Family Provision: the worm turns again

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About the author

Craig was admitted to practice as a solicitor in 2008. He commenced practice with Teece Hodgson & Ward solicitors in 2008 and worked predominately in estate litigation and protective matters until April 2017.

At the end of April 2017 Craig ceased practice as a solicitor and commenced practice as a barrister at 13 Wentworth Selborne Chambers in May 2017.

Before being called to the Bar, Craig was an Accredited Specialist in Wills & Estates Law.

Craig is a member of the Society of Trust & Estate Practitioners (STEP) and a co-author of C Birtles and R Neal, Hutley's Australian Wills Precedents 8th Edition (LexisNexis Butterworths) 2013 and 9th Edition 2016. He is an adjunct lecturer for College of Law (Masters of Applied Law) Family Provision subject and is also a casual lecturer in the Law Extension Committee Diploma of Law, Succession Law subject.

Introduction

1. This is the third in a series of papers which I have presented on Family Provision claims recently[1]. The first was entitled "The cause of disputes and why some matters do not settle: commentary on published Court statistics and a review of 2015 Family Provision judgments" presented for the Law Society of NSW on 22 February 2016; the second entitled "Family Provision: the turning of the worm" presented for the College of Law on 13 May 2017.

2. In the papers I commented on the statistics most recently published by the Supreme Court of NSW in relation to filed and completed matters, as well as set out my own crude analysis of the relative prevalence of types of estate litigation matters in published judgments. The analysis is based upon a search of judgments over referring to the Succession Act 2006, the Family Provision Act 1982 and the Probate and Administration Act 1898 over a set period.

3. In reviewing trends in the application of the law to particular common facts, some insight might be achieved. But knowledge of the law to be applied is important. In this paper I first set out some of the applicable principles.

4. I then set out my analysis and observations of a cross section of cases determined for the period 1 May 2017 to 16 March 2018 picked up by the usual search method.

5. Finally, I refer to important recent decisions.

Family Provision claims

6. Certain categories of eligible persons are entitled to apply to the Supreme Court of NSW for an order that he or she receive provision, or additional provision, from a deceased person's estate or notional estate (**Family Provision Order**).

7. The power to make a Family Provision Order was introduced in New South Wales with the Testator's Family Maintenance and Guardianship of Infants Act 1916. Section 3 of that act provided that:

> "If any person (hereinafter called "the testator") dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or

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has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any of them."

8. The Testator's Family Maintenance and Guardianship of Infants Act 1916 was revoked with the introduction of the Family Provision Act 1982. That Act applies where the deceased died on or after 1 September 1983 but before 1 March 2009. The definition of "eligible person" in s 6 of the Act included:

"(a) a person who

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

(ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or

(iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;

(b) a child of the deceased person;

(c) a former wife or husband of the deceased person; or

(d) a person:

(i) who was, at any particular time, wholly or partly dependent upon the deceased person; and

(ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member."

9. The Property (Relationships) Act 1999 repealed paragraphs (a) and (b) of the definition of "eligible persons" and they were replaced with:

"(a) a person:

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

(ii) with whom the deceased person was living in a domestic relationship at the time of the deceased person's death,

(b) a child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the Property (Relationships) Act 1984, a child of that relationship, or"

10. Section 9(2) of the Family Provision Act 1982 provided that:

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

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

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

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

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

> this Act out of the estate or notional estate, or both, of the deceased person,
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> is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person."

11. Under the Family Provision Act 1982, the Court applied a "two-stage" process as described in Singer v Berghouse [1994] HCA 40; 181 CLR 201 at 208-211 per Mason CJ, Deane and McHugh JJ:

> "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 jurisdictional question**]
>
> 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 discretionary question**]".

12. In Vigolo v Bostin (2005) 213 ALR 692 at 722 Callinan and Heydon JJ said:

> "We do not therefore think that the questions which the Court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

13. The Family Provision Act 1982 was repealed by the Succession Amendment (Family Provision) Act 2008 and Chapter 3 of the Succession Act 2006 now applies where the deceased died on or after 1 March 2009.

14. Section 57 of the Succession Act 2006 provides that:

"(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." [*Skarica v Toska* [2014] NSWSC 34]

15. Section 59 of the Succession Act 2006 provides that:

"(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."

16. The Succession Act 2006 also introduced, at section 60(2), a list of matters which the Court may take into account in determining claims, the last of which is "any other matter which the court considers relevant". Some of these matters were drawn from section 9(3) of the Family Provision Act 1982. As cited in recent judgments by Hallen J (including for example, Hinderry v Hinderry (2016) NSWSC 780 at [241], the s60(2) matters have been described by Basten JA in Andrew v Andrew [2012] NSWCA 308; (2012) 81 NSWLR 656 at [37], as "a multifactorial list", and by Lindsay J in Verzar v Verzar [2012] NSWSC 1380 at [123], as "a valuable prompt".

Practice Note SC Eq 7

17. The Supreme Court of NSW Practice Note SC Eq 7 (Family Provision) was issued on 12 February 2013 and commenced on 1 March 2013. The Practice Note prescribes:

a. The documents required to be filed by the Plaintiff at the time of the filing of the Summons (paragraph 6).

b. The documents required to be filed by the Defendant (paragraph 9).

c. The necessity for mediation, and the procedure between the first directions listing and mediation, and following mediation (paragraphs 10 to 18).

d. That certain matters be noted as agreed between the parties as part of any consent orders (paragraph 19).

e. That certain matters may be proved with less than strict proof (paragraph 21).

f. A pro forma plaintiff's affidavit (annexure 1).

How then has the Court approached determination of these matters?

18. In short, and for the purposes of a short form advice, having established eligibility and filed the application within time, on hearing the Court has a discretion as to what, if any provision or further provision ought to be awarded to a plaintiff.

19. For the purposes of submissions as to how the Court should exercise that discretion, it is necessary to go further.

20. In Andrew v Andrew [2012] 81 NSWLR 656 at 657, Allsopp P said:

> "[1] This is a difficult case. The difficulty arises from the need to apply a statutory test couched in evaluative language embodying human values and norms of conduct deeply personal to those involved and often incapable of clear expression. The human expression of will concerning the disposition of property flowing from considerations of emotion (including love and disappointment), reason and societal and family obligation cannot often be fully understood.
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> (…)
>
> [12] Accepted and acceptable social and community values permeate or underpin many, if not most, of the individual factors in s 60(2) and are embedded in the words of s 59, in particular "proper" and "ought". That such values may be contestable from time to time in the assessment of an individual circumstance, or that they may change over time as society changes and grows can be readily accepted. Customary morality develops "silently and unconsciously from one age to another", shaping law: Benjamin N Cardozo, The Nature of the Judicial Process (1921) New Haven, Yale University Press at 104–105. The relation ship between law and morals or morality depends, of course, on the context of the enquiry: see for example, Roscoe Pound, The History and System of the Common Law (1939) New York, Collier, at 16–21. As Gleeson CJ said in Vigolo at [25], the language of the statute is "general but value-laden", operating in connection with "community standards" that will see it given "practical meaning", that is, to the people and community who and which the law serves.

[13] The values or morality of a civil society underpin or inform, at different levels and in different degrees of abstraction, law at all levels including interpretation of legal (including statutory) rules, evaluative assessment of standards (legal and factual) and discretionary judgments. To the extent that values are expressed by Parliament, they are interpreted and given limits and contours by the courts. Parliament may prescribe relevant factors to be taken into account, but community values are not the monopoly of Parliament. Ultimately they belong to civil society itself, to be ascertained or discerned by courts, whether by interpretation of statute or by the expression of the general law, when the application of judicial power requires it: cf Onus v Alcoa of Australia Ltd (1981) 149 CLR 27 at 42. Such does not obtain only in homogeneous or static societies. Diverse, tolerant and democratic societies governed by law and justice must, even more so, reflect the binding coherence of shared values and assumptions. Difficulty from time to time in accurate contemporaneous expression of such values and assumptions lessens not the need for the values or assumptions to be recognised or applied.

[14] In a broad evaluative judgment based necessarily upon community values, the task should be expressed broadly and not by precise rules, lest particular rules or duties expressed by reference to one age's values come to distort later evaluative assessments by the imposition of the earlier age's rules and values.

[15] The list of considerations in s 60(2) encompasses many, if not most, considerations likely to be of relevance to the resolving of the broad evaluative task.

[16] If I may respectfully paraphrase Sheller JA in Permanent Trustee v Fraser at 46, the court in assessing the matter at s 59(1) and the order that should be made under s 59(1) and s 59(2), should be guided and assisted by considering what provision, in accordance with perceived prevailing community standards of what is right and appropriate, ought be made. This, Sheller JA said, referring to Mahoney JA in Kearns v Ellis (Court of Appeal, 5 December 1984, unreported), involved speaking for the feeling and judgment of fair and reasonable members of the community. It is to be emphasised that s 59(1)(c) and s 59(2) refer to the time when the court is considering the application and the facts then known to the court. The evaluative assessment is to be undertaken assuming full knowledge and appreciation of all the circumstances of the case. This is another consideration which makes the notion of

> compliance by the testator with a moral duty (on what he or she knew) apt to distract from the statutory task of the court."

21. In Henry v Hancock [2016] NSWSC 71 at [69], Brereton J said (cited by Hallen J in Hinderry v Hinderry [2016] NSWSC 780 at [266]):

> "Formerly, the yardstick which was applied was that of the wise and just testator. Nowadays, it is fashionable to couch it in terms of "community standards", although I am not at all sure that this is any different from the moral obligation of a wise and just testator and, as has not infrequently been pointed out, there is no ascertainable external community standard to guide the decision, which involves a broad evaluative judgment unconstrained by preconceptions and predispositions, and affording due respect to the judgment of a capable testator who appears to have duly considered the claims on his or her testamentary bounty — subject to the qualification that the court's determination is made having regard to the circumstances at the time of the hearing, rather than at the time of the testator's will or death."

22. I have found that reference to the abstract concepts of the "just and wise testator" and "community standards of what is right and appropriate" are an unhelpful tool for the purpose of explaining my assessment of prospects of success, or possible ranges of outcomes when the disappointed eligible person (or the concerned beneficiary) is the audience.

23. A more useful tool for the purpose of client explanation are "general principles" (more recently described as "principles") which might apply to a particular category of eligible person, as set out in judgments of Hallen J (Family Provision List Judge).

24. But before I set them out, a word of caution, as set out in the judgments of Hallen J (Meres v Meres [2017] NSWSC 285 at [150]):

> "As I have stated in a number of cases (see, for example, Bowditch v NSW Trustee and Guardian), I do not intend what I have described as "principles" or "general principles" to be elevated into rules of law, propositions of universal application, or rigid formulae. Nor do I wish to suggest that the jurisdiction should be unduly confined, or the discretion should be constrained, by statements of principle found in dicta in other decisions, or by preconceptions and predispositions. Decisions of the

past do not, and cannot, put any fetters on the discretionary power, which is left largely unfettered. I do not intend a guide to be turned into a tyrant."

25. In relation to a claim by an adult child, the most recent exposition of principles was in Meres v Meres [2017] NSWSC 285 at [133] as follows:

(a) The relationship between parent and child changes when the child attains adulthood. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.

(b) It is impossible to describe, in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, "…ordinarily the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life - such as a deposit on a home, although it might well take a different form. 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 and the relationship between the parties is such as to justify it, there might be such an obligation": Taylor v Farrugia, at [57]; McGrath v Eves [2005] NSWSC 1006; Kohari v Snow [2013] NSWSC 452 at [121]; Salmon v Osmond [2015] NSWCA 42 at [109].

(c) Generally, also, "…the community does not expect a parent to look after his or her children for the rest of [the child's life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute": Taylor v Farrugia at [58].

(d) 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; Hawkins v Prestage (1989) 1 WAR 37 at 45 (Nicholson J); Taylor v Farrugia, at 58.

(e) 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 [179]-[182]; Crossman v Riedel [2004] ACTSC 127 at [49]. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life are relevant: Marks v Marks [2003] WASCA 297 at [43]. In addition, if the applicant 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].

(f) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim: Hughes v National Trustees, Executors and Agency Co of Australasia Ltd (1979) 143 CLR 134; [1979] HCA 2 at 149.

26. In relation to a claim (or competing beneficiary claim) by a spouse the principles were most recently set out in Clark v Ro [2016] NSWSC 1877 at [109] as follows:

(a) As a broad general rule, and in the absence of special circumstances, the general duty of the deceased to his spouse, to the extent to which his assets permit him to do so, is to ensure that she is secure in the matrimonial 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. Generally speaking, the amount should be sufficient to free her mind from any reasonable fear of any insufficiency as she grows older and her health and strength fail (see: Permanent Trustee Co Ltd v Fraser (1995) 36 NSWLR 24). Concern as to the capacity of the spouse to maintain herself independently, and autonomously, may also bear upon the notion of what is proper provision.

(b) However, what is said above is not of immutable application: Marshall v Carruthers [2002] NSWCA 47; Clifford v Mayr [2010] NSWCA 6 at [142]-[144].

(c) The three elements identified in (a) above are not necessarily mutually independent. The Court is not to approach the assessment of what is proper for a competing claimant by attempting precisely to replicate the way of life that the deceased and his or her spouse planned to have, had he or she survived.

(d) There is binding authority which gives greater weight to the claims of a party who has entered "a formal and binding commitment to mutual support": Marshall v Carruthers; Re the Will of Sitch (deceased); Gillies v Executors of the Will of Sitch [2005] VSC 308; Sellers v Scrivenger [2010] VSC 320 at [68].

27. In relation to claims by grandchildren see Griffiths v Craigie [2014] NSWSC 1339 at [138] as follows:

(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) 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.

(i) A relative want of resources in the parent of the grandchild may create an obligation of the deceased towards a grandchild. For example, where the deceased is of ample means, she or he, reflective of prevailing community standards, might well recognise, in certain circumstances, a duty to make provision out of her, or his, estate for the grandchild who has needs. If the estate or notional estate could satisfy the grandchild's claim without significant adverse impact on the chosen beneficiaries, a duty to provide for the education, maintenance and advancement in life may arise.

28. In relation to claims by a former spouse see Glynne v NSW Trustee and Guardian; Lindsay v NSW Trustee and Guardian [2011] NSWSC 535 at [89] as follows:

(a) "The policy of the law is to promote the finality of settlements of property disputes by orders made in the Family Court or by the amicable division of matrimonial property prior to death.

(b) Another policy of the law is that parties whose marriage has been dissolved, and in respect of whom orders have been made disposing of their matrimonial property, or where there has been an amicable division of that property, should be able to go

their own separate ways. Except for the specific cases provided for under the Family Law Act 1975 (Cth), and provided there has been compliance with the orders, or the agreement for amicable division, made, such parties should, thereafter, face no financial obligation, one to the other.

(c) A settlement, whether by order of the Family Court, or by agreement reached amicably, and complied with, however, does not preclude a claim by a former spouse for a family provision order, but, in those circumstances, additional, and different, considerations will arise. The Act gives a specific entitlement to a former spouse to make a claim. That provision contemplates there will be cases where such a claim will succeed, notwithstanding the public policy of the finality of a property settlement.

(d) It is not the task of this Court to go behind the orders made in the Family Court or the amicable agreement of the parties unless a specific basis is advanced for this Court to do so (e.g. fraud).

(e) In every case involving a former spouse, it will be necessary to examine the actual relationship between the two people concerned, as far as possible without preconceptions based only on the fact of the dissolution of their marriage and their property division.

(f) The terms of the parties division of property will be relevant in determining the Plaintiff's needs and the extent to which those needs may have been satisfied in the deceased's lifetime, as will be the length of time from the separation of the former spouse to the death of the deceased, and the course that the lives of the two spouses have followed since separation.

(g) There is a distinction between "factors which warrant the making of the application' and the factors that warrant the making of an order. Merely establishing that an applicant is a former spouse and that she, or he, has a financial need, would not, as such, entitle her, or him, to an order. In addition, even if there are factors that warrant the making of the application, the applicant may fail in establishing that an order for provision should be made.

(h) What has to be decided is whether what is relied upon in the case by the applicant, in association with all other relevant matters, puts her, or him, within the class of persons to whom the deceased had an obligation to make provision."

Court statistics

29. The Supreme Court of NSW has published provisional statistics for the 2017 calendar year as at 23 January 2018[2]. The statistics for Estate Litigation and Protective matters are relevantly:

	Filings 2014	**Filings 2015**	**Filings 2016**	**Filings 2017**
Probate applications	24,526	26,408	26,243	27,287
Proceedings in Probate List	212	207	262	294
Proceedings in Family Provision List	774	972	1,018	973
Proceedings in Protective List	110	107	81	109

Review of Judgments published between May 2017 and 16 March 2018

30. Mediation is compulsory for Family Provision proceedings "unless otherwise ordered". Most proceedings resolve prior to hearing. It is not possible to compile statistics for the number of claims filed sorted by category of eligibility.

31. I have reviewed the Judgments picked up by a search of those referring to the Family Provision Act 1982, Probate and Administration Act 1898 and the Succession Act 2006 for the 2015 calendar year, January 2016 to April 2017 and May 2018 to 16 March 2018. Most of the cases are discovered by a search for references to Succession Act 2006, with those picked up by reference to Family Provision Act 1982 and Probate and Administration Act 1898 largely duplicate results. As stated in the introduction there may be estate litigation cases which were not picked up by a search of the legislation referred to, and the purpose of the analysis is to consider a modest cross section of matters over the relevant timeframe.

[2] http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/sco2_statistics.aspx Last accessed on 18 March 2018,

32. In terms of types of claims decided, the results are summarised as follows:

Claim type	2015	%	Jan 2016 – Apr 2017	%	May 2017 – 16 Mar 2018	
Family Provision	53	55.2%	43	63.2%	37	
Construction	15	15.6%	2	2.94%	4	
Statutory Will	2	2.08%	0	0%	4	
Interim administrator	3	3.15%	2	2.94%	1	
Informal testamentary document	6	6.25%	3	4.4%	4	
Testamentary capacity/knowledge and approval	10	15.6%	8	11.7%	2	
Intestacy	0	0%	2	2.94%	3	
Revocation of grant/appointment of new administrator	0	0%	3	4.4%	2	
Miscellaneous	7	7.8%	9	12.5%	18	22.8%
Total	96		72		79	

33. In the miscellaneous category between May 2017 and 16 March 2018 there were two estoppel claims, two for orders relating to ademption, a rectification claim, a claim for security for costs in a probate suit, a claim in relation to a “literary executor”, a preliminary discovery claim in relation to family provision, 7 judicial advice applications and 7 decisions on costs.

34. Within the category of Family Provision, the claims by type of eligibility are as follows:

Eligibility type	2015	%	Jan 2016 – Apr 2017	%	May 2017 – 16 Mar 2018	
Spouse	3	5.66%	2	4.65%	1	2.5%
De facto spouse	3	5.66%	1	2.32%	4	10%
Child	37	69.8%	32	74.4%	31	77.5%
Grandchild	2	3.77%	3	6.97%	1	2.5%
Dependent member of household	6	11.3%	4	9.3%	2	5%
Close personal relationship	2	3.77%	0	0	1	2.5%
Ex-spouse	0	0%	1	2.32%	0	0
Total	53		43		40	

35. Of the spouse claims:

    a. In the 2015 calendar year there were two successful applications, and one unsuccessful application.

    b. In the period January 2016 to April 2017 both applications were successful.

    c. In the period May 2017 to 16 March 2018 the application was successful.

36. Of the de facto spouse claims:

    a. in the 2015 calendar year there was one successful application, and two unsuccessful applications.

b. In the period January 2016 to April 2017 the application was successful.

c. In the period May 2017 to 16 March 2018 there were two successful applications and two unsuccessful applications.

37. Of the child claims:

a. in the 2015 calendar year there were 20 successful applications, and 17 unsuccessful applications.

b. In the period January 2016 to April 2017 there were 19 successful applications and 13 applications dismissed.

c. In the period May 2017 to 16 March 2018 there were 21 successful applications and 10 applications dismissed.

38. Of the dependent grandchild claims:

a. in the 2015 calendar year there were 2 successful applications.

b. In the period January 2016 to April 2017 there were 2 successful applications.

c. In the period May 2017 to 16 March 2018 the application was successful.

39. Of the dependent member of the household claims:

a. in the 2015 calendar year there were 2 successful applications and 4 unsuccessful applications.

b. In the period January 2016 to April 2017 there were 2 successful applications and 2 unsuccessful applications.

c. In the period May 2017 to 16 March 2018 the two applications were successful.

40. In 2015 the close personal relationship claim was successful. In 2017 the close personal relationship claim was successful, but it was dismissed after an appeal.

Relevance to estate planning

41. The first observation I want to make is the proportion which the number of Family Provision List filings bears to the number of Probate applications is small. This is important to remember when you have cause to advise a testator in respect of their estate planning.

Relevance to estate administration

42. Under the Succession Act 2006 the prescribed period for commencing a Family provision claim is 12 months from the date of death. If a claim is brought pursuant to the Family Provision Act 1982 it will now be well out of time.

43. Ordinarily there will be some delay between the date of death and the obtaining of a grant of Probate, and thereafter to the point of bringing in the assets and paying the estate liabilities.

44. Section 92 of the Probate and Administration Act 1898 provides that:

> "(1) The executor or administrator of the estate of a testator or an intestate may distribute the assets, or any part of the assets, of that estate among the persons entitled having regard to the claims of beneficiaries (including children conceived but not yet born at the date of the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of which the executor or administrator has notice at the time of distribution if:
>
> (a) the assets are distributed at least 6 months after the testator's or intestate's death, and
>
> (b) the executor or administrator has given notice in the form approved under section 17 of the Civil Procedure Act 2005 that the executor or administrator intends to distribute the assets in the estate after the expiration of a specified time, and
>
> (c) the time specified in the notice is not less than 30 days after the notice is given, and
>
> (d) the time specified in the notice has expired."

45. If an executor or administrator distributes a deceased estate between 6 and 12 months after the date of death, after following the section 92 procedure, the executor will not be at personal risk if a Family Provision claim of which he or she had no notice at the time of distribution is later commenced.

46. If notice of a claim is received prior to distribution of the estate then the executor is at personal risk if a distribution is made prior to the expiry of the prescribed period.

Relevance to estate litigation

47. There are far more Family Provision matters than any other type of equity litigation. They are cheaper to run due to the efficiencies created by the practice note and the fact that expert evidence is rarely required.

48. There seem to be few decided cases concerning the spouse or de facto spouse. That may be because testators in making Wills and executors in deciding whether to resolve claims at mediation have a fair idea of what provision might be awarded for that category of eligible person.

49. Children claims, particularly adult children claims, are prevalent. This may be because reasonable minds may differ as to the range of provision to be awarded with reference to the facts. The outcome will usually be a balancing exercise dependent not just on whether the plaintiff has proved his or her case, but whether and the extent to which it can be accommodated having regard to the claims of the competing beneficiaries.

50. The difficulty in advising how a claim is likely to be determined was shown by the contrasting judgments, delivered in the same week of March in 2011, of *Andrew v Andrew* [2011] NSWSC 115 and *Bourke v Keep* [2011] NSWSC 88. Both were the subject of appeals: *Andrew v Andrew* [2012] NSWCA 308 and *Keep v Bourke* [2012] NSWCA 64.

51. There are few other applications, perhaps because such applicants less frequently commence proceedings in the knowledge of the eligibility requirements (including factors warranting), or otherwise because such claimants are willing to take a discount on the settlement range to free their claim from risk.

52. It also seems that a greater percentage of the adult children claims that are run to hearing are succeeding.

53. Until recently, the number of Family Provision *filings* have increased over time, as follows[3]:

2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
624	641	512	858	803	792	790	774	972	1,018	973

A selection of recent cases

Smoje v Forrester [2017] NSWCA 308, appeal from Estate MPS [2017] NSWSC 482

54. The plaintiff sought provision from the estate of the late Miryana Smoje, claiming to be eligible as a person living in a close personal relationship with her at the time of her death.

55. The late Ms Smoje had no children and had never married. She was in a relationship with a man who died in 2012.

56. In 2010 Ms Smoje was diagnosed with breast cancer, and was terminally ill, expecting death, and commonly in pain. She died in October 2014 in a ground floor unit at the Parkway Hotel, Frenchs Forest where she had lived since 10 March 2014. The room had two single beds. A specialist physician was of the opinion that she had received very little personal care over several weeks.

57. Prior to taking up residence at the hotel, the deceased had been continuously a patient at public and private hospitals since 25 December 2012, with two exceptions: 10 days in January 2013 and between 8 February 2013 and 22 May 2013. During those times the deceased stayed at other hotels, and, for a period, at Narrabeen Caravan Park.

58. The plaintiff claimed to have had a sexual relationship with the deceased and her partner in 1979, and that the deceased had been under her care since March 2014. He

[3] Supreme Court of NSW Annual Review 2010/11 (<http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/SCO2_annualreviews.aspx>) and Preliminary Statistics 2016 (fn1), both last accessed on 4 May 2017

was not working, and in receipt of the disability support pension. He was listed as next of kin and emergency contact, and described as a nephew, when she was admitted to Manly Hospital at the end of 2012.

59. At first instance it was submitted on behalf of the plaintiff that:

a. the plaintiff and the deceased were in a close and intimate relationship, in which he spent his days and parts of his nights caring for her, at various locations.

b. the deceased was almost entirely dependent on the plaintiff.

c. The plaintiff and the deceased provided each other with domestic support and care.

60. At first instance the Court found the plaintiff to be eligible, and provision of $550,000 was awarded for him.

61. On appeal the Court's finding that the plaintiff and the deceased were living together in the hotel unit was challenged. The relevant parts of the first instance judgment are as follows:

> [18] [The plaintiff and the deceased] were living together in a [motel] unit at ….. Frenchs Forest at the time of her death. It was her home. He stayed there, though not continuously.
>
> …
>
> [20] They were 'living together' at the [Frenchs Forest] motel unit at the time of her death on 6 October 2014, and had been living there continuously since 10 March 2014. It was [undoubtedly] [the deceased's] residence. Although she owned three home units in Balgowlah [and other premises] she chose not to live in them.
>
> …
>
> [26] The parties are agreed that the concept of "living together" in section 3(3) of the Succession Act does not necessitate the existence of a single residence: Popescu v Borun [2011] NSWSC 1532 at [51]; Bayssari v Bazouni [2014] NSWSC 910 at [43]. They accept that people can "live together" in more than one residence and that people may, jointly or severally, have more than one home which, from time to time, they separately occupy. Nor is it a prerequisite of "living together" that people spend all of their time together: Amprimo v Wynn [2015] NSWCA 286 at [77].

[27] The concept of “living together” in the definition of “close personal relationship” is adaptable to the reality of domestic life in this respect, constrained not by a requirement that people live together “as a couple” (Hayes v Marquis [2008] NSWCA 10 at [75]- [76]), but by a relationship that is close, personal and attended by provision by one or each of them to the other with domestic support and personal care (Dridi v Fillmore [2001] NSWSC 319 at [102]- [104]; Barlevy v Nadolski [2011] NSWSC 129 at [25]; Holden Francis Frisoli v Natasha Anastasia Kourea [2013] NSWSC 1166 at [45]- [47]).

[28] In the present case, the fact that the plaintiff and the deceased held themselves out to the public as “nephew” and “aunty” might reasonably be thought to have been an impediment to a finding that they were “living as a couple” (an element of a “de facto relationship” required by section 21C(2)(a) of the Interpretation Act 1987 NSW with an emphasis, reflected in section 21C(3)(i), on the reputation and public aspects of a relationship), but it is not inconsistent with the idea of persons who, living together, provide, within a private relationship, domestic support and personal care.

[29] The concept of “living together” has a dimension that focuses on the quality of a relationship rather than mere physical proximity: Hayes v Marquis [2008] NSWCA 1 at[75]- [83]. Ordinarily, it might be expected to be associated with the concept of “family” in its broadest sense, importing social intimacy rather than a formal, blood tie (Skarica v Toska [2014] NSWSC 34 at [39]- [43]) or sexual relations (Amprimo v Wynn [2015] NSWCA 286 at [77]) as a prerequisite.

…

[106] I accept the Plaintiff’s evidence, accurately reflected in his counsel’s submissions, that, at the time of the deceased’s death, he was “living together” with her (each providing the other with “domestic support” and he providing her with “personal care”) within the meaning of section 3(3).

…

[108] The “domestic support and personal care” provided by the plaintiff for the deceased was not “for fee and [or] reward” within the meaning of section 3(4)(a). Any payment of money made by the deceased to the plaintiff, and any expectation of the plaintiff that he might be paid money or otherwise benefit, was an incident of the parties’ relationship, not, in intendment or effect, a *quid pro quo*. Theirs was a domestic, not a business, arrangement. It was built upon a pre-existing friendship, renewed personal contact and shared grieving for lost partners. These were the

dominant, causative factors in the provision of support and care, not the prospect or fact of monetary gain.

[109] Although all the plaintiff's comings and goings might not have been noticed by witnesses from whom the defendant obtained affidavits, and his limited personal contact with them might have been an alienating experience for them, I accept the evidence of the plaintiff that he generally spent part of each day with the plaintiff, or at her beck and call; that, from time to time, he slept at her place of abode and, at least in the early days of their relationship, she sometimes slept at his; and that, as best as he was able, he attended to her needs.

62. On appeal, Meagher JA said:

[32] (The) evidence describes the respondent providing care and support to the deceased but not that they were "living together" in her hotel room. The respondent did not regard that room as his "home". He acknowledges, after he had visited and provided care to the deceased in the morning, he returned to his "home", showered and had breakfast. None of this evidence suggests the respondent kept clothing or any other possessions in the deceased's room, or that it was a place where he undertook any activity other than providing care.

…

[42] Whilst the state of living "together" does not require that the living occur at and from a single place, or that the two adults spend all of their time together at the same place, it will ordinarily include elements of interaction and sharing whilst engaging in activities associated with occupying the same place. Repeated visits for a singular purpose, without more, do not satisfy that description.

63. The appeal was allowed, the first instance orders set aside, and the summons dismissed.

Sgro v Thompson [2017] NSWCA 326, appeal from Thompson v Sgro [2016] NSWSC 1869

64. The plaintiff was a daughter of the late Carmela Sgro, The defendant executrix was the deceased's other daughter. The only substantial asset in the deceased's estate was the deceased's home in Jonathan Street, Greystanes. The estimated value of the property was $800,000. The estimated costs and disbursements for the sale was $30,000. The residuary estate was spent on costs and disbursements.

65. The defendant was entitled to receive the Greystanes property under the Will. The parties were entitled to share the residue.

66. At first instance the plaintiff was ordered to receive 40% of the net proceeds of sale of the Greystanes property, estimated to be about $268,400.

67. At the time of hearing the plaintiff was 52 years old. She lived with her husband and three adult children in a house at Ropes Crossing, a suburb of Blacktown. It had an estimated value of $840,000, with a mortgage of about $527,000. It was jointly owned by the plaintiff and her husband. The household expense were only just met by their income.

68. The Defendant did not file evidence of her competing financial circumstances.

69. The reason for the gift of the Greystanes property to the defendant was that the plaintiff and her husband had already received a gift of real estate, a property at Merrylands, in August 1984. That property was sold in February 1989 for $136,000. The plaintiff and her husband spent the proceeds on other property; but the plaintiff's husband's courier business started to fail, and they had trouble meeting repayments.

70. The defendant submitted at first instance that the plaintiff's current financial position was to a large extent of her own making, the result of poor investment choices, and overextending themselves with borrowings used for investment purposes. However, it was found that these decisions did not disentitle the plaintiff from obtaining provision from the deceased's estate.

71. It was found at first instance that the deceased had a clear and unwavering intention, known by both daughters for more than 30 years, that she wished for the Greystanes property to go to the defendant.

72. On appeal, White JA:

    a. Noted the recent debate concerning the continuing application of the two stage test (*Andrew v Andrew* (2012) 81 NSWLR 656; *Poletti v Jones* [2015] NSWCA 107). His Honour said that the question was of no real significance as long as the first stage of the enquiry is not misunderstood. The same considerations apply to both stages. It is necessary to consider whether adequate provision has been made having regard to the plaintiff's material and financial circumstances, the size and nature of the deceased's estate, the totality of the relationship between

the plaintiff and the deceased, and between the deceased and other persons who have legitimate claims on his or her bounty.

b. Found that the defendant's competing claim was founded not only on her contributions to the deceased (she having not filed evidence of her financial circumstances), but also on what all members of the family recognised as her moral claim to the Greystanes property upon her parents' death because her sister had receive an early inheritance of the Merrylands property.

c. Referred to *Slack v Rogan; Palffy v Rogan* (2013) 85 NSWLR 253 (quoted by the primary Judge) where his Honour said:

> "In my view, respect should be given to a capable testator's judgment as to who should benefit from the estate if it can be seen that the testator has duly considered the claims on the estate. That is not to deny that s 59 of the Succession Act interferes with the freedom of testamentary disposition. Plainly it does, and courts have a duty to interfere with the will if the provision made for an eligible applicant is less than adequate for his or her proper maintenance and advancement in life. But it must be acknowledged that the evidence that can be presented after the testator's death is necessarily inadequate. Typically, as in this case, there can be no or only limited contradiction of the applicant's evidence as to his or her relationship and dealings with the deceased. The deceased will have been in a better position to determine what provision for a claimant's maintenance and advancement in life is proper than will be a court called on to determine that question months or years after the deceased's death when the person best able to give evidence on that question is no longer alive. Accordingly, if the deceased was capable of giving due consideration to that question and did so, considerable weight should be given to the testator's testamentary wishes in recognition of the better position in which the deceased was placed (Stott v Cook (1960) 33 ALJR 447 per Taylor J at 453–454 cited in Nowak v Beska [2013] NSWSC 166 at [136]). This is subject to the qualification that the court's determination under s 59(1)(c) and s 59(2) is to be made having regard to the circumstances at the time the court is considering the application, rather than at the time of the deceased's death or will."

d. Referred to the observations of Dixon CJ in *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9; [1962] HCA 19 (at 19) as follows:

> " All authorities agree that it was never meant that the Court should re-write the will of a testator. Nor was it ever intended that the freedom of testamentary

> disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court. An observer of the course of development in the administration in Australia of such statutory provisions might be tempted to think that, unchecked, that is likely to become the practical result. Perhaps this Court and other Courts of Appeal have attached too much significance to the discretionary aspects of orders under appeal and have accordingly allowed orders to stand which no member of the Court of Appeal would himself have made, had he sat at first instance."

e. Said that the primary judge's statements of general principle did not address a case where the adult child who claims provision had already received by way of early inheritance what would otherwise have been his or her share of the estate.

f. Said that it was an error of principle requiring appellate intervention that the primary judge's central consideration was the plaintiff's financial need and the absence of competing beneficiary financial circumstances, rather than the issue raised concerning the plaintiff's receipt of early inheritance.

g. Decided that having regard to the deceased's consideration of the competing claims of her daughters, the plaintiff had not been given less than adequate provision.

Other decisions of note

73. **Lodin v Lodin [2017] NSWCA 327,** appeal from Lodin v Lodin; Estate of Dr Mohammad Masoud Lodin [2017] NSWSC 10 (appeal against award of provision for ex-spouse allowed, Summons dismissed).

74. **Leary v NSW Trustee & Guardian [2017] NSWSC 1113** (insufficient evidence of plaintiff's financial circumstances, claim dismissed)

75. **Ikonomou v Panagopoulos [2017] NSWSC 1805** (claim by widower dismissed)

76. **Lemon v Mead [2017] WASCA 215**, appeal from Mead v Lemon [2017] WASC 71.

Closing

77. With respect:

a. There has been a tendency since *Andrew v Andrew* [2012] NSWSC 308 for the question as to whether an adult child should be awarded additional provision, upon the demonstration of financial "need", to be approached from the basis of "*why not*" rather than "*why*";

b. Some of the recent decisions, principally *Sgro v Thompson* [2017] NSWCA 326 but also *Ikonomou v Panagopoulos* [2017] NSWSC 1805 place greater emphasis on the testator's judgment in relation to these matters;

c. This is a significant shift in emphasis even if the underlying principles have not changed;

d. *Smoje v Forrester* [2017] NSWCA 308 appears to place limits on categories of eligibility requiring that the plaintiff and the deceased be "living together", a category which previously seemed to be expanding.

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