Implications of the *Succession Amendment (Family Provision) Bill* 2008

Michael Meek

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CONTENTS

- Notional estate
- Protection of the administrator
- Mediation
- Advertising
- Informal proof
- Costs
- Small estates

- Conclusion

  Schedule – comparative table of sections from FPA to Proposed Succession Act

INTRODUCTION

The Bill

1. The *Family Provision Act* 1982 (NSW) ("FPA") commenced operation on 1 September 1983. It has been amended on 12 occasions over the 25 years of its operation with the last substantial amendment occurring in 1999[1] as an adjunct to the more specific reform then of property relationships law – to re-define a *de facto relationship*, introducing the concept of a *domestic relationship* and extending (to some degree) rights/obligations of married persons and persons in a de facto relationship to persons in a domestic relationship.
2. The *Succession Amendment (Family Provision) Bill* 2008 ('the Bill') provides for repeal of the FPA[2] (as we know it) and its reenactment as part of the Succession Act 2006[3].
3. The Bill is described as:

> "*An Act to amend the Succession Act 2006 to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of the deceased person; to repeal the Family Provision Act 1982; and for other purposes*.[4]"

4. In some respects the Bill is akin to the overtaking[5] in 1983 by the FPA of its predecessor namely the Testators' Family Maintenance and Guardianship of Infants Act 1916.
5. The proposed amendments to the Succession Act which are to replace the provisions of the FPA are principally set out in Schedule 1 [10] of the Bill.
6. It is proposed that the "Family Provision" Provisions will become Chapter 3 of the Succession Act[6].

Legislative progress

7. The Bill was initially introduced in the Legislative Council on Thursday 26 June 2008[7]. It was read a first time and ordered to be printed on motion by the Hon. John

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[1] See the Property (Relationships) Legislation Amendment Act 1999 (No4)
[2] see cl 5 Bill. Savings and transitional provisions are simply noted as being dealt with by reference to the general savings and transitional provisions of the Succession Act 2006 ('SA') see s58 SA which will be renumbered as s104 SA: Schedule 1 [15] Bill
[3] Cl3 & Schedule 1 Bill principally in Schedule 1 [10] of the Bill
[4] Long Title
[5] The Testators' Family Maintenance and Guardianship of Infants Act 1916 was not repealed but is operation was confined by s1A so that its provisions do not apply in respect of the estate of any deceased person in relation to whom the FPA applies
[6] Chapter 3 is currently a chapter dealing with "Miscellaneous provisions". There will be consequential re-numbering.
[7] Hansard Legislative Council p9422

Hatzistergos[8]. The Second Reading Speech was given by the Hon. John Hatzistergos[9]. Debate was adjourned on the motion of the Hon. Don Harwin and further debate set down as an order of the day for a future day[10]. The Bill has not been further considered in the 3 sitting days of Parliament since 26 June 2008[11]. It is listed on Tuesday 23 September 2008 as an order for business for resumption of the adjourned debate of the question on the motion of that the bill be read a second time[12].

8. This paper sets out and addresses:

    (a) Some of the background to the introduction of the Bill including the issues or purposes it seek to address; and
    (b) The proposed changes from the FPA.

THE BACKGROUND TO THE BILL

Law reform reports

9. In May 1995 a reference project was made for the various Law Reform Commissions for a National Committee for Uniform Succession Laws to examine four areas of succession law: the law of wills, family provision, intestacy, and the administration of estates, and to prepare model bills[13].
10. The National Committee submitted reports on proposed national uniform laws on family provision to the Standing Committee of Attorneys-General [SCAG] in December 1997 and July 2004. In New South Wales the law was reviewed in the Law Reform Commission Report 110 Uniform succession laws: family provision (May 2005) and a draft model bill (entitled the "Family Provision Bill 2004") was proposed.
11. The Bill is said to be:

> "*the next step for New South Wales in implementing the recommendations of the uniform succession laws project, a project aimed at developing model*

[8] Hansard Legislative Council p9422
[9] Hansard Legislative Council p9422-9424
[10] Hansard Legislative Council p9424
[11] 1 July 2008, 5 & 28 August 2008
[12] Proof version of the Notice Paper for 23 September 2008 for the business of the Legislative Council p2952
[13] Hansard Legislative Council 2nd Reading Speech p9423

> *laws to be used as the basis for reform of succession law in all Australian States and Territories*"[14].

12. It is said that consistent succession laws across jurisdictions will have a number of benefits, including simplifying or lowering the costs of administering the estates of people who have moved between, or held assets in, different jurisdictions[15].
13. The first of the National Committee reports, on the law of wills, was implemented in New South Wales in 2006 with the enactment of the *Succession Act* 2006[16].
14. The national committee made the FPA the basis of the model family provision bill, as it was considered the most comprehensive and recent legislation in the area of family provision[17].

The Purposes of the Bill

15. According to the Second Reading Speech the purposes[18] of the Bill appear to be:

    (a) To address widely held concerns about the increasing and disproportionate costs of family provision proceedings;
    (b) To modernise the law of family provision in New South Wales;
    (c) To protect family estates from being whittled away by unmeritorious litigation; and
    (d) To encourage settlement.

16. The "Disproportionate costs" concern is well known[19]. However, it appears that the Government has recognized that the Court is addressing this and at this stage is prepared to allow the Court to continue to regulate disproportionate costs. In this regard the Hon. John Hatzistergos stated[20]

> "*The Supreme Court has recognised this problem and is currently implementing its own strategies, including intensive case management, the introduction of a new practice note for family provision, and a more restrictive approach to the recovery of costs.*

[14] Hansard Legislative Council 2nd Reading Speech p9423
[15] Hansard Legislative Council 2nd Reading Speech p9423
[16] Commencing on 1 March 2008
[17] Hansard Legislative Council 2nd Reading Speech p9423
[18] Hansard Legislative Council 2nd Reading Speech p9424
[19] Three specific (but unnamed) case instances of disproportionate costs were given. It was said that "The majority of lawyers work hard to achieve a fair outcome for their clients. There is, however, a minority of practitioners who exploit the highly emotionally charged nature of these cases to their own benefit, on the assumption that all costs are paid out of the estate."
[20] Hansard Legislative Council 2nd Reading Speech p9424

The bill gives the court specific rule-making powers to: make rules in relation to costs, including the costs payable out of the estate and, specifically, the costs in relation to estates worth less than $750,000; make rules relating to the use of expert witnesses and other means of proof of medical reports, valuations, et cetera—these items are sometimes the most expensive component of the costs of a case; and make rules relating to applications that can be dealt with on the papers, which will allow the court to cut costs by determining simple cases without a hearing.

The bill gives the Government the potential to build on these strategies. The bill contains a regulation-making power that enables regulations to be made with to respect costs in family provision proceedings, including the fixing of maximum costs that can be paid out of the estate or notional estate. The bill also contains the power to make regulations regarding advertising of legal services in connection with proceedings for family provision: advertising that is often aggressive, unrealistic and seeks to exploit the vulnerable."

17. The "unmeritorious litigation" litigation concern was described in the Second Reading Speech as seeking "*to prevent people from making unmeritorious claims and accessing money from the deceased's estate to fund their legal costs without any restriction*"[21].
18. As to the "settlement" objective it is said that the (proposed) section 98 (dealing with mediation) makes it clear that the Government's objective is to encourage settlement of family provision matters before they go to a hearing, if possible. It is proposed that the Court will refer all matters to mediation before any hearing unless there are special reasons why the matter should not be mediated. In this respect there is nothing "new" as the current practice of the Court is (generally) to require that all matters be allocated a mediation date prior to a hearing date being allocated.
19. Oddly, the Second Reading Speech indicated that mediation would not be advisable in circumstances where there is a threat of violence or a power imbalance between the parties. This does not appear hitherto to have been a problem.

<u>Departures from the Model Bill</u>

20. The Bill aims to implement the model bill with some changes which have been made to address policy concerns of the NSW Government, and suggestions made by an

[21] Hansard Legislative Council 2nd Reading Speech p9423

expert committee[22], which the Government established to provide advice on the reforms to succession law[23].

21. The departures identified by Hon. John Hatzistergos from the model bill are as follows:

    (a) The model bill did not adopt the eligibility requirements for an application for family provision that are currently in place in New South Wales. It retained the approach taken in the FPA with the modification that a person living in a close personal relationship with the deceased must now demonstrate "factors warranting" the making of a claim[24].

    (b) The model bill did not include a provision based on section 32 FPA (evidence of statements made by the deceased). However, the Bill re-enacts section 32 in proposed section 100.

22. As will be seen below there are other changes to the FPA provisions.

JUDICIAL APPROACH TO CONSTRUCTION

23. If the Bill is enacted a purposive approach to its construction is dictated by the *Interpretation Act* 1987[25].
24. The specific nature of the Court's approach to the new legislation remains to be seen. However, it is timely to remember comments made by Kirby P (as His Honour then was) in ***Samsley[26] v Barnes***[27].

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[22] The committee comprised: Justice Young, Chief Judge in Equity; Justice Windeyer; the Probate Registrar of the Supreme Court; the Public Trustee; representatives for the Law Society and Bar Association; Ross Ellis, representing the Trustee Corporations Association of Australia; Les Handler, the co-author of the loose-leaf service on succession law; and a representative from the Guardianship Tribunal.

[23] Hansard Legislative Council 2nd Reading Speech p9423

[24] The model bill restricted the list of those who are automatically entitled to make an application for provision to spouses, de facto partners and non-adult children of the deceased. It contained a "catch-all" category of claimant permitting anyone to whom the deceased owed a responsibility to provide maintenance, education or advancement in life to apply to the court for a family provision order: see Hansard Legislative Council 2nd Reading Speech p9423

[25] s33 Interpretation Act 1987 (NSW)

[26] Rather confusingly the name of the case is spelt various in publications see below ("Samsely" in the CCH report, and "Samsley" in LexisNexis Unreported judgments BC9001675)

[27] (1991) DFC 95-100 at 76,304; [1991] NSWCA 94

25. Kirby P stated inter alia:-

> "*There is always a danger where a reformed Act borrows heavily upon ideas which previously existed in the common law or in an earlier statute, that lawyers will approach the construction of the Act affected by the previous law….*
>
> *There is a particular danger in the case of the Family Provision Act in construing its terms by reference to the law which developed around the Testators' Family Maintenance and Guardianship of Infants Act 1916….*
>
> *The former Act also operated in a society quite different from that of today…"*

26. These comments were expressed by Kirby P in relation to an FPA claim by a de facto husband. However, whilst one might think that the changes wrought by the FPA to the TFM regime were in many respects more significant than those being proposed under the Bill, it is now some 25 years since the FPA first commenced[28] and it is to be expected that there are now, or might be, different judicial attitudes and community standards prevailing, which might have some affect on the way that the legislation is to be construed. Moreover, the fact that the Bill has been born out of a desire to model provisions nationally (in other States & Territories) will mean that approaches taken in other Australian jurisdictions will, or at least might, become relevant to consider.

THE MAIN CHANGES

27. The main changes are addressed below.

Eligibility

28. Under the FPA a person who is in a domestic relationship with the deceased person (which is essentially defined as a de facto relationship or close personal relationship) at the time of the deceased person's death is entitled to apply as of right for a family provision order. Under the Bill a person in a de facto relationship will be entitled to

[28] 1 September 1983

apply as of right but a person in a close personal relationship will be able to apply only if the Court is satisfied that the circumstances warrant the application[29].

Timing & administration

29. The period within which an application must be made has been reduced from 18 months to 12 months[30]. The power of the Court to extend the time upon "sufficient cause" being shown has been retained[31]. However, the provisions enabling the parties to the proceedings to consent to an extension of time[32] and enabling the Court to shorten the period to bring an application[33] have, apparently, not been retained.
30. However, an application for a family provision order may now be made whether or not there is a grant of administration of the estate[34]. This is not particularly significant as the Court has for the last 22 years consistently followed the decision in *Leue v Reynolds* (1986) 4 NSWLR 590, and permitted a claim to be made and pursued, provided a grant of administration is made at least as at the time that the order is made, rather than requiring a grant to be made before the proceedings are commenced[35]. In any event an applicant under the FPA has the option of applying for a grant for the purposes of making an FPA application (known as Section 41A Grant) and this option has been retained[36].

Additional provision

31. The Bill proposes an extension of the circumstances in which an eligible person may apply for additional provision. Under the FPA[37] an applicant is able to apply for additional provision if the Court is satisfied that, since an order for provision was last made by the Court (in favour of the eligible person)

> "*there has been …a substantial detrimental change in the circumstances of the eligible person*".

[29] see s6(1) & 9(1) FPA; cf s59(1)(b) SA
[30] s58(2) SA; cf s16(1)(b) FPA
[31] s58(2) SA
[32] s16(3)(a) FPA
[33] s17 FPA
[34] s58(1) SA; cf s7 FPA
[35] See *Leue v Reynolds* (1986) 4 NSWLR 590
[36] s91 SA; cf s41A Probate and Administration Act 1898
[37] s8 FPA

32. That section still required the application to satisfy the Court that the applicant at the time of the determination had been left with "inadequate" provision[38].
33. These sections[39] were construed by the Court of Appeal in *Wentworth v Wentworth* (1995) 37 NSWLR 703 as requiring according to Powell JA "(a) that the order or last order, for provision which was made was an order for a continuing provision; and, that, (b) due to some cause the income derived from that order, or the income derived from that order coupled with such income as the eligible person is then capable of earning is inadequate to provide for the maintenance, education or advancement in life of the eligible person"[40].
34. According to Cole JA the task to be undertaken in an application for additional provision is: "(a) first, to consider whether such change as has occurred since the making of the section 7 provision requires re-adjustment of the earlier judgment. At this stage the court is not concerned with whether the change constitutes "a substantial detrimental change in the circumstances of the eligible person"; (b) secondly, the court must consider whether the demonstrated change constitutes a "substantial detrimental change"; and (c) if such a change is demonstrated the court must consider whether as a discretionary exercise additional provision ought, having regard to the circumstances at that time, be made for the maintenance, education and advancement in life of the eligible person"[41].
35. This construction had the practical effect of at least on the Powell JA view that unless the section 7 provision was in the nature of an "income" order, no (successful) application could be made under a section 8.
36. The existence of section 8, coupled with miscellaneous factors (for example concerns about finality and "clean breaks" on the part of clients and negligence on the part of lawyers) and fostered a mentality that in settlements of FPA claims the executor or legal personal representative would often request a s31 release. This was often unnecessary (when one had regard to the practical risks of further applications) and adds to costs.
37. Under the Bill, the grounds for further provision have been enlarged.
38. The Bill has retained the "substantial detrimental change in circumstances" category[42].
39. However, now that the Court may also make an order for additional provision where at the time that a family provision order was last made in favour of the eligible person[43]:

[38] s8 FPA when read with s9(2)(b)(ii) FPA
[39] s8 FPA when read with s9(2)(b)(ii) FPA
[40] As summarised in the headnote (1995) 37 NSWLR 703 citing 724C
[41] As summarised in the headnote (1995) 37 NSWLR 703 citing 738D
[42] s59(3)(a) SA

(a) the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (*the undisclosed property*), and

(b) the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property, and

(c) the Court would not have made the previous family provision order if the evidence had revealed the existence of the undisclosed property.

40. There is a restraint on this category in that the Court may make a family provision order in favour of an eligible person whose application for a family provision order in relation to the same estate was previously refused only if, at the time of refusal, there existed all the circumstances regarding undisclosed property described[44].
41. However, the mere existence of this additional category is likely to foster some applications for additional provision and one would have thought be counter-productive to some degree of the concerns behind the Bill of increasing costs in FPA proceedings and protecting family estates from being whittled away by unmeritorious litigation.

Factors relevant to the Court's determination

42. The Bill sets out in more detail than is the case under the FPA the matters to be considered by the Court as to whether a person is eligible and what if any order ought to be made.

43. The FPA requires that the Court must consider certain factors in making its determination[45] which are (in summary):

(a) contributions to the extent of property of the deceased and to the welfare of the deceased;

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[43] s59(3)(b)(i)-(iii) SA
[44] s59(4) SA
[45] s.9(3) FPA

(b) the character and conduct of the plaintiff in relation to the deceased;
(c) circumstances existing before and after the death of the deceased; and
(d) other relevant factors.

44. Factors generally relevant to the assessment have been held to include:

(a) the nature and size of the estate of the deceased;
(b) what provision (if any) was given under the will;
(c) the financial circumstances of the plaintiff;
(d) the 'needs' of the plaintiff for maintenance and advancement in life;
(e) the extent of the relationship between the plaintiff and the deceased;
(f) the extent to which the plaintiff has contributed to the deceased's welfare;
(g) the extent to which the plaintiff has contributed to the acquisition, maintenance or improvement of the deceased's property, and
(h) the extent of the claims of other persons on the estate of the deceased.

: *Singer v Berghouse (No. 2)* (1994) 181 CLR 201 at 208 – 211.

45. The Bill sets out a litany of matters under 16 sub-clauses which are described as matters which "may" be considered by the Court[46].

46. Broadly speaking many of the matters listed are the sort of matters the Court currently considers in FPA applications. However, there are some additional matters which are specified – for example the Court may consider any relevant Aboriginal or Torres Strait Islander customary law[47].

47. The intention would appear to be to give the Court more flexibility in determining applications. However, it has the potential to see affidavits in support of applications being expanded, with consequential cost increases.

[46] s60(2)(a)-(p) SA
[47] S60(2)(o) SA

Injunctive relief

48. The Bill includes a power make an order restraining the final or partial distribution of an estate (other than a distribution under section 94 (1) of this Act or section 92A of the *Probate and Administration Act 1898*) pending its determination of an application for a family provision order[48].

49. This provision makes explicit a power that the Court has ordinarily exercised under the general law in appropriate cases. Whilst there was some disagreement amongst the Equity judges in the early years of the operation of the FPA as to the Court's power to restrain an executor from distributing the estate[49], no significant concern has been expressed about the Court's power in recent years[50].

Nature of orders

50. The Bill introduces some formality to the process of making FPA orders by specifying the matters that an FPA order must include[51]. However, these are nothing much more than are ordinarily specified in any event. It might have the effect of avoiding confusion in the very occasional case where there are issues over the part of the deceased's estate that is to bear the burden of an order.

Notional estate

51. The range of property which may be affected by orders under the FPA differed very significantly from the *Testator's Family Maintenance and Guardianship of Infants Act 1916*. The Bill is not as radical a departure from the earlier regime. However, it does represent some further developments in the realm of what property may be affected by a family provision order.

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[48] s62(3) SA
[49] See for example the differing views of Young J (as his Honour then was) in *Packo & Anor v Packo* (1989) 17 NSWLR 316 and Powell J (as His Honour then was) in *Deguara v Mercieca* (unreported, 23 August 1988)
[50] See for example *Lo Surdo v Public Trustee & Anor* [2003] NSWSC 837 (Gzell J), *Grizonic v Suttor* [2004] NSWSC 137 (Campbell J)
[51] s65(1) SA; cf s11(1)(a)&(b) FPA

52. The concept of a “prescribed transaction” has been relabeled as a “relevant property transaction”[52].

53. The notion of “in money or money’s worth” has been deleted from the requirement for “full valuable consideration”[53]. The change might not be significant. The labels “disponee” and “disponer”[54] (which describe persons who hold property or have property held for them as a result of a prescribed transaction) have been deleted, but the concept of property being held by or for a person is still essential to the Court’s power to designate property as notional estate[55].

54. Under the Bill the Court is precluded from ordering that costs be paid from notional estate unless the Court has also made a family provision order in favour of the applicant[56]. This would appear to be directed to the “policy” of ensuring that estates are not whittled away by unmeritorious litigation.

55. Proposed clause 82 allows the Court to designate as notional estate property that has been transferred into the hands of a person who has subsequently died where the property has come into the hands of the person’s legal representative or has been distributed from their estate. The explanatory note suggests that the proposed clause is intended to overcome the decision in *Prince v Argue* [2002] NSWSC 1217[57].

56. *Prince v Argue* involved the hearing of 5 proceedings involving various claims on the estates of 2 deceased persons, who were husband and wife. Two of the proceedings were FPA claims on the estate of the wife (who died after her husband). One of the proceedings was an FPA claim by the children of the husband.

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[52] ss74-76 SA
[53] see s76(1) SA; cf s22(1)(b) FPA
[54] s21 FPA
[55] s80(3) SA
[56] s78 SA
[57] Macready AsJ, 20 December 2002

57. The husband and wife owned a property in which they lived and on the husband's death that house passed by survivorship to the wife. At the time of the hearing there was no evidence indicating that there were any assets in the husband's estate[58].

58. It was suggested in submissions that there was a prescribed transaction as a result of the failure of the husband to sever the joint tenancy.

59. However, the "disponee" in relation to that transaction was the wife who had died (obviously prior to the commencement of the proceedings).

60. Macready AsJ dismissed the claim because the FPA only allows the court to make an order designating as notional estate of the deceased person property which is held by, or on trust for the disponee[59] and as the wife was dead there was no property held by her or on trust for her[60].

61. It can be seen that proposed section 82(2) overcomes that problem.

Protection of the administrator

62. The Bill proposes a change to the existing provisions regarding distribution of the property in an estate by providing that a legal personal representative may distribute only if a period of at least 6 months have expired months after the deceased person's death as well as having published notice of the intention to distribute[61].

63. The protection that is afforded to the legal personal representative in respect of any applicant for a family provision order is in respect of applications of which the legal personal representative did not have notice and, if (a) the distribution was made in

[58] *Prince v Argue* at [10], [87]
[59] See s23 FPA (whether or not that property was the subject of the prescribed transaction)
[60] *Prince v Argue* at [87]-[88]
[61] s93(1) SA; cf s35(1) FPA

accordance with the proposed section, but also if (b) the distribution was properly made by the legal representative[62].

64. The requirement that the distribution being "properly made"[63] is new and there is no specification (apart from what might be gleaned from the general law) as to when a distribution is "properly made". However, the Bill on the other hand appears to change the existing position by restricting what matter constitutes "notice" of an application. The Bill specifies that notice to the legal representative of an application or intention to make any application must be in writing signed in accordance with rules for the signing of documents by a party in proceedings under the *Uniform Civil Procedure Rules 2005*. The general law previously has allowed a less formal approach to what matter constitutes "notice" of an application.

65. The Bill carves out a further new exception regarding distribution by providing that a legal representative of the estate of a deceased person who distributes property in the estate for the purpose of providing those things immediately necessary for the maintenance or education of an eligible person who was wholly or substantially dependent on the deceased person immediately before his or her death is not liable for any such distribution that is properly made[64] irrespective whether or not the legal representative had notice at the time of the distribution of any application or intended application for a family provision order affecting property in the estate[65].

66. Moreover the Bill affords protection to a legal representative regarding any applications of which he/she did not have earlier notice in respect of distributions made not earlier than 12 months after the deceased's death[66].

Mediation

67. The policy regarding mediation of claims has been formalized in clause 98 of the Bill. As noted earlier this accords with the Court's existing practice.

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[62] s93(2) SA; cf s35(2) FPA
[63] s93(2)(b) SA
[64] s94(1) SA
[65] s94(2) SA
[66] s94(4)&(5) SA

Advertising

68. The Bill provides that regulations may make provision for or with respect to the regulating or prohibiting advertising concerning the provision of legal services in connection with mediations and other proceedings in relation to the estate or notional estate of a deceased person[67]. One might presume that this is intended further the "policy" of protecting estates from being whittled away by unmeritorious litigation. Whether any such regulations are to be made waits to be seen.

Informal proof

69. One way the Bill aims to address concerns about the increasing and disproportionate costs of family provision proceedings is by providing the current section of the *Succession Act* dealing with "Rules of Court" (namely s56 SA, which will be renumbered as s102 SA) be amended to make it clear that that rules of court may be made with respect to various matters including:

    (a) dispensing with the rules of evidence for proving any matter that is not bona fide in dispute or in which formal proof may give rise to expense or delay[68];
    (b) without limiting the generality of paragraph (a), permitting informal evidence to be given of property valuations or the medical condition of the deceased or any other persons concerned with family provision proceedings[69].

70. Whilst these provisions provide some specific recognition within the family provision legislation of the policy of reducing costs, the reality is that there already exists statutory provisions which allow informal proof of matters that are not bona fide in dispute or in which formal proof may give rise to expense or delay[70]. Moreover, the Court has for several years when giving notice of Callovers[71] issued Standard Directions for FPA matters which include procedures for informal valuation of real property[72]. The direction regarding valuations was subsequently formalised by the

[67] s 98(4)(b) SA
[68] s102(2)(e) SA: see Schedule 1 [12] Bill
[69] s102(2)(f) SA: see Schedule 1 [12] Bill
[70] s70(1)(a) Civil Procedure Act 2005
[71] The Callover system has been abolished and dates for hearing of FPA proceedings before Associate Justices are now being allocated by the Registrar in Equity
[72] These directions were issued by the Registry and headed "Valuations in Family Provision Act and De Facto Relationships Matters".

issuing of the Practice Note SC Eq 1[73] (17 August 2005) in which under the heading of "Proportionality of costs to result in Family Provision proceedings" the Practice Note provides that:

> "*In accordance with ss 56 and 60 of the CPA, the Court does not require formal valuations of dwelling houses, home units, town houses or the like unless a Judge or an Associate Judge has otherwise directed*"[74].

Costs

71. As earlier noted the Second Reading Speech heralds as one of the purposes the Bill the addressing of increasing and disproportionate costs of family provision proceedings and the protection of estates from being whittled away by unmeritorious litigation.
72. The FPA contained specific provisions dealing with costs[75] including a provision placing a restraint on the Court's power to order costs of unsuccessful claims by eligible persons in the remoter categories of eligibility[76].

73. With the exception noted above[77] the Bill retains the general power of the Court to order that the costs of proceedings be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit[78].

74. However, rather than take the opportunity to set out particular costs guidelines the Bill simply provides that the regulations may make provision for or with respect to the costs in connection with proceedings including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person[79].

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[73] A practice note issued by or on behalf of the Court is taken to be a statutory rule for the purposes of Part 6 of the Interpretation Act 1987: s124(11) Supreme Court Act.
[74] Paragraph 57 Practice Note SC Eq 1
[75] s33 FPA
[76] See s33(2) FPA –requiring that there be special circumstances which make it just & equitable for the Court to order costs of unsuccessful category (c) & (d) applicants being paid out of the estate
[77] See s78 SA which limits the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person
[78] s99(1) SA; cf s33(1) FPA
[79] s99(2) SA

Small estates

75. Another way the Bill aims to address concerns about the increasing and disproportionate costs of family provision proceedings is by introducing the concept of a "*small estate*" which is defined to mean an estate the value of which is less than $750,000 or such other amount as may be prescribed by the Regulations[80].

76. The Bill proceeds to make it clear that rules of court may be made with respect to various matters including:

    (a) the costs payable out of small estates and other estates[81]
    (a) the circumstances in which family provision proceedings respect of small estates may be dealt with in the absence of the parties[82].

77. It may be noted that there already exists Court procedures which address costs in small estates. In particular the Practice Note SC Eq also under the heading of "Proportionality of costs to result in Family Provision proceedings" provides that:

> "*The Court takes care that the costs of proceedings are proportionate to the result. Practitioners in cases where the estate is under $500,000 should take particular care to minimise costs as it may be that costs of a successful claim will be capped*"[83].

CONCLUSION

78. Time will tell how much of the proposed bill survives Parliamentary debate and Committee stages.

79. With the exception of the changes bearing upon eligibility, time for bringing the application, additional provision, notional estate and protection of the administrator

[80] s102 (4) SA
[81] s102(2)(d) SA: see Schedule 1 [11] Bill
[82] s102(2)(g) SA: see Schedule 1 [12] Bill
[83] Paragraph 58 Practice Note SC Eq 1

the proposed changes are not overly significant. In some respects this is because there already exists powers or Court procedures which allow the Court to make orders in respect of the proposed changes.

80. Some matters that have the potential for rather significant ramifications have been left to realm of regulations and Court Rules which have not yet been proposed.

81. In these respects the bill appears to reflect the views of the Government (as expressed in paragraph above) that the Supreme Court has recognised various costs problems and is currently implementing its own strategies. There is reserved to the Government by means of inter alia regulation making power the scope for further intervention.

Michael Meek
13th Floor Wentworth Selborne Chambers
Dated: 17 September 2008

SCHEDULE

COMPARATIVE TABLE – FPA TO PROPOSED SECTION OF THE SUCCESSION ACT

Section/Provision	FPA	Proposed Succession Act
PART I - PRELIMINARY		
Short title	1	-
Commencment	2	-
Arrangement [repealed]	3	-
Application	4	-
Act binds Crown	5	56
Interpretation	6 6(8)	55, 57, 63 97
PART II – FAMILY PROVISION		
Division 1 - Orders for Provision		
Provision out of estate or notional estate of deceased person	7	59(1)&(2)
Additional provision	8	59(3)&(4)
Provisions affecting Court's powers under sections 7 and 8	9	59(1)&(2), 60(2)
Consequential Provision	10	66(2)
Orders for provision	11	64, 65
Class Fund	12	65(2)(e)
Burden of provision out of estate	13	65(1)(c)
Effect of order for provision out of estate of deceased person	14	72
Consequential and ancillary orders	15(1) 15(2) 15(3)	66(1)&(2) 69 65(3)
Time for application for provision	16	58
Shortening of time for applications for provision	17	-
Court may require undertakings to restore property if deceased found to have been alive	18	67
Revocation or alteration of orders for provision	19(1)-(3)	70

	19(4)	71
Court may disregard persons who have not applied for provision	20 20(4)	61 70
Division 2- Notional Estate		
Interpretation: Pt II, Div 2	21	cf 80(3)
Prescribed transactions	22(1),(3) &(7) 22(1),(2),(5) &(6) 22(4)	75 77 76
Notional estate – prescribed transactions	23	80
Notional estate – distributed estate	24	79
Notional estate – subsequent prescribed transactions	25	81
Property not to be designated as notional property by reason of certain prescribed transactions	26	83
Designation of property as notional estate – matters to be considered	27(1) 27(2)	87 89(1)
Designation of property as notional estate – powers and restrictions	28(1) 28(2) 28(3) 28(4) 28(5)	88 89(2) 85 89(3) 90
Effect of order designating property as notional estate	29	84
Division 3 – General		
Discharge of property from liability as estate or notional estate	30	92
Release of right to apply for provision	31(1)-(6) 31(7)-(9)	95 96
PARTIII – MISCELLANEOUS		
Evidence	32	100
Costs, charges and expenses	33	99
Certain documents exempt from stamp duty	34	66(3)
Protection of administrator	35	93