FAMILY PROVISION CLAIMS UNDER

SUCCESSION ACT

1. **Preparation and Procedural Issues**
2. **Assessing what a family provision claim is worth**
3. **Claims by second spouses and claims by children**
4. **Notional Estate**
5. **Release of Rights**
6. **Recent Developments**

Colin Hodgson
Barrister
13 Wentworth Selborne Chambers

5 March 2014

1. Preparation and Procedural Issues

1. Whilst claims may still arise under the *Family Provision Act 1982* (death before 1 March 2009) and even the *Testator's Family Maintenance and Guardianship of Infants Act 1914* (death before 1 September 1983) claims for family provision are now almost universally governed by the provisions of the *Succession Act 2006*. This paper deals with family provision claims under the *Succession Act 2006* rather than under the earlier Acts although similar but not identical considerations apply under the earlier legislation, in particular the *Family Provision Act 1982* (hereafter referred to as the "FPA"). As a result, decisions under the former legislation are useful in consideration of claims under the *Succession Act 2006* (hereafter referred to as the "SA") although they should not be adopted broadly without consideration of the terms of the SA.

2. I do not propose to recite, or review exhaustively, Chapter 3 (Family Provision) of the SA which sets out the current framework for family provision claims. Nevertheless, some fundamental matters should be referred to first.

3. The principle of freedom of testation still applies in New South Wales. Chapter 3 of the SA does not confer any statutory right upon an applicant to receive a fixed portion of the estate of a deceased, nor does it require the deceased to make provision for any particular person. Rather, if the statutory requirements of Chapter 3 are met,

the Court is empowered by the SA to alter the disposition made by the deceased of his/her estate, but only to do so in a manner which is in accordance with the purpose of the SA. The Court's power to do so is discretionary.

4. First, for an application to be made, s.59(1) of the SA requires the plaintiff to be an eligible person as defined by s.57 of the SA, which is in the following terms:

> *"**57 Eligible persons***
>
> *(cf FPA 6 (1), definition of "eligible person")*
>
> *(1) The following are "eligible persons" who may apply to the Court for a family provision order in respect of the estate of a deceased person:*
>
> > *(a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,*
> >
> > *(b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,*
> >
> > *(c) a child of the deceased person,*
> >
> > *(d) a former wife or husband of the deceased person,*
> >
> > *(e) a person:*
> >
> > > *(i) who was, at any particular time, wholly or partly dependent on 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 the household of which the deceased person was a member,*
> >
> > *(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.*
> >
> > ***Note:** Section 60 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order. An application may be made by a tutor (within the meaning of the Civil Procedure Act 2005) for an eligible person who is under legal incapacity.*

> ***Note:*** *"De facto relationship" is defined in section 21C of the Interpretation Act 1987.*
>
> *(2) In this section, a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the Property (Relationships) Act 1984 , at the time of death, a reference to the following:*
>
> > *(a) a child born as a result of sexual relations between the parties to the relationship,*
> >
> > *(b) a child adopted by both parties,*
> >
> > *(c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the Status of Children Act 1996 , to be the father (except where the presumption is rebutted),*
> >
> > *(d) in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the Status of Children Act 1996 ,*
> >
> > *(e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1998)."*

5. Of the six categories of eligible persons defined by s.57 of the SA, the last three (see s.57(1)(d), (e) & (f)) must also, at the time the Court is considering their application, establish that there are "*factors which warrant the making of the application*" – s.59(1)(b). For ease of reference I note that s.59 of the SA provides as follows:

> *"**59 When family provision order may be made***
>
> *(cf FPA 7–9)*
>
> *(1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:*
>
> > *(a) the person in whose favour the order is to be made is an eligible person, and*
> >
> > *(b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of "eligible person" in section 57—having regard to all the circumstances of the case (whether*

past or present) there are factors which warrant the making of the application, and

(c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.

(2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.

Note: *Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 73). Part 3.3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order.*

(3) The Court may make a family provision order in favour of an eligible person in whose favour a family provision order has previously been made in relation to the same estate only if:

(a) the Court is satisfied that there has been a substantial detrimental change in the eligible person's circumstances since a family provision order was last made in favour of the person, or

(b) at the time that a family provision order was last made in favour of the eligible person:

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

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

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

> *(4) 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 in subsection (3) (b)."*

6. Factors which warrant the making of the application are factors which, when added to the facts which render the applicant an eligible person, give the applicant the status of a person who would generally be regarded as a natural object of testamentary recognition by the deceased – see ***Re Fulop Deceased*** (1987) 8 NSWLR 679 at 681 and ***Churton v. Christian*** (1988) 13 NSWLR 241 at 252 (per Priestley JA). The authorities on this topic are carefully collected in ***Doshen v. Pedisich*** [2013] NSWSC 1507 at [69]-[81].

7. Applications must be commenced within 12 months of the death of the deceased person, although the Court has power to extend that period (the mere consent of the parties to an extension is not now sufficient under the SA) – see s.58 SA.

8. The Court is merely is merely required to respond to the application of a plaintiff, and consider whether, as claimed, the provision made by the deceased in his or her last will is not adequate for that plaintiff's proper maintenance and advancement in life. That requires an enquiry involving a two-stage test (there is presently some debate about the accuracy of that proposition, and whether instead a one-stage test now applies under the SA, which is discussed below). The first stage calls for a determination of whether or not the plaintiff has been left without adequate provision for his or her proper maintenance, education and advancement in

life. The second stage, which only arises if that determination is made in favour of the plaintiff, requires the Court to determine what provision ought to be made out of the deceased's estate for the plaintiff – see ***Singer v. Berghouse (No. 2)*** (1994) 181 CLR 201 at 208-9.

9. The first stage, provided for by s 59(1)(c), has been described as "the jurisdictional question": ***Singer v Berghouse*** (1994) 181 CLR 201 at 208-209. At this stage, the court considers whether it can make an order for provision for the maintenance, education or advancement in life of a particular applicant. The Court does this by determining whether it is satisfied that adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made by the will of the deceased, and/or by operation of the intestacy rules, for the applicant. If it is not so satisfied, then the Court is precluded from making a family provision order. If the Court is so satisfied, the second stage requires it to determine what provision ought to be made out of the deceased's estate for the plaintiff

10. The Court's role is not to reward a plaintiff, or to distribute the estate of the deceased according to notions of fairness or equity, rather it is required to consider the matters required of it by the SA, in particular, the two-stage (or one-stage) process referred to above. That involves the court forming, by reference to the SA, an opinion upon the basis of its own general knowledge and experience of

current social conditions and standards, usually referred to as community standards or community expectations.

11. In assessing any such claim, the matters for consideration set out in s60 of the *Succession Act 2006* should be noted.

> *"**60 Matters to be considered by Court***
>
> *(cf FPA 7–9)*
>
> *(1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:*
>
> > *(a) whether the person in whose favour the order is sought to be made (the "applicant") is an eligible person, and*
> >
> > *(b) whether to make a family provision order and the nature of any such order.*
>
> *(2) The following matters may be considered by the Court:*
>
> > *(a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,*
> >
> > *(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,*
> >
> > *(c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,*
> >
> > *(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,*
> >
> > *(e) if the applicant is cohabiting with another person—the financial circumstances of the other person,*
> >
> > *(f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that*

is in existence when the application is being considered or that may reasonably be anticipated,

(g) the age of the applicant when the application is being considered,

(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,

(i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,

(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,

(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,

(l) whether any other person is liable to support the applicant,

(m) the character and conduct of the applicant before and after the date of the death of the deceased person,

(n) the conduct of any other person before and after the date of the death of the deceased person,

(o) any relevant Aboriginal or Torres Strait Islander customary law,

(p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered."

12. Procedural regulation of family provision claims is set out in Supreme Court Practice Note No. SC Eq 7. Family provision claims are now listed before the Family Provision List Judge, rather than an Equity Registrar. Procedural management of family provision claims now

takes place entirely by the Family Provision List Judge, more rigorously, no doubt, than previously.

13. When considering the Practice Note, and the conduct of family provision claims generally, it is crucial to proceed from a starting point that it is important that the litigation be conducted not only in accordance to the Practice Note, but expeditiously, pragmatically and in as cost efficient a manner as is possible. Perhaps uniquely in litigation in the Supreme Court of New South Wales, the costs incurred by parties in family provision litigation is disclosed and scrutinised by the Court, and recovery is regulated, not only in relation to ordinary costs but also solicitor/client costs. Cost capping is specifically adverted to in paragraph 24 of the Practice Note – including, but not limited to, cost capping in cases where the net distributable estate (excluding the costs of the proceedings) is under $500,000.

14. Paragraphs 5-7 of the Practice Note set out the documents which the plaintiff is required to file when commencing proceedings, and when. Please note the requirement that the Summons should identify the date of death of the deceased.

15. The Family Provision List takes place each Friday and, ordinarily, a matter will receive a first listing date 28 days after the date that the Summons was filed. It is ordinarily expected that the plaintiff's primary affidavit (Practice Note para 6(a) and see the pro forma at annexure 1 of the Practice Note), the Notice of Eligible Persons, which should be attached to the Summons or to the plaintiff's

principal affidavit (Practice Note para 6(b)), and the affidavit setting out the estimate of the plaintiff's costs and disbursements, on the ordinary basis, calculated up to and including the completion of a mediation, will be filed with the Summons. However, if that is not possible (see for example Practice Note para 7) the Summons should be filed and those affidavits should be filed prior to the first return date. Short extensions of time for filing those documents may be obtained at the first directions hearing, although there is then the potential of adverse costs consequences unless there is a good explanation for the documents not having been filed.

16. At the first directions hearing, ordinarily, directions will be made in accordance with standard directions circulated by the Family Provision List Judge. Efforts should be made to agree upon directions prior to the first directions hearing. Indeed, if agreement cannot be reached there is the risk of having the matter stood down to, much, later in the day for there to be any argument. Ordinarily, there is little reason for there to be argument given the clear regimen set out in the Practice Note.

17. The initial directions provide not only for filing and service of the defendant's affidavits, up to five affidavits, pursuant to paragraph 9 of the Practice Note, but also the production and inspection of documents. It should be noted that original affidavits should be filed by sending them to the Family Provision List Judge's Associate rather than in the registry – one of the standard directions provides:

Each party is to deliver only the original of any affidavit, not already filed, to the Chambers of the Family Provision List Judge by 4.00 p.m., 3 working days prior to the second directions hearing.

18. Nevertheless, the directions do not have to be adopted slavishly. In particular, if the parties do not require the discovery of documents (in particular, financial documents) envisaged by the standard directions, directions to that effect did not need to be made at that stage; it may be that the parties are prepared to proceed to mediation without that disclosure and only to require disclosure, subsequently, if the proceedings cannot be resolved at mediation.

19. Additionally, in the case of small estates, in particular estates under $500,000, the Family Provision List Judge may be reluctant to make those directions unless there is a good basis for them to be made. Again pragmatism and costs issues come to the fore. In small estates, in particular where the parties are well aware of the general financial circumstances of the other parties, being family members, so that there is unlikely to be an issue regarding what their circumstances are, the production of documents may simply serve to increase costs unnecessarily and, in a worst case scenario, create an impediment to settlement.

20. At the second directions hearing, unless there are exceptional circumstances, the proceedings will be referred to some form of alternative dispute resolution. However, in large estates where a private mediator is retained for mediation, there may be a referral to mediation at the first directions hearing.

21. The Family Provision List Judge applies a "rule of thumb" in relation to the mode of alternative dispute resolution for family provision proceedings.

22. In estates where the net distributable estate excluding the costs of the proceedings is approximately $400,000 or less, the preference is that the matter be referred to an informal settlement conference before the Family Provision List Judge. However, there is no strict boundary per se and if the net distributable estate is slightly larger (say, $500,000-$600,000) and the legal representatives believe that having an Informal Settlement Conference would be of benefit to the parties, his Honour may be minded to grant one.

23. Those informal settlement conferences take place, initially in Court, before his Honour, who will be robed. His Honour, after ascertaining what the current costs of the parties are, and what the likely further costs of the parties will be should the matter not be resolved and require a hearing, will then address the parties regarding the risks of litigation, in particular family provision litigation, and the practical implications of failing to settle given the likely costs of the proceedings should the proceedings not settle and the size of the estate. The parties then negotiate through their legal representatives and, later in the day, advise his Honour if the matter has settled or not. If it has, providing signed consent orders and all necessary affidavits are available, orders can then be made by his Honour or he may refer the matter to chambers for the making of orders.

24. In estates above $400,000 and up to about $1 million the Family Provision List Judge will, unless the parties have arranged for private mediation, usually refer the matter to a Court annexed mediation.

25. In estates over $1 million the Family Provision List Judge will (given the scarcity of Court resources) ordinarily require the parties to arrange a private mediation. If there is some reason why that should not be done, for example, there are no liquid funds in the estate and the parties have limited funds, or if there is a large notional estate component, his Honour may be able to be persuaded to instead list the matter for a Court annexed mediation.

26. Paragraphs 16-18 of the Practice Note deal with directions after mediation. If the proceedings do not settle, directions may be made regarding matters such as the filing and service of further affidavits, the issuing of subpoenas and, subsequently, the matter will be listed for hearing and directions will be made regarding the hearing such as for the filing and service of submissions.

27. Paragraph 21 of the Practice Note allows for the informal proof of some matters such as real estate prices/values, renovation or refurbishment costs, and the physical, intellectual or mental disability of the plaintiff or a beneficiary, or a dependant.

28. When acting for a defendant, on receipt of instructions, steps should be taken immediately in relation to preparation of the defendant's affidavits required by the Practice Note. You are unlikely to receive a favourable response from the Family Provision List Judge if you arrive at the first directions hearing and, without very good reasons, advise

that you need several months to put on any affidavits. That is particularly so if he ascertains that the reason for this is that nothing has been done since the Summons was served, probably some four weeks earlier.

29. It should not be forgotten that the preparation of the Defendant's affidavits may require communication not only with the executor, but potentially with a number of beneficiaries, in relation to their financial circumstances, and also those people or other family members in relation to contested matters raised in the plaintiff's affidavit.

30. Whilst an unsuccessful plaintiff should not expect the court to make orders which provide for costs not following the event, the prospect of the court departing from the usual practice is greater than in most other forms of adversarial litigation.

31. In ***Singer v Berghouse*** (1993) 114 ALR 521, Gaudron J, albeit in the context of a security for costs application, said, at 522:

> *"Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under the Act which, in s.33, makes special provision in that regard, costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate."*

32. Section 99 of the SA provides a wide discretion in relation to costs, the Court may make an order *"in such manner as the Court thinks fit"*.

33. Where the claim is frivolous, vexatious, made with no reasonable prospects of success, or where the plaintiff has been guilty of some improper conduct in the course of the proceedings, an unsuccessful plaintiff will usually be ordered to pay costs: ***Re Sitch (No 2)*** [2005] VSC 383.

34. Proceedings for a family provision order involve elements of judgment and discretion beyond those at work in most *inter partes* litigation: ***Jvancich v Kennedy (No 2)*** [2004] NSWCA 397; ***Re Sherborne Estate (No 2); Vanvalen v Neaves*** [2005] NSWSC 1003. In the latter, Palmer J observed that:

> *"A decision whether a Family Provision Act claim fails or succeeds produces a black and white result which often belies the fact that the case was borderline and could have gone either way."*

35. In exercising its discretion in relation to costs, the court will have regard to *"the overall justice of the case"*: ***Jvancich v Kennedy (No 2)***.

36. While the *"overall justice of the case"* does not preclude an order for costs following the event, the Court may be more willing to depart from the general principle in proceedings for a family provision order than in other types of case: ***Moussa v Moussa*** [2006] NSWSC 509 at [8]-[11]; ***Carey v Robson*** [2009] NSWSC 1199*;* ***Bartkus v Bartkus*** [2010] NSWSC 889 at [24].

37. As proceedings for a family provision order are essentially for maintenance, a court may properly decide to make no order for costs, even though it were otherwise justified, against unsuccessful

applicants, if it would adversely affect the financial position which had been taken into account in dismissing the application: ***Morse v Morse (No 2)*** [2003] TASSC 145 at [4]; ***McDougall v Rogers; Estate of James Rogers*** [2006] NSWSC 484; ***McCusker v Rutter*** [2010] NSWCA 318 at [34].

2. Assessing what a family provision claim is worth

38. Giving advice regarding what orders might be made, and in particular the quantum of the order, in claims for family provision orders is notoriously difficult. The relief is discretionary and minds may reasonably differ over what orders might be made in any given factual circumstances. Indeed, in ***Sherborne Estate (No. 2)***; ***Vanvalen v. Neaves***; ***Gilroy v. Neaves*** [2005] NSWSC 1003 Palmer J said:

> *"[56] A claim under the FPA is not quantifiable by the parties' legal advisers prior to judgment with anything like the prescience possible in a claim for a liquidated sum such as a contract debt, or even in a claim for unliquidated damages for personal injury or for future economic loss. There are statutory and judicial guidelines for the range of damages appropriate for various types of personal injury; expert accountants attempt to quantify damages for future economic loss by reference to historical financial information.*
>
> *[57] However, in a claim under the FPA the Court has to quantify what provision "ought to be made" for the applicant out of the deceased's estate "having regard to the circumstances at the time the order is made": s.7. Inevitably, that question involves a large element of subjective assessment by the Judge. Inevitably, on any particular set of facts, there would be a variety of answers given by different Judges. The decided cases offer broad parameters as to what provision "ought to be made" in certain kinds of circumstances but there is no formula and there is no yardstick on which the degrees of measurement are not etched by the Judge's own experience of life.*
>
> *[58] There will be some FPA cases in which the applicant's claim is so unreasonable that the applicant is clearly unjustified in commencing the proceedings let alone prosecuting them to a conclusion. In such a case indemnity costs might well be ordered. There will be many cases in which an applicant only just fails to qualify for further provision before one Judge when the same applicant would have only just succeeded in qualifying for provision before another Judge. There will be cases in which the applicant obtains an order for further provision which one Judge would*

> *regard as appropriate, another would regard as generous and a third would regard as niggardly."*

39. Similarly, in ***Palaganio v Mankarios*** [2011] NSWSC 61, at [72], White J observed that the question of what provision for a person's maintenance, education or advancement in life is *"proper"* and the question of whether the provision made by the deceased was *"adequate"* for that person's maintenance, education or advancement in life involve value judgments on which minds can legitimately differ, and there are no definite criteria by which the questions can be answered. However, the court's role is not to reward the plaintiff, or to distribute the deceased's estate according to notions of fairness or equity.

40. Basten JA said in ***Foley v Ellis*** [2008] NSWCA 288 at [3] that the state of satisfaction *"depends upon a multi-faceted evaluative judgment"*. In ***Kay v Archbold*** [2008] NSWSC 254, at [126] White J said that the assessment of what provision is proper involved *"an intuitive assessment"*. Basten JA said in ***Hastings v Hastings*** [2010] NSWCA 197 at [20] that *"... because the standard cannot be identified with precision, the application of an appropriate standard to particular circumstances may ... give rise to a range of legitimate outcomes."*

41. Another matter which should not be forgotten is that a different approach is taken to the assessment of provision in a family provision case to the assessment of damages in a personal injury claim. As a result, it is not simply a matter of ascertaining what the plaintiff's reasonable financial needs are. Putting it very broadly, in a personal

injury case ordinarily all reasonable needs are compensable. However, in a family provision claim there are other factors which also apply. That is, the Court needs to assess what is proper provision, which may be less than a meeting of all reasonable needs. The issues which arise in this regard include the consideration of the extent of the available funds – i.e. the size of the net distributable estate, and also consideration of the impact of competing claims from other beneficiaries and claimants, factors which do not arise in a personal injury assessment. For example, in ***Tchadovitch v. Tchadovitch*** [2010] NSWCA 316 Campbell JA with whom Allsop P (as his Honour then was) and Young JA agreed said at 53-54:

> *"53 The task of a court in assessing damages at common law is to provide fair compensation for a legal wrong. That measure of compensation must be fair to the defendant, as well as to the plaintiff. The task of a court in assessing the amount of provision that should be made for an "eligible person" under the Family Provision Act is to ascertain "such provision ... 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" (section 7). Some factors that the court must in some circumstances take into account, and others that it may take into account, are listed in section 9. However, the quantum of the provision is a matter for exercise of a judicial discretion, exercised bearing in mind the circumstances of the particular claimant. The principles on which the two types of award are made are not the same. Thus the method for calculating common law damages is not necessarily the method to use in arriving at a Family Provision Act award.*
>
> *54 There are insurmountable difficulties in carrying out an accurate calculation of the amount that will make proper provision for certain needs of a person for the rest of their life. As well as the unpredictability of future inflation rates and taxation regimes that Todorovic allows for in an extremely broad-brush way, Family Provision Act claims concerning a claimant who is to be provided for for the rest of his or her life have an additional complexity arising from the uncertainty of the length of that person's life. That dimension of uncertainty does not appear with quite the same acuteness in calculation of damages for personal injury, because the calculation for loss of earning capacity is made for a determinate period of*

> *time, up to the ordinary date of retirement of the plaintiff in question, with the prospect of earlier death being allowed for as one matter that goes into the deduction that is made for contingencies of life. In an estate that is large enough to satisfy all the claims upon it, it would be a significant detraction from the adequacy of the provision made for a widow that it left her at risk of not being properly provided for if she were to live for longer than the statistical average for a woman of her age."*

42. Similarly, in ***Stern v. Sekers*** [2010] NSWSC 59 Ward J (as her Honour then was) accepted the proposition that what was required in a family provision claim was the assessment of proper provision for an applicant for whom inadequate provision had been made, not an assessment of what might be the compensation to be awarded in a personal injury case.

43. In practice, assessing the value of claims is something which really only comes with experience. However, whilst experience assists in ascertaining a range, experience also informs that one cannot be dogmatic about any particular assessment. Obviously there are clearer cases, for example, a claim by a widow or widower of a long-standing marriage, but when one moves away from that type of case to cases which have more textured nuances, assessment becomes more difficult.

44. Obviously, the starting point is determining the size of the estate and the size of any potential notional estate. The plaintiff's needs and circumstances, and relationship with the deceased, is then considered and then that of beneficiaries and any other competing claimants.

45. Whilst the needs of a plaintiff may not vary, depending on the size of the estate, the Court will, generally, more generously assess those needs when the estate is large – see ***Anasson v Phillips*** - NSWSC, 4 March, 1988, unreported, Young J (as his Honour then was).

46. As noted above, the impact of any order for provision upon the beneficiaries, or other claimants, needs to be assessed. This becomes a real issue in small to moderate estates but may become a non-issue in large or very large estates.

47. In ***Sammut v Kleemann*** [2012] NSWSC 1030 Hallen AsJ (as his Honour then was) said:

> *"[134] There is no statutory mandate requiring a beneficiary, or beneficiaries, to provide such details of his, or her, financial circumstances to the court. A beneficiary is entitled to elect to remain silent in relation to all matters, and in particular, as to his, or her, financial resources (including earning capacity) and financial needs, both present and future. In addition, as here, a beneficiary may expressly decline to submit that he, or she, has a competing financial need and provide no evidence of financial resources or needs.*
>
> *[135] Where, as in this case, the beneficiaries have declined to provide such evidence to the court, the important question is what inference, if any, should be drawn from the beneficiaries' silence?*
>
> *[136] In the present case, the beneficiaries are parties to the proceedings. Thus, the court may assume that they do not wish their financial resources (including earning capacity) and financial needs, both present and future, to be taken into account:* ***Matthews v Wear*** *[2011] NSWSC 1145, at [45], per Macready AsJ.*
>
> *[137] The question, then, is what flows from a beneficiary's silence? The answer is, in those circumstances, that the court is entitled to infer that the beneficiary has adequate resources upon which to live and that he, or she, does not wish to advance a competing financial claim upon the bounty of the deceased:* ***Anderson v Teboneras*** *[1990] VicRp 47; [1990] VR 527 at 535, per Ormiston J;* ***Frey v Frey (as personal representatives of the estate of HE Frey, dec'd)*** *[2009] QSC 43, at [148], per A Lyons J;* ***Edgar v Public Trustee for the Northern Territory****, at [54], per Kelly J;* ***Neil v***

> ***Jacovou*** *[2011] NSWSC 87 at [248] per Slattery J;* ***Haklany v Gittany*** *[2011] NSWSC 1549 at [49]-[51] per Slattery J;* ***Hyatt v Covalea*** *[2011] VSC 334, at [128], per Zammitt AsJ;* ***Davis v Davis*** *[2012] NSWSC 201, at [80], per Slattery J;* ***Paola v State Trustees Ltd*** *[2012] VSC 158, at [46], per Zammitt AsJ; and* ***Collins v Mutton*** *[2012] NSWSC 548.*
>
> *[138] However, the claims of a beneficiary, as the chosen object of the deceased's testamentary bounty, or as a person with a legitimate claim on the bounty of the deceased, and also as a person whose interest in the estate may bear the burden of the order made in favour of the applicant, are to be borne in mind. (It is to be remembered that the court must specify, amongst other things, the manner in which the provision is to be provided and the part, or parts, of the estate out of which it is to be provided: s 65(1)(c) of the Act.)*
>
> *[139] Where there is no evidence from the beneficiary, it is those claims (ie as the chosen object of the deceased's testamentary bounty, or as a person with a legitimate claim on the bounty of the deceased, or as a person whose interest in the estate may bear the burden of the order made in favour of the applicant), rather than any financial claim upon the bounty of the deceased, that should be considered. Put another way, and using the oft-quoted words of Salmond J in* ***Re Allen (dec'd); Allen v Manchester*** *[1922] NZLR 218, at 220, the court is not able to have regard to "the means" of the beneficiary, but the court may still consider "the deserts of the several claimants" and the "relative urgency" of the various moral claims upon [the deceased's] bounty".*"

48. The better that attention is paid to addressing, and quantifying, the needs of the plaintiff, the more likely a favourable result becomes. That is, it is prudent to give detailed consideration of what the plaintiff's needs are and then attempt to reduce those needs into real numbers. For example, if there is a need for income, or for the provision of services into the future, there should be an attempt to quantify that and, also, quantify issues such as life expectancy of the plaintiff so that a present value calculation can be performed.

49. The crucial issue is always what needs of a plaintiff ought to be met. That will depend, obviously, on many factors, not only the particular circumstances of the plaintiff, and the circumstances of beneficiaries

and competing claimants, but also the nature of the relationship of the plaintiff with the deceased. A claim by a widow, for example, falls into a far different category to that by a son, or that by a grandson.

3. Claims by second spouses and claims by children

49. Whilst every claim needs to be assessed on its merits, some general principles can be noted in relation to claims by widows (or widowers). Leaving aside the impact of competing claims and the ramifications which flow from the size of the estate, the length of the marriage, (at least before some judges) whether it is a de jure or a de facto marriage, the age of the widow or widower, the lifestyle adopted during the marriage and the nature and circumstances of the marriage (at least viewed objectively) will bear on the determination of what provision should be ordered.

50. Claims by second spouses are further complicated by the fact that there is more often competition from the children of the deceased (because they are not also children of the plaintiff).

51. The traditional formulation setting out how a widow's claim would be viewed is set out in ***Golosky v. Golosky*** where Kirby P (with whom Cripps JA agreed), stated at pp.16-17:

> *"(c) Consideration of other cases must be conducted with circumspection because of the inescapable detail of the factual circumstances of each case. It is in the detail that the answer to the proper application of the Act is to be discovered. No hard and fast rules can be adopted. Nevertheless, it had been said that in the absence of special circumstances, it will normally be the duty of a testator to ensure that a spouse (or spouse equivalent) is provided with a place to live appropriate to that which he or she has become accustomed to. To the extent that the assets available to the deceased will permit such course, it is normally appropriate that the spouse (or spouse equivalent) should be provided, as well, with a fund to meet unforeseen contingencies: see* ***Luciano*** *(above) 69-70;*

> *(d) A mere right of residence will usually be an unsatisfactory method of providing for a spouse's accommodation to fulfil the foregoing normal presupposition. This is because a spouse may be compelled by sickness, age, urgent supervening necessity or otherwise, with good reason, to leave the residence. The spouse provided will then be left without the kind of protection which is normally expected will be provided by a testator who is both wise and just. See* ***Moore v. Moore*** *Court of Appeal, unreported, 16 May, 1984 per Hutley JA;*
>
> *(e) Considering what is 'proper' by inference with what is 'improper' as a provision in a will, it is appropriate to take into account all of the circumstances of the case including such matters as the nature and quality of the relationship between the testator and the claimant; the character and conduct of the claimant; the present and reasonably anticipated future needs of the claimant; the size and nature of the estate and of any relevant dispositions which may have reduced the estate available for distribution according to the will, the nature and relative strengths of the competing claims of testamentary recognition; and any contributions of the claimant to the property or to the welfare of the deceased. See* ***Re Fulop Deceased*** *(1987) 8 NSWLR 679 (SC);* ***Churton v. Christian & Ors.*** *(1988) 13 NSWLR 241 (CA), 252."*

52. In ***Luciano v. Rosenblum*** (1985) 2 NSWLR 65 at 69-70 Powell J (as he then was) said:

> *"It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies."*

53. Where, after competing factors have been taken into account, it is possible to do so, a spouse ought to be put in a position where she/he is the master of her/his own life, and in which, for the remainder of her/his life, she/he is not beholden to beneficiaries: ***Langtry v Campbell*** (NSWSC, 7 March 1991, Powell J, unreported).

54. Usually, a mere right of residence will be an unsatisfactory method of providing for a spouse's accommodation. This is because the spouse may be compelled, by sickness, age, urgent supervening necessity, or otherwise, with good reason, to leave the residence. The spouse will then be left without the kind of protection which is normally expected should be provided by a deceased who is both wise and just: ***Moore v Moore*** (NSWCA, 16 May 1984, unreported), per Hutley JA, p 2; ***Golosky v Golosky*** [1993] NSWCA 111.

55. However, the above general principles do not apply universally and without qualification to all widows. For example, in ***Marshall v Carruthers*** [2002] NSWCA 47 Hodgson JA said (albeit in the case of an application by a de facto spouse for provision under the FPA rather than one resisting an application for provision):

> *"63 The Master found that Ms Carruthers had a strong claim, and I agree with that finding. However, the strength of a claim of a surviving partner does, in my opinion, vary with circumstances. Although the Family Provision Act does, in some respects, equate de facto spouses with de jure spouses, this does not, in my opinion, make the existence or otherwise of a marriage irrelevant. In my opinion, a formal and binding commitment to mutual support through good times and bad, other factors being equal, adds strength to a legitimate claim. In my opinion also, the strength of a claim can be affected by the length of a relationship and contributions to the relationship. One factor which may be particularly important in a claim by a woman is that a woman may have, to the detriment of her own financial prospects, taken a major role in raising the children of herself and the deceased.*
>
> *64 The Master referred to the following statement of principle which appears in **Luciano v Rosenblum** (1985) 2 NSWLR 65 at 69*
>
> > *'It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she*

> *is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies.'*
>
> *65 I do not think it is to be assumed that this statement is to apply in all cases, particularly where factors such as those I have mentioned are absent. In my opinion, it is not clear that this statement would apply to applications by widowers. The difference in attitude that the Court may take to applications by widowers is due in part, I think, to economic disadvantages which women still face. One important aspect of this is the economic disadvantage occasioned by the greater responsibility which women often take in looking after children. That factor is of course absent here."*

56. Additionally, Young CJ in Eq said:

> *"71 I agree that the appeal should be allowed and both claims dismissed. I basically agree with the reasons which Justice Hodgson has just delivered. However, I should make a few additional comments.*
>
> *72 Mr Ellison for the respondent strongly submitted that a person who makes a claim as a spouse of a class (a) eligible person is entitled to take comfort from the words of Mr Justice Powell in **Luciano v Rosenblum** (1985) 2 NSWLR 65 at 69 that a spouse is more or less entitled to have a home plus income to enable her to live in the style to which she is accustomed provided out of the estate. Indeed this passage is actually a summary of a similar but longer statement made by Powell J in **Elliott v Elliott** 18 May 1984 unreported which was approved by the Court of Appeal on 24 April 1996 and which is set out in the learned Master's judgment.*
>
> *73 It must be remembered that Powell J put his proposition as a "broad general rule". However, there is in fact no "standard former spouse" to which one can just apply that proposition as a rule of thumb.*
>
> *74 Powell J's broad general rule may not be a good guide as to what the Court will consider as the duty of a testator towards a spouse except in the case of a financially dependent spouse where there is a history of bringing up children with the deceased or in supporting the deceased while he was amassing his fortune. The broad general rule may well be inapplicable in cases of other spouses. Indeed, the cases in the first half of the 20th century show that as far as widowers were concerned, the proposition was quite untrue.*
>
> *75 I also take this opportunity to reject Mr Ellison's submission that a person who has a claim as a class (a) eligible person ipso facto has a stronger claim than a person who comes under class (b). Indeed, in many cases, such as where there are infant children, this may not be so.*

> *76 The present case is not one that can be decided by some rule of thumb. One must look at the female applicant as a de facto spouse of five years' standing whose property was held with the deceased as tenant in common rather than jointly, who has no apparent health problems and who earns $61,000 a year. With assets of $930,000 she is no way the typical mid-20th century widow that Powell J had in mind when making his assessment in **Luciano's** case."*

57. Palmer J agreed with Hodgson JA and with the additional observations of Young CJ in Eq.

58. More recently, in ***Bladwell v. Davis*** [2004] NSWCA 170, Bryson JA said:

> *"[18] In my respectful view there is an inconsistency between an approach, in the context of competing claims, to the claims of widows as paramount, and the application to the facts and circumstance of each case of s.7 and the approach established by **Singer v. Berghouse**. Preconceptions and predispositions are likely to be the source of inadequate consideration of the process required by the Family Provision Act 1982.*
>
> *[19] In the application of the test in s.7, and of the exposition thereof in **Singer v. Berghouse** by Mason CJ, Deane and McHugh JJ at 409-411 it would be an error to accord to widows generally primacy over all other applicants regardless of circumstances and regardless of performance of the stages of consideration described in Singer v. Berghouse, in full and with reference to the instant facts. Defeat of the opponents' claims does not necessarily follow from a demonstration, which the claimant can make, that all her needs with respect to income, home renovation, and provision for contingencies cannot be met if any provision is made for the opponents; indeed she could well demonstrate that even if the provisions of the will took effect without any modification, the provision for her is not adequate. That is not a demonstration that no claim by an eligible person can succeed; the claims and circumstances of the opponents also have to be weighed, and they too have their needs and merits."*

59. Stein AJA agreed with Bryson JA and with the additional remarks of Ipp JA and Ipp JA said, relevantly:

> *"[1] I agree with Bryson JA, for the reasons his Honour has stated, that 'it would be an error to accord to widows generally primacy over all other applicants regardless of*

> *circumstances and regardless of performance of the stages of consideration described in **Singer v. Berghouse** (1994) 181 CLR 201…'*
>
> *[2] I would add, however, that where competing factors are more or less otherwise in equilibrium, the fact that one party is the elderly widow of the testator, is permanently unable to increase her income, and is never likely to be better off financially, while the other parties are materially younger have the capacity to earn more or otherwise improve their financial position in the future, will ordinarily result in the needs of the widow being given primacy. That is simply because, in such circumstances, the widow will have no hope of improving herself economically, whereas that would not be the position of the others. In that event, the need of the widow would be greater than that of the others."*

60. Also see **Clifford v Mayr** [2010] NSWCA 6 at [144]:

> *"It has been held that the principle is equally applicable to the position of a person who occupies the position of a de facto wife: **Re Marcuola-Bel Estate; Marcuola-Bel v Thi Ly Tran** [2005] NSWSC 1182 at [31]. Inevitably, when the statute calls for the court to make a decision about what is the appropriate provision in the circumstances of the particular case before it, the principle is not one of immutable application: **Marshall v Carruthers** [2002] NSWCA 47."*

61. In ***Cross v Wasson*** [2009] NSWSC 378 Ward J, in a case involving a claim by a widower, said:

> *"[98] Of course, the position of surviving spouse no longer attracts any primacy or paramountcy in the face of other competing claims. In **Bladwell v Davis** [2004] NSWCA 170 Bryson JA (at [18]) noted an inconsistency between according paramountcy to the claims of surviving spouses (in the context of competing claims) and the application to the facts and circumstances of each case of s 7 of the Family Provision Act and the approach established by **Singer v Berghouse**. His Honour said: "Preconceptions and predispositions are likely to be the source of inadequate consideration of the process required by the Family Provision Act 1982". His Honour considered it would be an error generally to accord to widows (or, by analogy here, widowers) primacy over all other applicants regardless of the circumstances and "regardless of performance of the stages of consideration described in **Singer v Berghouse** in full and with reference to the instant facts" (para 19).*

62. ***Bladwell v Davis*** was also referred to, with approval, in ***Milillo v Konnecke*** [2009] NSWCA 109 at [80] - [82].

63. In ***Verzar v Verzar*** [2012] NSWSC 1380 Lindsay J said, after referring to ***Luciano v. Rosenblum***, at [130]-[131]:

> *" … There is no inflexible rule that governs the entitlements of widows or partners generally. The facts of each case must be considered, particularly where there are competing claims on the bounty of a deceased person and the deceased's resources are insufficient to satisfy them all.*
>
> *Whatever guidance one might draw from analogous cases all analogies, and any guidelines drawn from a pattern of similar cases, must yield to the text of the legislation, the duty of the Court to apply that text to the particular circumstances, and the totality of material circumstances, of each case. Preconceptions and predispositions, comforting though they may be, can be the source of inadequate consideration of the jurisdiction to be exercised:* ***Bladwell v Davis*** *[2004] NSWCA 170 at [12] and [18]-[19]."*

64. Again, some general principles can be noted in relation to claims by children.

65. The relationship between parent and child changes when the child leaves home. Nevertheless, a child does not cease to be a natural recipient of parental ties, affection or support, in adulthood.

66. The bare fact of paternity is a matter of very great importance in considering the moral obligations of a parent and may of itself provide a basis for some order for provision – see for example ***Wheatley v. Wheatley*** [2006] NSWCA 262, Bryson JA, with whom Santow and McColl JJA agreed, at [22]-[23] and ***Nicholls v. Hall*** [2007] NSWCA 356 at [42]-[43].

67. Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, in relation to whom the deceased has a primary obligation to do so.

68. One cannot describe community expectation of a parent in respect of an adult child in terms of an universally applicable formula. Ordinarily, the community expects parents to raise, and to educate, their children to the very best of their ability while they remain children, and probably to assist them with a tertiary education, where that is feasible, and by providing funds to permit to provide them with a start in life – such as a deposit on a home or help starting a business.

69. It is thought that the community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit, such as in the case of a very large estate, and the relationship between the parties is such as to justify it, there may be such an obligation – see for example ***Fung v. Ye*** [2007] NSWCA 115, where Young CJ in Eq (as his Honour then was), with whom Tobias JA and Bell J agreed, said:

> *"[25] Returning to the present case, I must say that Gzell J's statement at [31] that "… there is no rule to the effect that proper provision for an adult and presently able-bodied child does not extend to providing him or her with a house or money to buy one" may give rise to unreasonable expectations by future claimants. The statement is correct as far as it goes, but the statement would also be correct that in very many cases it will not be appropriate to provide a house, or money to buy one, to an able-bodied adult child. In each case one needs to consider the basic human right of freedom of testation of the deceased, the relationship between the plaintiff and the deceased, the size of the estate and the other claimants. I would venture to say that probably in the majority of cases the evaluation of that equation will not result in an able-bodied child being "entitled" to a house or money to buy one."*

70. If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant: ***Re Buckland Deceased*** [1966] VR 404 at 411; ***Hughes v National Trustees Executors and Agency Co. of Australasia Ltd*** (1979) 143 CLR 134 at 148; ***Goodman v Windeyer*** (1980) 144 CLR 490 at 498, 505. But the Act does not permit orders to be made to provide for the support of third persons to whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons: ***Re Buckland Deceased*** at 411; ***Kleinig v Neal (No 2)*** [1981] 2 NSWLR 532 at 537; ***Mayfield v Lloyd-Williams*** [2004] NSWSC 419 at [86]. One cannot convert the application into, in effect, an application for provision for a third party who is not an eligible person and who could not make a claim in his or her own right.

71. There is no need for an applicant adult child to show some special need or some special claim: ***McCosker v McCosker****;* ***Kleinig v Neal (No 2)****,* at 545; ***Bondelmonte v Blanckensee*** [1989] WAR 305; and ***Hawkins v Prestage*** (1989) 1 WAR 37 per Nicholson J at 45.

72. The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: ***MacGregor v MacGregor*** [2003] WASC 169 at [181], [182]; ***Crossman v Riedel*** [2004] ACTSC 127 at [49]. Similarly, the need for financial security and for a fund to protect against the ordinary vicissitudes of life, is relevant: ***Marks v Marks***

[2003] WASCA 297 at [43]. In addition, if the plaintiff is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: ***Christie v Manera*** [2006] WASC 287; ***Butcher v Craig*** [2009] WASC 164 at [17].

73. A typical factor in claims by children is a level of estrangement as that is often what has caused the deceased parent to treat his or her children other than equally.

74. A level of estrangement between a parent and a child will not necessarily terminate the obligation to make provision for the child. Nevertheless, the poor state of a relationship between a parent and a child may operate to restrain the amplitude of the provision to be ordered – see for example ***Wheatley v. Wheatley*** [2006] NSWCA 262 at [37]. In extreme circumstances, the extent of poor relations between a child and a parent may mean that no order for provision will be made. What will generally be significant is the extent of the breakdown of the relationship and the extent to which it can be attributed either solely to the child, solely to the deceased parent, or some combination of the two. In relation to the significance of estrangement also see ***Ford v. Simes*** [2009] NSWCA 351, Bergin CJ in Eq, with whom Tobias JA and Handley AJA agreed, at [57]-[73].

75. Given the recent decisions of the Court of Appeal in ***Keep v. Bourke*** [2102] NSWCA 64 and ***Andrew v Andrew*** [2012] NSWCA 308, one wonders whether there can ever be a case of estrangement sufficient

to entirely preclude an order for provision for an otherwise meritorious plaintiff.

76. There is no obligation upon a deceased parent to treat all of his or her children equally – see for example ***Bacon v. Bacon; Estate of Ethel Irene Bacon Deceased*** NSWSC, unreported, 11 February 1991, Bryson J and also see ***Carey v. Robson; Nicholls v. Robson*** [2009] NSWSC 1142 (Palmer J) at [57]-[58] and ***Gersbach v. Blake*** [2011] NSWSC 368 at [94] (Hallen AsJ, as his Honour then was). Similarly, Bryson J noted in ***Gorton v Parks*** (1989) 17 NSWLR 1, at 6, that it is not appropriate, to endeavour to achieve a "fair" disposition of the deceased's estate and it is not part of the Court's function to achieve some kind of equity between the various claimants. The Court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity.

77. For completeness, if a grandchild of a deceased is to successfully make a claim he or she must establish eligibility, which involves establishing dependence upon the deceased at some time, and also "factors warranting". Where the grandchild is a beneficiary he or she does not have to establish those things, but the other general principles applicable to claims by grandchildren are useful in considering the competing claims of grandchildren beneficiaries, if that is necessary in the assessment of a plaintiff's claim for provision.

78. In ***Vanvalen v Neaves*** [2005] NSWSC 593 Palmer J said at [41]:

"The following is a convenient summary of the principles which I understand to be applicable to the determination whether a grandchild is an eligible person:

> *"25. The authorities make it clear that a grandchild is not normally regarded as a natural object of a testator's testamentary recognition and that additional factors need to be shown to bring a grandchild into the category of persons for whom the testator ought to have made provision. These additional factors usually show that the testator had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the testator has undertaken a continuing and substantial responsibility to support the plaintiff financially: see e.g.* ***Tsivinsky v Tsivinsky*** *(unrep) NSWCA 5 December 1991 per Kirby P;* ***Sayer v Sayer*** *[1999] NSWCA 340;* ***MacEwan Shaw v Shaw*** *[2003] VSC 318;* ***O'Dea v O'Dea*** *[2005] NSWSC 46.*
>
> *26. The authorities are equally clear that the grandchild's dependence, whether whole or partial, on the grandparent must be direct and immediate; it is not sufficient that the grandchild's dependence is the indirect result of the testator providing support and maintenance for his or her own adult child and thereby incidentally benefiting the testator's grandchildren who are directly dependent on that child: see e.g.* ***Petrohilos v Hunter*** *(1991) 25 NSWLR 343, at 346;* ***Re Fulop*** *(1987) 8 NSWLR 679, at 682;* ***Pearson v Jones*** *[2000] NSWSC 799;* ***MacEwan Shaw v Shaw*** *(supra).*
>
> *27. Further, the fact that the testator occasionally, or even frequently, made gifts to or for the benefit of the grandchild does not in itself make the grandchild wholly or partially dependent on the testator for the purposes of s.6(1)(d). To qualify the grandchild as a dependant, the gifts or benefits provided by the testator must be of such regularity and significance that one can say that the testator had clearly assumed a continuing and substantial responsibility for the grandchild's support and welfare: see e.g.* ***Leahey & Trescowthick*** *[1999] VSC 409;* ***MacEwan Shaw v Shaw*** *(supra);* ***Pearson v Jones*** *(supra)":* ***Simons v Permanent Trustee Co Ltd*** *[2005] NSWSC 223."*

79. Also, more recently, Hallen J said at [251] in ***Kallidis v Kallidis*** [2012] NSWSC 1485:

> *"In relation to a claim by a grandchild for a family provision order, the following general principles are, in my view, relevant and should be remembered, whether the claim is under the former Act or under the Act:*
>
> *(a) As a general rule, a grandparent does not have an obligation or responsibility to make provision for a grandchild;*

that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition.

(b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes a surrogate parent, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.

(c) The mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created, in a particular case, by reason, for example, of the care and affection provided by a grandchild to his, or her, grandparent.

(d) It has been said that a pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.

(e) The fact that the grandparent occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the grandparent for the purposes of the Act.

(f) The grandchild's dependence, whether whole or partial, on the grandparent must be direct and immediate; it is not sufficient that the grandchild's dependence is the indirect result of the deceased providing support and maintenance for his, or her, own adult child, and thereby, incidentally, benefiting the deceased's grandchildren who are directly dependent on that child.

(g) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents. Yet, the obligation of a parent to provide for his, or her child does not, necessarily, negate, in an appropriate case, the moral obligation of a grandparent to make provision for the maintenance, education or advancement in life of a grandchild out of her, or his, estate.

(h) The fact that the parents, or either of them, of a grandchild have, or has, predeceased the grandparent may be

a relevant factor in support of the claim made by a grandchild."

4. Notional Estate

80. The notional estate provisions of the SA (Part 3.3 of Chapter 3; ss. 74-90) permit the Court, upon proof of certain matters, to designate property no longer owned by the deceased at his/her death, or disposed of by his/her estate, to be treated as the "notional estate" of that deceased person for the purpose of making provision in favour of an applicant. They only apply if:

    (a) The deceased left no actual estate at the time of his or her death;[1] or
    (b) the deceased's estate is insufficient for the making of the family provision orders or costs orders that the court thinks should be made;[2] or
    (c) family provision orders or costs orders should not be made wholly out of the deceased's estate because there are other persons who could apply for family provision orders, or there are special circumstances;[3] or
    (d) the deceased's estate has been distributed, and no estate remains, or the remainder is insufficient for the court making family provision orders or costs orders[4].

81. Broadly speaking, the notional estate provisions work by the following mechanism:

    (a) determining whether or not a "relevant property transaction" has occurred;
    (b) if a relevant property transaction has occurred, determining whether it has taken effect within defined periods prior to the deceased's death; and

---

[1] section 88(a)
[2] section 88(b)
[3] section 88(c)
[4] section 79

(c) if those determinations are made favourably towards a plaintiff, consideration of the further factors set out in sections 83, 87, 88, 89 and 90 of the SA in order for the Court to determine whether or not an order should be made designating property as notional estate.

82. The Court may also enquire as to whether or not the deceased's estate has already been distributed, and, if so, may designate property as notional estate[5], subject to the considerations raised by sections 87, 88, 89 and 90 of the SA.

83. Part 3.3 of the SA grants the Court significant power. The width of those powers is underlined by section 84 of the SA which simply states that *"A person's rights are extinguished to the extent that they are affected by a notional estate order"*.

84. A "relevant property transaction" (known as a "prescribed transaction" under the, similar, notional estate provisions of the FPA means[6] a transaction or circumstance affecting property that results in property being held by another person or being subject to a trust,[7] including certain other transactions,[8] where full valuable consideration has not been given.

---

[5] section 79
[6] section 74
[7] section 75
[8] section 76

85. A liberal, rather than a narrow or pedantic, approach to construction is taken in determining whether a relevant property transaction has occurred.[9]

86. In ***Kavalee v. Burbidge*** (1998) 43 NSWLR 422, Mason P (with whom Meagher JA agreed) observed in relation to the notional estate provisions of the FPA, at 441:

> *"'Prescribed transaction' is defined in s.22. It is obvious that the legislature has cast the net very wide, in pursuit of its goal of providing adequate provision in favour of eligible persons. As beneficial legislation, a liberal approach to construction is called for, notwithstanding the obvious impact of a designating order upon existing property rights ... However, the ability to choose a construction which promotes the purpose of extending the powers of the Court to the full range of benefits and advantages controlled by testators exists only 'in so far as any question of construction presents a choice' "*

His Honour continued, at 443:

> *"Several of the prescribed transactions detailed in s.22 required a specified consequence 'as a result of' the specified act or omission: see s.22(1)(a), (4)(a), (c), (e). This poses a question of fact ... It should not be overlooked that the expression is 'as **a** result' [of which] and not 'as **the** result' [of which]; and that the link may be 'directly or indirectly'. "*

His Honour then said, at 446-7:

> *"... I do not see s.22(1)(a) as confined to acts or omissions that are the operative cause of property becoming held by the deceased's intended disponee. To do so would ignore the thrust of this liberal enactment which emphasises its scope with the words 'directly or indirectly', 'as **a** result of which' (emphasis added) and 'whether or not the property becomes ... so held immediately' ... The legislation is clearly intended to operate in a context of human agents where several may have to act in concert and where there is the possibility that one may not co-operate. To paraphrase Mason J in Fagan v. Crimes Compensation Tribunal (at 673) - 'the fact that other unconnected events may also have had some relationship to*

---

[9] See ***Schaeffer v. Schaeffer*** (1994) 36 NSWLR 315 and ***Kavalee v. Burbidge*** (1998) 43 NSWLR 422.

> *the occurrence is not material if the ... act was a cause, even if not the sole cause' ...*

87. Section 75(1) of the *SA* provides:

> *"(1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:*
>
> > *(a) held by another person (whether or not as trustee), or*
> >
> > *(b) subject to a trust,*
> >
> > *and full valuable consideration is not given to the person for doing or not doing the act."*

88. A number of matters should be noted in relation to section 75 of the SA. First, it captures not only positive acts, but also omissions - in either case where the act or omission directly or indirectly is a cause of the defined result – see ***Kavalee v. Burbidge*** (supra). For example in relation to companies, the decision of a deceased *not* to exercise rights can affect his/her shareholding in the company just as much as his/her positive acts – compare a *failure* to exercise rights to a share issue, or to vote against the issue of new shares at nominal prices to other persons which has the practical effect that the deceased's percentage of equity in a company is disproportionately reduced, with *positive steps* to "gift" shares to others, or to grant increased rights to the shares held by others.

89. Secondly, the concept of "property" in section 75 of the SA picks up the definition of "property" in section 3 of the SA that includes "any valuable benefit". For example, this includes an increase in the value

of shares already owned.[10] Moreover, an increase in the value of shares is capable of being "held" by a shareholder for the purposes of section 75 of the SA.[11]

90. In addition, section 75 of the SA picks up the definition of "property held by a person". That includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.[12]

91. Thirdly, full valuable consideration[13] must not have been given in compensation for the doing or omitting to do the act – see the discussion in ***Wade v. Harding*** (1987) 11 NSWLR 551 regarding what is meant by that expression[14] at 554-555. It requires a fair equivalent for what is provided; i.e. more than token consideration.

92. For an example of where full valuable consideration (agreement to cease a profitable architectural practice and undertaking to work full time with the deceased in a business) defeated a claim for a designating order, where there otherwise was a relevant property

---

[10] See ***Schaeffer v. Schaeffer*** at 318-320 and ***Kavalee v. Burbidge*** at 443 - "(the) definition of 'property' and s.22(1)(a)(i) means that there may be a prescribed transaction even though there has been no change in the ownership of any property. It is sufficient that 'any valuable benefit' becomes held by a person other than the deceased. Accordingly, an increase in the value of shares held by existing shareholders as a result of the conversion on death of the deceased's ordinary shares into preference shares falls within the scope of the Act."

[11] See ***Schaeffer v. Schaeffer*** at 318-319.

[12] Section 55(4)

[13] The equivalent FPA section referred to full valuable consideration in money or money's worth. It is unclear whether the deletion of the words "in money or money's worth" will affect the interpretation of the section or the application of previous authority.

[14] Whilst ***Wade v. Harding*** was disapproved by the New South Wales Court of Appeal in ***Cetojevic v. Cetojevic*** [2007] NSWCA 33 (albeit in obiter comments) that disapproval related to the conclusions reached in ***Wade v. Harding*** regarding whether or not in particular circumstances there was full valuable consideration for the failure to sever a joint tenancy and the discussion set out above of what constitutes full valuable consideration is not tainted by that disapproval.

transaction, see ***Vaughan v. Duncan; Vogt v. Duncan*** [2005] NSWSC 670 – Macready AsJ.

93. The property designated as notional estate does not need to be the same property that was the subject of the relevant property transaction.[15] However, the property designated as notional estate must be held by a person or be subject to a trust associated with a relevant property transaction – the property designated as notional estate must be held by or held on trust for a person by whom property became held as the result of a relevant property transaction, or the object of a trust for which property became held on trust as the result of a relevant property transaction.[16] Further, if the person holding the property is only holding as a trustee, then, in relation to that person, the court can only make an order against the property held as a consequence of the relevant property transaction.[17]

94. A relevant property transaction is deemed to take effect at the time the relevant property becomes held by a person or subject to a trust or as otherwise set out in section 77.[18]

95. The fact that a person has previously caused property to become held by another person, or subject to a trust, does not prevent a later act or omission by that same person, causing a further change

---

[15] sections 79 and 80(3) and see ***Phillips v. James*** [2014] NSWCA 4 at [74]-[76].
[16] section 80(3)
[17] section 89(3)
[18] s77(1) SA

in ownership of that property, to constitute a relevant property transaction.[19]

96. Section 76 of the SA sets out a detailed, but not exclusionary, list of types of transactions whereby a person is deemed to have entered into a relevant property transaction, that is, done or omitted to have done an act as a result of which property becomes held by another person or subject to a trust. It includes exercising power to appoint or dispose or property that is not in the person's estate, powers to extinguish the interests of others in property, jointly owned property passing by survivorship, life assurance policies, superannuation funds, and contracts which effect a disposition of property on or after death. This subsection, which does present some tortuous reading, warrants careful examination and I deal with some instances where it is invoked in more detail below.

97. Sections 77 of the SA deals with the timing of relevant property transactions and provides that:

> *"(1) For the purposes of this Chapter, a relevant property transaction is taken to have effect when the property concerned becomes held by another person or subject to a trust or as otherwise provided by this section.*
>
> *(2) A relevant property transaction consisting of circumstances described in section 76 (2) (a), (c) or (d) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event resulting in the person no longer being entitled to exercise the relevant power.*
>
> *(3) A relevant property transaction consisting of circumstances described in section 76 (2) (b) or (e) is taken to have been entered into immediately before, and to take*

[19] s75(2) SA

> *effect on, the person's death or the occurrence of the other event referred to in those paragraphs.*
>
> *(4) A relevant property transaction that involves any kind of contract for which valuable consideration, though not full valuable consideration, is given for the person to enter into the transaction is taken to be entered into and take effect when the contract is entered into."*

98. The particular significance of subsection 77(2) and (3) is that, at least in relation to conduct by omission, it has the potential to cause conduct more than 3 years before the date of death of the deceased to be the subject of designating orders.

99. Subsection 77(4) has the effect of removing contractual transactions taking effect on or after death where there is (merely) valuable consideration, though not full valuable consideration, from being caught by subsection 80(2)(c) of the SA so that if the transaction is to be a relevant property transaction the criteria in one or more of subsections 80(2)(a) and (b) must be met.

100. The making, or not making, of a will cannot be a relevant property transaction unless it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in the person's estate[20].

101. Before a designating order can be made in relation to a relevant property transaction, and subject to sections 83, 87, 88, 89 and 90 of the SA, the Court must be satisfied that an order for provision ought to be made on the application by the plaintiff.[21] The Court

---

[20] s75(3).
[21] s78(1).

must also be satisfied that the relevant time prescriptions have been met.

102. The requirement in subsection 80(3) of the SA that the relevant property to be designated as notional estate be held by, or on trust for, a person by whom property became held as the result of a relevant property transaction or the object of a trust extends to a person who is deceased where the property has become part of their estate.[22]

103. For a designating order to be made the relevant property transaction:

> (a) must have taken effect no more than 3 years before the death of the relevant deceased and be one where it "was entered into with the *intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order*;[23]
>
> (b) must have taken effect no more than 1 year before the death of the deceased and be one where it "was entered into when the *deceased person had a moral obligation to make adequate provision, by* will *or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction*;[24] or
>
> (c) must be a transaction that took effect or is to take effect on or after the deceased person's death.[25]

---

[22] See s.82 SA. This overcomes the issue highlighted in *Prince v Argue* [2002] NSWSC 1217 per Macready AJ and *Sekers v Sekers* [2010] NSWSC 59 per Ward J
[23] s80(2)(a).
[24] s80(2)(b).
[25] s80(2)(c).

104. Significantly, where an application is made for a designating order it is crucial, when relevant, that evidence be addressed to the italicised issues set out above. Further, it should not be forgotten that that in the first two categories evidence needs to deal with the position *as at the date of the relevant property transactio*n so that, it may be necessary (depending upon whether you act for the plaintiff or the defendant) to put on evidence regarding the intentions of the deceased or the financial circumstances of the plaintiff, or other eligible persons, at some point prior to the death of the deceased as well as evidence, in the ordinary way, of the current circumstances of the plaintiff or the defendant and/or beneficiaries.

105. In the case of a relevant transaction taking effect more than 1 year, but less than 3 years, before the death of the deceased person there needs to be evidence sufficient for the Court to form a view as to the intention of the deceased in entering into the relevant property transaction. There may, perhaps unusually, be direct evidence by way of evidence of statements made by the deceased or the transferee[26] but otherwise the evidence will have to be evidence from which the appropriate inference can be drawn (as opposed to mere conjecture). The nature of the particular transaction may be sufficient in the circumstances, or more may be required.

106. The FPA equivalent of section 80(2)(a) of the SA requiring proof of intention was section 23(b)(i). In ***Kwan v. Kwan*** [2008] NSWSC 465, Macready AsJ, the transfer of real estate for $1.00 plus

---

[26] See for example ***Fletcher v. Fletcher*** [2007] NSWSC 728, Macready AsJ at [4] & [71].

statements by the deceased to the effect that she did not want assets of hers going to the plaintiff, her son, because they might then go to his wife, who she disliked, was sufficient to satisfy subsection 23(b)(i) of the FPA.

107. In ***Gill v. Smith*** [2007] NSWSC 832, where the deceased, diagnosed with cancer, took steps in the last 3½ months of his life to convert a tenancy in common regarding real estate to a joint tenancy, and to cause other assets to pass, either before or after his death, to the defendant, so that gifts of residue to the children of his failed marriage failed from a practical point of view, McLaughlin AsJ held that, amongst other things, 23(b)(i) of the FPA had been satisfied –

108. The Court may make an order designating notional estate[27] where there has been a distribution from the estate of the deceased person and the court is satisfied that property became held by a person or subject to a trust as a result of the distribution.

109. Depending on the circumstances in relation to the distribution, for example the timing of it and whether or not there has been a distribution of the entirety of the estate of the deceased, a decision may need to be made regarding who should be joined as defendants[28].

110. The following statement of Young CJ in Eq in ***Ernst v Mowbray*** [2004] NSWSC 1140 should be borne in mind in the case of early distribution of estates:

---

[27] section 63(5) and 79.
[28] For example, see the discussion in ***Spencer v. Blyth*** [2006] NSWCA 181 at [10]-[13].

"57 Before dealing with the question of costs, I must consider the question of the appropriation by the defendants of the monies in the estate. Mr Livingstone has defended this on the basis that small estates are to be settled quickly and when no actual claim is made, estates may be distributed.

58. I cannot see any evidence where any notice was given under s35 of the ***Family Provision Act*** *of intention to distribute. Mr Livingstone says that it was up to the plaintiff to swear that there was no such notice, otherwise the Court should assume it was given. I reject this submission. The knowledge of the fact that the notice was or was not given was purely in the defendants' camp and they chose not to give any evidence of it. They knew in May 2001 that a claim was contemplated, yet notwithstanding this, distributed the estate.*

59. Section 35 seems to contemplate that there are personal claims against an administrator who distributes property in an estate where the notice has not been given. Master Macready in ***D'Albora v. D'Albora*** *[1999] NSWSC 468; BC 9902597, considered what this liability was. The learned master referred to the Privy Council's decision in* ***Guardian Trust and Executors Company of New Zealand Ltd v. The Public Trustee of New Zealand*** *[1942] AC 115 where Lord Romer, giving the decision of the Board said at 127 that there were well established principles of equity, 'One of those principles is that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded.'*

…

61. In ***Re Gimblett*** *[1960] NZLR 664, 666, McGregor J in New Zealand said it was quite improper for administrators to administrate the estate before the expiration of the period in which claims could be made under the Act, at least without notice to the widow with full particulars of the assets.*

62. In ***Re Faulkner*** *[1999] 2 Qd R 49, Moynihan J in the Supreme Court of Queensland held that an executor who distributed an estate despite notice of a claim under the* ***Family Provision Act*** *committed a breach of trust. His Honour considered that there should be a setting aside of the distribution.*

63. Dickie ***Family Provision after Death*** *(Law Book Co, 1992) p179 sets out a series of authorities for the proposition that a personal representative who distributes estate assets during a period in which an application for Family Provision can be made, may be personally liable to a successful applicant who suffers loss as a result.*

64. It would seem to me that where the executors have distributed to themselves prematurely, they would ordinarily

> *be ordered to restore the monies to the estate with interest and that for the purpose of working out the value of the estate left by the testator as at the date of the hearing that interest should be taken into account. This is because had the executors done their duty the estate monies would have been invested the interest so that the fund available for the Court to consider would have been increased by the relevant amount of interest."*
>
> [emphasis added]

111. In ***Phillips v. James*** (supra) paragraph [64] of the judgment in ***Ernst v. Mowbray*** (supra) was referred to with apparent approval.

112. **Dickey's *"Family Provision after Death"*** states at pages 178-179:

> *"Unless statute provides otherwise, an executor or administrator must ordinarily refrain from distributing any part of a deceased's estate to beneficiaries during the period in which an application for family provision can be made either without leave of the court or, semble, pursuant to leave granted by the court. Although there is scant Australian authority on point, it would appear that this rule is subject to reasonable exceptions. For example, it seems probable that an executor (and mutatis mutandis an administrator) may distribute a legacy:*
>
> - *if it is trifling in comparison with the size of the estate residue;*
> - *if a beneficiary has a strong moral claim to provision from the deceased's estate and his or her need for the legacy is urgent;*
> - *if all persons who are eligible to apply for family provision have effectively disclaimed their right to do so;*
> - *if it is clear that there is no person who is eligible to apply for family provision from the deceased's estate.*
>
> *Be that as it may, however, it seems accurate to say that if a personal representative does distribute estate assets during the period in which an application for family provision can be made either without leave of the court or pursuant to leave granted by the court, he or she may be personally liable to a successful applicant who suffers a loss as a result. (See **Re Simson (Deceased); Simson v. National Provincial Bank Ltd**. [1950] Ch. 38 at 42-43; **Re Lerwill (Deceased); Lankshear v. Public Trustee** [1955] N.Z.L.R. 858 at 862; **Re Winwood (Deceased); Winwood v. Winwood** [1959]*

> *N.Z.L.R. 246 at 249;* ***In the Estate of Gough (Deceased); Gough v. Fletcher*** *(1973) 5 S.A.S.R. 567 at 566;* ***Re Whitta*** *[1984] 2 Qd. R. 356 at 364-365;* ***Re McPherson*** *[1987] 2 Qd. R. 394 at 399.) In appropriate circumstances, an injunction will lie to prevent a personal representative from acting in contravention of the general prohibition on the premature distribution of estate assets. (****In the Estate of Gough (Deceased); Gough v. Fletcher*** *(1973) 5 S.A.S.R. 675 esp at 565-566. Note also* ***Packo v. Packo*** *(1989) 17 N.S.W.L.R. 316 (injunction will lie to restrain distribution of estate pending determination of application to extend time to apply for family provision)).*
>
> *There is a suggestion that if an executor (or, semble, an administrator) distributes estate assets during the period when an application for provision can be made either without leave of the court or pursuant to leave granted by the court, these assets may not be rightly received by the beneficiaries, with the result that they remain estate assets. (****Re Lowe (Deceased)*** *[1964] Q.W.N. 37.)*
>
> *If a personal representative proposes to distribute estate assets during the period in which an application for family provision can be made either without leave of the court or pursuant to leave granted by the court, it has been said to be advisable that he or she inform each person who is eligible to apply for family provision of the proposed action, and also that he or she provide every such person with notice of the estate's assets. (Re* ***Gimblett; Gimblett v. Gimblett*** *[1960] N.Z.L.R. 664 at 666.)"*
>
> [Some footnotes omitted]

113. At the very least, at a practical level, where there has been an early distribution of the estate, the threshold for a plaintiff to obtain a designating order should be low.

114. Section 81 of the SA permits the court to catch the situation where there is a subsequent relevant property transaction; that is, where the transferee or person on whose behalf the property was held on trust has themselves entered into a second relevant property transaction in relation to property which was already available to be designated as notional estate of the deceased person. However, the Court is not to make such an order unless it is of the opinion that

there are special circumstances which warrant the making of the order.[29]

115. Section 83 of the SA provides:

> *"(1) The Court must not, merely because a relevant property transaction has been entered into, make an order under section 80, 81 or 82 unless the Court is satisfied that the relevant property transaction or the holding of property resulting from the relevant property transaction:*
>
> > *(a) directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or*
> >
> > *(b) involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that, if not exercised, could have resulted in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or*
> >
> > *(c) involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or*
> >
> > *(d) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) so as to*

---

[29] S81(1)(c)

> *result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).*
>
> *(2) In this section: "principal party to the transaction", in relation to a relevant property transaction, means the person who, under section 75 or 76, enters into the relevant property transaction."*

116. Section 87(1) of the SA requires the Court 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.

117. Again these are matters to which evidence should be addressed. Here the perspective is *"as at the date of the hearing, and people with reasonable expectations include people who have benefited under the will, a fortiori, those persons who have not only benefited under the will, but have received their benefaction"*.[30]

118. Section 88 of the SA includes further restrictions on the Court's power to designate property as notional estate. The Court is required not to make an order designating property as notional estate unless the deceased left no estate or the Court is satisfied of one of two conditions – first, that the estate of the deceased person is insufficient to allow for the making of a family provision order or

---

[30] See ***Carstrom v. Boesen*** [2004] NSWSC 1109 at [22] per Campbell J. Also see ***John v John*** [2010] NSWSC 937 (Ward J, as her Honour then was) cited with approval in ***Phillips v. James*** [2014] NSWCA 4 at [105], also see [123]-[125].

costs order that, in the Court's opinion, should be made, or, secondly, 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.

119. Section 89 sets forth various matters to which the Court is required to consider in determining what property should be designated as notional estate of a deceased person. As noted above, that property need not be the property which is the subject of the relevant property transaction or the distribution.[31] The considerations include the nature and value of the property the subject of the relevant property transaction or distribution or held by the legal representative of a deceased transferee, whether consideration was given, and if so the value and nature of the consideration for the relevant property transaction, changes over relevant times in the value of the property/property of that nature or of the consideration given, whether income might have been derived from property of that nature or from the consideration, and any other matter which it considers relevant in the circumstances.

120. The Court is not to designate property as notional estate in excess of that necessary to allow the making of the family provision order or costs order that, in the Court's opinion, ought to be made[32] but the

---

[31] Section 80(3)
[32] s89(2).

Court's powers are not restricted by reason of its previous exercise of its powers to designate notional estate[33].

121. Where the application is made pursuant to an order extending time to bring an application under section 58 of the SA, or where it is an application for additional provision pursuant to section 59(3) of the SA, section 90 of the SA sets out further matters which the plaintiff must satisfy the Court of before the Court can make an order designating property as notional estate. These are:

> *"(2) The Court must not make a notional estate order in the proceedings unless:*
>
> *(a) it is satisfied that:*
>
> *(i) the property to be designated as notional estate is property that was the subject of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, and*
>
> *(ii) the person who holds the property holds it as a result of the relevant property transaction or distribution as trustee only, and*
>
> *(iii) the property is not vested in interest in any beneficiary under the trust, or*
>
> *(b) it is satisfied that there are other special circumstances that justify the making of the notional estate order."*

122. There is little guide as to what matters (when assessed with other facts in the case) would constitute "special circumstances", other than the lack of capacity of the plaintiff, strength of a claim and lack of fault for a delay[34]. Subsection 90(2)(a) of the SA gives an indication of a type of circumstances that may count as a special circumstance, for example property not finally vesting in interest in

---

[33] s85.
[34] See the detailed discussion by Campbell J in ***Cetojevic v. Cetojevic*** [2006] NSWSC 431 at [76]-[80].

any beneficiary. However, special circumstances are not limited to the types of circumstances suggested by section 90 of the SA itself or circumstances closely analogous to them.[35] It, however, seems clear that special circumstances require something more than the matters set out in sections 87 and 89 of the SA or, at least, that it requires that those matters be in some way "special", because sections 87 and 89 applies both when a claim is made before and when it is made after the time limited by section 58 of the SA.

123. One circumstance which may count as a special circumstance under subsection 90(2)(b) of the SA is the infancy of the plaintiff, although this factor is not necessarily determinative[36].

124. Examples of situations which might qualify as "special circumstances" include the situation where a plaintiff's circumstances have changed significantly and detrimentally[37] or where proceedings have been commenced within time by other plaintiffs. The absence of prejudice to beneficiaries of the estate is not, without more, a special circumstance here[38].

---

[35] ***Lewis v. Lewis*** [2001] NSWSC 321 at [85].
[36] See ***Dare v. Furness*** (1998) 44 NSWLR 493 at 503-504.
[37] ***Lewis v. Lewis*** [2001] NSWSC 321 at [85].
[38] ***Spencer v. Blyth*** [2006] NSWCA 181 at [17].

5. Release of Rights

125. It is possible for a person to "contract out" of his or her right to make an application for a family provision order, or a further family provision order, by executing a release of rights. However, the release must be approved by a court and cannot have been revoked by the court.[39] The court may approve the release before or after the deceased's death. The court may only revoke an approval of a release in limited circumstances; with the consent of all sufficiently affected persons or in cases of fraud or undue influence.[40]

126. The court will not give the release merely because it is by consent. Under s95(4) it is required to consider various matters. It will take into account whether the release was to the releasing person's advantage financially or otherwise, whether it was prudent for the releasing person to make the release, whether the provisions of the release were fair and reasonable at the time, and whether the releasing party has taken independent advice and given due consideration to the advice.

127. Releases occur in two cases. Releases executed before the deceased's death; generally as part of a general family arrangement or as part of a family law property settlement, and releases executed after the deceased's death as part of the settlement of a family

---

[39] section 95(1)
[40] section 96

provision claim or perhaps some other claim against the estate of the deceased.

128. Occasionally, parties agree to a release but defer seeking approval of it. Whilst it is then usual, as part of the relevant deed or agreement, to include a stipulation that at least the releaser co-operate with an application for, and take reasonable steps to obtain, approval of the release by the Court should that approval subsequently be sought, that does not guarantee that the Court will, at that later time, approve the release. The court may hold that the release would never have been approved or that even if the release was reasonable at that time, the claimant's circumstances have changed since the release was executed so that it now is not.

129. If such a stipulation is not included, the releasee is in an even worse position.

130. For example, in ***Singer v Berghouse*** (1994) 181 CLR 201 the deceased was 65 when he met the widow. He married the widow the following year and died less than a year later. They signed a deed shortly before they were married that provided that each of them would release any claims they may have against the other's estate. The deed had not been approved by the court. The High Court held that the deed did not preclude the widow's claim, and the relevance was merely to show that the parties thought its terms fair when they

signed it and that the widow could not say that she had expectations of a more affluent life than she had led before the marriage.[41]

131. In ***Hertzberg v Hertzberg*** [2003] NSWCA 311 the parties executed a deed that had not been approved by the court. The will recited that the deceased had not made provision for his widow because he had made generous provision for her during the marriage and had executed a deed pursuant to which he paid her $1 million and agreed to pay her future expenses. However, the Court of Appeal held that the widow was still entitled to make a claim for the family home. Indeed, when the widow was asked in cross-examination why she changed her mind in the 2 years since she executed the deed, she said *"It is my home and I want my home to be my home."*[42]

132. More recently Young AJ refused to approve a release in ***Colosi v Colosi*** [2013] NSWSC 1892 where approval was sought by a Defendant in a cross-claim in a family provision claim. His Honour did so notwithstanding the fact that the relevant deed contained a clause in which both parties agreed to approach the Court for approval of the release and a clause by which each warranted that he or she had received and considered independent legal advice before entering into the deed. In relation to the latter clause his Honour held it to be valueless where the other party must have known that the warranty was untrue. In refusing to approve the release, his Honour said that virtually all the factors which the Court was

---

[41] Per Mason CJ, Deane and McHugh JJ at para 12
[42] See [36]

required to consider under section 95(4) of the SA would be answered negatively.

6. Recent Developments

Two-stage test?

131. Recently, in the New South Wales Court of Appeal, whether the two-stage approach referred to in ***Singer v. Berghouse*** (1994) 181 CLR 201 applies in relation to family provision claims under the *Succession Act* has been questioned. By way of recap, the majority in ***Singer v. Berghouse*** said at 208-9:

> *"It is clear that, under these provisions, the court is required to carry out a two-stage process.* ***The first stage*** *calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life.* ***The second stage****, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. The first stage has been described as the 'jurisdictional question' ..."*
>
> [emphasis added]

132. Their Honours also observed that the words "*adequate*" and "*proper*" in the legislation were "*relative*" and that there were no fixed standards by which those words were to be adjudged – see p.201 and that the Court was required to "*form opinions upon the basis of its own general knowledge and experience of current social conditions and standards*", making reference to ***Goodman v. Windeyer*** (1980) 144 CLR 490.

133. Their Honours also, at p.209-210, made it clear that determination of the second stage of that process involved similar considerations to the first stage and that, in fact, in the first stage of the process, the

Court might need to arrive at an assessment of what the proper level of maintenance was and what adequate provision was, which is largely determinative of the second stage of the process – i.e. what the order which ought be made in favour of the plaintiff is.

134. Similarly, in ***Vigolo v. Bostin*** (2005) 211 CLR 191 Callinan and Heydon JJ observed that the questions which the Court had to answer assessing a family provision claim did not always necessarily divided neatly into two – see [122]. As a result, even based on those authorities of the High Court there is not necessarily a strict or bright line dividing each stage of the two- stage process referred to in ***Singer v. Berghouse***.

135. In ***Andrew v. Andrew*** (2012) 81 NSWLR 656 Basten JA, whilst observing that the outcome would not have been different regardless of whether the determination had been based upon a two-stage enquiry (see [42]) expressed the view that the language of the SA was not consistent with the two-stage enquiry that was the feature of the FPA saying:

> *"41. As noted above, the language of the Succession Act is not consistent with the two-stage inquiry which was a common feature of earlier legislation: cf **Singer v Berghouse** at 208-209. In **Keep v Bourke** [2012] NSWCA 64 the Court appears to have assumed that the two-stage process continued to operate under the Succession Act: at [24]-[29]. However, the issue not having been directly addressed, there is no constraint on this Court now adopting a different approach. Nor does earlier High Court authority construing an earlier statutory scheme govern the approach to be adopted to materially different legislative provisions."*

136. Also see [26]-[28] where his Honour identified the differences, in his opinion, in the statutory provisions which led to his view in relation to the appropriateness of the two-stage enquiry. Then his Honour said:

> *"The combination of changes requires that the court address the nature of the exercise being undertaken. Three potential consequences may be identified. First, there is a simplification of the structure of the process.* ***There is no longer a two-stage process required.*** *A degree of artificiality has thus been removed.* ***The court should now ask what, taking all relevant factors into account, would have been adequate provision for the applicant.*** ***There is no first stage of determining whether the actual provision was "inadequate", followed by a discretionary exercise of determining what would be adequate and what should in fact be done.****"*
>
> [emphasis added]

137. Allsop P (as his Honour then was) accepted that the language in s.59 of the SA was "*subtly different from the previous legislation*" but also observed that whether the Court's task under that section could still be described as involving a two-stage process might "*be an analytical question of little consequence*" – see [6]. Barrett J considered, at [94], that the two-stage approach ought to be adhered to.

138. In most, if not all, cases there is much to be said for the view of Allsop P that the question is probably of little practical relevance, particularly especially as the High Court has, as noted above, previously recognised that under the earlier legislation there was not a bright line between the two stages.

139. Subsequently, in ***Franks v Franks*** [2013] NSWCA 60the New South Wales Court of Appeal effectively applied the two-stage approach without comment.

140. The effect of ***Andrew v Andrew*** remains uncertain; first instance judges have expressed different views. They are comprehensively summarised in ***Aubrey v. Kain*** [2014] NSWSC 15 by Hallen J, whose view is that the two-stage approach applies, at [71]-[111].

141. Most recently this issue came before the New South Wales Court of Appeal in ***Phillips v. James*** [2014] NSWCA 4. The bench included Basten JA.

142. In the judgment of Beazley P, with which Meagher JA substantially agreed, her Honour identified the competing arguments.

143. Ultimately, although the implication in her Honour's judgment was that the question was really academic, her Honour did not determine the issue, at least because it was submitted, and apparently not challenged, that, in determining whether the trial judge was right or wrong in relation to his determination about whether there had not been appropriate provision and what provision ought to be made, it did not make any difference whether the two-stage approach or the one-stage approach applied.

144. Basten JA did not comment on the issue.

145. In ***Dudic v. Jakovljevic*** [2014] NSWSC 169 Hallen J said that nothing in ***Phillips v. James*** (supra) caused him to change the views which he expressed in ***Aubrey v. Kain*** (supra).

146. Accordingly, the issue remains, although it is academic in most cases, and probably in all cases at present. To the extent that the

issue remains academic, that is to the extent that parties continue to contend that the result under either approach would be the same, it seems that the NSW Court of Appeal may not be quick to determine the correctness of the approach taken by Basten JA in ***Andrew v. Andrew***.

Foster children

147. Through the legislation, adopted children have equality of status with natural children. The position of step-children, generally speaking, is determined by the circumstances of their lives vis a vis their step-parent. For example, a step-child who is substantially brought up by the deceased, a step-parent, is often likely to be largely akin to that of a natural child, but one who perhaps only lived at the same house as the step-parent for a short period of time, perhaps in their later teens or early twenties, may well be treated differently.

148. An interesting question arises in relation to how foster children should be treated. In considering what community expectations might be here, it might be thought that the usual circumstances of fostering, that is that it is an arrangement which is not intended, at least initially, to last for a lifetime but merely to last until age 18, might bear upon the question of what provision a foster children might expect to receive in a claim against a deceased foster parent.

149. Until recently, there had been little reasoned, consideration of this issue.

150. There have, recently been two decisions at first instance in relation to claims by foster children.

151. Not unusually in family provision claims, what the decisions demonstrate is that whilst there is general guidance in the authorities, there is no bright line regarding what the test is and that the result will very much will depend on the particular circumstances of the particular case.

152. In ***Carney v. Jones*** [2012] NSWSC 352 Associate Justice Macready considered a claim by two foster children, a third foster child, who had subsequently been adopted, having settled her claim. The competing claimant was the natural son of the deceased, who provided significant assistance, financial and otherwise, to the deceased during his life time. Both plaintiffs received modest orders for provision. Nevertheless the arguments and reasons of his Honour bear some note.

153. For the Defendant it was submitted – see [42] - that:

> *"17. To undertake to adopt a child, as opposed to foster a child, involves significantly different consideration s and different, and greater, obligations.*
>
> *18. The moral obligation on agreeing to foster a child (or what might be considered to be right and proper according to contemporary accepted community standards) involves undertaking an obligation for maintenance of the child, usually with financial assistance, but does not involve an undertaking regarding advancement, particularly in the child's adult years.*
>
> *19. Fostering often commences with short term respite/holiday stay. If it then moves on to a more permanent arrangement it is:*

> *(a) One desired to provide a significant benefit to the child in need, that benefit being relief from State care (or removal from an unsatisfactory family situation) during the child's minority to, at most, age 18;*
>
> *(b) An undertaking by the foster parent only during the minority of the foster child, not undertaking beyond that; and*
>
> *(c) Not an undertaking to adopt the foster child, nor the creation of a relationship such as that created by adoption.*
>
> *20. It is submitted that it is only if events after the foster child achieves the age of 18, or there are special circumstances which demonstrate that notwithstanding a failure to adopt the foster child the foster parent considered the relationship to be akin to an adoption (for example where adoption could not take place, despite the wishes of the fostering parent, because of non-co-operation by a biological parent) that the moral duty of the foster parent, subject to competing claims and the extent of his or her estate, carries on beyond the foster child's age of 18."*

154. However, his Honour determined that:

> *"50 Making a conscious decision to bring a child into the world brings with it responsibilities. Taking a child into care without adoption does not involve the same commitment. If it does not work out, the foster parents can give the child back to the State, which will resume its care for the child as a ward of the State. However, experience teaches us that the initial starting point can change over the years as, hopefully, the child and the foster parents grow together in their relationship.*
>
> *51 One frequently sees cases where a foster child is treated as a natural child by the foster parents. This occurs not only with a childless couple but also with other families who also have a natural child as well as the foster child.*
>
> *52 To suggest that there is such a major difference in the obligation owed to a natural child compared to that owed to foster children ignores the complexities of relationships which occur in each individual case.*
>
> *53 As has been said before, there must be a full investigation into all the facts and circumstances of the matter to see whether the community would expect that a person in the plight of this testator ought to have made provision, or further provision, for the applicant.*
>
> *54 For example, if after a year of foster care a child is returned to the State and there is no further contact for the*

> *remaining fifty years of the deceased's life, one may well conclude that there was no duty to provide for the child.*
>
> *55 In this case we have a quite different situation. Both children maintained their contact with the deceased for the next fifty years after they grew up. That contact and the relationship arising from it was so important that Alva adopted a position of major responsibility for the deceased in the last five years of her life.*
>
> *56 The relationship with Clement did not finish when he turned eighteen and ceased to be a foster child. He stayed living as part of the family until he married at age twenty-five. When he married, the deceased and her husband, as I have said, sat at the bridal table."*

155. Whilst there is some strength in what his Honour said, there must be some difference in the case of a claim by a foster child between the case where there has merely been maintenance of contact after age 18 and the case where there has been some positive assistance provided to the deceased during those years.

156. More recently, Hallen J in ***Hamilton v Moir*** [2013] NSWSC 1200 has considered the question. His Honour said:

> *138 In relation to a claim by a foster child, the following principles may also be relevant:*
>
> > *(a) Making a conscious decision to bring a child into the world brings with it responsibilities. Taking a child into care, without adoption, does not involve the same commitment. If foster carers are asked if they are able to have a child placed with them, there is not an obligation to accept the child. They may, for any reason, decline to accept a child into their care. If they take a child into their care, and if it does not work out, the foster parents can have the child retaken from their care, and the State will resume care of the child as a ward of the State. However, experience teaches that the relationship of foster parent and child can change over the years as, hopefully, they grow together in their relationship:* ***Carney v Jones*** *[2012] NSWSC 352 per Macready AsJ, at [50].*
> >
> > *(b) Whether there is a major difference in the obligation owed to a natural child compared to that owed to a foster child depends upon the facts of each individual case:* ***Carney v Jones****, at [51] - [52].*

(c) A foster child brought up as a member of a family, in a secure and loving environment, may have a greater claim on his, or her, foster parent's testamentary bounty than a foster child who was not integrated into the family: ***Slack v Rogan****;* ***Palffy v Rogan****, at [69].*

(d) Some of the matters that may be considered relevant include the duration of the foster care relationship; the age of the child when she, or he, became a foster child to the deceased; whether the child was brought up as a permanent member of the family; the closeness of their relationship during foster care and subsequently; whether the foster child and foster parent maintained the relationship thereafter, and if so, for how long; and the extent to which the applicant was supported by the deceased, whether it be financially, educationally or emotionally.

139 I make clear that I do not intend what I have described as "principles" to be elevated into rules of law. Nor do I wish to suggest that the jurisdiction should be unduly confined, or the discretion at the second stage to be constrained, by statements of principle found in dicta in other decisions. I identify them merely as providing useful assistance in considering the statutory provisions, the terms of which must remain firmly in mind.

140 In addition, in each case, a close consideration of the facts is necessary in order to determine whether the bases for a family provision order have been established. As Lindsay J said in ***Verzar v Verzar****, at [131]:*

> *"Whatever guidance one might draw from analogous cases all analogies, and any guidelines drawn from a pattern of similar cases, must yield to the text of the legislation, the duty of the Court to apply that text to the particular circumstances, and the totality of material circumstances, of each case. Preconceptions and predispositions, comforting though they may be, can be the source of inadequate consideration of the jurisdiction to be exercised:* ***Bladwell v Davis*** *[2004] NSWCA 170 at [12] and [18]-[19]."*

141 I respectfully agree, also, with the statement of White J in ***Slack v Rogan****, at [126]:*

> *"The question of whether the provision, if any, made for an eligible applicant is adequate for his or her proper maintenance, education or advancement in life is to be assessed having regard to the facts and circumstances of each individual case. The assessment involves a broad evaluative judgment which is not to be constrained by preconceptions and predispositions (****Bladwell v Davis****). This really means that there are no definite criteria for the exercise of the "evaluative judgment"."*