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UNIFORM SUCCESSION LAWS
for
AUSTRALIAN STATES AND TERRITORIES

ISSUES PAPER NO 2

FAMILY PROVISION

WP 47

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PREFACE

Reference

The Standing Committee of Attorneys-General of Australia has decided that steps should be taken towards rendering uniform the succession laws of the Australian States and Territories. The Attorney-General for Queensland has remitted a reference to the Queensland Law Reform Commission to co-ordinate the project.

The need for uniformity

English succession law and jurisdiction were imported into Australia upon the colonisation of the States and existing English succession legislation was duly copied into the State statute books. The succession laws were therefore uniform during the nineteenth century. During the twentieth century the succession laws diverged when States began to enact their own legislation. Those divergences have become more marked as States have embarked on more purposive law reform, in some cases as the result of recommendations of law reform agencies.

Differences between the States

The consequence of these divergent activities is that there are no two States or Territories in Australia where the succession laws are the same. In many respects the divergences are matters of detail; but often enough they are of great significance.

For example, a will made by a testator may be recognised for admission to probate in some States but not others. The main reason for this is that some States are more exacting than others with respect to compliance with formalities of execution.

The intestacy rules, that is the rules that govern the distribution of a deceased estate to the extent that a will fails to, differ substantially between the States.

Where neither the will makes nor the intestacy rules make adequate provision for the proper maintenance and support of members of the deceased's family, all States and Territories confer a power upon the Court to make provision for them. But the laws differ markedly as to who may apply for such provision.

Less significant differences between the succession laws of the States and Territories are numerous, particularly in those relatively neglected areas of law reform such as probate and administration. If one extends the scope of the inquiry to the Rules of Court, the conclusion is justified that to practise successfully in succession law requires State by State expertise. Since most succession practice is or should be concerned with minimising the costs of administering deceased estates, the majority of which are of no great financial value, it is ordinary people who suffer most from the inevitable increase in costs which must occur if a

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deceased estate has connection with more than one jurisdiction.

Implications of differing legislation

To offer a general example, if a person dies domiciled in one State or Territory but leaves land in another State or Territory, two (or more) systems of succession law will apply - the law of the place in which the land is situate (the *lex situs*), as far as that land is concerned, and the law of the place of the deceased's domicile (the *lex domicilii*), as far as property other than that land is concerned. Thus, a person might die domiciled in South Australia but leaving land in Victoria and Queensland. A will of the deceased's might be admissible to probate in South Australia but not in Victoria or Queensland because of a deficiency in execution, tolerated in South Australia but not in Victoria or Queensland. The deceased would therefore die intestate so far as the land in Victoria and Queensland are concerned, but testate in South Australia.

Again, if the parents of the deceased person wished to make a family provision application with respect to the estate, they would not be able to do so with respect to the land situate in Victoria, because parents may not apply for family provision in that State; but they would be able to do so in Queensland, where parents may apply; and although the Queensland Court would not be able to make an order affecting the land in Victoria, it would be able to take its value into account in considering whether and what order it should make affecting any land in Queensland.¹

Recent legislative and law reform activity in Australia

There has been considerable activity, both by legislatures and by law reform agencies in most Australian States within the last decade or so.

Australian Capital Territory

Amendments to the *Wills Act 1968* made in 1991.

New South Wales

Amendments to the *Wills, Probate and Administration Act 1898* made in 1989.

¹ *In Re Butchart (Deceased)* [1932] NZLR 125.

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Queensland

The *Succession Act 1981* has brought all the succession law together into one enactment of a mere 72 sections, incorporating some reforms of a ground breaking nature. In July 1993 the Queensland Law Reform Commission issued its Report No 42 entitled *Intestacy Rules*.

South Australia

The *Wills (Miscellaneous) Amendment Act 1994*.

Tasmania

The *Wills Act 1992* embodies some of the reforms recommended by Report No 35 of the Law Reform Commission of Tasmania entitled *Report on Reform in the Law of Wills* (1983). But the 1992 Act goes further in including some additional provisions.

Victoria

The *Administration and Probate (Amendment) Act 1994* has introduced changes to the intestacy rules, and makes provision with respect to the effect of divorce on wills. In addition the Victorian Law Reform Committee has published its comprehensive Report *Reforming the Law of Wills* (1994) with a proposed *Wills Act 1994*. References in this Paper to the Victorian Law Reform Committee's recommendations are references to that Report. This proposed Act is of considerable significance for law reform and uniformity initiatives.

Western Australia

The *Wills Amendment Act 1987* introduced provisions for the admission to probate of wills informally executed, following the Law Reform Commission of Western Australia's *Report on Wills: Substantial Compliance* (Project No 76 Part I, November 1985). Other Reports of that Commission, including the *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* (Project No 34 Part IV, November 1984), the *Report on the Effect of Marriage or Divorce on Wills* (Project No 76 Part II, December 1991) and the *Report on the Administration Act 1903* (Project No 88, August 1990), have been published but have not resulted in enacted legislation.

This list of activity is not exhaustive.

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To date, in Australia, State succession laws have been reformed in a piecemeal manner. There has never been an attempt to reconsider all the succession laws in their entirety in any State or Territory. Piecemeal reforms have tended to be concentrated on relatively urgent or popular issues. The most neglected part of succession law is the part that relates to procedure.

Law reform and the concept of uniformity

To a certain extent law reform and the search for uniformity of laws amongst the States and Territories of Australia do not go hand in hand. A law reform agency may find it difficult to recommend, in the interests of uniformity, provisions existing in other States with which it cannot agree; and a State which has recently enacted legislation, which it believes represents the best in up-to-date law, cannot be expected very soon afterwards to introduce further amendments merely in the interests of uniformity. It may be asked, therefore, what the objects of initiatives to render Australia's succession laws uniform really are.

Word for word uniformity

Ideally, uniform laws should be identical, word for word, in every State and Territory. Where the subject matter of the legislation is of vital commercial significance, word for word uniformity becomes a matter of political priority and can be accomplished, as in the uniform corporations legislation. In the relatively less urgent context of the law relating to private family wealth, however, political commitment sufficient to overcome relatively minor differences in the wording of legislation may be difficult to secure. It is therefore fair to ask whether "uniformity" can be achieved with something less than complete verbal identity of all State and Territory statutes.

Consistency

If word for word uniformity cannot be realised, it may nevertheless be possible to achieve consistency of the succession laws in major respects. If the substance of the legislation, section by section, is the same, then a great deal will have been achieved. For instance, if it were made quite clear in all the legislation that a will admissible to probate in any Australian jurisdiction is admissible in all jurisdictions, anxiety would be alleviated in those cases, which can exist under the present law, where a will is admissible to probate in some jurisdictions but not others.

If rules about the effect of marriage and divorce on a will are consistent as far as policy is concerned, that is, the rule is the same and any standard of proof (for example, respecting contrary intention) is the same, the fact that there may be differences of drafting of the various provisions will not matter. The point is that it may be particularly difficult, in a search for word for word uniformity, to secure agreement by parliamentary counsel in State or Territory A to accept that the

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drafting habits of parliamentary counsel in State or Territory B are either preferable or acceptable, practices of counsel being varied and guarded with some pride of expertise. It may be preferable to aim for consistency of policy.

What are the goals of the project?

Whether uniform or consistent, all the succession laws must be up-to-date. The law of wills, intestacy, family provision, administration and probate, and administration of assets must be brought together in one piece of legislation and must share, as far as possible, a common underlying principle. Unnecessary provisions and old language must be recognised and removed. Such a project inevitably entails law reform.

Nevertheless, it may be said that the statutes which have been examined, between them, probably achieve all that could be desired to ensure that proper provision can be guaranteed for persons having legitimate claims on the estates of deceased persons. If the best bits are taken from all the statutes, with some reconsideration of the presentation and drafting of the material, it is predictable that a statute could be produced, without the travail of major reconsideration of issues of principle or of substantive reform, which could arguably, as far as it goes, be the best in the world.

Identifying issues

In an attempt to identify matters which could be the subject of a common approach to succession law throughout Australia the Queensland Law Reform Commission proposes to prepare or arrange for the preparation of a series of papers discussing relevant issues. To date the Commission has prepared a paper on *The Law of Wills* (WP 46, July 1994, reprinted June 1995) and this paper on *Family Provision*.

The Issues Papers have as their object initiating action towards rendering uniform the relevant legislation of the Australian States and Territories. It is not their object to analyse the differences which exist with a view to coming to a decision as to whether a given provision in one State or Territory is preferable to a similar provision elsewhere; or to analyse the way in which the provisions work, their success from the point of view of practitioners, the incidence of applications actually made, or the case-law record. Those tasks lie ahead.

Future work

It is anticipated that all Australian jurisdictions will take an interest in the project. The Queensland Law Reform Commission will be inviting each jurisdiction to use the papers it has produced as the basis for community consultation within each jurisdiction. In September 1995 there will be a meeting in Brisbane of

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representatives from all jurisdictions to discuss the outcome of consultations within each jurisdiction and to discuss the future direction of the project.

Other topics which may need to be dealt with as part of the project include:

- (a) intestacy; and
- (b) the administration of estates including:
 - (i) abolition of distinction between probate and administration;
 - (ii) abolition of the administrator's bond;
 - (iii) vesting of deceased estates;
 - (iv) chain of executors;
 - (v) entitlement to letters of administration;
 - (vi) order of payment of debts;
 - (vii) common forms of application for grants;
 - (viii) interstate recognition of grants without resealing; and
 - (ix) statutory wills for people lacking testamentary capacity.

HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues discussed in this Paper.

Written comments and submissions should be sent to:

The Secretary
Queensland Law Reform Commission
PO Box 312
ROMA STREET QLD 4003

or by facsimile on: (07) 247 9045

Oral submissions may
be made by telephoning: (07) 247 4544

Closing date: 31 August 1995

It would be helpful if comments and submissions addressed specific issues or paragraphs in the Paper.

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Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

The Commission may refer to or quote from submissions in future publications. If you do not wish your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate clearly.

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CHAPTER 1

INTRODUCTION

Legislation exists in all Australian States and Territories which enables certain persons to make application to the Court for provision, or further provision, from the estate of a deceased person where the provisions of any will, or the intestacy rules (governing the situation where a person dies without having made a completely effective will), or a combination of the two, fail to make adequate provision for the proper maintenance and support of the applicant.

The legislation derives from *The Testator's Family Maintenance Act, 1900* (NZ). Victoria followed suit by passing the *Widows and Young Children Maintenance Act 1906*; Tasmania passed the *Testator's Family Maintenance Act, 1912*; Queensland passed *The Testator's Family Maintenance Act of 1914*; New South Wales passed the *Testator's Family Maintenance and Guardianship of Infants Act, 1916*; South Australia passed the *Testator's Family Maintenance Act, 1918* and Western Australia inserted section 11 into the *Guardianship of Infants Act, 1920*. The Australian Capital Territory added Part (VII) to the *Administration and Probate Ordinance* in 1929 and the Northern Territory passed the *Testator's Family Maintenance Order* in 1929. These statutes necessarily reflected a view of the family and of obligations to the family at the time they were passed.

The concept of court intervention in the application of succession law has the potential to cure any injustice caused by the provisions of a particular will or applicable intestacy rules. It also has the potential to interfere with carefully thought out, deliberate decisions taken by will-makers (referred to as testators) when making their wills.

It is understandable that family provision legislation, as it was originally conceived, and as it has developed, is constrained by limitations which reflect on the one hand a view that a person who has amassed wealth during his or her lifetime should be able to dispose of it freely upon death and, on the other hand, a desire to ensure that the surviving spouse and children or other lineal descendants (referred to as issue), at least, of a deceased person should not be left destitute. These limitations vary between the States and Territories.

1.1 THE OBJECTIVES OF SUCCESSION LAW

It might be hoped that the law of wills, intestacy and family provision could be capable of attaining two broad objectives: that of allowing substantial freedom to every person making a will to dispose of his or her property; and that of ensuring that the legitimate expectations of persons having a moral claim upon the deceased person can be satisfied. Historically these competing objectives have always preoccupied those concerned with the justice of the succession system. Striking an appropriate balance between these two objectives is what is at issue.

The balance may need to be reconsidered from time to time in the light of changing social conditions.

1.2 THE LAW OF WILLS

The law of wills has never attempted to encompass an objective of satisfying the legitimate expectations of persons having a claim upon the testator. The law of wills has been almost exclusively concerned with ensuring unfettered freedom to the will maker. The eighteenth and nineteenth century philosophers who praised the concept of freedom of testamentary disposition generally took the view of Jeremy Bentham² that it is a power to reward "dutiful and meritorious conduct" and is:

an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of families.

It was a freedom predicated on the view that children should be obedient to their parents, most particularly their father, their mother having no property of her own. In other words, historically, freedom of testation was a vehicle of paternal power; and it tended to be equated with wealth accumulated by the testator in his lifetime, rather than with inherited wealth. The sanctity of private property may be seen as a fundamental achievement of the progress from an absolutist monarchy to democratic government.

In the case of inherited wealth there were important mechanisms of the law which protected the legitimate expectations of a testator's family. Until about the end of the nineteenth century in England a system of primogeniture was maintained by the landed classes which ensured, by the mechanism of the legal settlement of the fee simple, that land, the most significant form of wealth socially, was always under the control of the male heir, although the heir was only a life tenant and could not sell it. That structure has completely broken down and was never relevant in Australia.

The members of a family other than the heir-at-law were provided for, in most families, of even moderate wealth, by a system of *inter vivos* settlements. Usually upon the marriage of two persons it was common for their respective families to place property in a settlement which gave the income to the husband for life, which might make some small provision for the wife during the marriage, by way of "pin" money, and which gave her an income for life should her husband predecease her. After the death of the marriage partners, the fund would usually go to the issue of the marriage, or if there were no issue, back to the families which had originally provided it. Usually issues' interests would be resettled upon their marriage, so maintaining continuity of property control within a series of settlements.

² Bentham J "Of Wills" *Principles of the Civil Code in The Works of Jeremy Bentham* (1838) Part II Ch V at 337.

The family settlement was the creation of equity and was sustained by it. It consisted of personalty rather than realty. Its main objective was to protect the wife from the common law rule that a woman's property became her husband's upon marriage. It could also ensure that siblings of the heir could count upon receiving some part of inherited family wealth without suffering from the paternal tyranny of unfettered freedom of testamentary disposition. This practice could be described as a form of *inter vivos* inheritance. Family settlements are still being created. They can perform a role in tax planning and they can be a valuable means of protecting persons not well able to manage property for themselves.

There was another reason why testamentary injustice was not of great significance at least earlier in history. That was that the widow of a deceased person did have rights of dower, that is the right to a certain part of the estate. Those rights were effectively taken from her by the *Dower Act* of 1833.³ In many overseas jurisdictions a surviving spouse still has an overriding right to a part of the estate whatever the will says.⁴

It is not without significance that it was in the colonies, where legal settlements of land and equitable family settlements of personalty were uncommon, that testamentary freedom was first found to be intolerable and family provision legislation was introduced - the most significant revolution in succession law, arguably, since Roman times.

What was intolerable was not the freedom conferred on the testator, but the fact that a testator might leave a surviving spouse, usually a surviving wife, and children unprovided for.

Despite the fact that the principal objective of the law of wills seems to be to ensure freedom of disposition to testators, there is nevertheless within the law of wills some jurisprudence which emphasises moral propriety. It emerges in dicta concerning the prerequisites of testamentary capacity in establishing testamentary intention.

For instance there are the oft quoted words of Sir James Hannen in *Boughton v Knight*:⁵

In one sense, the first phrase, *sound mind*, covers the whole subject; but emphasis is laid upon two particular functions of the mind, which must be in sound order to create a capacity for the making of a will; there must be a memory to recall the

³ For a history of the widow's right of dower see Holdsworth *WS A History of English Law* (Methuen & Co Ltd 5th ed 1942) Vol III at 189-197.

⁴ For instance under the American *Uniform Probate Code* s2-201-2-207 a surviving spouse has a right to elect to take a certain share in preference to any provision made for the spouse by the will.

⁵ (1873) LR 3 P & D 64 at 65-66.

several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their claim upon him. [original emphasis]

It is significant that the moral dimension implicit in these words is conceived as relevant only to the testator's capacity to make a will. No similar moral dimension is to be found in the other prerequisite of testamentary intention, namely the testator's knowledge and approval of the contents of the will. If a testator deliberately and knowingly makes a will which excludes those who may be fitting objects of the testator's bounty, or who have, to the testator's knowledge, proper claims upon him or her, the will cannot be challenged on the grounds of incapacity.

As De Groot and Nickel observe:⁶

A person's freedom to dispose of his or her estate remains untouched except to the extent that there has been a failure to make proper provision for the maintenance and support of those who are seen at the time as entitled to such maintenance and support. Apart from this exception, the court will not rewrite the will even where the deceased has been unjust towards deserving members of his or her family.

A major issue to be considered concerning the future of family provision legislation must therefore be whether the claims of fitting objects of a capable testator's recall and understanding can be found a more significant place within the legislation without discarding reasonable freedom of disposition by will of wealth amassed by a testator during his or her lifetime. This would entail a significant change of philosophical position about the nature of rights of inheritance. A review of the nature of those rights is arguably not within the framework of a law reform reference to achieve uniformity or consistency of the existing law among States and Territories.

1.3 INTESTACY RULES

Intestacy rules cannot take the place of a will. They have always offered, at best, rough justice. Until very recently it is doubtful whether anyone would have questioned the proposition that intestacy laws cannot benefit anyone except the lawful spouse of the intestate, legitimate issue of the intestate, and the intestate's kin (that is, legitimate descendants of a common ancestor of the intestate). Changes, from time to time, in the benefits which intestacy rules have conferred upon the spouse of an intestate have reflected the position in society and within the family of the widow⁷ of a deceased person; but they commonly reflected a view

⁶ De Groot J K and Nickel B W *Family Provision in Australia and New Zealand* (Butterworths 1993) (hereafter cited as "De Groot and Nickel") at 3-4.

⁷ Reference is made to "widow" because of the greater likelihood that a wife will outlive her husband. See 5-6 below for the statistics for the average life expectancies for men and women.

that the widow's place in the family is one of dependence. A major issue of intestacy law reform is the extent to which financial independence should be conferred upon a surviving spouse so far as the estate can afford it.

It is only in the latter part of the twentieth century that intestacy benefits have been extended, in Australia, to illegitimate issue of the intestate, and that it has become possible to contemplate extending intestacy benefits to, for example, a de facto partner of an intestate. In June 1993 the Queensland Law Reform Commission⁸ recommended that intestacy benefits should be conferred upon certain de facto partners⁹ and proposed an extended definition of de facto partner in the following terms:¹⁰

An intestate's 'de facto partner' is a person, whether or not of the same gender as the intestate, who at the intestate's death -

- (a) lived with the intestate as a member of a couple on a genuine domestic basis and either -
 - (i) in the 6 years before the intestate's death, lived with the intestate as a member of a couple on a genuine domestic basis for a period of, or periods totalling, at least 5 years; or
 - (ii) is the parent of a child of the intestate who is less than 18 years old; but
- (b) was not legally married to the intestate.

This definition is not quoted for the purpose of endorsing it: but to show that there is an arguable case, even in the comparatively rigid context of intestacy rules, for extending benefits beyond the historically narrow legal definition of the family. However, in the context of a reference to render existing laws uniform, it cannot be regarded as an issue for uniformity unless it, or something like it, has been enacted before the project reaches fruition.

Other practical parameters necessarily prevent the development of intestacy rules from performing a sophisticated role in the succession system.

Intestacy rules must take account of certain statistical verities, such as the statistical fact that, in Australia, in 1992, the average life expectancy for men was 74.54 years whilst that for women was 80.54.¹¹ This statistic alone has the effect that intestacy

⁸ Queensland Law Reform Commission *Intestacy Rules* Report No 42 June 1993.

⁹ *Id* at paras 2.3.1-2.3.3.

¹⁰ *Id* at para 2.3.1.

¹¹ Australian Bureau of Statistics *Trends in Mortality* June 1994 at 6.

rules should be contemplating the needs of a surviving spouse in an age group which is past the age of regular employment as far as both men and women are concerned; and well past the age of child bearing as far as women are concerned. It is a statistic which also implies that any children of the intestate and a surviving spouse will be mature, even middle aged adults, and so not likely to be dependent on the intestate at the time of the intestate's death, or to be residing with the intestate. Despite the importance and relevance of this statistical context, it has changed remarkably over the years. Thus the average life expectancies for the years 1881-1891 were 47.2 years for men and 50.8 years for women.¹²

In one sense intestacy should only be concerned with statistical averages. To insert into intestacy rules provisions about an event which may possibly occur once in twenty years could cause the rules to become irrelevantly extensive. While it would be possible to make provision for certain uncommon events, other events not even contemplated as possibilities would inevitably occur, which events would not be the subject of any specific intestacy rule. For example, if a husband and wife are proceeding towards a divorce and have completed a property settlement, but one of them dies intestate before the divorce is finalised, so that the other inherits as on intestacy, as well as taking the settled property, it might be argued that the intestacy rules should be changed to take that into account. As just as that may be in the circumstance of the particular case, however, one may question the desirability of legislating for an event which is likely to occur once in the proverbial blue moon: divorce is not a common phenomenon in the age groups with which intestacy rules are concerned and neither is death after a property settlement but before divorce. It is arguable that family provision legislation is the proper place to deal with the statistically rare phenomenon.

Another intrinsic and impersonal constraint which limits the efficacy of intestacy rules is that they cannot distinguish between the needy and the affluent, or the deserving and the undeserving. This particularly affects a person who sacrifices his or her independence and perhaps career to look after an invalid parent or other relative;¹³ and who finds, after so doing, if the parent or relative dies intestate, that he or she has to share the estate with others. The consequence of this may well be that the carer has to move out of a home shared with the deceased for perhaps many years, or that he or she is not entitled to anything at all.

The desire of the surviving, usually female, spouse, or carer, to remain independent, and to live in the matrimonial home, or in other suitable independent accommodation for as long as possible, has become an accepted fact of contemporary life, even if it were not so half a century ago. To a certain extent this is a product of the facts that more families own their own home than formerly and

¹² Australian Bureau of Statistics *Women's Health* December 1994 at 13.

¹³ See Australian Bureau of Statistics *Queensland Families Facts and Figures* June 1994 at 102-103: In 1993 almost 250,000 people aged 55 and over with a disability were living in Queensland households. More than 150,00 required assistance in everyday tasks.

that children are less able to undertake the care of an ailing parent often because they all have work responsibilities. The recent prevalence of joint ownership of the matrimonial home by marriage, and even de facto, partners has enabled the surviving partner to remain in the matrimonial home as a matter of right whatever his or her position might be by reason of the succession laws. The growth of the practice of joint ownership of the matrimonial home has engendered an expectation, even in partners who have not acquired a matrimonial home in joint tenancy, that a surviving partner will remain in the matrimonial home, or should be able to acquire a suitable home.

In some States intestacy rules appear to have attempted to embody a concept of recognising the surviving spouse's need for independent accommodation by allowing a lump sum to the surviving spouse of an amount which might be considered to represent the cost of acquiring modest accommodation. The Queensland Law Reform Commission's Report on Intestacy Rules has as its principal recommendation that a surviving partner should have a home to live in.¹⁴

Ensuring the provision of suitable accommodation for the aged is an issue of public financial significance. The issue is whether the costs of caring for the aged should be met by the State or by available family money. Should the succession system try to ensure, to a certain extent, that the needy aged spouse be given preference over the affluent middle aged children of a deceased person? That is, should the State, or the estate, be charged with the maintenance of those who would, if no provision were made for them from the estate, become dependent on the State? And what of those who have displeased the deceased - disobedient children or an "unsatisfactory" spouse? Should the deceased be entitled to disinherit them, whether or not, in so doing, the State would become charged with their maintenance?

1.4 FAMILY PROVISION

Just as the law of wills is limited by its adherence to the notion of the freedom of the testator to dispose of his or her property; and the intestacy rules are constrained by statistical and impersonal imperatives, so the law of family provision is capable of rectifying injustices caused by wills or the intestacy rules only in certain limited cases, carefully defined by legislation. In the Australian States and Territories there are significant divergences of approach to a number of substantial issues, including: entitlement to make application for provision; the adequacy of provision made, if any; the property from which provision can be made, and the matters which the Courts must take into account when considering the application.

¹⁴ Queensland Law Reform Commission *Intestacy Rules* Report No 42 June 1993. See para 1.12 (c),(d),(e),(f) and (g).

1.5 CASE-LAW AND UNIFORMITY

Over the years the statutory language of family provision legislation throughout Australia has been glossed over, in some contexts, by extensive case-law. For instance, the Courts have become more liberal in deciding whether "adequate provision" has been made for the "proper maintenance" of an adult son or daughter of the deceased; and less likely to refuse or reduce provision on the grounds of the applicant's character or conduct. On the other hand, the Courts are more likely to insist on the making of applications within mandated time limits.

To the extent that legislation passed to secure uniformity retains language found in the original statutes it must be made clear that the subsequent development of the case-law relative to such language has not been repudiated; and that the Courts may continue, in the future, to take into account changes in social attitudes in considering applications brought under the legislation.

CHAPTER 2

PERSONS ENTITLED TO MAKE APPLICATION FOR A FAMILY PROVISION ORDER

This chapter is concerned with the differences which exist, in States' and Territories' legislation, with respect to who is entitled to make a family provision application.

It is stressed that entitlement to make a family provision application does not of itself mean that provision will be ordered. Those entitled to apply must further satisfy the Court that, to use the wording of section 8 of the *Family Provision Act 1969* (ACT):

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

The wording of this adequacy threshold varies throughout the States and Territories. The differences of wording are considered in Chapter 3.

The persons entitled to make application for a family provision order are defined in the following legislation:

Australian Capital Territory:	<i>Family Provision Act 1969</i> section 7; ¹⁵
New South Wales:	<i>Family Provision Act 1982</i> section 6(1);
Northern Territory:	<i>Family Provision Act 1970</i> section 7;
Queensland:	<i>Succession Act 1981</i> section 40;
Tasmania:	<i>Testator's Family Maintenance Act 1912</i> section 3A;
Victoria:	<i>Administration and Probate Act 1958</i> section 91;
Western Australia:	<i>Inheritance (Family and Dependants Provision) Act 1972</i> section 7;
South Australia:	<i>Inheritance (Family Provision) Act 1972</i> section 6.

2.1 SURVIVING SPOUSES

The surviving spouse of a deceased person is eligible to apply in all States and Territories. The propriety of a spouse's eligibility has never been questioned. At the time the legislation was first introduced a husband was under a legal duty to

¹⁵ Pursuant to s5(1) of the *Self-Government (Citation of Laws) Act 1989* (ACT), the *Family Provision Ordinance 1969* (ACT) is to be cited as the *Family Provision Act 1969*.

maintain his wife: it could hardly be argued that that duty should cease on his death.

2.2 CHILDREN

The children of a deceased person are eligible to apply in all States and Territories.

2.3 FORMER SPOUSE

A former, that is divorced, spouse, may apply in all States and Territories, although in Victoria and Tasmania, it appears that only a former wife, and not a former husband, may apply.¹⁶

In Queensland¹⁷ and Tasmania¹⁸ the former spouse's eligibility is limited by a requirement that the spouse has not remarried, and in the Australian Capital Territory,¹⁹ Queensland, the Northern Territory,²⁰ Tasmania, Victoria²¹ and Western Australia²² by a requirement that the former spouse was receiving or entitled to receive maintenance at the date of the deceased's death. The language of this requirement differs from State to State and there is accompanying case-law.²³

In New South Wales and South Australia no restriction is placed on the eligibility of a former spouse to make application. However, in New South Wales the Court has to be satisfied of a variety of matters under section 9 of the *Family Provision Act*

¹⁶ *Administration and Probate Act 1958* (Vic) s91; *Testator's Family Maintenance Act 1912* (Tas) s3A(d).

¹⁷ *Succession Act 1981* (Qld) s40 (definition of spouse).

¹⁸ *Testator's Family Maintenance Act 1912* (Tas) s3A(d).

¹⁹ *Family Provision Act 1969* (ACT) s7(2).

²⁰ *Family Provision Act 1970* (NT) s7(2).

²¹ *Administration and Probate Act 1958* (Vic) s91.

²² *Inheritance (Family and Dependents Provision) Act 1972* (WA) s7(1)(b).

²³ See *Re HJ Mayo (deceased)* [1968] 2 NSW 709; *Re Lack* [1981] Qd R 112; *Dobelle v Van Damme* [1982] VR 104; *Re Blood* [1983] 1 Qd R 104; and *Sarich v Erceg* [1984] WAR 11.

1982 (NSW), reinforcing underlying criteria of adequacy and need.²⁴

Issues for Consideration

- (1) It is necessary to consider whether the remarriage of a former spouse should disqualify that spouse from making a family provision application.
- (2) It is necessary to consider whether a former spouse should be eligible to make application only if he or she is receiving or entitled to receive maintenance from the estate of the deceased.
- (3) It is necessary to consider whether the law should apply equally to a former wife and to a former husband.

2.4 STEP-CHILDREN

A stepchild of the deceased is made specifically eligible to apply for family provision in the Australian Capital Territory, the Northern Territory, Queensland, South Australia and Tasmania.²⁵ In the Australian Capital Territory, the Northern Territory and South Australia the step-child must be a person who was maintained by the deceased person immediately before his or her death.²⁶

Definition of step-child

The Full Court of the Queensland Supreme Court has held that the relationship of step-child and step-parent ceases to subsist after the termination of the marriage which created it, by divorce or death. In *Re Burt*²⁷ McPherson J said:

the applicant must be the child by a former marriage of one who is the husband or wife of that person at the date of death of the latter.

²⁴ See section 4.2 of this Paper.

²⁵ *Family Provision Act 1969* (ACT) s7(2); *Family Provision Act 1970* (NT) s7(2); *Succession Act 1981* (Qld) s40 (definition of "child"); *Inheritance (Family Provision) Act 1972* (SA) s6(g); *Testator's Family Maintenance Act 1912* (Tas) s2(1) (definition of "child").

²⁶ *Family Provision Act 1969* (ACT) s7(2); *Family Provision Act 1970* (NT) s7(2); *Inheritance (Family Provision) Act 1972* (SA) s6(g).

²⁷ [1988] 1 Qd R 23 at 29.

The decision overruled earlier cases, viz. *Re Trackson (Deceased)*²⁸, *Re Nielsen, Deceased*²⁹ and *Re Burt* at first instance.³⁰ This decision, which was reiterated by the Full Court in 1989 in *Re Marstella*,³¹ greatly restricts the ability of step-children to make application as the following example shows.

Example

A and B marry and have a child Janice.
A and B divorce. A marries C and B marries D.
C and D are both step-parents of Janice.

If the step-parents predecease the parents, Janice will be able to make a family provision application against four estates, that is those of her parents A and B and her step-parents C and D.

But if the parents predecease the step-parents Janice will have to make application on the death of each of her parents: she cannot wait and apply on the subsequent death of the former step-parent, even although the former step-parent may have inherited her parent's estate: she will have to compete with the step-parent in the application.

If Janice could defer making an application until the death of the step-parent, entirely different considerations would govern the application, including how much the parent had left the step-parent and the other obligations of the step-parent at the time of the step-parent's death. She would not have to compete with the step-parent.

If C and D have children of previous marriages their rights to apply will be the other way around.

Practitioners have frequently criticised the limited meaning placed on the term step-child by the Queensland Full Court which is binding in Queensland, but not necessarily elsewhere.

²⁸ [1967] Qd R 124.

²⁹ [1968] Qd R 221.

³⁰ [1985] 2 Qd R 335.

³¹ [1989] 1 Qd R 638; *sub nom Glover v Executors, Estate of Marstella (deceased)* (1988) 12 Fam LR 787.

Thus De Groot and Nickel said:³²

Macrossan J (as he then was) has highlighted the arbitrary result produced by the current definition in that, whatever the length of the relevant marriage, the step-child might have a claim if his or her natural parent dies a short time after but not if such parent dies a short time before the day on which the deceased, the spouse of such parent, dies. Clearly, considerable injustice can result from this interpretation of 'stepchild', and the intervention of the legislature is warranted.

The Queensland Law Reform Commission has received correspondence from a leading firm of Brisbane solicitors criticising the narrowness of the Full Court's definition.

It is arguable that the Queensland decision may be incorrect, on the ground that it significantly impairs (even if it does not nullify) rather than enhances what is, after all, a jurisdiction traditionally characterised by the breadth of the discretion which it confers on the judiciary.

In any case it would be undesirable to leave matters where they are because of the uncertainty of the law. There is always the possibility of an appeal from Queensland to the High Court of Australia; and consideration of the same question in other States could lead to divergent interpretations because of the criticism to which the Queensland cases have been subject.

It may also be mentioned that in Queensland a person under the age of eighteen years, who was being wholly or substantially maintained or supported (otherwise than for full and valuable consideration) by the deceased person at the time of the deceased person's death, may make an application for provision.³³ This could include a former step-child.

Issue for Consideration

It is submitted that it would be better either to draft legislation to make it clear that former step-children may apply; or to adopt some other approach such as that of New South Wales or South Australia which avoids the use of the term.

³² De Groot and Nickel at 92.

³³ *Succession Act 1981* (Qld) s40 (definition (c) of 'eligible person').

2.5 GRANDCHILDREN

Specific provision is made for grandchildren of a deceased to apply in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Western Australia.³⁴ In Queensland a grandchild may apply as a dependant. Except in South Australia, differing restrictions are placed upon applicants. In the Australian Capital Territory³⁵ and the Northern Territory³⁶ the grandchild cannot make application unless -

- (a) the parent of the grandchild who was a child of the deceased person died before the deceased person died; or
- (b) one or both of the parents of the grandchild ~~was~~ [was or were] alive at the date of the death of the deceased person and the grandchild was not maintained by that parent or by either of those parents immediately before the death of the deceased person.³⁷

In New South Wales³⁸ the grandchild is required to have been, at a particular time or at any time, a member of the household of which the deceased person was a member.

In Queensland a dependant, who may include a grandchild, must be under the age of 18 years and a person who:³⁹

was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

In Western Australia there is a combination of the other restrictions. Eligibility to apply is conferred on a grandchild:⁴⁰

³⁴ *Family Provision Act 1969* (ACT) s7(1)(e); *Family Provision Act 1982* (NSW) s6(1) (definition (d) of "eligible person"); *Family Provision Act 1970* (NT) s7(1)(e); *Inheritance (Family Provision) Act 1972* (SA) s6(h); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(d).

³⁵ *Family Provision Act 1969* (ACT) s7(3).

³⁶ *Family Provision Act 1970* (NT) s7(3).

³⁷ Where the legislation of the Australian Capital Territory is virtually identical to that of the Northern Territory the provisions have been set out together. The Australian Capital Territory legislation is to be read exclusively of the words appearing in square brackets; for the Northern Territory legislation the words appearing in square brackets are to be read in substitution for the shaded words.

³⁸ *Family Provision Act 1982* (NSW) s6(1) (definition (d) of "eligible person").

³⁹ *Succession Act 1981* (Qld) s40 (definition (c) of "dependant").

⁴⁰ *Inheritance (Family and Dependants Provision) Act 1972* (WA) s7(1)(d).

who at the time of death of the deceased was being wholly or partly maintained by the deceased or whose parent the child of the deceased had predeceased the deceased living at the date of the death of the deceased, or then *en ventre sa mere*.

Issues for Consideration

- (1) The requirement of the dependency of the grandchild upon the grandparent is part of the fundamental perception of family provision law, and indeed of succession law more generally, that blood relationship *per se* is not a justification for the conferring of rights of succession. Nevertheless it is arguable that that perception can be expressed in the general part of the legislation, and not repeated, with variations, in relation to different classes of potential applicants.
- (2) Specific reference to grandchildren, like specific reference to stepchildren, implies the exclusion of other young persons who may have just as good a potential claim and who may be just as dependent on the deceased. For instance, an uncle and aunt may become testamentary guardians of a child or children whose parents have died prematurely. One issue for consideration is whether there needs to be reference to specific young person groups.
- (3) In any case, if grandchildren are to be given specific eligibility, any restrictions should be consistent.

2.6 OTHER YOUNG PERSONS

In New South Wales a young person may apply as a dependant or member of the household of the deceased person.⁴¹ In Queensland a person under the age of 18 years may apply as a dependant if he or she:⁴²

was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

⁴¹ *Family Provision Act 1982* (NSW) s6(1) (definition (d) of 'eligible person').

⁴² *Succession Act 1981* (Qld) s40 (definition (c) of 'dependant').

Issues for Consideration

The main issue in relation to young persons is whether they should be referred to in general terms and not by specific categories. Another issue is defining a dependency criterion in consistent terms.

2.7 DE FACTO SPOUSES

A de facto spouse may make a family provision application in the New South Wales, the Northern Territory, Queensland, South Australia and Western Australia. Eligibility is restricted by strict factual criteria.

In the Northern Territory a de facto spouse must show that he or she was "maintained by the deceased person immediately before his or her death".⁴³

In New South Wales the applicant must have been living with the deceased person at the time of that person's death, "as his wife" or "as her husband" on a *bona fide* domestic basis.⁴⁴

In Queensland a de facto spouse must show that he or she:⁴⁵

- (i) has lived in a connubial relationship with that deceased person for a continuous period of 5 years at least terminating on the death of that deceased person; or
- (ii) within the period of 6 years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating 5 years at least including a period terminating on the death of that deceased person.

Since a de facto spouse can only apply as a dependant there must also be shown that he or she:⁴⁶

was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

⁴³ *Family Provision Act 1970* (NT) s7(2).

⁴⁴ *Family Provision Act 1982* (NSW) s6 (definitions (a)(ii) and (iii) of 'eligible person').

⁴⁵ *Succession Act 1981* (Qld) s40 (definition (d) of 'dependant').

⁴⁶ *Succession Act 1981* (Qld) s40.

In South Australia "spouse" is defined, in relation to a deceased person, to include:⁴⁷

a person adjudged under the *Family Relationships Act, 1975*, to have been a putative spouse of the deceased either on the date of his death, or at some earlier date.

There is no requirement that the de facto spouse was being maintained by the deceased.

In Western Australia there are different provisions again. Eligible to make application, under section 7(1)(f) is:⁴⁸

a *de facto* widow or widower of the deceased who at the time of the death of the deceased was being wholly or partly maintained by the deceased, who was ordinarily a member of the household of the deceased, and for whom the deceased, in the opinion of the Court, had some special moral responsibility to make provision.

Issues for Consideration

- (1) A consistent definition of de facto spouse, or some other appellation, must be sought. This might, in any case, become a matter of Federal Government intervention as a matter of family law.
- (2) The extent to which a de facto spouse must show dependency, or that the deceased was maintaining or had been maintaining the applicant, needs to be consistent. It is arguable that if a suitable definition of de facto spouse can be agreed there is no need to differentiate between the lawful spouse and the de facto spouse; and that the general adequacy threshold provision should suffice.

2.8 PARENTS

All States, except Victoria, and the Territories allow parents to apply for family provision. Once again their eligibility is restricted by requirements of dependency.

⁴⁷ *Inheritance (Family Provision) Act 1972 (SA) s4.*

⁴⁸ *Inheritance (Family and Dependants Provision) Act 1972 (WA) s7(1)(f).*

In the Australian Capital Territory and the Northern Territory the parent must show that he or she was being maintained by the deceased immediately before the death of the deceased, and that the deceased was not survived by a spouse or children.⁴⁹

In New South Wales, the definition of eligible person includes:⁵⁰

a person who was, at any particular time, wholly or partly dependent upon the deceased person.

This class of eligible persons can include adults not related by blood to the deceased. However the Court has to be satisfied of a variety of matters under section 9 of the Act reinforcing underlying criteria of adequacy and need. The extensively written provisions of section 9 largely relate to the matters which the Court should take into account in exercising its discretion in making an order.

In Queensland a parent may make an application as a dependant and must show that he or she:⁵¹

was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death.

In South Australia a parent may apply if he or she:⁵²

satisfies the court that he cared for, or contributed to the maintenance of, the deceased person, during his lifetime.

It has been held that this is not restricted to a period immediately before the death of the deceased.⁵³ Most parents would be able to show that they come within this test.

In Tasmania the parents of a deceased person may apply if the deceased person dies without leaving a widow⁵⁴ or any children.⁵⁵

⁴⁹ *Family Provision Act 1969* (ACT) s7(4); *Family Provision Act 1970* (NT) s7(4).

⁵⁰ *Family Provision Act 1982* (NSW) s6(1) (definition (d)(i) of "eligible person").

⁵¹ *Succession Act 1981* (Qld) s40 (definition (a) of "dependant").

⁵² *Inheritance (Family Provision) Act 1972* (SA) s6(i).

⁵³ *In the Estate of Terry, Deceased* (1980) 25 SASR 500.

⁵⁴ *Testator's Family Maintenance Act 1912* (Tas) s2 defines "widow" to include "widower".

⁵⁵ *Id* s3A(c).

In Western Australia a parent, including an adoptive parent, may apply without qualification.⁵⁶

Issues for Consideration

- (1) There is the general issue of whether a class of parents could be merged into a more general class of adults eligible under a general criterion or criteria, as is the case in New South Wales.
- (2) Then there is the question of what, if any, restrictions should be placed upon parents who apply, such as restrictions about being maintained, or having maintained, or the absence of other potential applicants, particularly a spouse or children of the deceased.

2.9 OTHER ADULTS

In New South Wales, as has already been shown, a person is eligible to apply:⁵⁷

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

No other Australian legislature has gone so far.

⁵⁶ *Inheritance (Family and Dependents Provision) Act 1972 (WA) s7(1)(e).*

⁵⁷ *Family Provision Act 1982 (NSW) s6(1) (definition (d) of 'eligible person').*

Issues for Consideration

The New South Wales provision represents an inroad into the concept that applicants for family provision must be classified by groups; although the provision must be read in the light of the lengthy requirements of section 9 concerning the way in which the Court should approach applications by such a person.

It may be possible, if simplification as well as consistency can be achieved, to reduce the number of classified groups of eligible applicants, including, for instance, step-children, grandchildren, parents and de facto spouses, if the focus of the legislation were redirected to the sorts of matters which the Court should take into account in considering an application, rather than with possibly arid and arbitrary questions of formal eligibility to apply.

CHAPTER 3

"ADEQUATE PROVISION" FOR "PROPER MAINTENANCE"

In all States and Territories persons eligible to make application for a family provision order must satisfy the Court of the following matters in relation to the disposition of the deceased's estate.

3.1 AUSTRALIAN CAPITAL TERRITORY AND NORTHERN TERRITORY

Section 8(1) of the *Family Provision Act* in each Territory⁵⁸ requires the Court to be satisfied that:

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

Section 8(2) requires the Court to take into account any benefits conferred by the exercise by will of a general or special power of appointment.

3.2 NEW SOUTH WALES

Section 9(2) of the *Family Provision Act 1982* (NSW) requires the Court to be satisfied that:

- (a) the provision (if any) made in favour of the eligible person by the deceased person either during his lifetime or out of his estate...

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

Section 9(2) also requires the Court to take account of any provision made out of the "notional" estate of the deceased. The concept of notional estate is particular to New South Wales and is considered in Chapter 5 of this Paper.

⁵⁸ *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

3.3 QUEENSLAND

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

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

3.4 SOUTH AUSTRALIA

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

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

3.5 TASMANIA

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

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

3.6 VICTORIA

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

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

3.7 WESTERN AUSTRALIA

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

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

Section 6(2) adds:

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

In *Bosch v Perpetual Trustee Company Limited*,⁵⁹ a case often referred to, the Privy Council said:⁶⁰

The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore, the property left by the testator has to be taken into consideration.... Where, therefore, the testator's estate is a large one the Court will be justified in such a case in making provision to meet contingencies that might have to be disregarded where the estate is small.⁶¹

So Hardingham, Neave and Ford say:⁶²

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

⁵⁹ [1938] AC 463.

⁶⁰ *Id* at 478.

⁶¹ This requirement is considered in detail in Hardingham I J, Neave M A & Ford H A J *Wills and Intestacy in Australia and New Zealand* (Law Book Co 2nd ed 1989) (hereafter cited as "Hardingham, Neave & Ford") at 490-497 and in De Groot and Nickel at para [204.4].

⁶² Hardingham, Neave & Ford at 494.

Except in New South Wales the question of whether adequate provision has been made is determined at the date of the death of the testator; but the Court may take into account circumstances existing at the time of the making of the order for the purposes of determining the amount of the order;⁶³ and the Court may take into account matters which the testator either knew of or could reasonably have foreseen.⁶⁴ In New South Wales the question of adequacy is dealt with at the time the Court is considering the application.⁶⁵

⁶³ *Blore v Lang* (1960) 104 CLR 124 per Dixon CJ at 130.

⁶⁴ Eg *White v Barron* (1980) 144 CLR 431 per Mason J at 444.

⁶⁵ *Family Provision Act 1982* (NSW) s9(2).

3.8 ISSUES FOR CONSIDERATION

- (1) The words "adequate" and "proper provision" recur in all States' and Territories' legislation. They are fundamental to the concept of family provision. They do not, therefore, raise issues of uniformity, except for the fact that there are some differences in the drafting of the provisions in which these phrases occur. However, some States and Territories refer only to support and proper maintenance of the applicant, while others refer to proper maintenance, education and advancement in life of the applicant. There is a significant difference; whereas support, maintenance and education are words traditionally associated with the expenditure of income, advancement has been associated with the expenditure of capital, such as setting a person up in business or upon marriage.⁶⁶ Consistency requires the inclusion or exclusion of these words.
- (2) Whether adequate provision was made for proper provision should be ascertained by reference to the circumstances of the applicant and the deceased at the date of death or at the date of the hearing is another question which requires consideration and reconciliation. To a certain extent this difference may have been obscured in practice by the device of allowing for consideration what a testator might reasonably have foreseen; and by the rule that what may be allowed to the applicant is to be determined at the date of the application; although both these practices may have themselves been generated by the difficulty of the question.

Example

A testator leaves to a surviving spouse a portfolio of share of sufficient value at the date of the death to make adequate provision for his or her proper maintenance; but within a short period of time (say a year), before the shares have been transferred to the spouse in the normal course of administration, their value has been substantially reduced by a stock market crash. Should that be ignored, or might it be brought within a "reasonably foreseeable" concept? If the latter, why insist on testing adequacy at the date of death?

⁶⁶ See Ford H A J & Lee W A *Principles of the Law of Trusts* (Law Book Co 2nd ed 1990) at para 1261 for examples of advancement.

CHAPTER 4

OTHER CONSTRAINTS ON THE COURT'S JURISDICTION TO MAKE A FAMILY PROVISION ORDER

In addition to the constraints placed upon the Court to make a family provision order mentioned in the preceding chapters, there are additional constraints imposed either as part of the definition of some classes of eligible applicants or in terms of statutory instructions to the Court respecting what the Court should take into account in exercising its jurisdiction to make an order. These constraints vary considerably from jurisdiction to jurisdiction.

4.1 AUSTRALIAN CAPITAL TERRITORY AND NORTHERN TERRITORY

Section 8(3) of the *Family Provision Act* in each Territory⁶⁷ provides:

The Court may refuse to make an order in favour of a person whose character is such, or whose conduct is or has been such, as, in the opinion of the Court, disentitles him to the benefit of an order.

This significant provision is found in other jurisdictions.⁶⁸

4.2 NEW SOUTH WALES

Section 9(1) of the *Family Provision Act 1982* (NSW) provides that where an application is made by persons defined in paragraph (c) or (d) of the definition of "eligible person" in section 6(1), that is:

- (c) a former wife or husband of the deceased person, or
- (d) a person:
 - (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
 - (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member;

⁶⁷ *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

⁶⁸ Its effect is thoroughly examined in Hardingham, Neave & Ford at 514-518 and in De Groot and Nickel at para [207].

the Court:

shall first determine whether, in its opinion, having regard to all the circumstances of the case (whether past or present), there are factors which warrant the making of the application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors.

Hardingham, Neave and Ford describe the meaning of this provision as "somewhat obscure".⁶⁹

By section 9(3)(b) the Court "may take into consideration", among other things, when making an order:

the character and conduct of the eligible person before and after the death of the deceased person.

4.3 QUEENSLAND

Section 40 of the *Succession Act 1981* (Qld) defines "dependant" as follows:

"dependant" means, in relation to a deceased person, any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death being -

- (a) a parent of that deceased person;
- (b) the parent of a surviving child under the age of 18 years of that deceased person;
- (c) a person under the age of 18 years; or
- (d) a person who -
 - (i) has lived in a connubial relationship with that deceased person for a continuous period of 5 years at least including a period terminating on the death of that deceased person; or
 - (ii) within the period of 6 years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating 5 years at least including a period terminating on the death of that deceased person.

In addition to the constraints imposed by the requirement that the dependant was being maintained by the deceased, a further constraint is imposed on the Court by the wording of the proviso in section 41(1A) which reads:

⁶⁹ Hardingham, Neave & Ford at 488; but there is a detailed consideration of the way in which it operates in De Groot and Nickel at paras [204.4] and [307].

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

This proviso is consistent with underlying doctrine that persons, particularly those not within the contemplation of the first versions of the legislation, that is, spouses and children, must show specific cause.

Section 41(2)(c) provides that the Court may:

refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the Court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

4.4 SOUTH AUSTRALIA

Section 7(3) of the *Inheritance (Family Provision) Act 1972 (SA)* provides:

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

A similar constraint is to be found in the other jurisdictions.

4.5 VICTORIA

Victoria, with its very limited jurisdiction, repeats the constraint of other jurisdictions by providing, in section 96(1) of the *Administration and Probate Act 1958 (Vic)* as follows:

The Court may refuse any such application if the character or conduct of the applicant is such as in the opinion of the Court to disentitle him or her to the benefit of any provision under this Part.

4.6 WESTERN AUSTRALIA

Section 6(3) of the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* provides:

The Court ... may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient.

Then section 7(1)(f) places a constraint upon the Court where it is considering the application of a "de facto widow or widower". The applicant must show that he or she was being wholly or partly maintained by the deceased and was ordinarily a member of the household of the deceased:

and for whom the deceased, in the opinion of the Court, had some special moral responsibility to make provision.

4.7 WHEN SHOULD THE APPLICANT'S MORAL OR OTHER FITNESS FOR RELIEF BE CONSIDERED?

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

Thus in *Hughes v National Trustees, Executors and Agency Company of Australasia Limited*⁷⁰ Murphy J, referring to the adequate provision constraint in section 91 of the Victorian legislation, said:⁷¹

Difficulty arises from the unwarranted introduction of the notion of moral claim into s.91 from which it follows that the appellant must establish his moral claim; in effect, his character and conduct must qualify him for the benefit of provision out of the estate...

In my opinion, this confuses the simple operation of the sections. Section 91 specifies the conditions of qualification; s.96 specifies the conditions of disqualification. To bring himself within s.91, the appellant does not have to establish any moral claim or qualification other than those specified in the section.

⁷⁰ (1979) 143 CLR 134.

⁷¹ *Id* at 159-160.

Murphy J adhered to this view in *Goodman v Windeyer*.⁷² Gibbs J, however, in the same case took a rather broader view,⁷³ taking account of the many considerations which must be borne in mind when deciding whether an applicant has a prima facie case, including the applicant's conduct in relation to the testator. So in *Hughes'* case Gibbs J had said:⁷⁴

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

⁷² (1980) 144 CLR 490 at 504-505.

⁷³ *Id* at 496-499.

⁷⁴ *Hughes v National Trustees, Executors and Agency Company of Australasia Limited* (1979) 143 CLR 134 at 156.

4.8 ISSUES FOR CONSIDERATION

- (1) With respect to the question of the effect of the conduct of the applicant it seems that it is not clear in jurisdictions other than New South Wales⁷⁵ whether the Court can take into account conduct after as well as before the death of the deceased. It is clear that this needs to be considered for the purposes of rendering the legislation consistent. For example, should an applicant whose conduct before death could not be criticised be penalised if he or she can be shown to have stolen from the estate of the deceased?

Moreover the legislation does not make it clear, although it appears to be the law, that, although the word "disentitle" is used in all the legislation, conduct may result in a reduction of the amount of the award and not necessarily in a disentitlement. This could be spelled out.

- (2) Where, as in New South Wales in relation to a former spouse, grandchildren and other dependants being members of the deceased's household, and in Queensland in relation to defined "dependants", the Court is constrained to give additional scrutiny to the application, it is desirable that the terminology used be reconsidered, having regard to principles of "plain English", and an appropriate degree of abstraction of the language.
- (3) There seem to be differing views as to when the applicant's character and conduct should be considered by the Court. Should character and conduct only be considered when the Court has decided that an award should be made, for the purposes of reducing or nullifying that award? Or should character and conduct be considered, as well, in the initial stage of the application, when what is being considered is whether adequate provision has been made for the proper maintenance and support of the applicant? Case-law is tending to indicate that consideration of character and conduct should be made only at the later stage and not at the initial stage. Should this be enshrined in legislation?

⁷⁵ See 27 above.

4.9 EVIDENCE OF CHARACTER AND CONDUCT

Some States have made no statutory provision respecting what evidence is admissible of an applicant's character and conduct. In case-law, the admissibility as evidence of statements made by the testator has been impugned.

A practice of admitting testators' statements concerning the conduct of applicants for provision under the legislation as evidence of that conduct was mentioned by Gibbs J in *Hughes v National Trustees, Executors and Agency Company of Australasia Limited*.⁷⁶ Having observed that "usage justifies its reception" Gibbs J said:⁷⁷

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

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

Australian Capital Territory and Northern Territory

Section 22 of the *Family Provision Act* in each Territory⁷⁸ provides:

Relevance of testator's reasons [ACT]

The Court may have regard to the testator's reasons [NT]

- (1) The Court shall, in determining an application for an order under ~~section 8~~ ~~or 9A~~ [section 8], have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by his will [,] or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Act.
- (2) The Court may receive in evidence a statement signed by the testator and purporting to bear the date on which it was signed and to set out reasons for making or not making provision or further provision by the will of the testator for a person as evidence of those reasons.

⁷⁶ (1979) 143 CLR 134 at 150.

⁷⁷ *Id* at 153.

⁷⁸ *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

- (3) Where a statement of a kind referred to in subsection [sub-section] (2) is received in evidence, the Court shall, in determining what weight, if any, ought to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement.

New South Wales

In New South Wales there is a lengthy provision in section 32 of the *Family Provision Act 1982* (NSW) concerning the admissibility of evidence. What follows quotes (using inverted commas) some portions of this section, and summarises other portions of this section.

- (1) Definition of "document" and "statement".
- "(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 he were able to give that evidence, be admissible."
- "(3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during his 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) Statement made by the deceased in legal proceedings may be "approved in any manner authorised by the Court".
- (5) A statement made by the deceased in a document may be proved by the production of the document (or copy by leave).
- (6) Court may require additional evidence where document evidence is tendered.
- "(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) Circumstances which the Court may consider in estimating the weight of statements.
- (9) Counter evidence admissible.
- (10) Inconsistent evidence admissible.

- *(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; and
 - (b) the rules against secondary evidence of the contents of a document
- 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) This section does not apply to statement to which Part 2C of the Evidence Act 1898 applies.*

Tasmania

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

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

Western Australia

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

- (2) In any proceedings under this Act a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.
- (3) Where a provision of this Act requires the Court to be satisfied of the existence of any ground or fact or as to any other matter, it is sufficient if the Court is reasonably satisfied of the existence of that ground or fact or as to that other matter.

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

Issues for Consideration

It is clear that the lengthy New South Wales provisions are the most considered of the provisions which exist concerning the admissibility of statements made by a testator which may have effect on the entitlement of an applicant for family provision. They are also specific. Of other legislation, particularly that of Western Australia, it may be considered that the language is so generalised as to be difficult to be clear as to the extent to which it impacts on traditional rules of evidence.

CHAPTER 5

THE "ESTATE" FROM WHICH PROVISION MAY BE MADE

An applicant for family provision seeks provision "out of the estate" of the deceased person. There is some doubt about the meaning of the word "estate" and there are differences between the statutes. In particular, in New South Wales, there is the unique concept of "notional estate" from which provision may be made.

5.1 AUSTRALIAN CAPITAL TERRITORY AND NORTHERN TERRITORY

In section 7(1) of the *Family Provision Act 1969* in each Territory⁷⁹ the applicant may make application for provision "out of the estate" of the deceased person.

5.2 NEW SOUTH WALES

In sections 7 and 8 of the *Family Provision Act 1982* (NSW) the application is for provision to be made "out of the estate or notional estate" of the deceased. "Notional estate" is defined in section 6(1) as "property designated by the Court under sections 23, 24 or 25 as notional estate of the deceased person". The notional estate legislation is designed to counter a substantial risk of evasion of family provision legislation.

Division 2 of Part 2 of the Act, entitled *Notional Estate*, embracing sections 21 to 29 inclusive, makes important provisions not found in other legislation. The provisions are lengthy and complex.⁸⁰ Notional property arises as a result of a "prescribed transaction". The following acts or omissions of the deceased or another person can in certain circumstances constitute a "prescribed transaction":

- (1) the making of a gift, directly or on trust - section 22(1);
- (2) failure to exercise a power of appointment - section 22(4)(a);
- (3) failure to sever a joint tenancy - section 22(4)(b);⁸¹
- (4) failure to extinguish an interest under a trust - section 22(4)(c);

⁷⁹ *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

⁸⁰ There is a summary of their effect in Hardingham, Neave & Ford at 509-511 and in G L Certoma *The Law of Succession in New South Wales* (Law Book Co 2nd ed 1992) at 228-234.

⁸¹ In *Wade v Harding* (1987) 11 NSWLR 551 the failure of the deceased to sever a joint tenancy created for value was held not to be a prescribed transaction.

- (5) failure to exercise a power to nominate a person as a person to whom money payable under a policy of insurance may be paid - section 22(4)(d);
- (6) death of a member or participant of a body, association, scheme, fund or plan - section 22(4)(e);
- (7) the entering into a contract to dispose of property from the estate of the deceased person - section 22(4)(f).

In most or all of these cases the deceased might have conducted himself or herself so that the property sought to be designated as notional estate would have become part of the deceased person's estate.

By section 23 the Court may designate property the subject of a prescribed transaction to be notional estate of the deceased person; but it must be satisfied, amongst other things, that the prescribed transaction was one:

- (i) which took effect within the period of 3 years before his death and was entered into with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of his estate or otherwise;
- (ii) which took effect within the period of 1 year before his death, and was entered into at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the deceased person to enter into the prescribed transaction; or
- (iii) which took effect or is to take effect on or after the death of the deceased person.

Section 24 allows the Court to designate as notional estate any part of the estate which has been distributed.

By section 25 property which the Court may designate as notional estate cannot be removed from the Court's jurisdiction to designate as notional estate by subjecting it to a subsequent prescribed transaction.

The Court's power to designate property as notional estate is further limited, by section 26, by reference to the object of the legislation, that is it must have disadvantaged the estate of the deceased (or other disponer), or an eligible person.

Section 27(1) requires the Court, when an order designating property as notional estate is sought, to consider:

- (a) the importance of not interfering with reasonable expectations in relation to property;
- (b) the substantial justice and merits involved in making or refusing to make the order; and
- (c) any other matter which it considers relevant in the circumstances.

In addition the Court is required to give consideration to a variety of circumstances going to the value of the property sought to be designated.⁸²

By section 28(1) the Court is prevented from designating property as notional property unless it is satisfied:

- (a) that the estate of the deceased person is insufficient to allow the making of provision that, in its opinion, should be made; or
- (b) that, by reason of the existence of other eligible persons or the existence of special circumstances, provision should not be made wholly out of the estate.

There are further restrictions in section 28, the tenor of which is to impress upon the Court that it must be satisfied as to the facts and justification for making the order.

Subject to these manifold restrictions, however, section 29 provides that to the extent that a person's rights are affected by a designation order, those rights are extinguished.

This legislation is expertly drafted by experienced conveyancing and equity lawyers. To make it readily comprehensible to the average reader would present a formidable task to the "plain English" drafter. Nevertheless, as Young J said in *Wade v Harding*,⁸³ it can require a judge "to construe what happened in a transaction that did not take place, was never even thought about by the person who notionally omitted to do it was a transaction which was for full valuable consideration in money's worth".

⁸² *Family Provision Act 1982 (NSW) s27(2)*.

⁸³ (1987) 11 NSWLR 551 at 555.

5.3 QUEENSLAND

In Queensland the Court may only make provision for an applicant out of "the estate" of the deceased.⁸⁴

5.4 SOUTH AUSTRALIA

In South Australia the Court may only make provision for an applicant out of the "estate" of the deceased.⁸⁵

5.5 TASMANIA

In Tasmania the Court may only make provision for an applicant out of the "estate" of the deceased.⁸⁶

5.6 VICTORIA

In Victoria the Court may only make provision for an applicant out of "the estate" of the deceased.⁸⁷ It is also made clear that it is the net value of the estate which is to be taken into account.⁸⁸

5.7 WESTERN AUSTRALIA

In Western Australia the Court may only make provision for an applicant out of the "estate" of the deceased person.⁸⁹

⁸⁴ *Succession Act 1981* (Qld) s41(1).

⁸⁵ *Inheritance (Family Provision) Act 1972* (SA) s7(1).

⁸⁶ *Testator's Family Maintenance Act 1912* (Tas) s3(1).

⁸⁷ *Administration and Probate Act 1958* (Vic) s91.

⁸⁸ *Id* s95.

⁸⁹ *Inheritance (Family and Dependents Provision) Act 1972* (WA) s6(1).

5.8 MEANING OF "ESTATE"

For practical reasons it is to be expected that the word "estate" in the context of family provision legislation will be given its usual succession law meaning, that is, the property which passes to the executor or administrator to be dealt with in accordance with the law of wills or intestacy as well as the law relating to the administration of estates with respect to such matters as the payment of debts. Property which cannot be considered to be part of the estate of a deceased person includes the following:

- (1) Property given away by the deceased before death. In New South Wales this can be designated as "notional estate".
- (2) Property held by the deceased on a joint tenancy does not form part of the deceased's estate. It passes to the surviving joint tenant. That is a necessary incident of the tenure of joint tenancy. The placing of property in a joint tenancy can be a major way of circumventing family provision legislation. In New South Wales property held in a joint tenancy may be designated as "notional estate" of the deceased.
- (3) Property distributed in the ordinary course of the administration of the estate ceases to be a part of the estate of the deceased. Particular difficulty has been encountered where an executor appropriates part of the estate towards a trust created by the will, the executor remaining trustee. It is arguably the law that the appropriation takes the property out of the estate and subjects it to the created trust. Nevertheless the High Court of Australia held otherwise in *Easterbrook v Young*⁹⁰ on the wording of the New South Wales legislation. But the High Court decision was not followed in Queensland in the cases of *Re Burgess*⁹¹ and *Will of McPherson*,⁹² the wording of the Queensland statute being slightly different from that of New South Wales.

In New South Wales property held by a trustee is not to be treated as having been distributed unless it is vested in the beneficiary.⁹³ This appears to partially reverse *Easterbrook v Young*.⁹⁴

⁹⁰ (1977) 136 CLR 308 at 324.

⁹¹ [1984] 2 Qd R 379.

⁹² [1987] 2 Qd R 394.

⁹³ *Family Provision Act 1982* (NSW) s6(4).

⁹⁴ (1977) 136 CLR 308.

Section 2(4) of the *Family Protection Act 1955* (NZ) provides:

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

This provision goes to the heart of the difficulty.

- (4) *Donationes mortis causa*, that is, gifts made conditionally upon the donor not seeking to recover the gift before death, and becoming absolute upon death, are anomalous and do not form part of the estate of the deceased because they do not vest in the personal representative as such. But there are statutory provisions in New Zealand⁹⁵ and in Queensland,⁹⁶ which reverse the rule and in New South Wales,⁹⁷ which can reverse the rule by enabling the gift be designated as "notional estate" of the deceased.
- (5) Property the subject of a contract to leave a specific benefit by will is seen as caught by the contract and as a specifically enforceable obligation of the estate, even though the contract has been performed by the deceased by way of the inclusion of a specific legacy or devise in a will. This was held by the Privy Council in *Schaefer v Schuhmann*.⁹⁸ In New South Wales the subject matter of such a contract can, in certain circumstances, be designated as notional estate of the deceased. Since the other contracting party will have furnished consideration for the specifically enforceable promise an issue of competition between the efficacy of contracts and the moral imperative underlying family provision legislation is raised.
- (6) In Queensland there is a provision in section 44(1) of the *Succession Act 1981* which, in effect, removes from the ambit of a family provision claim property forming part of the estate which the personal representative has utilised for the maintenance or support of the wife, husband or any child of the deceased who was totally or partially dependent on the deceased person immediately before the death of the deceased person. This provision enables the personal representative to look after the surviving spouse and issue of the deceased during the period immediately after the

⁹⁵ *Family Protection Act 1955* (NZ) s2(5).

⁹⁶ *Succession Act 1981* (Qld) s41(12).

⁹⁷ *Family Provision Act 1982* (NSW) s22.

⁹⁸ [1972] AC 572.

death. It is consistent with the underlying policy of the legislation. In Western Australia there is a differently worded provision, but to the same purpose, in section 11 of the *Inheritance (Family and Dependants Provision) Act 1972 (WA)*. In the Australian Capital Territory and the Northern Territory there is a not dissimilar provision in section 20 of the *Family Provision Act*.⁹⁹

- (7) If a potential applicant has consented to the distribution of property to a beneficiary, that property cannot form part of the estate from which that consenting applicant later applies for provision.

⁹⁹ *Family Provision Act 1969 (ACT); Family Provision Act 1970 (NT)*.

Issues for Consideration

It is clear that some decisions regarding the meaning of the term "the estate" of the deceased will confront those seeking to render family provision legislation uniform or consistent.

- (1) The principal challenge is presented by the New South Wales inclusion of the concept of the "notional" estate, directed mainly against those who attempt to evade the legislation by *inter vivos* acts or omissions which have the effect of reducing the property forming part of their estates. Whether it would be possible to persuade other States and Territories to follow this approach may perhaps depend on how successful it has been in New South Wales in practice. There is also the question of whether the policy of the legislation, which can be perceived within the legislation, might perhaps be capable of being expressed in shorter but broader language. An evaluation of the legislation, from a New South Wales perspective, must be undertaken as part of the project.
- (2) The question must be settled of whether property the subject of a trust created by the will, or upon the intestacy, of a deceased person should be considered to remain as part of the estate of the deceased person. This issue is not unconnected with the rules respecting the time within which an application must be made.¹⁰⁰ As an example, suppose that a testator leaves property of significant value upon trust for a spouse or perhaps an incapacitated person for life with gifts over. It may well be that some of those entitled to the gift over have no objection to the gift of the life interest but might consider that better provision should have been made for them after the death of the life tenant. There seems to be no harm in allowing any dispute concerning the distribution of the property the subject of the life interest to be resolved after the death of the life tenant, in the light of circumstances as they are at that time.
- (3) There is also the relatively minor question of whether a *donatio mortis causa* should be regarded as forming part of the estate of the deceased.

¹⁰⁰ See Ch 6.

5.9 PROPERTY THE SUBJECT OF A POWER OF APPOINTMENT EXERCISABLE BY WILL

When a testator exercises a power of appointment by will the property appointed is not part of the testator's estate; it is the property of the person who conferred the power on the testator. The testator merely points out who is to take the property the subject of the power. If the power is of the kind described as general, that is, it can be exercised by the donee of the power in favour of anyone, then the testator can deal with that property by will virtually as if it were his or her own property.

Moreover all wills legislation provides, to use the wording of section 28(d) of the *Succession Act 1981* (Qld), that:

a general disposition of all the testator's property or of all the testator's property of a particular kind includes property or that kind of property over which the testator had a general power of appointment exercisable by will and operates as an execution of the power.

In substance the same provision, deriving from the English *Wills Act 1937* is found in all States and Territories.¹⁰¹

The subject matter of such a general power of appointment might indeed be the most important asset passing, by virtue of the exercise of the power (whether consciously or not). For instance, a husband may leave the family home to his wife for life and after her death to such person or persons as the wife may in her absolute discretion appoint. The wife's own estate, at her death, might not be substantial. However, if, by will, she leaves "all my estate" to a certain person the general power of appointment of the family home, conferred upon the wife by the husband's will, would be exercised by the general provision of the wife's will, even if the wife were not aware of the operation of the rule.

Family provision legislation in the Territories and New South Wales makes property the subject of a general power of appointment available as if it were part of the estate of the deceased. For example, section 13(1) of the *Family Provision Act* in each Territory¹⁰² provides in part:

¹⁰¹ Viz: *Wills Act 1968* (ACT) s26(2)(3); *Wills, Probate and Administration Act 1898* (NSW) s23(2)(3); *Wills Act 1938* (NT) s30(1)(2); *Wills Act 1936* (SA) s30; *Wills Act 1992* (Tas) s36; *Wills Act 1958* (Vic) s25; *Wills Act 1970* (WA) s26(d).

¹⁰² *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

- (1) Where -
- (b) the deceased person has, by his will, exercised a general or a special power of appointment in respect of property, being a power under which the deceased person was, immediately before his death, entitled to appoint the property to himself; ...

the Court may order that provision be made out of, or charged on, the property in respect of which the deceased person has exercised the general or special power of appointment.

The remainder of the section expands considerably on this provision.

In New South Wales property which is the subject of a power of appointment in the deceased is embraced within the concept of "notional estate".¹⁰³

In Queensland, South Australia, Tasmania, Victoria and Western Australia there is no specific provision enabling property which is the subject of a general power of appointment to be treated as part of the testator's estate for the purpose of the legislation; but the Court may take into account the effect of any exercise of a power of appointment by the deceased in the way in which it orders the distribution of property which does form part of the estate. This is specifically provided for in the Australian Capital Territory and in the Northern Territory.¹⁰⁴

There could be an argument that the subject matter of a general power of appointment does form part of the estate of the deceased to the extent that it is appointed by the will by virtue of the statute.

Issue for Consideration

The New South Wales legislation has addressed the question of property which is the subject of a power of appointment within its sophisticated doctrine of notional estate. The Territories have addressed the question in more traditional language. The other States have not caught up. There is a major issue here, including the issue of whether the States and Territories should take up the New South Wales concept of notional estate.

¹⁰³ *Family Provision Act 1982 (NSW) s22(4)(a).*

¹⁰⁴ *Family Provision Act 1969 (ACT) s8(2); Family Provision Act 1970 (NT) s8(2).*

CHAPTER 6

THE TIME WITHIN WHICH AN APPLICATION MUST BE MADE

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

As to the time within which the application must be made, time limits vary from six months to eighteen months. More significant is that in some States the application must be made within the specified period after the death of the deceased but in other States the application must be made within the specified period after the grant of probate or letters of administration. The difference is significant in that personal representatives often decide to administer without taking out a grant, unless circumstances beyond their control, for example the existence of shares in the deceased estate, make it imperative that they show title to estate assets, by way of a grant. Where the personal representatives do not take out a grant, then, in a jurisdiction where an application must be made within a specified period after the grant of probate, an application for family provision may be made at any time. A testator might make a will appointing an only adult child as executor and leaving the child all the estate. The child might decide not to take out probate. A potential applicant for family provision would then be able to defer making an application virtually indefinitely. It may well be that this anomaly persuaded some legislatures to provide that the application for family provision should be made within a specified period after the death of the deceased.

As has already been suggested in Chapter 5, where an estate or substantial property has been justifiably left upon a life interest, there seems to be no reason for refusing to allow the Court to adjourn or defer a family provision application, with respect to property the subject of the life interest, until after the death of the life tenant.

It may well be that ambiguity in the law about whether an estate is distributed when a personal representative assumes trusteeship of an asset is in part a result of the perception that sometimes it might be best to defer resolution of a family provision matter until after the death of the life tenant.

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

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

6.1 AUSTRALIAN CAPITAL TERRITORY AND NORTHERN TERRITORY

Section 9 of the *Family Provision Act* in each Territory¹⁰⁵ provides:

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

6.2 NEW SOUTH WALES

Subsections 16(1)-(3) of the *Family Provision Act 1982* (NSW) provide:

- (1) In this section, "prescribed period" in respect of an application in relation to a deceased person, means:
 - (a) where the Court has, in an order made under section 17, specified a period in relation to the application - that period; or
 - (b) in any other case - the period of 18 months after the death of the deceased person.

¹⁰⁵ *Family Provision Act 1969* (ACT); *Family Provision Act 1979* (NT).

- (2) An order under section 7 shall not be made unless the application for the order is made within the prescribed period in respect of that application or within such further period as the Court may, having regard to all the circumstances of the case but subject to subsection (3), by order, allow.
- (3) The Court shall not make an order under subsection (2) allowing an application in relation to a deceased person to be made after the expiration of the prescribed period unless sufficient cause is shown for the application not having been made within the period.

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

Comment

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

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

6.3 QUEENSLAND

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

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

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

No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of 6 months from the death of the deceased and without notice of any application or intended application under section 41(1) or 42 in respect of the estate.

Section 42 is concerned with the variation of Court orders.

Comment

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

6.4 SOUTH AUSTRALIA

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

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

6.5 TASMANIA

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

- (1) Except as provided by subsection (2) of this section, the Court or judge shall have no jurisdiction to hear any application, or to make any order under this Act, unless the summons hereinbefore mentioned be taken out before or not later than three months after the date of grant of probate of the will of the deceased person, or letters of administration of the estate of the deceased person, as the case may be.
- (2) Notwithstanding anything in subsection (1) of this section, upon application being made in that behalf by a person claiming the benefit of this Act, the Court or a judge may, after hearing such of the persons affected or likely to be affected by that application as it or he may think fit, extend the time limited by that subsection for the taking out of a summons for such further period as the Court or judge may think necessary.
- (3) The powers conferred on the Court or a judge by subsection (2) of this section may be exercised notwithstanding that the time limited by subsection (1) of this section for the taking out of a summons may have expired (whether that time expired or expires before or after the commencement of this subsection).
- (4) An application under subsection (2) of this section shall be made before the final distribution of the estate of the deceased person, and no distribution of any part of the estate made before the making of an application under that subsection shall be disturbed by reason of that application or of any order made thereon or in consequence thereof.

6.6 VICTORIA

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

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

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

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

6.7 WESTERN AUSTRALIA

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

- (2) No application under subsection (1) of this section shall be heard by the Court unless -
 - (a) the application is made within six months from the date on which the Administrator becomes entitled to administer the estate of the deceased in Western Australia; or
 - (b) the Court is satisfied that the justice of the case requires that the applicant be given leave to file out of time.
- (3) A motion for leave to file out of time may be made at any time notwithstanding that the period specified in paragraph (a) of subsection (2) of this section has expired.

6.8 ISSUES FOR CONSIDERATION

- (1) A major issue for consideration is the fixing of a period for the making of a family provision order by reference either to the date of death or the date of grant.
- (2) A similar period of time needs to be specified, but one governed by reasonable requirements for the efficient administration of the deceased estate.
- (3) Provisions respecting the Court's power to extend the period for the making of an application need to be rendered consistent.
- (4) The question of whether the Court should be empowered to allow an application to be deferred or adjourned until a future specified event, such as the death of a life tenant, is bound up with the question of the Court's power to extend the period and requires analysis.
- (5) The question of whether assumption of trusteeship amounts to a distribution of the estate needs to be addressed.

CHAPTER 7

THE COURT'S DISCRETION

Subject to the constraints placed upon the Court, which have been mentioned, all the States confer on the Court virtually unfettered discretion to order provision to be made for the applicant out of the estate of the deceased person. The wording of the statutes is as follows.

7.1 AUSTRALIAN CAPITAL TERRITORY AND NORTHERN TERRITORY

Section 8 of the *Family Provision Act* in each Territory¹⁰⁶ provides:

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

7.2 NEW SOUTH WALES

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

if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

7.3 QUEENSLAND

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

the Court may, in its discretion, ... order that such provision as the Court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.

¹⁰⁶ *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

7.4 SOUTH AUSTRALIA

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

the Court may in its discretion ... order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled.

7.5 TASMANIA

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

the Court or a judge may, in its or his discretion ... order that such provision as the Court or judge, having regard to all the circumstances of the case, thinks proper shall be made out of the estate of the deceased person for all or any of the persons by whom or on whose behalf such an application may be made...

7.6 VICTORIA

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

the Court may ... order that such provision as the Court thinks fit shall be made out of the estate of the deceased for such widow widower or children.

7.7 WESTERN AUSTRALIA

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

the Court may, at its discretion ... order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose.

7.8 ISSUE FOR CONSIDERATION

It is hard to imagine a more potent conferring of discretion on the Court than in these quoted words which date from the early days of family provision legislation. The decision of the legislatures to confer a broad discretion on the Court, in a context where a very wide variety of possible fact situations will inevitably present over the years, reflects confidence in the judicial process as a means of reconciling competing claims in a context where moral as well as legal issues can be intertwined. It is unlikely that the words "having regard to all the circumstances of the case", not found in all the statutes, significantly restrict the Court's discretion: rather, they underline legislative policy that the Court must take care in exercising so broad a discretion. It will be desirable to render uniform or consistent the wording of these sections, all of which confer a broad discretion on the Court; to analyse the practical effect, if any, of words which may perhaps be seen as attempting to place some sort of indefinable brake upon the discretion; and to consider the desirability of retaining them.

CHAPTER 8

ORDERS AND VARIATION OF ORDERS

Testator's family provision legislation details matters such as the contents of an order which the Court may make (from which beneficiaries' shares in the estate the provision ordered must be made), the effect of an order, the variation of orders, and, occasionally, refers to inter-State matters. The provisions quoted below encapsulate the difficulties attending those seeking uniformity of the law, because they often differ considerably in the expression of the legislative intent without differing greatly in substance. To choose the best provision is likely, therefore, to be a subjective exercise, dictated by preference for one drafting style over another, one's opinion concerning the appropriate amount of detail required, and perhaps merely a conviction that the legislation of one's own State should be adopted for uniformity purposes unless there is a convincing demonstration of its inadequacy.

8.1 CONTENTS OF ORDER

Australian Capital Territory and Northern Territory

Section 11(1) of the *Family Provision Act* in each Territory¹⁰⁷ provides:

- (1) An order under ~~section 8 or 9A~~ [section 8] shall specify the amount and nature of the ~~provision, if any, to be made~~ [provision to be made] and may specify such conditions, restrictions and limitations subject to which the provision is to be made as the Court thinks fit to impose.

New South Wales

Section 11 of the *Family Provision Act 1982* (NSW) provides:

- (1) An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may:
 - (a) require the provision to be made in any 1 or more of the following manners:
 - (i) by way of a lump sum;
 - (ii) by way of a periodic sum;
 - (iii) by way of specified existing or future property;

¹⁰⁷ *Family Provision Act (1969)* (ACT); *Family Provision Act (1970)* (ACT).

- (iv) by way of an absolute interest, or a limited interest only, in property;
 - (v) by way of property set aside as a class fund for the benefit of 2 or more persons;
 - (vi) in any other manner which the Court thinks fit.
- (b) be in respect of property which is situated in or outside New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of his death, domiciled in New South Wales;
 - (c) specify the manner in which a sum of money or other property is to be paid or made available to the person in whose favour the order is made.
 - (d) where provision is required to be made by way of a sum of money, specify that the whole or any part of the sum shall bear interest at such rate as the Court thinks fit for such period as the Court thinks fit; and
 - (e) be made subject to such conditions as the Court thinks fit.

Queensland

Section 41(2) of the *Succession Act 1981* (Qld) provides:

- (2) The Court may-
 - (a) attach such conditions to the order as it thinks fit; or
 - (b) if it thinks fit - by the order direct that the provision shall consist of a lump sum or a periodical or other payment;...

South Australia

Subsections 7(4),(5) and (6) of the *Inheritance (Family Provision) Act 1972* (SA) provide:

- (4) The Court may, in making any order under this Act, impose such conditions, restrictions and limitations as it thinks fit.
- (5) If, in respect of an application under subsection (1) of this section, it appears to the Court that the matter would be more appropriately determined by proceedings outside the State, the Court may (without limiting the powers conferred on it by the preceding provisions of this section) refuse to make an order under this section or adjourn the hearing

of the application for such period as the Court thinks fit.

- (6) In making the order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments or a lump sum and periodic or other payments.

Tasmania

Section 9(1) of the *Testator's Family Maintenance Act 1912* (Tas) provides:

Every order under this Act making provision for any person shall specify, *inter alia*-

- (a) the amount and nature of such provision;
- (b) the manner in which such provision shall be made; or be raised or paid, out of some, and what, part of the estate of the deceased person;
- ... and
- (d) any conditions, restrictions, or limitations imposed by the Court or judge.

Victoria

Section 97(1) of the *Administration and Probate Act 1958* (Vic) provides:

Every order under this Part making provision for any widow widower or child shall specify (*inter alia*)-

- (a) the amount and nature of the provision;
- (b) the manner in which the provision shall be raised or paid out of some and what part or parts of the estate of the deceased; and
- (c) any conditions restrictions or limitations imposed by the Court.

Western Australia

Subsections 6(3) and (4) of the *Inheritance (Family and Dependents Provision) Act 1972* (WA) provide:

- (3) The Court may attach such conditions to the order as it thinks fit...
- (4) In making any such order the Court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

Issue for Consideration

The quoted provisions differ mostly in the fact that some are drafted in greater detail than others. There is also the difference that in some States and Territories the Court is required to include certain matters in its order, whereas in other States the Court may include certain matters.

8.2 CLASS FUNDS

Detailed provisions respecting orders made in favour of a class of beneficiaries are found in States and Territories other than Queensland, South Australia and Victoria. The class funds envisaged appear to have as their factual focus the infant children of the deceased.

Australian Capital Territory and Northern Territory

Section 12 of the *Family Provision Act* in each Territory¹⁰⁸ provides:

- (1) Without limiting the powers of the Court under this Act, the Court may order that an amount specified in the order be set aside out of the estate of the deceased person and held on trust as a class fund for the benefit of two or more persons specified in the order in whose favour orders for provision out of the estate of the deceased person have been made.
- (2) Where an amount is ordered to be held in trust as a class fund, the trustee of the fund shall invest so much of the amount as he does not apply in accordance with this subsection [sub-section] and may, subject to such directions or conditions as the Court gives or imposes, but otherwise as he thinks fit, apply the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life [for the benefit] of the persons for whose benefit the class fund is held, or any one or more of them to the exclusion of the other or others of them in such shares and in such manner as the trustee, from time to time, determines.
- (3) Where one or more of the persons for whose benefit moneys are held in trust as a class fund dies, a reference in subsection [sub-section] (2) to the persons for whose benefit moneys are held in trust as a class fund shall, after the death of that person, be read as a reference to the survivor or survivors of those persons.

¹⁰⁸ *Family Provision Act 1969 (ACT); Family Provision Act 1970 (NT).*

- (4) Where an amount is set aside as a class fund, the administrator of the estate of the deceased person shall, unless the Court otherwise orders, be the trustee of the class fund.

New South Wales

Section 12 of the *Family Provision Act 1982* (NSW) provides:

- (1) Where the Court makes an order for provision requiring the provision to be made by way of property set aside as a class fund, it shall specify a trustee of the property so set aside.
- (2) The trustee of property set aside as a class fund may, subject to such directions and conditions as the Court gives or imposes, but otherwise as he thinks fit, apply from time to time the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life of the persons for whose benefit the fund is held, or any one or more of them to the exclusion of the other or others of them, in such shares and in such manner as the trustee, from time to time, determines.

Tasmania

Section 10 of the *Testator's Family Maintenance Act 1912* (Tas) provides:

- (1) Without prejudice to the powers conferred on the Court or a judge under any other provision of this Act, the Court or a judge may order that any amount specified in an order made on an application under subsection (1) of section three shall be set aside out of the estate to which the order relates and held on trust as a class fund for the benefit of two or more persons specified in the order (being persons who are entitled under section three A to make an application under that subsection).
- (2) Where an amount is ordered to be held on trust as a class fund for any persons, pursuant to this section, that amount shall be invested, and the trustee may-
 - (a) in his discretion but subject to such directions and conditions as the Court or judge may give or impose, apply the income and capital of that amount, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance or education (including past maintenance or education provided after the death of the deceased person), or the advancement or benefit, of those persons or of any one or more of them to the exclusion of the other or others of them, in such shares and proportions, and generally in such manner, as the trustee thinks fit; and

- (b) so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.
- (3) For the purposes of this section, the expression "trustee" means the executor or administrator of the estate of the deceased person unless the Court or judge appoints any other trustee (whether by the order creating the class fund or subsequently), in which case it means the trustee so appointed.
- (4) If the trustee is not the executor or administrator of the estate of the deceased person, the Court or judge may give such directions as it or he thinks fit relating to the payment to the trustee of the amount that is to be held on trust as a class fund, and may exercise any power conferred on the Court by section forty-seven of the *Trustee Act 1898*, either on the creation of the class fund or at any time during the continuance of the trusts thereof.

Western Australia

Section 13 of the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* provides:

- (1) The Court may, if it thinks fit, order that an amount specified in the order shall be set aside out of the estate and held on trust as a class fund for the benefit of two or more persons specified in the order, being persons for whom provision may be made under this Act.
- (2) Where an amount is ordered to be held on trust as a class fund for any persons under subsection (1) of this section, that amount shall be invested and the trustee may at his discretion, but subject to such directions and conditions as the Court may give or impose, apply the income and capital of that amount, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance, support or education (including past maintenance, support or education provided after the death of the deceased) or the advancement or benefit of those persons, or any one or more of them to the exclusion of the other or others of them in such shares and proportions and generally in such manner as the trustee from time to time thinks fit; and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.
- (3) For the purposes of this section the term "trustee" means the Administrator, unless the Court appoints any other trustee, whether by the order creating the class fund or subsequently, in which case it means the trustee so appointed.
- (4) If the trustee is not the Administrator, then the Court may give such directions as it thinks fit relating to the payment to the trustee of the amount which is to be held on trust as a class fund and may exercise any power under section 89 of the *Trustees Act, 1962*, either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

Issues for Consideration

These provisions are all of a very similar import but the wording varies between them. It may be possible to abridge the provision substantially. It is unlikely that the Courts in jurisdictions where there is no similar provision cannot create by order appropriate trusts for classes of beneficiaries. The language of the provisions derives from traditional trust precedents and is perhaps not as broad as it might be. For example, the insistence of the legislation that the person or persons the beneficiaries of the class fund must be specified, rather than described as a class, could place an unnecessary limitation on the order, for instance if there were a member of the class not known about at the time of the making of the order, for instance a child believed to be dead, or an illegitimate child of whose existence the legitimate children of the deceased were unaware. A larger issue is whether such detailed provisions are needed. It might be that the legislation should be expressed in detailed terms, or that it might be expressed in much shorter, more abstract, terms.

8.3 WHICH BENEFICIARIES' SHARES MUST BEAR THE BURDEN OF THE ORDER?

The legislation refers to which beneficiaries' shares must bear the burden of any order made.

Australian Capital Territory and Northern Territory

Subsections 11(2) and (3) of the *Family Provision Act* in each Territory¹⁰⁹ provide:

- (2) Unless the Court otherwise orders, the burden of the provision ordered by the Court to be made for the benefit of a person shall, subject to ~~subsection (3)~~ [sub-section (1)] be borne between the persons beneficially entitled to the estate of the deceased person (other than the person or persons in whose favour an order or orders under this Act is or are made), in proportion to the values of their respective interests in the estate.
- (3) Where persons are successively entitled to estates or interests in any property that is settled by the will of the deceased person, those estates

¹⁰⁹ *Family Provision Act 1969 (ACT); Family Provision Act 1970 (NT)*.

and interests shall not, unless the Court otherwise orders, be valued separately but the proportion of the provision required by subsection [sub-section] (2) to be borne by those persons out of those estates and interests shall be raised or charged against the corpus of that property.

Section 15 goes on to provide:

- (1) The Court may, when making, or at any time after having made, an order under section 8 or 9A [section 8 or at any time after having made an order under that section,] order a person who is entitled to a share in the estate of the deceased person as a legatee, devisee or beneficiary to pay a lump sum or periodical payments, or a lump sum and periodical payments, to represent, or in commutation of, such proportion of the provision ordered to be made for the person in whose favour the order is made as falls upon the legatee, devisee or beneficiary, and may exonerate the property or a specified part of the property to which the legatee, devisee or beneficiary is entitled from further liability in respect of that provision.
- (2) Where the Court makes an order under subsection [sub-section] (1), the Court may direct -
 - (a) the manner in which a lump sum or periodical payment is to be secured;
 - (b) the person to whom such a lump sum or periodical payment is to be made; and
 - (c) in what manner, if any, the lump sum or periodical payment is to be invested for the benefit of the person in whose favour the order under section 8 or 9A [section 8] has been made.

New South Wales

Section 13 of the *Family Provision Act 1982* (NSW) provides:

13. Where the Court makes an order for provision out of the estate of a deceased person it may specify the beneficial entitlements in that estate which shall bear the burden of that provision and, in relation to each of those entitlements, the part of the burden which it shall bear.

Queensland

Subsections 41(3),(4) and (5) of the *Succession Act 1981* (Qld) provide:

- (3) The incidence of the payment or payments ordered shall, unless the Court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the Court.

- (4) The Court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.
- (5) The Court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which the beneficiary is interested...

South Australia

Subsections 9(2) and (3) of the *Inheritance (Family Provision) Act 1972 (SA)* provide:

- (2) Subject to subsection (3) of this section and unless the Court otherwise orders, the burden of any such provision shall, as between the persons beneficially entitled to the estate of the deceased person, be borne by those persons in proportion to the values of their respective interests in the estate.
- (3) Where the deceased person died leaving a will under which two or more persons are successively entitled to any property, the successive interests shall not, unless the Court otherwise orders, be separately valued for the purposes of subsection (2) of this section, but the proportion of the provision to be borne by that property shall be raised or charged against the *corpus* thereof.

Tasmania

Section 10A of the *Testator's Family Maintenance Act 1912 (Tas)* provides:

- (1) The incidence of any payment directed to be made by an order under this Act shall, unless the Court or a judge otherwise orders, fall ratably upon the whole estate of the deceased person, or, where the authority of the Court does not extend or cannot be made to extend to the whole estate, ratably upon such part of the estate as is subject to the authority of the Court.
- (2) The Court or a judge may exonerate any part of the estate of a deceased person from the incidence of an order under this Act, after hearing such of the parties who may be affected by the exoneration as the Court or judge thinks necessary, and may, for that purpose, direct any executor or administrator to represent, or appoint any person to represent, any of those parties.

- (3) The Court or a judge may, at any time, fix a periodical payment or lump sum to be paid by any beneficiary in the estate of the deceased person to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which that beneficiary is interested, and may exonerate that portion from further liability, and may direct in what manner the periodical payment shall be secured, and to whom the lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment is payable.

Victoria

Section 97(2) of the *Administration and Probate Act 1958* (Vic) provides:

- (2) Unless the Court otherwise orders the burden of any such provision shall as between the persons beneficially entitled to the estate of the deceased be borne by those persons in proportion to the values of their respective estates and interests in such estate:

Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this sub-section be separately valued but the proportion of the provision made under this Part to be borne by such property shall be raised out of or charged against the corpus of such property.

Western Australia

Subsections 14(2) and (3) and section 17 of the *Inheritance (Family and Dependents Provision) Act 1972* (WA) provide:

- 14.(2) Subject to subsection (3) of this section, and unless the Court otherwise orders, the burden of any provision shall, as between the persons beneficially entitled to the estate of the deceased, be borne by those persons in proportion to the value of their respective interests in such estate.
- (3) The estates and interests of persons successively entitled to any property which is settled by the will of a testator shall not, for the purposes of this section, be separately valued, but the proportion of the provision to be borne by such property shall be raised or charged against the corpus of such property.
17. Where the burden of any provision ordered to be made falls upon the portion of the estate to which any person would, apart from that order, be entitled under the will or on intestacy, the Court may determine that a periodic payment or a lump sum shall be set aside or appropriated to represent or in commutation of such proportion of the provision ordered to be made as falls upon that portion of the estate, and thereupon -

- (a) the Court may exonerate such portion from all or any further liability;
- (b) the Court may direct in what manner the periodic payment shall be secured and to whom any lump sum shall be paid;
- (c) the Court may give directions as to the manner in which any moneys accruing shall be invested for the benefit of the person in whose favour the provision is made.

Issues for Consideration

It is arguable that some of the provisions quoted above are over lengthy and perhaps reflect very particular issues which preoccupied the minds of the legislators concerned with the legislation in its early days. For instance, life interests are probably not found as often these days as they used to be, and it may be the case that orders against life tenants and remaindermen are so infrequent that it is hardly worth making a specific provision for the apportionment between them of the burden of the order; the Court could be given power expressed in sufficiently general language to cover that and other cases.

It could also be argued that there is no real need any longer to include a provision that the burden, unless the Court otherwise orders, be borne proportionately by beneficiaries. These provisions were inserted into the legislation in early years in order to counter Court decisions in New Zealand,¹¹⁰ that the burden of the order should fall on the residue of the estate. The statutory rule involves valuing the share of every beneficiary; and so it is unlikely to be a rule which is applied often. Perhaps a better way of approaching the matter would be to require the Court to attend to all such matters in its order. Existing provisions about the effect of a Court order seem to imply that the order must attend to the entire scheme of benefits created by any will, intestacy and order.

¹¹⁰ Viz *Parker v Carr* (1905) 24 NZLR 895 and *Plimmer v Plimmer* (1906) 9 Gaz LR 10.

8.4 EFFECT OF ORDER

All jurisdictions except Queensland now contain provisions as to the effect of the order.

Australian Capital Territory and Northern Territory

Section 16 of the *Family Provision Act* in each Territory¹¹¹ provides:

- (1) Subject to subsection [sub-section] (2), an order under section 8 operates as if it were a codicil to the will of the deceased person executed by the deceased person immediately before his death.
- (2) An order under section 8 in relation to property of a deceased person who dies intestate operates as a modification of the provisions of Division 3A of Part III of the *Administration and Probate Act 1929* [Division 4 of Part III of the *Administration and Probate Act*] in their application to that property.

New South Wales

Section 14 of the *Family Provision Act 1982* (NSW) provides:

- (1) An order made by the Court for provision out of the estate of a deceased person (whether or not an order made in favour of an eligible person) shall, except in so far as the Court otherwise directs, take effect as if the provision had been made-
 - (a) where the deceased person died leaving a will - in a codicil to the will; or
 - (b) where the person died intestate - in a will of the deceased person.
- (2) The Court shall not direct that an order for provision out of the estate of a deceased person shall take effect otherwise than in the manner referred to in subsection (1) unless it is satisfied that compliance with the order will not adversely affect any creditor of the deceased person.

Comment

Subsection (2) draws attention to the rules which govern out of whose testamentary benefits creditors of a testator are to be paid. For instance, if a testator devises mortgaged property, the making of a family provision order with

¹¹¹ *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

respect to that property could not adversely affect the lender's security interest in that property. It is hard to see how a family provision order could affect a secured or an unsecured creditor's rights.

South Australia

Section 10 of the *Inheritance (Family Provision) Act 1972 (SA)* provides:

Every provision made by an order shall, subject to this Act, operate and take effect as if it had been made -

- (a) if the deceased person died leaving a will, by a codicil to that will executed immediately before his death; or
- (b) if the deceased person died intestate, by a will executed immediately before his death.

Victoria

Section 97(4) of the *Administration and Probate Act 1958 (Vic)* provides:

Every order made by the Court under this Part shall subject to the provisions of this Part operate and take effect -

- (a) where the deceased dies leaving a will disposing of the whole or any part of his estate - as if the provision made by the order had been made by the deceased by executing a codicil to his will immediately before his death; or
- (b) where the deceased dies without leaving a will - as a modification of the provisions of Division 6 of Part I of this Act in respect of so much of the estate of the deceased as is affected by the order.

Western Australia

Section 10 of the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* provides:

Every provision made by an order shall, subject to this Act, operate and take effect either as if the same had been made by a codicil to the will of the deceased executed immediately before his death or, in the case of intestacy, as a modification of the applicable rules of distribution.

8.5 PROBATE AND LETTERS OF ADMINISTRATION

In some jurisdictions it is provided that a certified copy of the order is endorsed on or annexed to the probate of the will or letters of administration.¹¹²

8.6 ISSUES FOR CONSIDERATION

It is interesting that Queensland does not have this provision. It is sometimes said that the jurisdiction does not enable the Court to make a new will for a person. The provisions quoted may give the superficial appearance that the Court can make a new will; but it is clear that the order which the Court may make is constrained by many factors. However the provision represents a convenient way of encapsulating the Court's order in the context of any will or intestacy. The jurisdictions differ in the context of intestacy in that the effect of the order in some of them is that a will is created, but in others that the intestacy rules are varied. It is doubtful whether this difference in wording is of practical significance, although some may perceive one as jurisprudentially more justifiable than the other. The will approach arguably imposes a fiction.

8.7 VARIATIONS OF ORDER

All the enactments include provisions about varying orders. The inherent difficulty is that a power to vary can be seen as trenching against the desirability of settling the distribution of the estate once and for all in the one process. On the other hand, a person entitled to an ongoing benefit, such as a periodical payment, may, after a time, become possessed of other means so that the order for periodic payment might justifiably be varied, suspended or discharged; or, if the person's circumstances have changed for the worse, the person may need to seek additional provision.

¹¹² See *Family Provision Act 1969* (ACT) s18; *Family Provision Act 1970* (NT) s18; *Administration and Probate Act 1958* (Vic) s97(3); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s14(4).

Australian Capital Territory

Section 9A of the *Family Provision Act 1969* (ACT) provides in part:

- (2) ...the Court may, in its discretion and having regard to all the circumstances of the case, by order -
 - (a) vary a previous order relating to that estate by reducing the amount of the provision made by that previous order;
 - (b) suspend a previous order relating to that estate for a specified period; or
 - (c) discharge a previous order relating to that estate.

Subsection (3) enables the Court to increase a benefit where the previous provision was by way of periodical payments or the benefit of the investment of a lump sum.

A provision dealing specifically with the variation of orders has been repealed, although it is retained in the almost identical Northern Territory legislation.¹¹³

New South Wales

Section 19 of the *Family Provision Act 1982* (NSW) provides in part:

- (2) ...the Court may, by order, revoke or alter an order for provision in favour of a person made in respect of property in the estate or notional estate of a deceased person so as to allow an order for provision to be made under this Act in favour of another person wholly or partly in respect of all or any of that property.
- (4) Where an order for provision is revoked or altered pursuant to section 9(6) [which enables the Court to make interim orders] or subsection (2) or (3) or is altered pursuant to section 30 [which provides for an alteration where property is offered in substitution for property or notional property of the estate], the Court may:
 - (a) revoke or alter any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the revocation or alteration; and
 - (b) make such additional orders (other than an order for provision) as may be so necessary.

¹¹³ Section 17 of the *Family Provision Act 1969* (ACT) was repealed by s15 of the *Family Provision (Amendment) Act 1981* (ACT) (No 38 of 1981). The Northern Territory legislation is set out below at 71.

Additional provision

In New South Wales section 8 of the legislation makes specific provision enabling an eligible person for whom provision has been made, to seek additional provision if there has been a "substantial detrimental change" in that person's circumstances.

Northern Territory

Section 17 of the *Family Provision Act 1970* (NT) provides in part:

- (1) ...the Court may, at any time and from time to time ... discharge, vary or suspend an order made by it under section 8 or any other order made by it under this Act.
- (2) Where the Court has ordered periodical payments, or has ordered that a lump sum be invested for the benefit of a person, the Court may, if it is satisfied ... that the person for whose benefit the order was made has otherwise become possessed of or entitled to means for his proper maintenance, education or advancement in life, discharge, vary or suspend its order or make such other order as is just in the circumstances.
- (3) An order shall not be made under sub-section (1) increasing a provision made by an order under this Act.

Queensland

Section 42 of the *Succession Act 1981* (Qld) is even more comprehensive:

- (1) Where ... the Court has ordered a periodical payment or has ordered any part of an estate or a lump sum to be invested for the benefit of any person, it may from time to time ... inquire whether any party deriving benefit under the order is still living or has become possessed of or entitled to provision for the party's proper maintenance or support and into the adequacy of the provision, or whether the provision made by the order for any such party remains adequate, and may increase or reduce the provision so made or discharge, vary or suspend the order, or make such other order as is just in the circumstances:
 - (1A) However, the Court shall not increase the provision so made unless the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned in pursuance of the original order is considered by the Court to be sufficient for the purposes of such increase and all other lawful payments (if any) therefrom.
- (2) Without derogating from the provisions of subsections (1) and (1A), where the Court has increased the provision so made for the benefit of any

person and at any subsequent date the income of the estate, or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned is considered by the Court to be insufficient for the purposes of such provision and all other lawful payments (if any) therefrom, the Court may reduce or suspend any increase or discharge, vary or suspend the original order, or make such other order as is just in the circumstances.

Comment

This provision gives an idea of the sorts of factual situations which may require a Court to vary an order. The setting appears to be that of a fund set aside in a previous order to meet the needs of one or more persons, probably the widow or infant children of the deceased. Nevertheless, it is very lengthy in comparison with the South Australian provision.

South Australia

Section 9(5) of the *Inheritance Family Provision Act 1972 (SA)* provides:

The Court may at any time, and from time to time, on the application of the administrator or of any person beneficially entitled to or interested in any part of the estate of the deceased person, rescind or alter any order.

Section 12 provides:

Where the Court has ordered periodic payments, or has ordered a lump sum to be invested for the benefit of any person, it shall have power to inquire whether at any subsequent date the party benefited by the order has otherwise become possessed of, or entitled to, provision for his proper maintenance, education and advancement, and into the adequacy of that provision, and may discharge, vary or suspend the order, or make such other order as is just in the circumstances.

Tasmania

Subsections 9(5) and (5A) of the *Testator's Family Maintenance Act 1912 (Tas)* provide:

- (5) The Court or a judge may, at any time, on the application of the executor or administrator of the estate of a deceased person or of any person who is beneficially entitled to, or interested in, any part of that estate -
 - (a) rescind any order making any provision under this Act out of that estate or any part thereof; or

- (b) alter any such order by increasing or reducing the amount of any provision made thereby or by varying such order in such manner as the Court or judge thinks proper.
- (5A) The Court or a judge shall not, in the exercise of the power conferred on it or him by paragraph (b) of subsection (5) of this section, alter an order under this Act so as to disturb a distribution of any part of the estate that was lawfully made before the making of the application for the alteration.

Victoria

Section 97(5) of the *Administration and Probate Act 1958* (Vic) provides differently:

- (5) The Court may at any time and from time to time on the application by motion of the executor or administrator of the testator's estate or of any person beneficially entitled to or interested in any part of the estate of the testator rescind or alter any order making provision for any widow widower or child....

Western Australia

Sections 15 and 16 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) make separate provision for the rescission or suspension or reduction of an order (section 15) and the increase of an order (section 16). They provide:

- 15.(1) On the application by or on behalf of
 - (a) the Administrator;
 - (b) any person beneficially entitled to or interested in the estate of the deceased; or
 - (c) a person for whom provision may be made under this Act,and having regard to the hardship that would be caused to any person taking benefit under the order and to all the circumstances of the case, the Court may rescind or suspend any order, or reduce the provision made under it...
- 16.(1) Where it would not be inequitable to grant relief having regard to all possible implications in respect to other persons, and an application for increased provision is made by or on behalf of a person in respect of whom an order has been made under this Act on the ground that since the date of that order circumstances have so changed that undue hardship will be caused if increased provision is not made, the Court may make an order for increased provision.

Issues for Consideration

With respect to the discharge, variation and suspension of orders the above quoted provisions differ in drafting and detail and are preoccupied sometimes by different considerations. It is difficult to resist the temptation to suggest that to a certain extent some of these provisions are over stated and that a more general power to vary, discharge, suspend, increase and decrease provision already made could be conferred on the Court, as in South Australia, without detailed constraints. It is significant that in the Australian Capital Territory the detailed variation power has been repealed. The Court, if given a general power, would be unlikely to exercise it except within the general purpose of the Act, and would have greater freedom to move with the times and to try different formulae of provision.

CHAPTER 9

PROTECTION OF DISTRIBUTIONS

Where a personal representative distributes a part or the whole of the deceased's estate before a family provision application is made, it is necessary to provide for the protection of the personal representative and of the beneficiary to whom the distribution has been made. The States and Territories all address one or both of these matters, but in different ways.

9.1 AUSTRALIAN CAPITAL TERRITORY

Protection of distributions

Section 20 of the *Family Provision Act 1969* (ACT) provides:

- (1) Subject to subsection (2), notwithstanding any distribution of property forming part of the estate of a deceased person made by the administrator of the estate, the Court may, in an order under section 8 or 9A in relation to that estate, direct that provision be made for a person out of that property.
- (2) In an order under section 8 or 9A, the Court shall not direct that provision be made for a person out of any property that has been the subject of a distribution referred to in subsection (1) if -
 - (a) the distribution was properly made for the purpose of providing for the proper maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before the death of the deceased person; or
 - (b) the distribution was made -
 - (i) more than 12 months after the date on which administration of the estate was granted; and
 - (ii) before the administrator had notice of the application for the order or, where an application was made under section 9 for an extension of time within which an application for an order under section 8 may be made, the application under section 9,

and the property that was so distributed has vested in possession of any person.

Protection of Administrator

Section 21 provides:

An action does not lie against the administrator of the estate of a deceased person by reason of his having distributed the whole or any part of the estate of the deceased person if the distribution was a distribution referred to in subsection 20(2) or if -

- (a) the distribution was made before the administrator had notice of an application for an order under this Act or notice of an application to extend the time within which such an application may be made under this Act; and
- (b) before making the distribution, the administrator had given notices in accordance with section 64 of the *Administration and Probate Act 1929* and the time specified in the notice or in the last of the notices for sending in claims has expired.

Section 64 of the *Administration and Probate Act 1929* (ACT) provides that an administrator may distribute the assets of an estate after the expiration of a time given by published notices inviting persons having claims against the estate to notify the administrator of them.

9.2 NEW SOUTH WALES

Protection of Administrator

In New South Wales administrators are protected by notices of distributions. Section 35 of the *Family Provision Act 1982* (NSW) provides:

- (1) Where the administrator of the estate of a deceased person has given notices in the manner and form prescribed by rules of court of his intention to distribute the property in the estate after the expiration of a specified time, he may, at the expiration of the time specified in the notices or, as the case may require, in the last of the notices, distribute that property having regard only to the applications in relation to the deceased person of which he has notice at the time of the distribution.
- (2) An administrator who distributes property in the estate of a deceased person in accordance with subsection (1) is not liable in respect of that property to any person of whose application in relation to the deceased person he did not have notice at the time of the distribution.

9.3 NORTHERN TERRITORY

Protection of distributions

Section 20 of the *Family Provision Act 1970* (NT) provides:

- (1) Notwithstanding any distribution of the property of the deceased person made by the administrator of the estate of the deceased person before the administrator had notice of an application for an order under section 8 made within 12 months after the date on which administration was granted, the Court may, subject to sub-section (2), order that provision be made under this Act out of any property of the deceased person that has been so distributed.
- (2) The Court shall not make an order under sub-section (1) if the making of that order would affect or disturb a distribution that was a proper distribution made for the purpose of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before his death.

Protection of administrator

Section 21 provides:

An action does not lie against the administrator of the estate of a deceased person by reason of his having distributed the whole or any part of the estate of the deceased person if the distribution was a distribution referred to in sub-section (2) of section 20 or if -

- (a) the distribution was made before the administrator had notice of an application for an order under this Act or notice of an application to extend the time within which such an application may be made under this Act; and
- (b) before making the distribution, the administrator had given notices in accordance with section 96 of the *Administration and Probate Act* and the time specified in the notices or the last of the notices for sending in claims had expired.

9.4 QUEENSLAND AND VICTORIA

The Queensland and Victoria family provision legislation conflates in one section protection to personal representatives who distribute, and to distributions to beneficiaries. The Queensland provision differs from the Victorian provision only in that in Queensland a limitation period is expressed to be by reference to the death of the deceased, whereas in Victoria it is expressed to be by reference to the date

of a grant.

Protection of personal representative and distributions

Section 44 of the *Succession Act 1981* (Qld) is virtually identical to section 99A of the *Administration and Probate Act 1958* (Vic) and both are lengthy. Section 44 provides:

- (1) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate and no application or order under this Part shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance or support of the wife, husband or any child of the deceased person totally or partially dependent on the deceased person immediately before the death of the deceased person whether or not the personal representative had notice at the time of the distribution of any application or intended application under this Part in respect of the estate.
- (2) No person who may have made or may be entitled to make an application under this Part shall be entitled to bring an action against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative after the person (being of full legal capacity) has notified the personal representative in writing that the person either -
 - (a) consents to the distribution; or
 - (b) does not intend to make any application that would affect the proposed distribution.
- (3) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of 6 months from the death of the deceased [in Victoria six months after the date of the grant of probate of the will or letters of administration (as the case may be)] and without notice of any application or intended application under section 41(1) or 42 in respect of the estate.
- (4) For the purposes of this section notice to a personal representative of intention to make any application under this Part shall be in writing signed by the applicant or the applicant's solicitor and shall lapse and be incapable of being renewed, and the personal representative may act as if the personal representative had not received the notice, unless, before the expiration of 3 months after the day on which the personal representative first receives notice of intention to make the application, the personal representative receives notice in writing that the application has been made to the Court or is served with a copy of the application.
- (5) However, nothing in subsection (4) shall prevent the subsequent making of an application within any other period allowed by or pursuant to this Part.

9.5 SOUTH AUSTRALIA

Protection of administrator

Section 14 of the *Inheritance (Family Provision) Act 1972* (SA) provides:

- (1) An administrator of the estate of a deceased person who has lawfully distributed the estate or any part thereof shall not be liable to account for that estate or that part thereof, as the case may be, to any person claiming the benefit of this Act, unless the administrator had notice of the claim at the time of the distribution.
- (2) For the purposes of this section, notice of the claim -
 - (a) shall be in writing signed by the claimant or his solicitor; and
 - (b) shall lapse and be incapable of being renewed unless, before the expiration of three months after the administrator receives notice of the claim a copy of an application by the claimant for the benefit of this Act has been served on him.
- (3) Subsection (1) of this section shall not prevent the Court from ordering that any provision under this Act be made out of the estate, or any part thereof, after it has been distributed.

There is no separate provision protecting distributions.

9.6 TASMANIA

Protection of distributions

Tasmania does not provide specifically for the protection of administrators; and it has only a brief reference to the protection of distributions. Section 11(4) of the *Testator's Family Maintenance Act 1912* (Tas) provides:

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

9.7 WESTERN AUSTRALIA

Protection of administrator

Western Australia has a different, but lengthy provision. Section 20 of the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* which is entitled Power of administrator to distribute provides:

- (1) No action shall lie against the Administrator by reason of his having distributed any part of the estate, if the distribution was properly made without notice of any application or intended application under this Act in respect of the estate.
- (2) For the purposes of the administration or distribution of any estate or any property no executor or administrator or trustee shall be under any obligation to inquire as to the existence of any person who could claim an interest in the estate or the property by virtue only of the provisions of this Act.
- (3) No action by any person whose relationship to the deceased is not determined through lawful wedlock or adoption shall lie against the Administrator, or any trustee appointed pursuant to this Act, by reason of his having prejudiced any claim of that person under this Act by distributing any part of any estate, or any property, if the distribution was made without notice of any application or intended application by that person under this Act in respect of that estate or property.
- (4) A person who makes or is entitled to make an application under this Act and who, being of full legal capacity, advises the Administrator in writing that he -
 - (a) consents to a proposed distribution; or
 - (b) does not intend to make any application under this Act that would affect a proposed distribution,

shall not bring an action against the Administrator by reason of his having thereafter distributed any part of the estate.

- (5) Notice to an Administrator of an intended application shall lapse and shall be incapable of being renewed, and the Administrator may act as if he had not received the notice, if, before the expiration of three months after the date on which he first receives notice of the intention to make the application or before the sooner expiration of twelve months from the date on which the Administrator became entitled to administer the estate of the deceased in Western Australia, the Administrator does not receive notice that the application has been made to the Court; but nothing in this subsection shall prevent the subsequent making of the application.

9.8 ISSUES FOR CONSIDERATION

There are some differences of substance between the quoted provisions; but the main differences between them are of drafting. The differences of substance include the following.

- (1) In all States and Territories except Queensland the protection given is dependent upon the expiration of a limitation period which is expressed to be by reference to the grant of probate or letters of administration. In Queensland the period is expressed by reference to the date of death.¹¹⁴
- (2) Protection is given to distributions made to dependants of the deceased in some States and Territories but not all.
- (3) Queensland has not provided, as other States and Territories do, that the Court may make an order against a distributed estate or property. That seems to be left to implication.
- (4) Only in Western Australia is it provided, by section 20(2), that an executor or administrator is not under an obligation to inquire as to the existence of possible applicants.
- (5) In Western Australia there is a limitation in section 20(3) which may adversely affect persons whose relationship with the deceased is not determined by lawful wedlock or adoption.
- (6) There is the general question of whether these provisions could not be greatly simplified by a general limitation period with which applicants must comply. There is potential inconsistency between the desire to ensure that the estate, and all applications made in respect of it under this legislation, should be distributed, and all issues settled, within a convenient period of time; and the desire to enable applicants who may not be aware of their entitlement, to make a late application. Although the legislation attempts to bridge this gap, it may well be that very careful consideration of its implications could result in much simpler legislation.

¹¹⁴ This difference of approach has already been referred to in section 9.4 above.

CHAPTER 10

MISCELLANEOUS

This chapter is concerned with minor topics, none of which appear in all the legislation.

10.1 CONTRACTING OUT

It was held early on that the rights given by family provision legislation were inalienable and that it was contrary to public policy to hold a person disentitled to relief merely because that person had entered into some agreement with the deceased.¹¹⁵ Similarly it is regarded as contrary to public policy to give effect to a provision in a will that a benefit will be forfeited if the beneficiary contests the will.¹¹⁶ In New South Wales there is a specific provision enabling a person to contract out of the jurisdiction.¹¹⁷ The gist of the provision is that a person may release rights to make an application by instrument or agreement to execute an instrument.¹¹⁸ The release must be approved by the Court and only has effect to the extent of the Court's approval.¹¹⁹ Proceedings seeking the Court's approval for a release of rights to make an application may be commenced before or after the death of the person - that is, the instrument or agreement may be made before death but approval of the Court left to be sought after death.¹²⁰

Section 31(5) of the *Family Provision Act 1982* (NSW) provides:

In proceedings for the approval of a release, the Court shall have regard to all the circumstances of the case, including whether:

- (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release;
- (b) it is or was, at that time, prudent for the releasing party to make the release;

¹¹⁵ *Lieberman v Morris* (1944) 69 CLR 69.

¹¹⁶ *In Re Chester, Deceased* (1978) 19 SASR 247; *Shah v Perpetual Trustee Co* (1981) 7 Fam LR 97.

¹¹⁷ *Family Provision Act 1982* (NSW) s31.

¹¹⁸ *Id* s31(1).

¹¹⁹ *Id* s31(2),(3).

¹²⁰ *Id* s31(4).

- (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.

The Court may approve of a release both in respect of the estate and the notional estate of the deceased.¹²¹

The remainder of the section enables the Court to revoke its approval in given circumstances.

Issue for Consideration

Whether a provision to this end should be incorporated in all family provision legislation should depend on how successful it has been. That could be gauged by the success rate of applications.

10.2 MORTGAGING, CHARGING AND ASSIGNING AN INTEREST ARISING FROM AN ORDER OF THE COURT

In some jurisdictions there is specific provision preventing a person in whose favour an order has been made from mortgaging, charging or assigning the right given by the order.

Australian Capital Territory and Northern Territory

Section 19 of the *Family Provision Act* in each Territory¹²² provides:

A mortgage, charge or assignment of any kind whatsoever, of or over the provision made, or to be made, by an order under this Act, is of no force or effect unless that mortgage, charge or assignment is made with the permission of the Court.

¹²¹ *Id* s31(6).

¹²² *Family Provision Act 1969* (ACT); *Family Provision Act 1970* (NT).

Queensland

Subsection 41(11) of the *Succession Act 1981* (Qld) provides:

No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the Court.

South Australia

Section 13 of the South Australian *Inheritance (Family Provision) Act 1972* (SA) provides:

No mortgage, charge, or assignment of any kind whatsoever of or over the provision made by an order under this Act shall, unless made with the prior permission of the Court, be of any force, validity or effect.

Western Australia

Section 19 of the *Inheritance (Family and Dependents Provision) Act 1972* (WA) is in slightly different terms.

No mortgage, charge, or assignment of any kind whatsoever which is given of or over any provision out of the estate of any deceased person granted by any order of the Court under this Act and which is given before the order of the Court is made shall be of any force, validity or effect; and no such mortgage, charge or assignment given after the order of the Court is made shall be of any force, validity, or effect unless it is given with the permission of the Court or the Court at the time of making the order otherwise directs.

There is no provision in Tasmania. It is significant that there is no similar provision in New South Wales, the State which has the most comprehensively revised family provision legislation.

It is clear that an applicant cannot charge or assign rights to make an application, or indeed prospective rights to a Court order. If a Court creates a trust of which an applicant is a life tenant, it appears that the applicant cannot assign or charge the life interest without the consent of the Court. On the other hand, it is equally clear that if the Court makes a final order and beneficial title to property is vested in the applicant following the order, the applicant has the same rights as any beneficial title owner and can do as he or she pleases with the property. Thus, if

the matrimonial home is ordered by the Court to be transferred to the surviving spouse without limitation, the surviving spouse is not prevented from selling or mortgaging the home.

Issue for Consideration

An issue for consideration is whether the provision should be retained or dropped. This depends on whether it is seen as useful. Is there any record of Court's being asked to approve a charge or assignment in this context?

10.3 "PRESUMPTION OF DEATH"

In the Australian Capital Territory,¹²³ the Northern Territory¹²⁴ there is a provision entitled "Presumption of death". There is a similar provision in New South Wales.¹²⁵ The gist of the provision is that where an order of the Court has been made although evidence of the death of the deceased is presumptive only, and in fact the deceased turns out to be alive, the Court may order a person in whose favour an order is made to undertake to restore property received in pursuance of the order, or to repay any amount of money received.

Issue for Consideration

The issue for consideration is whether a similar provision should be inserted in all States' legislation.

¹²³ *Family Provision Act 1969 (ACT)* s14.

¹²⁴ *Family Provision Act 1970 (NT)* s14.

¹²⁵ *Family Provision Act 1982 (NSW)* s18. This section is entitled "Court may require undertakings to restore property if deceased found to have been alive".

10.4 COSTS

A major problem of family provision law is the question of costs. In the case of smaller estates the cost of making an application for family provision is prohibitive. Perhaps a study should be undertaken to reveal what the average costs are of uncontested and contested family provision applications. The legislation is probably not really accessible in the case of an estate of less than \$50,000. Worse than that, persons who may be formally eligible to apply for provision, but who may have no justifiable claim, can use their eligibility to apply to threaten action as a means of forcing a beneficiary to settle out of Court, for fear of the costs of resisting the application despoiling the estate and perhaps of the odium of mud slinging which can occur in some contexts.

Only in New South Wales is there some sentiment expressed by statute which might be said to have reference to an unworthy application.

Section 33(1) of the *Family Provision Act 1982* (NSW) gives the Court a general power to order that costs may be ordered out of the estate or notional estate of the deceased. However, section 33(2) provides:

- (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.

The eligible persons referred to in section 6(1) are:

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

In other words, these persons may not be awarded costs out of the estate or notional estate of the deceased unless they are successful in their application for provision or there are special circumstances.

Issue for Consideration

The issue of costs is extremely sensitive. New South Wales has made a start in identifying possible cases where the making of an application could constitute an abuse. Nevertheless it is confined to certain classes of applicants, who in some States and Territories have no right to make application at all. Whether the legislation should be realistic and give the Court jurisdiction to deny access if, having regard to the possible costs involved, the litigation cannot be economically justified, is another matter, perhaps not appropriate for consideration in the context of merely rendering uniform or consistent what already exists.

10.5 STAMP AND ESTATE DUTY

In some jurisdictions there are specific provisions about stamp and estate duty. The provisions are as follows.

New South Wales	section 34	Certain documents exempt from stamp duty
Queensland	section 43	Manner of computing duty on estate
South Australia	section 15	Method of apportioning duty on estate
Victoria	section 98	Adjustment of probate duty

Issue for Consideration

It is unlikely that provisions such as these could be rendered uniform or even consistent because they refer to other revenue legislation. They are not part of the mechanics of family provision law.

