property as not having been distributed.

3.86 Although the National Committee was concerned that an application for provision should not be defeated by reason of the estate having been distributed, the model legislation will enable the court to designate distributed property as notional estate of a deceased person, and to order provision out of the property so designated.¹⁶⁴

3.87 The National Committee's recommendation would also enable an application to be made, as of right, possibly many years after the death of the deceased person. It therefore constitutes a significant exception to the National Committee's general recommendation that an application may be made more than twelve months after the deceased's death only if the court grants an extension of time.¹⁶⁵ The requirement that an applicant must have leave to bring a late application ensures that such an application may be made only where the applicant has provided a satisfactory reason for the delay in making the application and the court is otherwise satisfied that it is in the interests of justice to grant the extension. In particular, it gives the court the opportunity to consider whether any of the parties to the application are likely to be prejudiced by the applicant's delay.

3.88 Although the National Committee previously expressed the view that, in some circumstances, it would be inappropriate to insist that an application for family provision be made within a relatively short time after the deceased person's death,¹⁶⁶ it now considers that this view gave insufficient recognition to the prejudice that might be suffered by the parties opposing an application that was made long after the deceased had died.

¹⁶⁴ See para 3.2-3.7 of this Report.

¹⁶⁵ See para 5.25-5.34 of this Report.

¹⁶⁶ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 40.

3.89 The National Committee is therefore of the view that the model legislation should not include a provision to give effect to its original recommendation. It should not be possible for an application for provision to be made, as of right, within three months after the termination of a testamentary trust or a trust arising on an intestacy. An application for provision should be able to be made more than twelve months after the death of a deceased person only where the court has granted an extension of time within which the application may be made.

Undistributed property

3.90 In the National Committee's view, section 6(5) of the *Family Provision Act 1982* (NSW) provides certainty in determining whether property that is held on trust by a personal representative remains part of an estate or whether it has been distributed. The National Committee is therefore of the view that a provision to this effect should be included in the model legislation.

RECOMMENDATIONS

Property held under a joint tenancy

- 3-1** The model provision based on section 22(4)(b) of the *Family Provision Act 1982* (NSW)¹⁶⁷ should refer expressly to the circumstance in which a person holds an interest in property as a joint tenant and does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust.¹⁶⁸
- 3-2** The model legislation should provide that, in the circumstances described in Recommendation 3-1, a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.¹⁶⁹

¹⁶⁷ Section 22(4)(b) of the *Family Provision Act 1982* (NSW) is set out at para 3.12 of this Report.

¹⁶⁸ This recommendation is implemented by cl 27(2)(b) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

¹⁶⁹ This recommendation is implemented by cl 27(4) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

Effect of the death of a person whose property could have been the subject of a notional estate order

3-3 The model legislation should provide that where, immediately before the death of a person (the *deceased transferee*), the court had the power to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, the following property may be designated as notional estate of the deceased person:

- (a)** where administration has been granted in respect of the estate of the deceased transferee - property that is held by the personal representative of the deceased transferee's estate in his or her capacity as personal representative of the deceased transferee's estate;
- (b)** where all or part of the estate of the deceased transferee has been distributed - property that is held by, or on trust for:
 - (i)** a person by whom property became held (whether or not as trustee) as the result of the distribution of the deceased transferee's estate; or
 - (ii)** the object of a trust for which property became held on trust as the result of the distribution of the deceased transferee's estate.¹⁷⁰

3-4 The provision recommended in Recommendation 3-3 should apply where the court's power to designate property held by, or on trust for, the deceased transferee did not arise because property became held by the deceased transferee as trustee only.¹⁷¹

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This recommendation is implemented by cl 33 of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

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This recommendation is implemented by cl 33(1)(b) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

- 3-5** The model legislation should provide that if, as a result of a distribution of the deceased transferee's estate, property becomes held by a person as a trustee only, the court must not designate as notional estate any property held by the person other than the property held by the person as a trustee as a consequence of the distribution of the deceased transferee's estate.¹⁷²
- 3-6** The model legislation should provide that the court may make a notional estate order in relation to property that is held by, or on trust for, a beneficiary of the deceased transferee's estate only if the court is satisfied that there are special circumstances that warrant the making of the order.¹⁷³
- 3-7** The provision to be based on section 25 of the *Family Provision Act 1982* (NSW) should, in addition:
- (a) apply where:
 - (i) immediately before the death of a person (the *deceased transferee*), the court had the power to make an order designating, as notional estate of a deceased person, property held by, or on trust for, the deceased transferee; and
 - (ii) since the relevant property transaction or distribution that gave rise to the power to make the order was entered into or made, the deceased transferee entered into a relevant property transaction; and
 - (iii) there are special circumstances that warrant the making of the order; and
 - (b) provide that the court may designate property as notional estate of the deceased person if it is property that is held by, or on trust for:

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This recommendation is implemented by cl 40(3) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

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This recommendation is implemented by cl 33(1)(c) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

- (i) a person by whom property became held (whether or not as trustee) as the result of the relevant property transaction entered into by the deceased transferee; or
- (ii) the object of a trust for which property became held on trust as the result of the relevant property transaction entered into by the deceased transferee.¹⁷⁴

Application for provision out of certain trust property

3-8 The model legislation should not include a provision to enable an application for provision to be made within three months after the termination of any trust arising under a will or on an intestacy.¹⁷⁵

3-9 The model legislation should include a provision to the effect of section 6(5) of the *Family Provision Act 1982 (NSW)*.¹⁷⁶

¹⁷⁴ This recommendation is implemented by cl 32(1)(a)(ii), (b), (c) and (2) of the model legislation set out in Appendix 2 to this Report. It gives effect to the proposal discussed at para 3.49-3.52 of this Report, as well as to the proposal discussed at para 3.53-3.55. This recommendation modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 93-94.

¹⁷⁵ This recommendation reverses the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 44-45.

¹⁷⁶ This recommendation is implemented by cl 14(4) of the model legislation set out in Appendix 2 to this Report. It reverses the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 147.

Chapter 4

Protection of personal representatives

FAMILY PROVISION REPORT

4.1 In the Family Provision Report, the National Committee noted the need for legislation to protect a personal representative who distributes a part or the whole of a deceased person's estate before a family provision application is made.¹⁷⁷

4.2 However, the National Committee was also concerned, particularly in the light of its recommendation that there be a broad test of eligibility to apply for family provision based on the concept of "responsibility",¹⁷⁸ to ensure that potential applicants had sufficient opportunity to become aware of their entitlement and to make an application prior to the distribution of the estate.

4.3 Accordingly, the National Committee expressed the view that, in order to qualify for protection from liability for distributing an estate, a personal representative should be required, before making the distribution, to give public notice of the intended distribution.¹⁷⁹

4.4 The National Committee was also of the view that, in addition to a notice requirement, the model legislation should impose a specified period of time before the expiration of which a personal representative would not be entitled to protection if he or she distributed the estate. The National Committee noted that, under the Queensland legislation, a personal representative is protected from liability in respect of a distribution that takes place six months or more after the death of the deceased, and without notice of any application or intended application for family provision.¹⁸⁰

4.5 The National Committee therefore recommended the adoption of a provision combining features of section 35 of the *Family Provision Act 1982* (NSW) and the rules made under that section and section 44(3)(a) of the *Succession Act 1981* (Qld).¹⁸¹ Under the model provision, a personal representative who properly distributes any part of the estate of a deceased person will not be liable in respect of that distribution if:

177 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 95.

178 See para 2.3-2.6 of this Report.

179 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 101. Such a requirement is found in s 35 of the *Family Provision Act 1982* (NSW).

180 Id at 102, referring to s 44(3)(a) of the *Succession Act 1981* (Qld).

181 Id at 102.

- the personal representative gives public notice, at least one month before the date of intended distribution, of his or her intention to distribute the estate;¹⁸²
- the distribution takes place at least one month after the giving of the public notice and at least six months after the date of death of the deceased person; and
- at the time the distribution was made the personal representative had no notice of any application or intended application for family provision.

4.6 The National Committee also recommended the introduction of a provision to the effect of section 44(1) of the *Succession Act 1981* (Qld), which protects a personal representative who makes an early distribution of property for the maintenance or support of persons who were wholly or substantially dependent on the deceased person.¹⁸³

ISSUES FOR CONSIDERATION

4.7 In the course of finalising the terms of the model family provision legislation, the National Committee has given further consideration to its recommendation that a personal representative should be protected from liability in respect of a distribution made for the maintenance or support of the deceased's dependants. It has also given consideration to the inclusion of two further provisions in the model legislation.

Distributions made to the deceased's dependants

4.8 As mentioned above, the National Committee has recommended the adoption of a provision to the effect of section 44(1) of the *Succession Act 1981* (Qld). That section protects a personal representative who properly makes an early distribution for the purpose of providing "maintenance or support" for the relevant dependants.

4.9 Similar provisions are found in the legislation in the Australian Capital Territory, the Northern Territory, Victoria and Western Australia, although there are slight differences in the language used to describe the purposes for which a personal representative may make a distribution without incurring liability.

4.10 The provisions in the Territories protect a personal representative who makes a proper distribution for the purpose of providing for the "maintenance, education or advancement in life" of a person who was dependent on the

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See *Supreme Court Rules 1970* (NSW) Pt 77, r 69 and Form 121 of Schedule F to those Rules.

183

National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 103.

deceased person,¹⁸⁴ while the Victorian provision is expressed to apply where a distribution is properly made for the purpose of providing for the “maintenance, support or education” of the relevant dependants.¹⁸⁵ The equivalent provision in the Western Australian legislation is expressed in slightly more restrictive terms. It protects a personal representative who distributes the whole or any part of the estate “for the purpose of providing those things immediately necessary for the maintenance, support or education” of a relevant dependant, “being a person entitled thereto”.¹⁸⁶

4.11 A similar range of expressions is used in the various State and Territory provisions that prescribe the circumstances in which the court may order provision for an applicant and the nature of the provision that may be ordered.¹⁸⁷ The High Court has commented that the presence in the New South Wales legislation of the words “advancement in life” is “not unimportant”, and that those words are of “wide import”.¹⁸⁸ However, the Supreme Court of Victoria, in considering the meaning of the expression “maintenance and support” in that jurisdiction’s family provision legislation, has suggested that the reference to “support” is sufficiently wide to comprehend a claim for advancement.¹⁸⁹ The Court provided the following explanation for the emphasis in earlier decisions on the expression “advancement in life”.¹⁹⁰

The emphasis on the word “advancement” in *McCosker v. McCosker ...* and *Blore v. Lang ...* is readily explicable in the context of the known and relatively restricted meaning of the preceding words “maintenance [and] education” in the New South Wales Act. The natural meaning of the word “support” is at least as wide as “advancement in life” ...

4.12 In view of the more recent interpretation of the expressions “maintenance and support” and “maintenance, education and advancement in life”, it would appear that there is little, if any, difference between the nature of the distributions that can be made by a personal representative under section 44(1) of the *Succession Act 1981* (Qld) without incurring liability and of those

184 *Family Provision Act 1969* (ACT) ss 20(2)(a), 21; *Family Provision Act* (NT) ss 20(2), 21.

185 *Administration and Probate Act 1958* (Vic) s 99A(1).

186 *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 11.

187 See National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 47-49. Although s 91 of the *Administration and Probate Act 1958* (Vic) has been amended since the publication of that Report, it still provides that the court must not make a family provision order unless the deceased has made inadequate provision for “the proper maintenance and support” of the relevant person.

188 *McCosker v McCosker* (1957) 97 CLR 566 per Dixon CJ and Williams J at 575. See also *Blore v Lang* (1960) 104 CLR 124 per Dixon CJ at 128. Further, in *Kleinig v Neal* [1981] 2 NSWLR 532 Holland J suggested (at 543) that because the Victorian legislation refers to “proper maintenance and support”, but not to “advancement in life”, the range of needs that may be met under the Victorian legislation may not be as wide as those that may be met under the New South Wales legislation.

189 *Anderson v Teboneras* [1990] VR 527 per Ormiston J at 537.

190 *Ibid.* This statement was cited with approval in *Carter v Vernon* (Unreported, Supreme Court of Victoria, Beach J, 28 August 1997).

that can be made under the similar provisions in the other jurisdictions discussed above.

4.13 A provision in the same terms as section 44(1) of the *Succession Act 1981* (Qld) was first introduced in Queensland in 1968.¹⁹¹ During the debate in relation to the *Succession Acts Amendment Bill 1968*, the then Attorney-General, the Hon P R Delamothe, commented on the rationale for enacting a provision of this kind:¹⁹²

The inclusion in the Bill of the proposed measure of protection will enable the executor or administrator to make a proper distribution of any part of the estate in appropriate cases where he may be otherwise reluctant to do so because of the likelihood of an action being instituted against him.

The ultimate benefit of including the proposed measure of protection in the Bill will, in the main, be derived by those persons who are placed in necessitous circumstances by the death of their breadwinner in that their urgent needs for maintenance or support can be met without undue delay.

4.14 As noted above, the Western Australian provision is expressed to protect a personal representative who makes a distribution for the purpose of providing “those things immediately necessary” for the maintenance, support or education of a relevant dependant.¹⁹³ That limitation is consistent with the rationale for provisions of this kind - namely, to facilitate the satisfaction of the “urgent needs” of a dependant.

Distributions to which an eligible person consents

4.15 The legislation in Queensland, Victoria and Western Australia provides that a personal representative who has properly distributed any part of the estate of a deceased person will not be liable to a person who may have been entitled to apply for provision, but who advised the personal representative in writing that he or she consented to the proposed distribution or did not intend to make any application that would affect the proposed distribution.¹⁹⁴ Section 44(2) of the *Succession Act 1981* (Qld) provides:

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 -

¹⁹¹ Section 93(1) of the *Succession Act 1867* (Qld) was inserted by s 12 of the *Succession Acts Amendment Act 1968* (Qld).

¹⁹² Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1968 at 2425.

¹⁹³ See para 4.10 of this Report.

¹⁹⁴ *Succession Act 1981* (Qld) s 44(2); *Administration and Probate Act 1958* (Vic) s 99A(2); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 20(4).

- (a) consents to the distribution; or
- (b) does not intend to make any application that would affect the proposed distribution.

4.16 These provisions facilitate the early distribution of estates. By enabling a personal representative to make a distribution in the knowledge that he or she will not be liable to a person who gives notice that the person consents to the application or does not intend to make an application that would affect the proposed distribution, it is possible for a personal representative to be protected from liability in respect of a distribution made within six months of the deceased's death.

Distributions made after notice is given that a person intends to apply for family provision

4.17 As noted earlier, the National Committee has recommended a provision, based in part on section 44(3)(a) of the *Succession Act 1981* (Qld), to protect a personal representative who distributes any part of the estate of a deceased person at least six months after the death of the deceased, and without notice¹⁹⁵ of any application or intended application for family provision.¹⁹⁶

4.18 The situation may arise, however, where a person notifies a personal representative of his or her intention to apply for family provision, but does not commence proceedings within the applicable time limit for the making of a family provision application. It is not clear whether a personal representative who distributed the estate after the expiry of the applicable time limit would be liable in respect of that distribution if the person who had given the notice subsequently applied for provision out of time.¹⁹⁷ The proposed provision would not protect the personal representative in these circumstances, as it applies only in a situation where a personal representative makes a distribution without notice of any application or intended application.

4.19 The Queensland legislation provides for this situation, and protects a personal representative from liability to a person who gives notice of intention to bring a family provision application, but who fails to make the application in time

¹⁹⁵ Section 44(4) of the *Succession Act 1981* (Qld) provides that, for the purposes of that section, notice to a personal representative of an application or intention to make an application for provision must be in writing signed by the applicant or the applicant's solicitor.

¹⁹⁶ In order to qualify for protection, the personal representative must also have given public notice of the proposed distribution at least one month before making the distribution: see para 4.5 of this Report.

¹⁹⁷ In *Guardian Trust and Executors Company of New Zealand Limited v Public Trustee of New Zealand* [1942] AC 115 the Privy Council held (at 127) that "if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded". In that case, executors paid out pecuniary legacies under the terms of a will, notwithstanding that they were aware that the deceased's next of kin intended to apply for the revocation of the grant of probate.

and then makes a late application after the estate has been distributed. Section 44(3)(b) of the *Succession Act 1981* (Qld) provides:

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) ...; or
- (b) if notice under section 41(1) or 42 has been received - not earlier than 9 months¹⁹⁸ 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. [note added]

THE NATIONAL COMMITTEE'S VIEW

Distributions made to the deceased's dependants

4.20 The National Committee has considered whether the model provision protecting a personal representative who makes a proper distribution to a dependant of a deceased person should follow the Queensland provision and refer to a distribution made to provide for the "maintenance or support" of the person or whether the model provision should use a different expression.¹⁹⁹

4.21 As explained above, there appears to be little, if any, difference between the nature of the provision encompassed by the expressions "maintenance and support" and "maintenance, education and advancement in life".²⁰⁰ The National Committee considers that the provision dealing with a personal representative's liability in respect of distributions made to a deceased person's dependants should be expressed in terms that are consistent with the model provision that deals with the court's power to order provision.²⁰¹ The National Committee has previously recommended that the model legislation should confer on the court the power to order that provision be made for the "maintenance, education or advancement in life" of an eligible person.²⁰² Consequently, the National Committee is of the view that the model provision dealing with a personal representative's liability in respect of a distribution made to a dependant of a deceased person should refer to a distribution made for the

¹⁹⁸ Under the Queensland legislation, a person has nine months in which to make an application for family provision: *Succession Act 1981* (Qld) s 41(8).

¹⁹⁹ The various legislative provisions are discussed at para 4.8-4.14 of this Report.

²⁰⁰ See para 4.12 of this Report.

²⁰¹ See cl 10 of the model legislation set out in Appendix 2 to this Report.

²⁰² National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 65. This is the terminology used in s 7 of the *Family Provision Act 1982* (NSW).

purpose of providing for the person's "maintenance, education or advancement in life".

4.22 The model provision should make it clear that the protection from liability afforded to a personal representative is to apply only to the extent that the distribution made is for the purpose of providing those things immediately necessary for the specified purposes. In this respect, the National Committee favours the incorporation into the model provision of the restriction found in the Western Australian provision.²⁰³

Distributions to which an eligible person consents

4.23 The National Committee considers it desirable to facilitate the early distribution of estates, provided that the interests of persons who might be entitled to apply for family provision are not prejudiced by doing so.

4.24 In the National Committee's view, section 44(2) of the *Succession Act 1981* (Qld) meets these objectives. A provision to that effect should therefore be included in the model legislation.

Distributions made after notice is given that a person intends to apply for family provision

4.25 Section 44(3)(b) of the *Succession Act 1981* (Qld) confirms that the mere giving of notice to a personal representative that a person intends to apply for family provision is not to delay the distribution of the estate indefinitely. If a person who has given such a notice does not, within the applicable time limit for the making of a family provision application, commence proceedings and either notify the personal representative in writing of the commencement of those proceedings or serve a copy of the application on the personal representative, the personal representative should be able to distribute the estate in the knowledge that he or she will not be liable in respect of that distribution if the person subsequently makes an application out of time.

4.26 The National Committee is therefore of the view that a provision to the effect of section 44(3)(b) of the *Succession Act 1981* (Qld) should be included in the model legislation. However, as the time limit proposed in the model legislation for the making of a family provision application is twelve months from the date of the deceased's death, the model provision based on section 44(3)(b) of the *Succession Act 1981* (Qld) should refer to a distribution made not earlier than twelve months after the deceased's death.

²⁰³

Section 11 of the *Inheritance (Family and Dependents Provision) Act 1972* (WA) is discussed at para 4.10 of this Report.

RECOMMENDATIONS

- 4-1** The model provision based on section 44(1) of the *Succession Act 1981 (Qld)* should protect a personal representative from liability in respect of a distribution that is properly made for the purpose of providing those things immediately necessary for the maintenance, education or advancement in life of a person who was wholly or substantially dependent on the deceased person immediately before his or her death.²⁰⁴
- 4-2** The model legislation should include a provision to the effect of section 44(2) of the *Succession Act 1981 (Qld)*.²⁰⁵
- 4-3** The model legislation should include a provision to the effect of section 44(3)(b) of the *Succession Act 1981 (Qld)*, except that the provision should refer to the situation where the distribution has been made not earlier than twelve months after the deceased person's death.²⁰⁶

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This recommendation is implemented by cl 45(1) and (2) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 102.

205

This recommendation is implemented by cl 45(3) of the model legislation set out in Appendix 2 to this Report. Section 44(2) of the *Succession Act 1981 (Qld)* is set out at para 4.15 of this Report.

206

This recommendation is implemented by cl 45(4) and (5) of the model legislation set out in Appendix 2 to this Report. Section 44(3)(b) of the *Succession Act 1981 (Qld)* is set out at para 4.19 of this Report.

Chapter 5

Miscellaneous provisions

ACT TO BIND THE CROWN

The existing law

5.1 The family provision legislation in New South Wales and Queensland is expressed to bind the Crown.²⁰⁷ Section 5 of the *Family Provision Act 1982* (NSW) provides:

Act binds Crown

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.

5.2 Although the family provision legislation in the Australian Capital Territory is not expressed to bind the Crown,²⁰⁸ it nevertheless does so as a result of the *Legislation Act 2001* (ACT), which provides that “[a]n Act binds everyone, including all governments”.²⁰⁹

5.3 The legislation in the other Australian jurisdictions does not expressly bind the Crown.²¹⁰ Accordingly, whether or not the Crown is bound by the family provision legislation in these jurisdictions depends on whether the legislation in the particular jurisdiction manifests an intention to bind the Crown. The applicable test for determining whether an Act discloses such an intention depends on when the particular Act was passed.

5.4 Before the High Court’s decision in *Bropho v State of Western Australia*,²¹¹ a strict test had been applied to determine whether an Act bound the Crown. An Act would bind the Crown if there was a “necessary implication”

207 *Family Provision Act 1982* (NSW) s 5; *Succession Act 1981* (Qld) s 4(2). These provisions are virtually identical.

208 See *Family Provision Act 1969* (ACT).

209 *Legislation Act 2001* (ACT) s 121(1).

210 Section 6(6) of the *Acts Interpretation Act 1931* (Tas) provides:

No Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose.

This provision has not, however, been interpreted literally. In relation to the equivalent Queensland provision (*Acts Interpretation Act 1954* (Qld) s 13) it has been held that the provision “does not mean that the Crown cannot be bound where it appears to be a necessary implication that the Crown is to be bound”: *Re Commissioner of Water Resources and Leighton Contractors Pty Ltd* (1990) 96 ALR 242 per Byrne J at 244. See also *Brisbane City Council v Group Projects Proprietary Limited* (1979) 145 CLR 143 per Wilson J (with whom Gibbs and Mason JJ agreed) at 167.

211 (1990) 171 CLR 1.

that the Crown was intended to be bound.²¹² That test was satisfied if it was “manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound”.²¹³ It was also satisfied if it could be said that, at the time the legislation was passed, “it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound”.²¹⁴ The courts have acknowledged that the test of necessary implication was “not easily satisfied”.²¹⁵

5.5 In *Bropho v State of Western Australia*,²¹⁶ the High Court held that the presumption that an Act does not bind the Crown should not be treated as an inflexible rule involving a strict test of necessary implication,²¹⁷ and that an Act would be held to bind the Crown if its purpose, policy and subject matter, when construed in context (which includes permissible extrinsic aids) disclosed an intention that the Crown should be bound.²¹⁸

5.6 The High Court stated, however, that its decision was not intended “to overturn the settled construction of particular existing legislation”.²¹⁹ In that respect, the Court acknowledged that:²²⁰

... in the period since the *Province of Bombay Case*,²²¹ the tests of “manifest from the very terms of the statute” and “purposes of the statute being otherwise wholly frustrated” came to be established as decisive of the question whether, in the absence of express reference, the general words of a statute bind the Crown. That being so, it may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests were seen as of general application at the time when the particular provision was enacted. [note added]

5.7 The Court suggested that the authorities that preceded the Privy Council’s decision in *Province of Bombay v Municipal Corporation of the City of Bombay* did not support an inflexible approach.²²² The High Court has

212 *Bradken Consolidated Limited v Broken Hill Proprietary Company Limited* (1979) 145 CLR 107 per Gibbs ACJ at 116.

213 Ibid.

214 *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58 at 63; *Brisbane City Council v Group Projects Proprietary Limited* (1979) 145 CLR 143 per Wilson J (with whom Gibbs and Mason JJ agreed) at 169.

215 *Brisbane City Council v Group Projects Proprietary Limited* (1979) 145 CLR 143 per Wilson J (with whom Gibbs and Mason JJ agreed) at 167.

216 (1990) 171 CLR 1.

217 Id per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 21-22.

218 Ibid.

219 Id at 22. See also per Brennan J at 28-29.

220 Id per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 23.

221 *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58.

222 *Bropho v State of Western Australia* (1990) 171 CLR 1 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 22-23.

subsequently applied a less rigid test to determine whether legislation enacted before the Privy Council's decision is intended to bind the Crown.²²³

5.8 The family provision legislation in the Northern Territory, South Australia, Victoria and Western Australia was enacted after the decision in *Province of Bombay v Municipal Corporation of the City of Bombay*,²²⁴ but before the High Court's decision in *Bropho v State of Western Australia*.²²⁵ Consequently, the stricter test of necessary implication will be applied to determine whether the legislation in these jurisdictions binds the Crown. As the Tasmanian family provision legislation was enacted before the decision in *Province of Bombay v Municipal Corporation of the City of Bombay*, a less rigid test will presumably apply to determine whether that legislation binds the Crown.

Family Provision Report

5.9 In the Family Provision Report, the National Committee considered whether the model legislation should be expressed to bind the Crown. It considered that this issue would need to be considered by each jurisdiction, but was not a matter for uniformity. The National Committee therefore recommended that a provision to the effect of section 5 of the *Family Provision Act 1982* (NSW) should not be included in the model legislation.²²⁶

The significance of whether the model legislation binds the Crown

5.10 The intestacy legislation in each Australian jurisdiction provides that, where a person dies and is not survived by any of the persons who are entitled in that jurisdiction to take on intestacy, the Crown is entitled to the estate of the deceased person.²²⁷

5.11 One of the major recommendations made in the Family Provision Report concerned the eligibility of persons to apply for family provision. Whereas the legislation in most jurisdictions specifies various categories of persons who may apply for family provision, the National Committee adopted a

²²³ *Jacobsen v Rogers* (1995) 182 CLR 572 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ at 586.

²²⁴ [1947] AC 58. See para 5.4 of this Report.

²²⁵ (1990) 171 CLR 1. See para 5.5-5.7 of this Report.

²²⁶ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 143.

²²⁷ *Administration and Probate Act 1929* (ACT) s 49, Schedule 6 Part 6.2; *Wills, Probate and Administration Act 1898* (NSW) s 61B(7); *Administration and Probate Act* (NT) s 66(1), Schedule 6 Part IV; *Succession Act 1981* (Qld) s 35(1), Schedule 2 Part 2; *Administration and Probate Act 1919* (SA) s 72G(e); *Administration and Probate Act 1935* (Tas) s 45; *Administration and Probate Act 1958* (Vic) s 55; *Administration Act 1903* (WA) s 14(1).

different approach. It recommended that there should be three categories of persons who are eligible to apply for family provision.²²⁸

- a person who was the wife or husband²²⁹ of the deceased person at the time of the deceased person's death,²³⁰
- a non-adult child of the deceased person; and
- a person for whom, having regard to various specified matters, the deceased person owed a responsibility to provide for the person's maintenance, education or advancement in life.²³¹

5.12 A person with no entitlement under the relevant intestacy legislation might therefore be eligible to apply for family provision on the basis that he or she is a person for whom the deceased person had a responsibility to make provision. However, in circumstances where the estate of a deceased person was to pass to the Crown under the relevant intestacy legislation, a family provision order in favour of such a person would be effective only if the family provision legislation in the particular jurisdiction bound the Crown.

The National Committee's view

5.13 The National Committee is of the view that it is essential for the model family provision legislation to bind the Crown, and that, in the interests of certainty, the legislation should do so expressly.

5.14 Section 5 of the New South Wales Act is expressed in broad terms, and provides that the Act binds the Crown not only of that State, but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.²³² Given the potential for the estate of a deceased person who dies intestate to vest in the Crown in right of more than one jurisdiction,²³³ the

228 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 26-28.

229 See note 25 of this Report.

230 See the discussion of this issue in Chapter 2 of this Report and Recommendation 2-1, which adds as a further category of eligible applicant a person who was, at the time of the deceased person's death, the de facto partner of the deceased person.

231 These matters are set out in cl 11 of the model legislation in Appendix 2 to this Report.

232 See para 5.1 of this Report. It has been held that the presumption that the Crown is not bound by the general words of a statute "extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation": *Jacobsen v Rogers* (1995) 182 CLR 572 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ at 585; *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 per Dawson, Toohey and Gaudron JJ at 444. See also Taylor G, "Commonwealth v Western Australia and the Operation in Federal Systems of the Presumption that Statutes Do Not Apply to the Crown" (2000) 24 *Melbourne University Law Review* 77.

233 Under the law of conflicts, the law of more than one jurisdiction may apply to the estate of a deceased person. Where an intestate's estate includes both movable and immovable property, succession to movable property will be determined by the law of the deceased's domicile, while succession to immovable property will be determined by the law of the jurisdiction in which that property is situated: *Re Ralston* [1906] VLR 689.

National Committee is of the view that the model legislation should include a provision to the effect of section 5 of the *Family Provision Act 1982* (NSW).

EXTENSION OF TIME TO MAKE A FAMILY PROVISION APPLICATION

Introduction

5.15 The family provision legislation in each Australian jurisdiction provides a time limit for the making of an application for family provision.²³⁴

5.16 In addition, the legislation gives the court the power to extend the time within which an application for family provision may be made.²³⁵ The power to extend time is generally discretionary.²³⁶ In exercising the discretion, the courts must deal with each case on its own facts.²³⁷

5.17 An applicant for an extension of time must demonstrate that he or she has at least an arguable claim for provision.²³⁸ In addition, even where the legislation confers an unfettered discretion on the court, an applicant will generally be required to satisfy the court that the delay in making the application should be excused.²³⁹ Extensions have been granted in a variety of circumstances, including where the delay in applying for provision arose because the applicant:

- was not aware of the deceased's death;²⁴⁰
- was not aware of the size and extent of the deceased's estate;²⁴¹

234 *Family Provision Act 1969* (ACT) s 9(1); *Family Provision Act 1982* (NSW) s 16(1); *Family Provision Act* (NT) s 9(1); *Succession Act 1981* (Qld) s 41(8); *Inheritance (Family Provision) Act 1972* (SA) s 8(1); *Testator's Family Maintenance Act 1912* (Tas) s 11(1); *Administration and Probate Act 1958* (Vic) s 99; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(2)(a). See the discussion of these provisions in National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 28-35.

235 *Family Provision Act 1969* (ACT) s 9(2); *Family Provision Act 1982* (NSW) s 16(2); *Family Provision Act* (NT) s 9(2); *Succession Act 1981* (Qld) s 41(8); *Inheritance (Family Provision) Act 1972* (SA) s 8(2); *Testator's Family Maintenance Act 1912* (Tas) s 11(2); *Administration and Probate Act 1958* (Vic) s 99; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(2)(b).

236 *Re Barrot* [1953] VLR 308 at 312.

237 *Re Guskett* [1947] VLR 212 per Herring CJ at 214.

238 *Re Walker* [1967] VR 890 per Lush J at 892. Note that in *Phillips v Quinton* (Unreported, Supreme Court of New South Wales, 31 March 1988) Powell J suggested (at 13) that, where an application for an extension of time was heard together with the application for substantive relief, the applicant should demonstrate "not merely a reasonable prospect, but, at least, a strong probability, of obtaining substantive relief".

239 *Coffey v Bennett* [1961] VR 264; *Re Walker* [1967] VR 890 per Lush J at 892.

240 *Re O'Connor* [1931] QWN 39.

241 *Re Nassim* [1984] VR 51.

- was not aware of his or her right to claim provision or did not fully appreciate the nature of that right;²⁴²
- was under a legal disability;²⁴³
- was engaged in negotiations to settle the claim for provision;²⁴⁴
- lacked the financial means to institute proceedings.²⁴⁵

Family Provision Report

5.18 In the Family Provision Report, the National Committee's general recommendation was that an application for family provision should be made within 12 months of the death of the deceased person.²⁴⁶ The National Committee was also of the view that the court should have an unfettered discretion to extend this time limit. Consequently, it further recommended that the 12 month time limit should apply "unless the court otherwise directs".²⁴⁷ In this respect, its recommendation followed section 41(8) of the *Succession Act 1981* (Qld).

5.19 In view of the broad discretion recommended by the National Committee, it did not propose the adoption of the specific requirement then found in section 16(3) of the *Family Provision Act 1982* (NSW) that the court must not make an order allowing an application to be made out of time unless sufficient cause is shown for the application not having been made within time.²⁴⁸ However, as noted previously, this is a usual requirement for an application for an extension of time to make a family provision application.

The effect of the consent of the parties

5.20 In September 2000, the New South Wales legislation was amended to alter the circumstances in which an order may be made in that State allowing an

²⁴² *In the Estate of Barry* (1974) 9 SASR 439; *Re Barrot* [1953] VLR 308.

²⁴³ *Re Lawrence* [1973] Qd R 201.

²⁴⁴ *Amos v Amos* [1966] VR 442.

²⁴⁵ *Coffey v Bennett* [1961] VR 264.

²⁴⁶ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 42-43. Although the National Committee originally recommended that a different time limit should apply where an application was made for provision out of property that was the subject of a testamentary trust or a trust arising on an intestacy, the National Committee has since changed its decision in relation to that issue: see para 3.56-3.90 of this Report and Recommendation 3-8.

²⁴⁷ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 43.

²⁴⁸ *Ibid.* The subsequent substitution of s 16(3) of the *Family Provision Act 1982* (NSW) is discussed below.

application to be made out of time.²⁴⁹ Section 16(3) of the *Family Provision Act 1982* (NSW) now provides:

The Court may not make an order under subsection (2) allowing an application in relation to a deceased person to be made after the end of the prescribed period unless:

- (a) the parties to the proceedings concerned have consented to the application being made after the end of that period, or
- (b) sufficient cause is shown for the application not having been made within that period.

5.21 Under the new provision, if the relevant parties have consented to the application being made out of time, it is no longer necessary for the applicant to satisfy the court that there is sufficient cause for not having made the application within time.

5.22 In the second reading speech in relation to the Courts Legislation Amendment Bill 2000 (NSW), the then New South Wales Attorney-General, the Hon J W Shaw, explained the background to this amendment of the *Family Provision Act 1982* (NSW).²⁵⁰

Section 16(3) of the Family Provision Act currently prevents the court from making an order for provision outside the prescribed period unless sufficient cause is shown for the application not having been made within that period. This causes unnecessary delay and expense in cases where the relevant parties have no objection to an order being made out of time.

5.23 The fact that the parties to a late application for family provision have consented to the application being made out of time does not mean that an extension of time will automatically be granted. The court still retains its discretion to refuse the application on a ground other than that the applicant's delay is not satisfactorily explained.²⁵¹ An application for an extension of time might, for example, be refused on the ground that the success of the substantive application for provision is improbable.²⁵²

5.24 The effect of section 16(3) of the *Family Provision Act 1982* (NSW) is simply that, if the relevant parties have consented to the making of a late application, the applicant is relieved of the requirement to show sufficient cause for not having made the application within time. Consequently, it will still be

²⁴⁹ *Courts Legislation Amendment Act 2000* (NSW) s 3, Schedule 4 substituted a new s 16(3) in the *Family Provision Act 1982* (NSW). The new provision commenced on 25 September 2000.

²⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 7 June 2000 at 6719.

²⁵¹ Under s 16(3) of the *Family Provision Act 1982* (NSW) it is a necessary condition for the granting of an extension of time under s 16(2) that either the parties to the application consent to it being made out of time or the applicant shows sufficient cause for not making the application within time. However, neither circumstance is expressed to be a sufficient condition for extending time under s 16(2).

²⁵² *Re Michel* [1939] QWN 49; *Re Terlier* [1959] QWN 5; *Re Walker* [1967] VR 890 per Lush J at 892.

necessary for an applicant for an extension of time to file affidavit material that establishes that he or she has at least an arguable claim for provision.²⁵³

The National Committee's view

The utility of an unfettered discretion to extend time

5.25 The conferring on the court of an unfettered discretion to extend the time in which an application for family provision may be made allows the court to consider whether, on the facts of the particular case, there is sufficient reason to allow the application to be made out of time. As can be seen from the earlier discussion, extensions of time have been granted in a variety of circumstances.²⁵⁴

5.26 In New South Wales, the enactment of the new section 16(3) of the *Family Provision Act 1982* (NSW) was no doubt intended to liberalise the circumstances in which the court may grant an extension of time by making it unnecessary for an applicant to show sufficient cause for not making an application within time if the parties to the application consent to the making of the application out of time.²⁵⁵

5.27 However, in certain circumstances, section 16(3) of the New South Wales legislation could actually restrict the exercise of the court's discretion. Under that provision, if the parties to a late application do not consent to the application being made out of time, the court cannot grant an extension of time unless the applicant shows sufficient cause for not making the application within time. In other Australian jurisdictions, although it has consistently been held that an applicant for an extension of time must satisfy the court that his or her delay should be excused,²⁵⁶ there is no legislative requirement to that effect. This leaves open the possibility that, although an applicant might fail to provide a satisfactory explanation for his or her delay, that failure might not necessarily prove fatal. On the facts of a particular case, the court may be able to distinguish the earlier decisions about the effect of delay and grant an extension of time.

The utility of the New South Wales provision

5.28 As explained above, even if a provision to the effect of section 16(3) of the *Family Provision Act 1982* (NSW) were included in the model family provision legislation, it would still be necessary for an applicant who applied for an extension of time within which to make a family provision application to satisfy the court that he or she had at least an arguable claim for provision. In

253 See para 5.17 of this Report.

254 See para 5.17 of this Report.

255 Section 16(3) of the *Family Provision Act 1982* (NSW) is set out at para 5.20 of this Report.

256 See para 5.17 of this Report.

view of this requirement - which the National Committee does not propose to alter - it is questionable whether the inclusion of a provision to the effect of section 16(3) of the New South Wales legislation would result in savings in terms of the costs or time involved in applying for an extension of time within which to make a family provision application. Costs would still be incurred with respect to the preparation of the applicant's material and the hearing of the application itself. At most, it would be expected that only nominal savings could be made by reason of not having to address the question of delay in the applicant's material or at the actual hearing.

5.29 Further, given the nature of disputes that arise about the distribution of deceased persons' estates, there are unlikely to be many applications for extensions that are unopposed.

Other considerations

5.30 In deciding whether to include a provision to the effect of section 16(3) of the *Family Provision Act 1982* (NSW) in the model legislation, it is also necessary to consider the purpose of having a time limit in family provision legislation and, in the light of that purpose, what effect, if any, the fact that the parties to the application consent to its being made out of time should have on the exercise of the court's discretion to extend time.

5.31 On one view, it may be argued that, where family provision legislation provides a time limit for the making of an application, but allows the court to extend that time limit, the reason for an applicant's delay in applying for provision should be immaterial if the parties to the application have consented to its having been made late. This view is reflected in the New South Wales legislation.

5.32 The National Committee considers, however, that the purpose of providing a time limit in the legislation is to require applications for provision to be made promptly, and that an applicant who seeks an extension of time is, of necessity, seeking the indulgence of the court.²⁵⁷ Accordingly, it is proper for the court to scrutinise the explanation for the applicant's delay and to allow an application only if the applicant can provide a satisfactory explanation.

5.33 In the National Committee's view, the question of the weight to be given to the fact that the parties to a late application have consented to its being brought out of time should be a matter for the court to decide in its discretion and should not be prescribed by legislation, as it is in New South Wales. In a particular case, that fact might well be a matter for the court to take into account in deciding whether to grant an extension. However, it should not relieve an applicant of the requirement to provide a satisfactory explanation for the delay in making the application.

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See *Re Guskett* [1947] VLR 212 per Herring CJ at 214.

5.34 Further, the National Committee is concerned that, if the model legislation has the effect that the consent of the parties obviates the need for an applicant for family provision to explain his or her delay in applying for provision, it could result in pressure being brought to bear on the parties to provide their consent.

ADDITIONAL PROVISION

The existing law

5.35 A court may not vary the amount of provision made for a person by an existing family provision order unless the power to do so is specifically conferred by legislation.²⁵⁸ Consequently, if a person has had a family provision order made in his or her favour, the court may not, in the absence of a specific legislative provision, subsequently order that additional provision be made for that person.²⁵⁹

5.36 The New South Wales legislation contains a provision that enables the court to order that additional provision be made for a person in whose favour an order for provision has previously been made if the court is satisfied that, since the order was made, the person has suffered a substantial detrimental change in his or her circumstances. Section 8 of the *Family Provision Act 1982* (NSW) provides.²⁶⁰

Additional provision

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.

5.37 Under section 8, the court may, in its discretion, order that provision be made out of the estate or notional estate, or both, of the deceased person. In this context, the “estate” of a deceased person is a reference to property in the

258 *Re Breen* [1933] VLR 455; *Re Porteous* [1949] VLR 383; *Re Daniel* [1949] QWN 30. For a discussion of the variation provisions in the States and Territories see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 126-130.

259 *Re Breen* [1933] VLR 455; *Re Porteous* [1949] VLR 383.

260 For a discussion of this provision, see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 70-72.

estate that has not been distributed.²⁶¹ The court's power to designate property as notional estate for the purpose of ordering additional provision is restricted by section 28(5) of the *Family Provision Act 1982* (NSW), which provides that, unless there are special circumstances, the court may designate property as notional estate by reason of a prescribed transaction or distribution only if the court is satisfied that:

- the property was the subject of the prescribed transaction or distribution;
- a person holds the property as a result of the prescribed transaction or distribution as trustee only; and
- the property is not vested in interest in any beneficiary of that trust.

5.38 Further, section 19(2) of the *Family Provision Act 1982* (NSW) provides that the court may, by order, revoke or alter a family provision order made in favour of a person so as to enable an order for provision to be made in favour of another person.²⁶² Consequently, if the court originally ordered that provision be made in favour of both A and B and A subsequently applies for additional provision, the court may revoke or alter the previous order in favour of B for the purpose of ordering that additional provision be made for A.

Family Provision Report

5.39 In the Family Provision Report, the National Committee recommended that the model legislation should include provisions to the effect of sections 8, 19 and 28(5) of the *Family Provision Act 1982* (NSW).²⁶³

Issue for consideration

5.40 The National Committee has since considered whether there are circumstances other than those specified in section 8 of the *Family Provision Act 1982* (NSW) in which the court should be empowered to order that additional provision be made for a person in whose favour a family provision order has previously been made. Although section 8 provides a possible remedy for an applicant who suffers a substantial detrimental change in his or her circumstances after a family provision order is made in his or her favour, the section does not specifically enable the court to order additional provision where there has been a change in the nature of the deceased person's estate, or at

²⁶¹ *Family Provision Act 1982* (NSW) s 6(4). For an explanation of when property is considered to have been distributed, see para 3.61-3.64 of this Report.

²⁶² *Family Provision Act 1982* (NSW) s 19(2).

²⁶³ National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 75, 93-94, 131.

least in what was considered to be the deceased person's estate when the previous family provision order was made.²⁶⁴

5.41 For example, in *Re Strom*,²⁶⁵ a person in whose favour a family provision order had been made applied for additional provision out of the deceased person's estate when further assets of the deceased, which had a substantial value, were later discovered. The Court was satisfied that the evidence of the further assets was not available to the parties when the matter was previously litigated, and that the evidence of those assets could not, with reasonable diligence, have been discovered.²⁶⁶ However, the Court held that, as it had no power to redetermine the applicant's claim, the application for additional provision must be refused.²⁶⁷ The Court instead extended time for the applicant to institute an appeal in respect of the previous order for family provision, so that her claim could be assessed in the light of the recently discovered fresh evidence.²⁶⁸

5.42 Another situation may occur where the evidence at the previous hearing understated the value of a particular asset. It may be that the court would have made a more generous order in favour of the applicant if the evidence had reflected the true value of the particular asset.

5.43 A third situation may occur where, after a family provision order has been made, certain property that formed part of the estate increases substantially in value.

5.44 The issue that arises for consideration is whether the court should be empowered to order additional provision for a person in any of the situations outlined above.

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It is the personal representative's duty in family provision proceedings to give the court all possible assistance and to place all relevant evidence before the court: *In the Will of Lanfear* (1940) 57 WN (NSW) 181 at 183; *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639 per Kirby P at 654. The court rules and practice directions of a number of jurisdictions expressly require the respondent to a family provision application, who is usually the personal representative, to file evidence about the assets and liabilities of the estate: see for example *Supreme Court Rules 1970* (NSW) Pt 77 r 59; Practice Direction No 8 of 2001 of the Supreme Court of Queensland, Practice Direction No 8 of 2001 of the District Court of Queensland; *Supreme Court Rules 1987* (SA) r 119.10.

265

[1966] 1 NSW 592. Although this case was decided under the *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW), which did not include a provision to the effect of s 8 of the *Family Provision Act 1982* (NSW), the result would still be the same under the latter Act.

266

Id at 594.

267

Ibid.

268

Ibid.

The National Committee's view

5.45 As a general rule, the National Committee considers it desirable for there to be finality in relation to family provision orders. The National Committee is conscious that, in attempting to provide redress for applicants in exceptional cases, there is a risk of encouraging unmeritorious litigation, the effect of which can be to erode the assets of an estate.²⁶⁹ The National Committee has therefore given careful consideration to the question of whether it is appropriate, in the situations described above, for the court to be able to order additional provision for a person in whose favour an order for provision has previously been made.

Non-disclosure of a particular asset

5.46 Where the existence of an additional asset is discovered after the court has already made an order for provision in favour of a person (as occurred in *Re Strom*²⁷⁰), it will usually be the case that the estate would have been considered to be of greater value if the existence of the particular asset had been disclosed at the time of the previous hearing.²⁷¹ This does not mean that the court would necessarily have made a different order in favour of the previous applicant. However, the "need" of an applicant is a relative concept, depending, among other matters, on the size of the estate.²⁷² Consequently, where the estate would have been considered to be substantially greater in value if the existence of the particular asset had been disclosed at the time of the previous hearing, there is an increased likelihood that the court would have made a more generous order than was in fact made at that time.

5.47 Moreover, where the evidence at the previous hearing did not disclose the existence of a particular asset,²⁷³ the person in whose favour provision was made will not usually have had an opportunity to present his or her case for provision in the light of the evidence of the true value of the estate.²⁷⁴

5.48 The National Committee is therefore of the view that the provision of the model legislation that is to be based on section 8 of the *Family Provision Act 1982* (NSW) should enable the court to order additional provision for an applicant if, when the previous order was made in the applicant's favour:

269 Even if the costs of an unsuccessful application are awarded against the applicant, it may not be possible for the personal representative to recover those costs from the applicant. In those circumstances, the personal representative is nevertheless entitled to be indemnified out of the estate.

270 [1966] 1 NSW 592. The facts of this case are set out at para 5.41 of this Report.

271 This proposition assumes that the asset has more than a nominal value.

272 *Re Buckland* [1966] VR 404 at 415.

273 See note 264 of this Report in relation to the personal representative's duty to place all relevant information before the court.

274 It is possible that the person could have been independently aware of the existence of the asset. However, it is extremely unlikely, in those circumstances, that the person would not have given evidence of the asset, as evidence of the increased size of the estate would have been to the person's advantage.

- the evidence about the nature and extent of the deceased person's estate did not reveal the existence of certain property (the *undisclosed property*); and
- the court would have considered the deceased person's estate to be substantially greater in value if the evidence had revealed the existence of the undisclosed property.

5.49 Because the provision is to be framed in terms of “undisclosed property”, an applicant's right to apply for additional provision will not be restricted by the particular reason for which the existence of the undisclosed property was not earlier revealed. It will not matter, for example, whether the property was discovered only after the previous hearing or whether its existence at that time was concealed by the personal representative or another person.

5.50 The National Committee has considered whether an applicant should be disqualified from applying for additional provision if he or she was aware at the time of the previous order of the existence of the undisclosed property. In the National Committee's view, such knowledge on the part of the applicant would be a factor to be taken into account by the court in the exercise of its discretion, but should not constitute a bar to applying for additional provision.

Value of a particular asset understated

5.51 In some respects, the situation where the value of a particular asset was understated in the evidence at the previous hearing is similar to the situation where the existence of the asset was not disclosed at all. In both cases, the result of the deficiency in the evidence is that the court has made an order for provision in the absence of all the evidence concerning the size of the deceased person's estate.

5.52 However, where the evidence at the previous hearing disclosed the existence of the particular asset,²⁷⁵ albeit at an undervalue, there was at least the potential for the applicant to dispute the evidence of its valuation. In this respect, this situation differs from the situation where the existence of the asset was not disclosed at all.

5.53 On a practical level, the National Committee is conscious that any enlargement of the court's power to order additional provision carries with it the risk of encouraging further disputes in relation to deceased estates. Whereas it is likely to be fairly clear whether or not a particular asset was disclosed in the evidence given at the previous hearing, it may provide a fertile ground for litigation if an application can be made for additional provision on the ground that the person in whose favour the order was made subsequently disputes the valuation evidence about a particular asset.

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See note 264 of this Report in relation to the personal representative's duty.

5.54 Where the difference between the previous valuation evidence and the new evidence regarding what is alleged to have been the true value of the asset at the time of the previous hearing is so significant that the estate would have been regarded as being substantially greater in value at that time, it may be possible for the person concerned to apply for leave to appeal from the previous order on the grounds of fresh evidence.²⁷⁶ The National Committee considers that the appeal process provides an important filter for protecting the estate and the beneficiaries of the deceased's estate from the effects of unmeritorious applications.²⁷⁷

5.55 Accordingly, the National Committee is of the view that the model legislation should not provide that the understatement of the value of a particular asset at the previous hearing is a ground on which the court may order additional provision for a person.

Increase in value of particular assets since the previous hearing

5.56 The National Committee has already recommended that the model legislation should provide that the adequacy of the provision made for a person is to be assessed as at the time of the hearing, rather than as at the date of the deceased's death.²⁷⁸ The National Committee does not consider that a change in the value of particular assets after the date of the hearing should, of itself, provide a basis for the court to order additional provision for a person.²⁷⁹ Inevitably, assets that are bequeathed to some beneficiaries will increase in value over time, while assets that are bequeathed to other beneficiaries will decrease in value over the same period.

5.57 Accordingly, the National Committee is of the view that the model legislation should not provide that an increase in the value of a particular asset after the previous hearing is a ground on which the court may order additional provision for a person.

276 See the discussion of *Re Strom* [1966] 1 NSWR 592 at para 5.41 of this Report.

277 Of course, where a court's judgment is affected by fraud, it is "tainted throughout" and a party who is affected by the judgment may apply to the court to have it set aside: *Hip Foong Hong v H Neotia and Company* [1918] AC 888 at 894.

278 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 51.

279 It is possible that a decrease in the value of certain property might be a factor in the court finding that there had been a substantial detrimental change in a person's circumstances since a family provision order was last made in favour of the person, so as to entitle the person to apply for additional provision.

INTERIM ORDERS FOR FAMILY PROVISION

Existing legislation

5.58 Under the New South Wales legislation, the court is specifically empowered to make an interim order for family provision. Section 9(5) of the *Family Provision Act 1982* (NSW) provides:

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.

5.59 When an application is made under this provision, the court must assess, on the basis of the evidentiary material placed before it, the probable outcome of the proceedings.²⁸⁰ The court is not restricted “to making only such an order as would give the eligible person sufficient moneys to live on pending the hearing of the application”,²⁸¹ but may “make any interim order that it considers it is proper to make”.²⁸² Ordinarily, however, the court will make an order for such provision as will meet the applicant’s immediate needs.²⁸³

... in the normal case, although the Court has jurisdiction to make a wider order, it would seem to me that the proper order would be to give the eligible person only such a sum as would deal with real needs pending the hearing and then usually only on terms that the moneys could be recovered if the applicant were unsuccessful.

5.60 If the court makes an interim order for provision, it must in due course make a final determination of the application in which it confirms, revokes or alters its previous order.²⁸⁴

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Young v Salkeld (1985) 4 NSWLR 375 at 380-381. The court must assess what the applicant’s circumstances and the estate’s circumstances are likely to be as at the date when the court makes its final determination. As Young J observed (at 381), s 9(2) of the *Family Provision Act 1982* (NSW) provides that the court must not make an order for provision unless it is satisfied, at the time the court is determining whether to make an order, that the deceased made inadequate provision for the applicant. In other jurisdictions, this threshold question is determined as at the date of the death of the deceased person (*Blore v Lang* (1960) 104 CLR 124 per Dixon CJ at 128). The model legislation recommended by the National Committee follows the New South Wales legislation in this respect: see cl 10(1)(b) of the model legislation set out in Appendix 2 to this Report.

281

Young v Salkeld (1985) 4 NSWLR 375 at 381.

282

Ibid.

283

Ibid.

284

Family Provision Act 1982 (NSW) s 9(6).

Issue for consideration

5.61 It appears that, in the absence of a specific provision, the family provision legislation of the Australian States and Territories restricts the court to making a final determination of the provision that should be made for an applicant.²⁸⁵ In South Australia, it has recently been held that the family provision legislation of that jurisdiction does not give the court the power, pending the final determination of a family provision application, to make an interim order for provision.²⁸⁶

5.62 Consequently, if it is considered desirable for the court to have the power to make an interim order for provision, the model legislation should expressly confer that power on the court.

The National Committee's view

5.63 In some cases, an applicant for family provision may have a pressing need for financial support pending the final determination of his or her application. Alternatively, although an applicant may not demonstrate such a need, it may be clear to the court that an applicant will be entitled to at least a certain amount by way of provision out of the deceased's estate. In those circumstances, the court may be of the view that the applicant should not be deprived of that amount pending the final determination of the application.

5.64 The National Committee therefore considers it desirable for the court to have the power, pending the final determination of a family provision application, to make an interim order for provision. In its view, the model legislation should include a provision to the effect of section 9(5) and (6) of the *Family Provision Act 1982* (NSW).

THE COURT'S DISCRETION TO DISREGARD THE INTERESTS OF CERTAIN PERSONS

Existing legislation

5.65 Section 20 of the *Family Provision Act 1982* (NSW) enables the court, in specified circumstances, to disregard the interests of persons who are eligible

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In *Young v Salkeld* (1985) 4 NSWLR 375 Young J referred (at 377) to several New South Wales and Victorian cases in which it was held that the relevant legislation did not give the court the power to make an interim order for provision. In *Re Breen* [1933] VLR 455 and *Re Porteous* [1949] VLR 383 an application for increased provision was made by a person in whose favour the court had previously made an order for provision. In each case, it was argued on behalf of the applicant that the original order was an interim, rather than a final, order. That argument was rejected on the basis that the court's only power was to make a final order for provision: *Re Breen* [1933] VLR 455 at 456-457; *Re Porteous* [1949] VLR 383 at 387. The New South Wales cases to which Young J referred (*Re Yates* (1955) 72 WN (NSW) 497 at 498; *Re Piper* (1960) 60 SR (NSW) 328) concerned the legislation that applied prior to the enactment of the *Family Provision Act 1982* (NSW).

²⁸⁶

Cotton v Owen [1999] SASC 391 (17 September 1999).

to apply for provision, but who do not make such an application. The section provides:

Court may disregard persons who have not applied for provision

- (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) (Repealed)
- (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 firstmentioned order was made.

5.66 As noted in the Family Provision Report,²⁸⁷ the New South Wales Supreme Court held in *Luciano v Rosenblum*,²⁸⁸ that section 20 does not enable the court:²⁸⁹

... 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.

Family Provision Report

5.67 In the Family Provision Report, the National Committee recommended that a provision to the effect of section 20 of the *Family Provision Act 1982* (NSW) should be included in the model legislation.²⁹⁰

287 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 74.

288 (1985) 2 NSWLR 65.

289 *Id* at 69.

290 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 75.

The National Committee's view

5.68 A person who is a beneficiary under a deceased person's will or under the relevant intestacy rules may be satisfied with his or her share in the deceased's estate and, for that reason, not apply for provision.

5.69 In the National Committee's view, the model legislation should reflect the decision in *Luciano v Rosenblum*,²⁹¹ and make it clear that, although the court may generally disregard the interests of an eligible person who has not applied for provision, it must not disregard the interests of a person who is a beneficiary of the deceased's estate.

EVIDENCE OF STATEMENTS MADE BY DECEASED PERSONS

Introduction

5.70 During the course of the hearing of an application for family provision, a question may arise as to the attitude of the deceased person, during his or her lifetime, towards the applicant. The court may be asked to admit into evidence a statement made by the deceased person about the character and conduct of the applicant. Such a statement might take a number of forms. It could, for example, be made in writing - such as a letter,²⁹² a diary entry²⁹³ or the will itself - or it could simply consist of a comment made to a third person about the applicant.²⁹⁴

5.71 Because such a statement is made outside the court proceedings in which the issue of the applicant's conduct arises, its admissibility is subject to the common law rules about the admissibility of hearsay evidence.²⁹⁵

It is clear that under the rules of the common law a statement by a testatrix that her son has been guilty of misconduct, and that for that reason she has excluded him from any benefit under her will, is not admissible to prove that the son was in fact guilty of misconduct. What the testatrix said about the son's conduct is hearsay, and no exception to the rule against hearsay which is recognised by the common law allows the statement to be given in evidence to prove the facts stated.

291 (1985) 2 NSWLR 65.

292 See *Tausz v Elton* [1974] 2 NSWLR 163 at 172-173.

293 See *Tausz v Elton* [1974] 2 NSWLR 163 at 171-172.

294 See *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134; *Tausz v Elton* [1974] 2 NSWLR 163 at 172.

295 *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 per Gibbs J (with whom Mason and Aickin JJ agreed) at 149.

5.72 Although, at common law, evidence of a statement made by a deceased person is not admissible to prove that what the deceased person said or believed was true, it may nevertheless be admissible “as original evidence to prove the knowledge, motive or other state of mind” of the deceased, “should that be relevant”.²⁹⁶ If evidence is admitted on this limited basis, it cannot be used for the additional purpose of proving the truth of a fact asserted in the statement.²⁹⁷

... 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.

5.73 The common law in relation to the admissibility of statements made by a deceased person has been modified, to varying degrees, by legislation in the States and Territories.

Specific evidentiary provisions in family provision legislation

5.74 In some Australian jurisdictions, the family provision legislation contains a specific provision that addresses the admissibility of a statement made by a deceased person.²⁹⁸ The New South Wales legislation contains the most comprehensive of these provisions. The provisions in the Australian Capital Territory, the Northern Territory and Tasmania are more limited in their scope.

New South Wales

5.75 Section 32 of the *Family Provision Act 1982* (NSW) provides:

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.

²⁹⁶ Ibid. See, however, the reservations expressed by Gibbs J (at 149-150) about the relevance of evidence of this kind.

²⁹⁷ *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 per Gibbs J (with whom Mason and Aickin JJ agreed) at 153.

²⁹⁸ *Family Provision Act 1969* (ACT) s 22; *Family Provision Act 1982* (NSW) s 32; *Family Provision Act* (NT) s 22; *Testator's Family Maintenance Act 1912* (Tas) s 8A.

- (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) (Repealed)
- 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*.²⁹⁹

5.76 The effect of section 32(2) of the New South Wales legislation is that, in specified circumstances, a statement made by the deceased person whose estate is the subject of the application³⁰⁰ is admissible as evidence of any fact contained in the statement, provided the deceased person, if alive, could have given direct oral evidence of that fact. It therefore creates an exception to the rule against hearsay. Section 32 applies to statements contained in documents,³⁰¹ statements made while giving oral evidence in legal proceedings,³⁰² and statements made otherwise than in writing.³⁰³ Where the statement that is sought to be admitted was made by the deceased person other than in a document, the statement may ordinarily be proved only by the direct testimony³⁰⁴ of a person who heard or otherwise perceived the statement being made.

²⁹⁹ The relevant exceptions contained in the *Evidence Act 1995* (NSW) are discussed at para 5.80-5.83 of this Report.

³⁰⁰ *Purnell v Moon* (1991) 22 NSWLR 499. In that case, the applicants sought provision out of their mother's estate. The defendants sought to have admitted evidence of conversations between the deceased's late husband (the applicants' father) and a third person. Young J held (at 501) that s 32 of the *Family Provision Act 1982* (NSW) "only operates to make admissible an oral statement made by the deceased person about whose estate the court is concerned" and not a statement made by another deceased person.

³⁰¹ *Family Provision Act 1982* (NSW) s 32(5).

³⁰² *Family Provision Act 1982* (NSW) s 32(4).

³⁰³ *Family Provision Act 1982* (NSW) s 32(3).

³⁰⁴ *Family Provision Act 1982* (NSW) s 32(3).

Australian Capital Territory, Northern Territory

5.77 In the Australian Capital Territory³⁰⁵ and the Northern Territory,³⁰⁶ the court must have regard to the testator's reasons, so far as they may be ascertained, for making, or not making, provision for any person who is eligible to apply for provision. Further, a statement made by a testator setting out his or her reasons for making, or not making, provision for a person may be admitted as evidence of those reasons.³⁰⁷

Tasmania

5.78 The Tasmanian provision provides that the court may have regard to a deceased person's reasons for making, or not making, provision for a person who is entitled to apply for provision, and may accept such evidence of those reasons as it considers sufficient, whether or not that evidence would otherwise be admissible.³⁰⁸ It has been suggested that this provision does not "enable the court ... to accept as true any statement of fact made by the deceased as part of his or her reasons".³⁰⁹

Evidentiary provisions of general application

5.79 The evidence legislation in all Australian jurisdictions, which is of general application, contains various exceptions to the rule against hearsay. Certain of these provisions may enable a representation or statement made by a deceased person to be admitted as proof of a fact asserted by the representation or statement.

Australian Capital Territory, New South Wales and Tasmania

5.80 In the Australian Capital Territory (where the *Evidence Act 1995* (Cth) applies³¹⁰) and in New South Wales and Tasmania (where legislation that is virtually identical to the *Evidence Act 1995* (Cth) has been adopted³¹¹) evidence that is relevant is admissible in a proceeding unless otherwise excluded by the legislation.³¹² The Uniform Evidence Acts provide generally that evidence of a

305 *Family Provision Act 1969* (ACT) s 22(1). This provision continues to apply notwithstanding the operation in the Australian Capital Territory of the *Evidence Act 1995* (Cth): see *Evidence Act 1995* (Cth) s 8(4)(b).

306 *Family Provision Act* (NT) s 22(1).

307 *Family Provision Act 1969* (ACT) s 22(2); *Family Provision Act* (NT) s 22(2). In each jurisdiction, the statement must be signed by the testator and purport to bear the date on which it was signed.

308 *Testator's Family Maintenance Act 1912* (Tas) s 8A.

309 Dickey A, *Family Provision After Death* (1992) at 128. See also *Pincius v Wood* (Unreported, Supreme Court of Tasmania, Cox CJ, 1 May 1998) at 4.

310 *Evidence Act 1995* (Cth) s 4(1).

311 *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas).

312 *Evidence Act 1995* (Cth) s 56; *Evidence Act 1995* (NSW) s 56; *Evidence Act 2001* (Tas) s 56. These Acts are commonly referred to as the Uniform Evidence Acts.

“previous representation” made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.³¹³ However, this exclusion of hearsay evidence is subject to a number of exceptions, two of which are relevant for present purposes.

5.81 First, the Uniform Evidence Acts provide that, where evidence of a previous representation is admitted because it is relevant for a purpose other than proving a fact intended to be asserted by the representation, the general rule excluding hearsay evidence does not apply.³¹⁴ Consequently, if a representation made by a deceased person is admitted as evidence of that person’s reasons for making or not making a certain disposition, it may also be used to prove any fact asserted by the representation.

5.82 Secondly, the Uniform Evidence Acts create an exception to the hearsay rule where a person who has made a previous representation is unable to give evidence in a civil proceeding about a fact asserted in the representation because he or she is dead.³¹⁵ In those circumstances, a fact asserted in the representation may be proved by the evidence of a person who saw, heard or otherwise perceived the representation being made,³¹⁶ or by a document that contains the representation made by the deceased person.³¹⁷

5.83 These exceptions to the rule against hearsay are slightly broader in their scope than section 32 of the *Family Provision Act 1982 (NSW)*.³¹⁸ Obviously, they enable a statement made by a deceased person to be admitted as proof of a fact asserted in the statement, regardless of whether the statement was contained in a document, was made orally, or was made in some other way. However, whereas section 32 is restricted to statements made by the deceased person whose estate is the subject of the family provision application,³¹⁹ the provisions referred to above in the Uniform

313 *Evidence Act 1995 (Cth)* s 59; *Evidence Act 1995 (NSW)* s 59; *Evidence Act 2001 (Tas)* s 59. The term “previous representation” is defined in Part 1 of the Dictionary of the Commonwealth and New South Wales Acts and in s 3(1) of the Tasmanian Act to mean “a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced”. The term “representation” is defined in Part 1 of the Dictionary of the Commonwealth and New South Wales Acts and in s 3(1) of the Tasmanian Act to include:

- (a) an express or implied representation (whether oral or in writing), or
- (b) a representation to be inferred from conduct, or
- (c) a representation not intended by its maker to be communicated to or seen by another person, or
- (d) a representation that for any reason is not communicated.

314 *Evidence Act 1995 (Cth)* s 60; *Evidence Act 1995 (NSW)* s 60; *Evidence Act 2001 (Tas)* s 60.

315 *Evidence Act 1995 (Cth)* ss 3(1), 63, Dictionary, Part 2, cl 4 (“Unavailability of persons”); *Evidence Act 1995 (NSW)* ss 3(1), 63, Dictionary, Part 2, cl 4 (“Unavailability of persons”); *Evidence Act 2001 (Tas)* ss 3B, 63.

316 *Evidence Act 1995 (Cth)* s 63(2)(a); *Evidence Act 1995 (NSW)* s 63(2)(a); *Evidence Act 2001 (Tas)* s 63(2)(a).

317 *Evidence Act 1995 (Cth)* s 63(2)(b); *Evidence Act 1995 (NSW)* s 63(2)(b); *Evidence Act 2001 (Tas)* s 63(2)(b).

318 These provisions are, however, much broader in their scope than the specific provisions contained in the Australian Capital Territory, Northern Territory and Tasmanian family provision legislation, which are discussed at para 5.77 and 5.78 of this Report.

319 See note 300 of this Report.

Evidence Acts are not so restricted, and apply to the admissibility of a previous representation made by any deceased person.

Northern Territory, Queensland, South Australia, Victoria, Western Australia

5.84 The evidence legislation in the Northern Territory,³²⁰ Queensland,³²¹ South Australia,³²² Victoria³²³ and Western Australia³²⁴ contains a provision under which certain statements contained in a document made by a deceased person (whether in a will or in another document) may be admitted as evidence of the truth of the facts asserted in the document.³²⁵ However, where a deceased person had simply made comments to another person about the applicant, these provisions would not enable that person to give evidence to prove the truth of those comments.

Family Provision Report

5.85 In the Family Provision Report, the National Committee expressed the view that, ideally, the admissibility of evidence relating to the character and conduct of an applicant for family provision “should be left to the law of evidence and should not be spelt out in the model family provision legislation”.³²⁶ The National Committee suggested that each jurisdiction should consider the matter in the light of its own evidence legislation. It considered it unlikely, however, that jurisdictions that adopted the Uniform Evidence Act would need a specific provision in their family provision legislation.³²⁷

5.86 The National Committee initially recommended that, in the meantime, the model legislation should include a provision to the effect of section 32 of the *Family Provision Act 1982 (NSW)*.³²⁸

320 *Evidence Act (NT) s 26D.*

321 *Evidence Act 1977 (Qld) s 92.*

322 *Evidence Act 1929 (SA) s 34C.*

323 *Evidence Act 1958 (Vic) s 55.*

324 *Evidence Act 1906 (WA) s 79C.*

325 Under these provisions, where direct oral evidence of a fact would be admissible in civil proceedings, a statement contained in a document that tends to establish that fact is admissible as evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with in the statement and is unable to be called as a witness because he or she is dead. Before the enactment of the *Evidence Act 1995 (NSW)*, New South Wales had an equivalent provision (*Evidence Act 1898 (NSW) s 14B*). In *Tausz v Elton* [1974] 2 NSWLR 163 diary entries and a letter written by the testator were, under that provision, admitted into evidence to prove the facts asserted in those documents.

326 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 67.

327 *Ibid.* See the discussion at para 5.80-5.83 of this Report in relation to the admissibility of hearsay evidence under the Uniform Evidence Acts in the Australian Capital Territory, New South Wales and Tasmania.

328 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 67.

The National Committee's view

5.87 After further consideration, the National Committee has come to the view that the model legislation should not contain a provision to the effect of section 32 of the *Family Provision Act 1982* (NSW). The question of the admissibility of statements made by a deceased person about the character and conduct of an applicant for family provision should be dealt with under the law of evidence in each jurisdiction, rather than under the model legislation. The inclusion in the model legislation of a provision to the effect of section 32 would not of itself result in uniform evidentiary provisions for the hearing of family provision applications. As explained above, the evidence Acts in all Australian jurisdictions also have the potential to apply in family provision applications.³²⁹ By virtue of the operation of the Uniform Evidence Acts in the Australian Capital Territory, New South Wales and Tasmania, more liberal evidence laws would apply to family provision applications made in those jurisdictions than would apply to similar applications made in the other Australian jurisdictions.³³⁰

COSTS

Family Provision Report

5.88 In the Family Provision Report, the National Committee recommended that the model legislation should not include a provision to the effect of section 33 of the *Family Provision Act 1982* (NSW).³³¹ That section provides:

Costs, charges and expenses

- (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.

329 See para 5.79-5.84 of this Report.

330 See para 5.80-5.83 of this Report.

331 National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 139.

- (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.

Issues for consideration

The National Committee has since given consideration to two further issues:

- whether the model legislation should include a provision to enable the court to make a notional estate order for the purpose of ordering that the whole or part of a party's costs of the proceedings be paid out of property that is designated as the deceased person's notional estate; and
- if so, whether the court should be able to make a notional estate order for this purpose only if it has made a family provision order in the proceedings.

The National Committee's view

Designation of property as notional estate for the purpose of making a costs order

5.89 The National Committee remains generally of the view that the court should retain an unfettered discretion in relation to awarding costs in family provision proceedings, and that the model legislation should therefore not include a provision to the effect of section 33 of the *Family Provision Act 1982* (NSW).

5.90 However, the National Committee notes that section 33(1) of the New South Wales legislation provides that the court may order that the costs of proceedings be paid out of the notional estate of a deceased person. As the model legislation is to include provisions based on the New South Wales notional estate provisions,³³² the National Committee is of the view that the model legislation will need to include costs provisions so that the court may:

- designate property as notional estate of a deceased person for the purpose of making an order that the whole or part of the costs of a party to the proceedings be paid out of the deceased person's notional estate; and
- order that the whole or part of the costs of a party to the proceedings be paid out of property that has been designated as notional estate of the deceased person.

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See para 3.8 of this Report and cl 25-41 of the model legislation set out in Appendix 2 to this Report.

Whether the court must have made a family provision order in the proceedings

5.91 In *Tobin v Hardy*,³³³ the Court considered whether, if it had not actually made a family provision order in the proceedings, it had the power under the *Family Provision Act 1982* (NSW) to make a notional estate order so that it could order that a party's costs be paid out of the notional estate so designated.

5.92 In that case, the deceased had left virtually no estate. However, he had been a member of a superannuation fund and, under the rules of the fund, a substantial sum of money was payable on his death. The trustees of the superannuation fund determined, in the exercise of their discretion, that the money should be held on trust for the deceased's three children until they attained the age of 18. Accordingly, the plaintiff sought a declaration that the holding of the trust fund by the trustees amounted to a prescribed transaction and that the trust fund constituted part of the deceased's notional estate.³³⁴ The proceedings were defended by the deceased's executor, who was the deceased's estranged wife and the mother of two of his children.

5.93 Although, the Court held that the holding of the trust fund by the trustees constituted a prescribed transaction under the *Family Provision Act 1982* (NSW),³³⁵ it dismissed the plaintiff's application for provision.³³⁶ However, the Court did not regard the plaintiff's claim as so unreasonable as to require the plaintiff to pay the defendant's costs. The Court observed that, because the defendant had successfully defended the proceedings on behalf of the deceased's children, she would normally be entitled to take her costs from the estate. However, in the present case, there was no estate out of which those costs could be paid.³³⁷

5.94 The Court therefore considered whether it could designate part of the trust fund as the deceased's notional estate for the purpose of ordering that the defendant's costs be paid out of that fund. The Court noted that the relevant provisions of the *Family Provision Act 1982* (NSW) provide that the Court may designate property as notional estate only if it is satisfied that an order for provision should be made in the proceedings.³³⁸ As the Court had dismissed the plaintiff's claim for provision, it held that it did not have the power to make a notional estate order in relation to the trust fund:³³⁹

333 Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992.

334 *Tobin v Hardy* (Unreported, Supreme Court of New South Wales, Cohen J, 28 August 1992).

335 Ibid.

336 *Tobin v Hardy* (Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992). The Court was not satisfied, having regard to the matters that must be considered by the Court before making a notional estate order, that the plaintiff was entitled to an order under the Act.

337 *Tobin v Hardy* (Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992) at 13.

338 Ibid. See *Family Provision Act 1982* (NSW) ss 23(a), 24(a), 25(1)(a).

339 *Tobin v Hardy* (Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992) at 13.

The merits of the situation would require that the costs of the defendant be paid out of the fund available to the children, but I do not consider that I have the power to order that.

5.95 The National Committee has considered whether the model legislation should include the restriction presently found in the New South Wales legislation, or whether the court should be able to make a notional estate order for the purpose of making a costs order out of the notional estate regardless of whether it makes a family provision order in the proceedings.

5.96 In the National Committee's view, the restriction found in the New South Wales legislation is appropriate in so far as it concerns the costs of an applicant for provision. If an application for provision is dismissed, it should not be possible for the court to make a notional estate order to enable the unsuccessful applicant's costs to be paid out of the deceased person's notional estate.

5.97 However, the National Committee is of the view that this restriction should not apply in relation to the costs of other parties to the proceedings. Regardless of whether the court makes a family provision order in the proceedings, it should be possible for the court to designate property as notional estate of a deceased person for the purpose of making an order that the costs of a party (other than an applicant) be paid out of the property so designated. A provision in these terms would avoid the situation that arose in *Tobin v Hardy*.³⁴⁰

RECOMMENDATIONS

Act to bind the Crown

5-1 The model legislation should be expressed to bind the Crown not only in right of the enacting jurisdiction, but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.³⁴¹

³⁴⁰ Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992.

³⁴¹ This recommendation is implemented by cl 5 of the model legislation set out in Appendix 2 to this Report. It reverses the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 143.

Extension of time to make a family provision application

5-2 The model legislation should provide that the court has an unfettered discretion to extend the time within which an application for family provision may be made, and should not include a provision to the effect of section 16(3) of the *Family Provision Act 1982 (NSW)*.³⁴²

Additional provision

5-3 The model legislation should provide that the court may order that additional provision be made for an applicant in whose favour a family provision order has previously been made if, when the previous order was made in the applicant's favour:

- (a) the evidence about the nature and extent of the deceased person's estate did not reveal the existence of certain property (the *undisclosed property*); and
- (b) the court would have considered the deceased person's estate to be substantially greater in value if the evidence had revealed the existence of the undisclosed property.³⁴³

Interim orders for family provision

5-4 The model legislation should include a provision to the effect of section 9(5) and (6) of the *Family Provision Act 1982 (NSW)* so that the court has the power to make an interim order for family provision.³⁴⁴

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This recommendation is implemented by cl 9(1) of the model legislation set out in Appendix 2 to this Report. It confirms the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 43.

343

This recommendation is implemented by cl 10(3)(b) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 75.

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This recommendation is implemented by cl 13 of the model legislation set out in Appendix 2 to this Report.

The court's discretion to disregard the interests of certain persons

5-5 The model provision based on section 20 of the *Family Provision Act 1982 (NSW)* should provide expressly that the court may not disregard the interests of a person who is a beneficiary of the deceased person's estate (whether under the deceased person's will or by virtue of the relevant intestacy rules).³⁴⁵

Evidence

5-6 The model legislation should not include a provision to the effect of section 32 of the *Family Provision Act 1982 (NSW)*.³⁴⁶

Costs

5-7 The model legislation should provide that the court may make a notional estate order, designating specified property as notional estate of a deceased person, for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.³⁴⁷

5-8 The model legislation should provide that the court must not make an order under the provision recommended in Recommendation 5-7 for the purposes of an order that the whole or part of an applicant's costs in those proceedings be paid from the notional estate of the deceased person unless the court makes or has made a family provision order in favour of the applicant.³⁴⁸

³⁴⁵ This recommendation is implemented by cl 12(1) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 75.

³⁴⁶ This recommendation reverses the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 67.

³⁴⁷ This recommendation is implemented by cll 3(1) (definition of "costs") and 29(1)(b) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 139.

³⁴⁸ This recommendation is implemented by cll 3(1) (definition of "costs") and 29(2) of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 139.

5-9 The model legislation should provide that the court may order that a party's costs of proceedings under the legislation be paid out of the estate or notional estate of the deceased person.³⁴⁹

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This recommendation is implemented by cl 3(1) (definition of "costs") and 49 of the model legislation set out in Appendix 2 to this Report. It modifies the recommendation previously made by the National Committee: see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997) at 139.

Appendix 1

Comparative table

The following table indicates the provision or provisions on which individual provisions of the model family provision legislation have generally been based. Abbreviations used in the table are defined at the end of this Appendix.

MODEL LEGISLATION	BASIS OF PROVISION
PART 1 PRELIMINARY	
3 Definitions	
3(1) <i>costs</i>	-
3(1) <i>Court</i>	-
3(1) <i>deceased transferee</i>	-
3(1) <i>de facto partner</i>	-
3(1) <i>family provision order</i>	-
3(1) <i>notional estate</i>	NSW s 6(1) (definition of "notional estate")
3(1) <i>notional estate order</i>	-
3(1) <i>person entitled to exercise a power</i>	NSW s 6(7)
3(1) <i>property</i>	NSW s 6(1) (definition of "property")
3(1) <i>property held by a person</i>	NSW s 6(6)
3(1) <i>will</i>	Draft Wills Bill 1997 s 4(1) (definition of "will")
3(2)	-
4 Application of Act to deceased persons	
4(1)	-
4(2)	NSW s 6(1) (definition of "administration")
4(3)	NSW s 6(1) (definition of "administrator")
5 Act binds Crown	
5	NSW s 5; Qld s 4(2)
PART 2 FAMILY PROVISION ORDERS	
6 Family members who are entitled to make applications	
6	-
7 Other family members or persons owed responsibility entitled to make applications	
7(1)	Vic s 91(1)
7(2)	-
8 Applications for persons lacking capacity	
8	Qld s 41(7)

9 Time limit for applications	
9(1) 9(2) 9(3) 9(4)	NSW s 16(2); Qld s 41(8) Qld s 41(6) SA s 8(6) Qld s 41(7)
10 When family provision order may be made	
10(1)(a) 10(1)(b) 10(2) 10(3)(a) 10(3)(b)	NSW s 7 NSW s 9(2) NSW s 7 NSW s 8 -
11 Matters to be considered by Court	
11(1) 11(2)(a)-(g), (j)-(l), (n) 11(2)(h) 11(2)(i) 11(2)(m)	Vic s 91(4)(a), (b), (c) Vic s 91(4)(e)-(k), (m)-(p) NSW s 9(2)(a) - -
12 Other possible applicants	
12	NSW s 20(1), (2)
13 Interim family provision orders	
13(1) 13(2)	NSW s 9(5) NSW s 9(6)
14 Property that may be used for family provision orders	
14(1) 14(2) 14(3) 14(4) 14(5)	- NSW s 6(1) definition of "estate" NSW s 6(4) NSW s 6(5) -
15 Orders may affect property in or outside jurisdiction	
15	NSW s 11(1)(b)
16 Nature of orders	
16(1)(a) 16(1)(b) 16(1)(c) 16(1)(d) 16(2) 16(3)	- Vic s 97(1)(a) Vic s 97(1)(b); NSW ss 11(1)(c), 13 Vic s 97(1)(c) NSW s 11(1)(a) NSW s 11(1)(d)
17 Consequential and ancillary orders	
17	NSW s 15(1)
18 Undertakings to restore property	
18	NSW s 18
19 Payment for exoneration from liability for orders	
19	Qld s 41(5)

20 Effect of order vesting property in estate	
20	NSW s 15(2)
21 Variation and revocation of family provision orders	
21(1)	NSW s 19(1)
21(2)	NSW s 19(2)
21(3)	NSW s 20(4)
21(4)	NSW s 19(3)
22 Variation and revocation of other orders	
22	NSW s 19(4)
23 Effect of family provision order	
23	NSW s 14(1)
24 Application	
24	-
PART 3 NOTIONAL ESTATE ORDERS	
25 Definition	
25	-
26 Transactions that are relevant property transactions	
26(1)	NSW s 22(1)
26(2)	NSW s 22(3)
26(3)	NSW s 22(7)
27 Examples of relevant property transactions	
27(1)	NSW s 22(4) introductory paragraph
27(2)(a)	NSW s 22(4)(a)
27(2)(b)	NSW s 22(4)(b), <i>Cameron v Hills</i> (Unreported, Sup Ct of NSW, Needham J, 26 October 1989) at 5
27(2)(c)	NSW s 22(4)(c)
27(2)(d)	NSW s 22(4)(d)
27(2)(e)	NSW s 22(4)(e)
27(2)(f)	NSW s 22(4)(f)
27(3)	NSW s 22(4) introductory paragraph
27(4)	Inserted to overcome the effect of the decision in <i>Wade v Harding</i> (1987) 11 NSWLR 551
28 When relevant property transactions take effect	
28(1)	NSW s 22(2)
28(2)	NSW s 22(5)
28(3)	NSW s 22(5)
28(4)	NSW s 22(6)
29 Notional estate order may be made only if family provision order or certain costs orders to be made	
29	NSW ss 23(a), 24(a), 25(a)

30 Notional estate order may be made where property of estate distributed	
30(1) 30(2)	NSW s 24 NSW s 24 last paragraph
31 Notional estate order may be made where estate affected by relevant property transaction	
31(1) 31(2)(a) 31(2)(b) 31(2)(c) 31(3)	NSW s 23 NSW s 23(b)(i) NSW s 23(b)(ii) NSW s 23(b)(iii) NSW s 23 last paragraph
32 Notional estate order may be made where estate affected by subsequent relevant property transaction	
32(1)(a)(i) 32(1)(a)(ii) 32(1)(b) 32(1)(c) 32(2) 32(3)	NSW s 25(1)(b) Inserted to overcome the effect of the decision in <i>Prince v Argue</i> [2002] NSWSC 1217 (20 December 2002) NSW s 25(1)(c) NSW s 25(2) NSW s 25(1) last paragraph NSW s 25(1) last paragraph
33 Notional estate order may be made where property of deceased transferee's estate held by administrator or distributed	
33	Inserted to overcome the effect of the decision in <i>Prince v Argue</i> [2002] NSWSC 1217 (20 December 2002)
34 Disadvantage and other matters required before order can be made	
34(1)(a) 34(1)(b) 34(1)(c) 34(1)(d) 34(2)	NSW s 26(a) NSW s 26(b)(i) NSW s 26(b)(ii) NSW s 26(c) -
35 Effect of notional estate order	
35	NSW s 29
36 More than one notional estate order may be made	
36	NSW s 28(3)
37 Power subject to Division 3	
37	-
38 General matters that must be considered by Court	
38	NSW s 27(1)
39 Estate must not be sufficient for provision or order as to costs	
39	NSW s 28(1)
40 Determination of property to be subject to notional estate order	
40(1) 40(2) 40(3)	NSW s 27(2) NSW s 28(2) NSW s 28(4)

41 Restrictions on out of time or additional applications	
41	NSW s 28(5)
PART 4 MISCELLANEOUS	
42 Grant of probate or administration	
42(1)	NSW WPA s 41A(1), (3)
42(2)	-
42(3)	NSW WPA s 41A(2)
42(4)	NSW WPA s 41A(4)
42(5)	NSW WPA s 41A(5)
43 Substitution of property affected by orders or proposed orders	
43	NSW s 30
44 Protection of administrator who distributes after giving notice	
44(1)	NSW s 35(1); Qld s 44(3)(a)
44(2)	NSW 35(2); Qld s 44(3)(a)
44(3)	-
44(4)	Qld s 44(4)
45 Protection of administrator in other circumstances	
45(1)	Qld s 44(1); WA s 11
45(2)	Qld s 44(1)
45(3)	Qld s 44(2)
45(4)	Qld s 44(3)(b)
45(5)	Qld s 44(3)(b)
45(6)	Qld s 44(4)
46 Release of rights under Act	
46(1)	NSW s 31(2), (3)
46(2)	NSW s 31(4)
46(3)	NSW s 31(6)
46(4)	NSW s 31(5)
46(5)	NSW s 31(1)
47 Revocation of approval of release	
47	NSW s 31(7)-(9)
48 Court may determine date of death	
48	NSW s 6(8)
49 Costs	
49	-
50 Regulations	
50	-
51 Rules of Court	
51(1)	NSW s 36(1)
51(2)	NSW s 36(2)
51(3)	-

Schedule 1	
Notice of distribution	-

Abbreviations:

NSW:	<i>Family Provision Act 1982 (NSW)</i>
NSW WPA:	<i>Wills, Probate and Administration Act 1898 (NSW)</i>
Qld:	<i>Succession Act 1981 (Qld)</i>
SA:	<i>Inheritance (Family Provision) Act 1972 (SA)</i>
Vic:	<i>Administration and Probate Act 1958 (Vic)</i>
WA:	<i>Inheritance (Family and Dependants Provision) Act 1972 (WA)</i>

Appendix 2

Model family provision legislation

The model legislation set out in this Appendix gives effect to recommendations made by the National Committee in its Family Provision Report,³⁵⁰ as modified by the further recommendations contained in this Report.

A commentary outlining the main provisions of the model legislation is set out at pages i to v of this Report.

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National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, December 1997).

Family Provision Bill 2004

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Family Provision Bill 2004

Act No , 2004

A Bill for

An Act to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of the deceased person; and for other purposes.

Clause 1 Family Provision Bill 2004

Part 1 Preliminary

[enacting formula]

Part 1 Preliminary

1 Name of Act

This Act is the *Family Provision Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

costs, in relation to proceedings under this Act relating to the estate or notional estate of a deceased person, means the costs, charges and expenses of or incidental to the proceedings.

Court means [insert name of appropriate court for jurisdiction].

deceased transferee means a deceased transferee referred to in section 32 or 33.

de facto partner means [insert appropriate definition for jurisdiction or define other appropriate term for jurisdiction]

[This draft uses the NSW term “de facto partner”. Each jurisdiction may insert the appropriate term for the jurisdiction where references to de facto partner occur in the draft Bill.]

family provision order means an order made by the Court under Part 2 in relation to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of another person.

notional estate of a deceased person means property designated by a notional estate order as notional estate of the deceased person.

notional estate order means an order made by the Court under Part 3 designating property specified in the order as notional estate of a deceased person.

person entitled to exercise a power means a person entitled to exercise a power, whether or not the power:

(a) is absolute or conditional, or

- (b) arises under a trust or in some other manner, or
- (c) is to be exercised solely by the person or by the person together with one or more other persons (whether jointly or severally).

property includes the following:

- (a) real and personal property,
- (b) any estate or interest (whether a present, future or contingent estate or interest) in real or personal property,
- (c) money,
- (d) any cause of action for damages (including damages for personal injury),
- (e) any other chose in action,
- (f) any right with respect to property,
- (g) any valuable benefit.

property held by a person includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

will includes a codicil and any other testamentary disposition.

- (2) Notes in the text of this Act do not form part of this Act.

4 Application of Act to deceased persons

- (1) This Act applies in relation to the estate of a deceased person whether or not administration of the estate has been granted.

Note. Administration may be granted for the purposes of being able to apply for a family provision order (see section 42).

- (2) For the purposes of this Act, **administration** is granted in respect of the estate of a deceased person if:
 - (a) probate of the will of the deceased person is granted in *[insert name of jurisdiction]* or granted outside *[insert name of jurisdiction]* but sealed in accordance with *[insert name of appropriate provision of jurisdiction]*, or
 - (b) letters of administration of the estate of the deceased person are granted in *[insert name of jurisdiction]* or granted outside *[insert name of jurisdiction]* but sealed in accordance with *[insert name of appropriate provision of jurisdiction]*, whether the letters were granted with or without a will

Clause 5 Family Provision Bill 2004

Part 1 Preliminary

annexed and whether for general, special or limited purposes,
or

- (c) an order is made under *[insert references to appropriate provisions of jurisdiction relating to transfer of administration to the public trustee, election by the Public Trustee to administer small estates, administration by Public Trustee of intestate estates]*.
- (3) For the purposes of this Act, the **administrator** of the estate of a deceased person is a person to whom administration of the estate has been granted or any of the following persons:
- (a) a person who holds the estate or any part of that estate on a trust that arises out of the will or on the intestacy of the deceased person,
 - (b) a person who is otherwise entitled or required to administer that estate or any part of that estate.

5 Act binds Crown

This Act binds the Crown, not only in right of *[insert name of jurisdiction]* but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Part 2 Family provision orders

Division 1 Applications for family provision orders

6 Family members who are entitled to make applications

- (1) The following members of the family of a deceased person may apply to the Court for a family provision order in respect of the estate of the deceased person:
 - (a) the wife or husband of the deceased person at the time of the deceased person's death,
 - (b) a person who was, at the time of the deceased person's death, the de facto partner of the deceased person,
 - (c) a non-adult child of the deceased person.

- (2) In this section:

non-adult child of a deceased person means a child of the deceased person who was a minor when the deceased person died or who was born after the deceased person died, but does not include a step-child of the deceased person.

Note. Section 11 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order.

7 Other family members or persons owed responsibility entitled to make applications

- (1) A person to whom a deceased person owed a responsibility to provide maintenance, education or advancement in life may apply to the Court for a family provision order in respect of the estate of the deceased person.
- (2) An application may be made under this section by a person whether or not the person is a child or other member of the family of the deceased person.

Note. Section 11 sets out the matters that the Court may consider when determining whether a person is entitled to make an application under this section.

8 Applications for persons lacking capacity

- (1) This section applies to the following persons:
 - (a) the administrator of the estate of the deceased person,

Clause 9 Family Provision Bill 2004

Part 2 Family provision orders

- (b) *[insert appropriate reference to litigation guardian/guardian ad litem/guardian] of a person,*
 - (c) *[insert reference to appropriate equivalent to the public trustee in jurisdiction],*
 - (d) *[insert reference to appropriate officer of jurisdiction in relation to children in care],*
 - (e) *[insert reference to appropriate officer under mental health legislation of jurisdiction].*
- (2) A person to whom this section applies may apply to the Court:
- (a) for a family provision order on behalf of a person who is or may be entitled to apply for such an order but who lacks capacity to do so, or
 - (b) for advice or directions as to whether an application for a family provision order ought to be made by or on behalf of any such person.

9 Time limit for applications

- (1) An application for a family provision order must be made not later than 12 months after the death of the deceased person, unless the Court otherwise directs.
- (2) If an application for a family provision order has been made by any person, it is, for the purposes of determining whether any subsequent application is made within the required time, taken to have been made by all persons who are entitled to make an application for a family provision order in respect of the estate concerned.
- (3) An application is taken to be made on the day it is filed in the Court's registry.
- (4) For the purposes of this section, an application for advice or directions made under section 8 is taken to be an application for a family provision order.

Division 2 Determination of applications

10 When family provision order may be made

- (1) The Court may, on application under Division 1, make a family provision order in respect of the estate of a deceased person, if the Court is satisfied that:

- (a) the person in whose favour the order is to be made is a person who may make an application, or is a person on whose behalf such an application may be made, and
 - (b) at the time that the Court is determining whether or not to make the order, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made is not made by the provision made in the will of the deceased person, or the operation of the intestacy rules in relation to the estate of the deceased person, or both.
- (2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the person in whose favour the order is made, having regard to the facts known to the Court at the time the order is made.

Note. Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 24). Part 3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order.
- (3) The Court may make a family provision order in favour of a person in whose favour a family provision order has previously been made in relation to the same estate only if:
 - (a) the Court is satisfied that there has been a substantial detrimental change in the person's circumstances since a family provision order was last made in favour of the person, or
 - (b) at the time that a family provision order was last made in favour of the person:
 - (i) the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (the *undisclosed property*), and
 - (ii) the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property.

Clause 11 Family Provision Bill 2004

Part 2 Family provision orders

11 Matters to be considered by Court

- (1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:
 - (a) whether a person is entitled to make an application under section 7, and
 - (b) whether, in the case of any application under Division 1, to make a family provision order and the nature of any such order.
- (2) The following matters may be considered by the Court:
 - (a) any family or other relationship between the person in whose favour the order is sought to be made (the *proposed beneficiary*) and the deceased person, including the nature and duration of the relationship,
 - (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the proposed beneficiary, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
 - (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
 - (d) the financial resources (including earning capacity) and financial needs, both present and future, of the proposed beneficiary, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
 - (e) any physical, intellectual or mental disability of the proposed beneficiary, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
 - (f) the age of the proposed beneficiary when the application is being considered,
 - (g) any contribution, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by

the proposed beneficiary to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family,

- (h) any provision made for the proposed beneficiary by the deceased person, either during the deceased person's lifetime or any provision made from the deceased person's estate,
- (i) the date of the will (if any) of the deceased person and the circumstances in which the will was made,
- (j) whether the proposed beneficiary was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,
- (k) whether any other person is liable to support the proposed beneficiary,
- (l) the character and conduct of the proposed beneficiary or any other person before and after the death of the deceased person,
- (m) any relevant Aboriginal or Torres Strait Islander customary law or other customary law,
- (n) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

12 Other possible applicants

- (1) In determining an application for a family provision order, the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (other than a beneficiary of the deceased person's estate) but who has not made an application.
- (2) However, the Court may disregard any such interests only if:
 - (a) notice of the application, and of the Court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations [*insert reference to prescribing by rules of court, if appropriate for the jurisdiction*], or
 - (b) the Court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case.

Clause 13 Family Provision Bill 2004

Part 2 Family provision orders

13 Interim family provision orders

- (1) The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the person concerned in the final order.
- (2) After making an interim family provision order, the Court must proceed to finally determine the application for a family provision order by confirming, revoking or varying the interim order.

Division 3 Property that may be used for family provision orders

14 Property that may be used for family provision orders

- (1) A family provision order may be made in respect of the estate of a deceased person.
- (2) If the deceased person died leaving a will, the estate of the deceased person includes property that would, on a grant of probate of the will, vest in the executor of the will, or would on a grant of administration with the will annexed, vest in the administrator appointed under that grant.
- (3) A family provision order may not be made in relation to property of the estate that has been distributed, except as provided by subsection (5).
- (4) 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 is to 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.
- (5) A family provision order may be made in relation to property that is not part of the estate of a deceased person, or that has been distributed, if it is designated as notional estate of the deceased person by an order under Part 3.

15 Orders may affect property in or outside jurisdiction

A family provision order may be made in respect of property situated in or outside *[insert name of jurisdiction]* when, or at any time after, the order is made, whether or not the deceased person was, at the time of death, domiciled in *[insert name of jurisdiction]*.

Division 4 General provisions relating to family provision orders

16 Nature of orders

- (1) A family provision order must specify:
 - (a) the person or persons for whom provision is to be made, and
 - (b) the amount and nature of the provision, and
 - (c) the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided, and
 - (d) any conditions, restrictions or limitations imposed by the Court.
- (2) A family provision order may require the provision to be made in one or more of the following ways:
 - (a) by payment of a lump sum of money,
 - (b) by periodic payments of money,
 - (c) by application of specified existing or future property,
 - (d) by way of an absolute interest, or a limited interest only, in property,
 - (e) by way of property set aside as a class fund for the benefit of 2 or more persons,
 - (f) in any other manner the Court thinks fit.
- (3) If provision is to be made by payment of an amount of money, the family provision order must specify whether interest is payable on the whole or any part of the amount payable for the period, and, if so, the period during which interest is payable and the rate of the interest.

17 Consequential and ancillary orders

The Court may, in addition to, or as part of, a family provision order, make orders for or with respect to all or any of the following matters for the purpose of giving effect to the family provision order:

- (a) the transfer of property of the estate directly to the person in whose favour the order is made, or to any other person as trustee for that person,
- (b) the constitution of any person by whom property of the estate is held as a trustee of that property,
- (c) the appointment of a trustee of property of the estate,

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- (d) the powers and duties of a trustee of property of the estate, including any trustee constituted or appointed under this section,
- (e) the vesting in any person of property of the estate,
- (f) the exercise of a right or power to obtain property for the estate,
- (g) the sale of or dealing with property of the estate,
- (h) the disposal of the proceeds of any sale or other realising of property of the estate,
- (i) the securing, either wholly or partially, of the due performance of an order under this Part,
- (j) the management of the property of the estate,
- (k) the execution of any necessary conveyance, document or instrument, the production of documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of the order,
- (l) any other matter the Court thinks necessary.

18 Undertakings to restore property

- (1) The Court may make a family provision order subject to a condition that the person in whose favour the order is made is to enter into an undertaking, or give security, that, if the order is revoked because the deceased person was not deceased when the order was made, the person will restore any property received under the order, or otherwise make restitution, in accordance with any order of the Court made on the revocation.

- (2) In this section:

deceased person means the person (whether or not deceased) from whose estate a family provision order is made.

19 Payment for exoneration from liability for orders

- (1) The Court may, as part of a family provision order, or at any time, on the application of a beneficiary of the estate of a deceased person, by order:
 - (a) fix a periodic payment or lump sum payable by a beneficiary of an estate affected by a family provision order to represent the proportion of the property in the estate affected by the

family provision order that is borne by the beneficiary's portion of the estate, and

- (b) exonerate the beneficiary's portion of the estate from any further liability under the family provision order, on condition that payment is made as directed by the Court.
- (2) Without limiting subsection (1), in making any order under this section, the Court may do any of the following:
- (a) specify the person to whom the payment or lump sum is to be paid,
 - (b) specify how any periodic payment is to be secured,
 - (c) specify how any lump sum is to be invested for the benefit of any proposed beneficiary.

Note. Section 43 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

20 Effect of order vesting property in estate

[Each jurisdiction may determine whether to include a provision applying particular provisions of its trust law to an order under section 17.]

21 Variation and revocation of family provision orders

- (1) A family provision order may be varied or revoked by the Court only in accordance with this Act.
- (2) The Court may, by order, vary or revoke a family provision order so as to allow provision to be made in favour of another person wholly or partly from all or any property affected by the order.
- (3) The Court must not vary or revoke a family provision order so as to allow provision to be made in favour of another person unless that person shows sufficient cause for not having applied for a family provision order before the order sought to be varied or revoked was made.
- (4) A family provision order is revoked if the grant of administration in respect of the estate of the deceased person is revoked or rescinded, unless the Court otherwise provides when revoking or rescinding the grant.

Note. The Court may also vary a family provision order under sections 13 and 43.

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Part 2 Family provision orders

22 Variation and revocation of other orders

If a family provision order is varied or revoked, the Court may:

- (a) vary or revoke 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 variation or revocation, and
- (b) make such additional orders as may be so necessary.

23 Effect of family provision order

A family provision order takes effect, unless the Court otherwise directs, as if the provision was made:

- (a) in a codicil to the will of the deceased person, if the deceased person made a will, or
- (b) in a will of the deceased person, if the deceased person died intestate.

24 Application

- (1) This Part applies to interim family provision orders in the same way as it applies to family provision orders.
- (2) This Part (other than section 14) applies to property designated as part of the notional estate of a deceased person in the same way as it applies to property that is part of the estate of a deceased person.

Part 3 Notional estate orders

Note.

This Part applies where, as a result of certain property transactions, property is not included in the estate of a deceased person or where property has been distributed from the estate of a deceased person. This Part enables the Court in limited circumstances to make an order designating property that is not included in the estate, or has been distributed from the estate, as “notional estate” of the deceased person for the purpose of making a family provision order under Part 2 in respect of the estate of the deceased person (or for the purpose of ordering that costs in the proceedings be paid from the notional estate).

Property may be designated as notional estate if it is property held by, or on trust for, a person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on trust:

- (a) as a result of a distribution from the estate of a deceased person (see section 30), whether or not the property was the subject of the distribution, or
- (b) as a result of a relevant property transaction, whether or not the property was the subject of the transaction (see section 31), or
- (c) as a result of a relevant property transaction entered into by a person by whom property became held, or for whom property became held on trust, as a result of a relevant property transaction or a distribution from the estate of a deceased person (see section 32), whether or not the property was the subject of the relevant property transaction.

Property may also be designated as notional estate if it is property:

- (a) held by the administrator of the estate of a person by whom property became held as a result of a relevant property transaction or distribution referred to in paragraph (a)–(c) above and who has since died (known as the **deceased transferee**), or
- (b) held by, or on trust for, a person by whom property became held, or for the object of a trust for which property became held on trust, as a result of a distribution from the estate of a deceased transferee,

whether or not the property was the subject of the relevant property transaction or the distribution from the estate of the deceased person or the deceased transferee (see section 33).

Section 43 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

Division 1 Relevant property transactions

25 Definition

In this Part:

relevant property transaction means a transaction or circumstance affecting property and described in section 26 or 27.

26 Transactions that are relevant property transactions

- (1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:
 - (a) held by another person (whether or not as trustee), or
 - (b) subject to a trust,and full valuable consideration is not given to the person for doing or not doing the act.
- (2) The fact that a person has entered into a relevant property transaction affecting property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.
- (3) The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property that is not in the person's estate.

27 Examples of relevant property transactions

- (1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 26.
- (2) The circumstances are as follows:
 - (a) if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time) becomes, or continues to be, entitled to exercise the power,
 - (b) if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,

- (c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,
 - (d) if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death, or if some other event occurs, to a person other than the 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, or
 - (ii) to surrender or otherwise deal with the policy,and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,
 - (e) if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,
 - (f) if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.
- (3) Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 26.
- (4) For the purposes of this Act, in the circumstances described in subsection (2) (b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.

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Part 3 Notional estate orders

28 When relevant property transactions take effect

- (1) For the purposes of this Act, a relevant property transaction is taken to have effect when the property concerned becomes held by another person or subject to a trust or as otherwise provided by this section.
- (2) A relevant property transaction consisting of circumstances described in section 27 (2) (a), (c) or (d) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event resulting in the person no longer being entitled to exercise the relevant power.
- (3) A relevant property transaction consisting of circumstances described in section 27 (2) (b) or (e) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event referred to in those paragraphs.
- (4) A relevant property transaction that involves any kind of contract for which valuable consideration, though not full valuable consideration, is given for the person to enter into the transaction is taken to be entered into and take effect when the contract is entered into.

Division 2 When notional estate orders may be made

29 Notional estate order may be made only if family provision order or certain costs orders to be made

- (1) The Court may make an order designating property as notional estate only:
 - (a) for the purposes of a family provision order to be made under Part 2, or
 - (b) for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.

Note. Section 14 (5) enables a family provision order to be made in relation to property designated as notional estate of a deceased person.
Section 49 enables the Court to order that costs be paid out of the notional estate of a deceased person.
- (2) The Court must not make an order under subsection (1) (b) for the purposes of an order that the whole or part of an applicant's costs be paid from the notional estate of the deceased person unless the Court

makes or has made a family provision order in favour of the applicant.

30 Notional estate order may be made where property of estate distributed

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that, as a result of a distribution of the deceased person's estate, property became held by a person (whether or not as trustee) or subject to a trust.
- (2) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
 - (a) a person by whom property became held (whether or not as trustee) as a result of a distribution referred to in subsection (1), or
 - (b) the object of a trust for which property became held on trust as the result of a distribution referred to in subsection (1),whether or not the property was the subject of the distribution.

31 Notional estate order may be made where estate affected by relevant property transaction

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that the deceased person entered into a relevant property transaction before his or her death and that the transaction is a transaction to which this section applies.

Note. The kinds of transactions that constitute relevant property transactions are set out in sections 26 and 27.
- (2) This section applies to the following relevant property transactions:
 - (a) a transaction that took effect within 3 years before the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,
 - (b) a transaction that took effect within one year before the death of the deceased person and was entered into when the

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deceased person had a responsibility to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,

(c) a transaction that took effect or is to take effect on or after the deceased person's death.

(3) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:

(a) a person by whom property became held (whether or not as trustee) as the result of a relevant property transaction, or

(b) the object of a trust for which property became held on trust as the result of a relevant property transaction,

whether or not the property was the subject of the relevant property transaction.

32 Notional estate order may be made where estate affected by subsequent relevant property transaction

(1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:

(a) it:

(i) has power, under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, a person (the *transferee*) as notional estate of the deceased person, or

(ii) immediately before the death of a person (the *deceased transferee*), had power, under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and

(b) since the relevant property transaction or distribution that gave rise to the power to make the order was entered into or made, the transferee, or the deceased transferee, entered into a relevant property transaction, and

(c) there are special circumstances that warrant the making of the order.

- (2) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
- (a) a person by whom property became held (whether or not as trustee) as the result of the relevant property transaction entered into by the transferee or the deceased transferee, or
 - (b) the object of a trust for which property became held on trust as the result of the relevant property transaction entered into by the transferee or the deceased transferee,
- whether or not the property was the subject of the relevant property transaction.
- (3) A notional estate order may be made under this section instead of or in addition to an order under section 30, 31 or 33.

33 Notional estate order may be made where property of deceased transferee's estate held by administrator or distributed

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:
- (a) immediately before the death of a person (*the deceased transferee*), it had power under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and
 - (b) the power did not arise because property became held by the deceased transferee as trustee only, and
 - (c) in the case of property referred to in subsection (2) (b), there are special circumstances that warrant the making of the order.
- (2) The following property may be designated as notional estate by a notional estate order under this section, whether or not it was the property the subject of the relevant property transaction or distribution from which the Court's power to make such an order arose:
- (a) if administration has been granted in respect of the estate of the deceased transferee—property that is held by the administrator of the estate of the deceased transferee in his or

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her capacity as administrator of the estate of the deceased transferee, or

- (b) if all or part of the estate of the deceased transferee has been distributed—property that is held by, or on trust for:
 - (i) a person by whom property became held (whether or not as trustee) as the result of the distribution of the deceased transferee’s estate, or
 - (ii) the object of a trust for which property became held on trust as the result of the distribution of the deceased transferee’s estate.
- (3) A notional estate order may be made under this section instead of or in addition to an order under section 30, 31 or 32.

Note. Administration of the estate of a deceased transferee may be granted for the purposes of being able to designate property as notional estate under this section (see section 42).

34 Disadvantage and other matters required before order can be made

- (1) The Court must not, merely because a relevant property transaction has been entered into, make an order under section 31, 32 or 33 unless the Court is satisfied that the relevant property transaction or the holding of property resulting from the relevant property transaction:
 - (a) directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
 - (b) involved the exercise by the principal party to the transaction 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 that, if not exercised, could have resulted in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
 - (c) involved the exercise by the principal party to the transaction 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 that could, when the relevant property transaction was entered into or at

a later time, have been exercised so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or

- (d) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised by the principal party to the transaction 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 principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).

- (2) In this section:

principal party to the transaction, in relation to a relevant property transaction, means the person who, under section 26 or 27, enters into the relevant property transaction.

35 Effect of notional estate order

A person's rights are extinguished to the extent that they are affected by a notional estate order.

36 More than one notional estate order may be made

The Court may make one or more notional estate orders in connection with the same proceedings for a family provision order, or any subsequent proceedings relating to the estate.

37 Power subject to Division 3

The Court's power to make a notional estate order under this Division is subject to Division 3.

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Part 3 Notional estate orders

Division 3 Restrictions and protections relating to notional estate orders

38 General matters that must be considered by Court

The Court must not make a notional estate order unless it has considered the following:

- (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,
- (c) any other matter it considers relevant in the circumstances.

39 Estate must not be sufficient for provision or order as to costs

The Court must not make a notional estate order unless it is satisfied that:

- (a) the deceased person left no estate, or
- (b) the deceased person's estate is insufficient for the making of the family provision order, or any order as to costs, that the Court is of the opinion should be made, or
- (c) provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances.

40 Determination of property to be subject to notional estate order

(1) In determining what property should be designated as notional estate of a deceased person, the Court must have regard to the following:

- (a) the value and nature of any property:
 - (i) the subject of a relevant property transaction, or
 - (ii) the subject of a distribution from the estate of the deceased person or from the estate of a deceased transferee, or
 - (iii) held by the administrator of the estate of any deceased transferee in his or her capacity as administrator of the estate of the deceased transferee,
- (b) the value and nature of any consideration given in a relevant property transaction,

- (c) any changes in the value of property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the administrator of the estate of the deceased transferee or the consideration was given,
 - (d) whether property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), could have been used to obtain income in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the administrator of the estate of the deceased transferee or the consideration was given,
 - (e) any other matter it considers relevant in the circumstances.
- (2) The Court must not designate as notional estate property that exceeds that necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate under section 49, to allow to costs to be paid as ordered, or both.
 - (3) If, as a result of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, property becomes held by a person as a trustee only, the Court must not designate as notional estate any property held by the person other than the property held by the person as a trustee as a consequence of any such relevant property transaction or distribution.

41 Restrictions on out of time or additional applications

- (1) This section applies to proceedings where:
 - (a) an application for a family provision order is made later than 12 months after the death of the deceased person, or
 - (b) an application for a family provision order is made in relation to an estate that has been previously the subject of a family provision order.
- (2) The Court must not make a notional estate order in the proceedings unless:
 - (a) it is satisfied that:

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- (i) the property to be designated as notional estate is property that was the subject of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, and
 - (ii) the person who holds the property holds it as a result of the relevant property transaction or distribution as trustee only, and
 - (iii) the property is not vested in interest in any beneficiary under the trust, or
- (b) it is satisfied that there are other special circumstances that justify the making of the notional estate order.

Part 4 Miscellaneous

42 Grant of probate or administration

- (1) The Court may grant administration in respect of the estate of a deceased person, in order to permit an application to be made for a family provision order, to a person who may make an application, or to a person who may make an application on behalf of another person, if it is satisfied that it is proper to make the grant, whether or not the deceased person left property in *[insert name of jurisdiction]*.
- (2) The Court may grant administration in respect of the estate of a deceased transferee, in order to permit property to be designated as notional estate under section 33, to a person who may make an application, or to a person who may make an application on behalf of another person, if it is satisfied that it is proper to make the grant, whether or not the deceased transferee left property in *[insert name of jurisdiction]*.
- (3) Any such grant is to be for the purposes only of applying for a family provision order or a notional estate order.
- (4) The granting of administration under this section or under the *[insert name of appropriate Act of jurisdiction]* does not:
 - (a) prevent the Court from granting administration under this section, or
 - (b) unless the Court otherwise orders, affect any previous grant of administration under this section.
- (5) The provisions of the *[insert name of appropriate Act of jurisdiction]* apply to a grant of administration under this section, and to the administrator of the estate, in the same way as they apply to a grant of administration under that Act and the administrator of any estate for which such a grant has been made.

43 Substitution of property affected by orders or proposed orders

- (1) If the Court has made, or proposes to make, a family provision order affecting certain property in the estate of a deceased person, the Court may, on application by a person who offers other property in substitution (the ***replacement property***):
 - (a) vary the family provision order by substituting the replacement property for the property affected by the order, or

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Part 4 Miscellaneous

- (b) make a family provision order in respect of the replacement property instead of the property proposed to be affected by such an order,
as appropriate.
- (2) If the Court has made, or proposes to make, a notional estate order designating certain property as notional estate, the Court may, on application by a person who offers other property in substitution (the *replacement property*):
- (a) vary the notional estate order by substituting the replacement property for the property designated as notional estate by the order, or
- (b) make a notional estate order designating the replacement property as notional estate instead of the property proposed to be designated as notional estate by such an order,
as appropriate.
- (3) The Court may vary or make an order under this section only if it is satisfied that the replacement property can properly be substituted for the property affected or proposed to be affected by the family provision order, or the property designated or proposed to be designated as notional estate, as appropriate.
- (4) An order varied or made under this section is taken to be an order in respect of property of the estate or notional estate of the deceased person for the purposes of this Act (except section 23 (Effect of family provision order)).

44 Protection of administrator who distributes after giving notice

- (1) The administrator of the estate of a deceased person may distribute the property in the estate if:
- (a) the property is distributed not earlier than 6 months after the deceased person's death, and
- (b) the administrator has given notice in the form prescribed in Schedule 1 that the administrator intends to distribute the property in the estate after the expiration of a specified time, and
- (c) the time specified in the notice is not less than 30 days after the notice is given, and
- (d) the time specified in the notice has expired, and

- (e) at the time of distribution, the administrator does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.
- (2) An administrator who distributes property in the estate of a deceased person is not liable in respect of that distribution to any person of whose application for a family provision order affecting the estate of the deceased person the administrator did not have notice at the time of the distribution if:
 - (a) the distribution was made in accordance with this section, and
 - (b) the distribution was properly made by the administrator.
- (3) The notice given by the administrator must be given in accordance with the regulations.
- (4) For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's *[insert appropriate reference for jurisdiction to a legal practitioner]*.

45 Protection of administrator in other circumstances

- (1) An administrator of the estate of a deceased person who distributes property in the estate for the purpose of providing those things immediately necessary for the maintenance, education or advancement in life of a person who was wholly or substantially dependent on the deceased person immediately before his or her death is not liable for any such distribution that is properly made.
- (2) Subsection (1) applies whether or not the administrator had notice at the time of the distribution of any application or intended application for a family provision order affecting property in the estate.
- (3) No person who may have made or may be entitled to make an application under this Act is entitled to bring an action against the administrator of the estate of a deceased person because the administrator has distributed any part of the estate if the distribution was properly made by the administrator after the person (being of full legal capacity) has notified the administrator in writing that the person either:
 - (a) consents to the distribution, or
 - (b) does not intend to make any application under this Act that would affect the proposed distribution.

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Part 4 Miscellaneous

- (4) An administrator of the estate of a deceased person who receives notice of an intended application under this Act is not liable in respect of a distribution of any part of the estate if the distribution was properly made by the administrator not earlier than 12 months after the deceased person's death.
- (5) Subsection (4) does not apply if the administrator receives written notice that the application has been commenced in the Court or is served with a copy of the application before making the distribution.
- (6) For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's *[insert appropriate reference for jurisdiction to a legal practitioner]*.

46 Release of rights under Act

- (1) A release by a person of the person's rights to apply for a family provision order has effect only if it has been approved by the Court and to the extent that the approval has not been revoked by the Court.
- (2) Proceedings for the approval by the Court of a release of a person's rights to apply for a family provision order may be commenced before or after the death of the person whose estate may be the subject of the order.
- (3) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a person.
- (4) In determining an application for approval of a release, the Court is to take into account 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, and
 - (b) it is or was, at that time, prudent for the releasing party to make the release, and
 - (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.
- (5) In this section:

release of rights to apply for a family provision order means a release of such rights, if any, as a person has to apply for a family provision order, and includes a reference to:

- (a) an instrument executed by the person that 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.

47 Revocation of approval of release

- (1) The Court may not revoke an approval of a release given by it under section 46, except as provided by this section.
- (2) The Court may revoke an approval if it is satisfied:
 - (a) that its approval was obtained by fraud, or
 - (b) that the release was obtained by fraud or undue influence.
- (3) The Court may revoke an approval, either wholly or partially in respect of specified property, if it is satisfied that all persons who would be, in the Court's opinion, sufficiently affected by the revocation consent to the revocation.

48 Court may determine date of death

The Court may, if the date or time of death of a person is uncertain, determine, for the purpose of giving effect to any provision of this Act, a date or time of death that the Court thinks is reasonable for the purposes of the provision.

49 Costs

The Court may order that the costs of 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.

Note. Section 29 sets out the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person.

50 Regulations

The Governor may make regulations, not inconsistent with this Act, 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.

Clause 51 Family Provision Bill 2004

Part 4 Miscellaneous

51 Rules of Court

- (1) For the purpose of regulating any proceedings under this Act in or before the Court, rules of court, not inconsistent with this Act, may be made under the *[insert name of appropriate Act of jurisdiction]* for or with respect to any matter that by this Act is required or permitted to be prescribed by rules of court or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) This section does not limit the rule-making powers conferred by the *[insert name of appropriate Act of jurisdiction]*.
- (3) Without limiting subsection (1), a rule may be made conferring jurisdiction on Registrars of the Court to hear and determine specified proceedings under this Act.

[This provision may be inserted by jurisdictions in which rules of court relating to proceedings are intended to be made.]

[When the Bill is enacted additional provisions will need to be inserted relating to amendments, repeals and savings and transitional provisions.]

Schedule 1 Notice of distribution

(Section 44)

Notice of intended distribution of estate

Any person having any claim on the estate of (*name in capitals*) late of (*place*) (*occupation*) who died on (*date*) must send particulars of his or her claim to the executor (*or as the case may be*) (*name*) at (*address of executor or administrator*) (or care of *name of solicitor, solicitor, address, and, if applicable, or their agents, name, address*) within 30 days (*or such longer period as may be necessary so that the time specified expires not earlier than 6 months after the deceased person's death*) from publication of this notice. After that time, if the executor (*or as the case may be*) has received no notice of any claims, he or she may distribute the assets of the estate. Probate was (*or Letters of Administration were*) granted in (*name of jurisdiction*) on (*date*).