SYDNEY LAW SCHOOL

DEATH AND INHERITANCE LAW

26 May 2021

THE FAMILY PROVISION JURISDICTION: AN OUTLINE OF THEMES AND PRACTICAL CONSIDERATIONS

by

Justice Geoff Lindsay

Equity Division, Supreme Court of NSW

INTRODUCTION

1 The "family provision" jurisdiction of the Supreme Court of NSW is governed by legislation of the NSW Parliament. Each Australian state and territory has comparable legislation, but it is not uniform.

2 The jurisdiction of the Supreme Court of NSW to make a family provision order is currently found in chapter 3 of the *Succession Act* 2006 NSW. That legislation repealed and replaced the *Family Provision Act* 1982 NSW which, in turn, repealed and replaced the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 NSW so far as it concerned "Testator's Family Maintenance".

3 Section 3(1) of the *Succession Act* 2006 defines a "family provision order" to mean "an order made by the Court under chapter 3 in relation to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of an eligible person".

4 Section 3(1) defines “Court” to mean:

> “(a) the Supreme Court, in relation to any matter (including a matter referred to in paragraph (b)), or
>
> (b) the District Court, in relation to a matter under Chapter 3 for which it has jurisdiction under section 134 of the *District Court Act 1973*”.

5 In practice, virtually all applications for a family provision order are made in the Supreme Court. However, by virtue of section 134(1)(c) of the *District Court Act* 1973 NSW, the District Court of NSW has “the same jurisdiction as the Supreme Court, and may exercise all powers and authority of the Supreme Court, in proceedings for … a family provision order under chapter 3 of the *Succession Act 2006*”, subject to an important limitation. Section 134(2) provides that, in any proceedings pursuant to section 134(1)(c), the District Court has no power to make a family provision order that “will or may result in the amount of provision so made exceeding $250,000”.

6 In practice, virtually all applications for a family provision order, made to the Supreme Court, are case managed by the Supreme Court’s Succession List Judge in accordance with the Court’s “Practice Note No SC Eq 7 – Family Provision”.

7 Proceedings on a claim for a family provision order are ordinarily commenced by the filing of a summons, unless the claim is properly made in proceedings (commonly a contested claim for a grant of probate or administration) commenced by statement of claim: *Uniform Civil Procedure Rules* 2005 NSW rule 6.4(1)(i); Practice Note No SC Eq 7 - Family Provision, clause 5.

8 Ordinarily, in the originating process in which a claim for a family provision order is made, the applicant is named as the plaintiff and the legal personal representative of the deceased person in relation to whom the claim is made (an executor or administrator of the deceased’s estate) is named as the defendant. Where a claim is made by a legal personal representative in his or her personal capacity, the Court ordinarily will give directions for representation of the estate to ensure that there is a contradictor.

9 Where there is a need for representation of an estate in family provision proceedings, in the absence of a general grant of probate or administration upon an exercise of probate jurisdiction, an order for representation of the estate of the person in respect of whom an application is made for a family provision order is commonly made by one of the following procedural expedients:

(a) A grant of administration of the estate, for the purpose of the proceedings, pursuant to the *Succession Act*, section 91.

(b) A representative order made under the *Uniform Civil Procedure Rules* 2005 NSW, rule 7.10.

(c) A special grant of administration upon an exercise of probate jurisdiction (that is, an interim grant traditionally called a grant of administration *ad litem*) limited to conduct of the proceedings pending the making of a general grant of probate or administration.

10 Where the estate of the deceased person is duly represented in family provision proceedings a beneficiary is not a necessary or, ordinarily, an appropriate party to the proceedings. A person entrusted with responsibility to represent the estate in family provision proceedings is generally required to consult all beneficiaries in defence of the plaintiff's application for a family provision order and, if the beneficiaries so desire, to place before the Court evidence of each beneficiary's personal circumstances. Upon his, her or its own application a beneficiary might be joined in the proceedings at his, her or its own risks as to costs.

11 Because the family provision jurisdiction is "a creature of statute", any analysis of it must begin and end by reference to the statute which confers, and governs, the Court's jurisdiction.

12 The family provision legislation is both simple and complex. Chapter 3 of the *Succession Act* provides a template for decision making amenable to expression in terms of a checklist of steps to be taken and facts to be consulted. To this extent it is, or may appear to be, simple. However, to an uncommon extent, the text of family provision legislation requires an understanding of the context in which it is to be read and applied.

13 Layers of complexity require an understanding of the jurisprudence and practice attending the general law of succession (including the law of governing wills, intestacies and the administration of deceased estates), the law governing management of the affairs of a person incapable of self-management (including the law governing enduring powers of attorney and financial managers), the law of property (including the law governing co-ownership of property) and the law governing contracts and trusts. The family provision jurisdiction assumes familiarity with the general law, broadly understood.

14 Nevertheless, the starting point for any analysis is the text of the legislation governing the family provision jurisdiction. Complexity enough is embodied in a legislative text that requires "evaluative" reasoning, as well as discretionary decision-making, not merely findings of primary fact to which established rules of law are applied.

15 An application for a family provision order involves management of property, people and relationships in, or in relation to, administration of the estate of a deceased person. Grounded upon an eligible person's statutory right to apply for a family provision order, it is not otherwise directed towards a determination of a contested claim of right; the family provision jurisdiction is discretionary in character. The reasoning process attending assessment of an application for a family provision order requires an empathetic, but clear-eyed, assessment of personal relationships in a family setting, respectful of the deceased's assessment of those relationships and his or her testamentary intentions.

16 In common understanding, family provision proceedings are concerned with identification of property of a deceased person available for disposition and his

or her testamentary intentions; and considerations of "moral duty" on the part of a deceased person to make provision for a plaintiff, any identifiable "need" on the part of the plaintiff for provision, and the weight of competing claims on the bounty of the deceased.

17 This may involve a consideration of the past, the present and, insofar as can be known, the likely course of the future in the lives of persons affected by the proceedings. In a colloquial sense, the Court is called upon, within a strictly limited framework, to manage the affairs of a deceased person in his or her absence.

18 This process of "evaluative" reasoning stands in sharp contrast to that required for the determination of contested rights and obligations in commercial litigation where (unlike in family provision proceedings) the parameters of problem solving are often defined by written instruments, established rules of law governing claims of right and defined disputes of fact.

19 Decisions central to an exercise of family provision jurisdiction require consideration of:

(a) the expression "adequate provision for the proper maintenance, education or advancement in life"; and

(b) the word "ought".

20 Those expressions require the Court to place itself in the position of a deceased person, who lived and died within a community, viewing claims on the bounty of the deceased at the time of consideration of an application for a family provision order, a time at which the deceased (by reason of the nature of the jurisdiction) is not available to give evidence, to make submissions or to be heard generally. The Court is required to weigh up competing considerations and to make a rationally expressed judgement which may be essentially intuitive.

21 Although the Court's decision-making may be informed by reference to "comparable" cases, family provision cases are notoriously fact-sensitive.

THE CURRENT FAMILY PROVISION JURISDCITION OF THE NSW SUPREME COURT: Succession Act 2006 NSW, Chapter 3

22 As has been noted, the Court's family provision jurisdiction is presently found in, and governed by, Chapter 3 (sections 55-100) of the *Succession Act*.

23 For the purpose of exposition of the jurisdiction, the key provisions of Chapter 3 are the following (with emphasis added):

(a) Section 57 defines the categories of persons (described as "eligible persons") who have standing to make an application for a family provision order.

(b) Section 58 stipulates that, unless the Court otherwise orders on sufficient cause being shown, an application for a family provision order must be made within 12 months of the death of the deceased person in respect of whose estate the order is sought.

(c) Section 59(1) provides that the Court *may*, on an application for a family provision order, make such an order in relation to the estate of a deceased person *if the Court is satisfied* that:

(i) the applicant is an eligible person: section 59(1)(a).

(ii) if the applicant is otherwise than a "spouse" or child of the deceased, there are *factors which warrant the making of an application*: section 59(1)(b).

(iii) *at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life* of the applicant has not been made by the will of the deceased, or by the operation of the

intestacy rules in relation to the estate of the deceased, or both: section 59(1)(c).

(d) Section 59(2) provides that the Court *may* make *such order* for provision out of the estate of a deceased person *as it thinks ought to be made for the maintenance, education or advancement in life of the applicant, having regard to the facts known to the Court at the time the order is made*.

(e) Section 60(2) provides a checklist of matters (including matters bearing upon personal relationships, available resources, competing needs, provision earlier made, and character and conduct) that may be considered by the Court for the purpose of determining:

(i) whether an applicant is an eligible person; and

(ii) whether to make a family provision order and the nature of any such order.

(f) Section 61 provides that (*provided that due notice of an application for a family provision order is served* on a person interested in the application) in determining an application for a family provision order the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (*other than a beneficiary of the deceased's estate*) but who has not made an application.

(g) Section 63 provides that a family provision order may be made in relation to the estate of a deceased person *or* property designated as notional estate of the deceased under Part 3.3 (sections 74-90) of the *Succession Act*.

(h) Section 65 stipulates that *a family provision order must specify the person or persons for whom provision is to be made; the amount and nature of the provision; the manner in which the provision is to be provided and the part or parts of the estate of the deceased out of which it is to be provided; and any conditions, restrictions or limitations imposed by the Court*.

(i) Section 72 provides that *a family provision order takes effect, unless the Court otherwise orders, as if the provision was made*:

(i) *in a codicil to the will of the deceased person, if the deceased made a will*; *or*

(ii) *in a will of the deceased person, if the deceased died intestate*.

(j) Section 95 provides: that a release by a person of his or her rights to apply for a family provision order has effect only if it has been approved by the Court; that an application for approval can be made before or after the death of the person whose estate may be the subject of the application; and that upon an application for approval specified factors are to be taken into account to ensure that the releasor has given his or her fully informed consent to the release.

24 The notional estate provisions of Part 3.3 of the *Succession Act* are complex. Essentially, however, they enable the Court to make an order designating property as "notional estate" of a deceased person if, within three years before the date of death of the deceased, a transaction was entered into having the effect of transferring property out of the estate of the deceased for less than full valuable consideration.

25 Section 80(2) provides different criteria for assessment of a relevant property transaction depending upon its timing. The Court may make a designation

order if it is satisfied that the deceased entered into a relevant property transaction before his or her death and the transaction:

(a) took effect within three years before the date of the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order.

(b) took effect within one year before the date of death and was entered into when the deceased 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 to enter into the transaction.

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

26 A pivotal provision in all family provision cases, section 57 is in the following terms (with emphasis added):

> "**57**. **Eligible persons**
>
> (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 *spouse* 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 spouse* 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*)".

27 Section 21C of the *Interpretation Act* 1987 NSW is in the following terms:

"**21C References to de facto partners and de facto relationships**

(1) Meaning of "de facto partner". For the purposes of any Act or instrument, a person is the "de facto partner" of another person (whether of the same sex or a different sex) if--

(a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the *Relationships Register Act 2010* , or

(b) the person is in a de facto relationship with the other person.

(2) Meaning of "de facto relationship". For the purposes of any Act or instrument, a person is in a "de facto relationship" with another person if--

(a) they have a relationship as a couple living together, and

(b) they are not married to one another or related by family.

A de facto relationship can exist even if one of the persons is legally married to someone else or in a registered relationship or interstate registered relationship with someone else.

(3) Determination of "relationship as a couple". In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case--

(a) the duration of the relationship,

(b) the nature and extent of their common residence,

(c) whether a sexual relationship exists,

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,

(e) the ownership, use and acquisition of property,

(f) the degree of mutual commitment to a shared life,

(g) the care and support of children,

(h) the performance of household duties,

(i) the reputation and public aspects of the relationship.

No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple.

(4) Meaning of "related by family". For the purposes of subsection (2), 2 persons are "related by family" if--

(a) one is the child (including an adopted child) of the other, or

(b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or

(c) they have a parent in common (including an adoptive parent of either or both of them).

(5) Subsection (4) applies--

(a) even if an adoption has been declared void or is of no effect, and

> (b) to adoptions under the law of any place (whether in or out of Australia) relating to the adoption of children.
>
> (6) Subsection (4) applies in relation to a child whose parentage is transferred as a result of a parentage order, or an Interstate parentage order, within the meaning of the *Surrogacy Act 2010* in the same way as it applies in relation to an adopted child, even if the parentage order is discharged or otherwise ceases to have effect. For that purpose, a reference in that subsection to an adoptive parent is to be read as a reference to a person to whom the parentage of a child is transferred under such a parentage order".

28 The expression "close personal relationship" is defined by section 3(3) of the *Succession Act* as "a close personal relationship (other than a marriage or a *de facto* relationship" between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care".

29 By virtue of section 3(4) of the *Succession Act*, for the purposes of that definition, "a close personal relationship" is taken not to exist between two persons where one of them provides the other with domestic support and personal care: (i) for fee or reward; or (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

TESTAMENTARY FREEDOM: FREEDOM FROM WHAT, TO DO WHAT?

30 Expressions such as "testamentary freedom" and "freedom of testation" must be understood in the context in which they are used. They invite the questions: Freedom from what? Freedom to do what? Arguably, they have no real meaning unless they are used as a contrast to a statement of affairs involving a limitation on conduct.

31 "Testamentary freedom" appears generally to be a comparative, rather than an absolute, free-standing concept.

32 This may be demonstrated by the following extracts from GE Dal Pont and KF Mackie, *Law of Succession* (Lexis Nexis Butterworths, Australia, 2nd ed, 2017) at paragraphs [15.1]-[15.5] in Chapter 15, headed "Concept of Family Provision" (omitting footnotes, bar one incorporated in the text):

> "[15.1] The general law gave pre-eminence to freedom of testation, which has been described in more recent times as a 'basic human right' [: *Fung v Ye* [2007] NSWCA 115 at [25]; *Grey v Harrison* [1997] 2 VR 359 at 363 and 366]. Accordingly, it recognised few qualifications to this freedom, highlighting the weight given to the concept of 'property', and its alienability according to the wishes of its owner…
>
> [15.3] …[The importance attached by the general law to testamentary freedom stands] in contrast to the civil law's various forays into impinging on this freedom, chiefly via allocating the deceased's widow and children set shares of the deceased's estate. Not that the common law, going back to earlier times, never restricted it. The common law system of primogeniture provided that inheritance of land devolved to the first-born son; indeed, one of the reasons for development of the 'use' was as a vehicle to circumvent the restrictions inherent in primogeniture. The latter was, in any case, survived by the common law's refusal to recognise married women's legal capacity to hold title to property independent of their husbands, only rectified by statute in the late 19th century. This likewise operated as a de facto restriction on freedom of testation.
>
> [15.4] The headway of statute into the realm of freedom of testation has been a more recent phenomenon. Now in all jurisdictions – the first initiatives emanating from the 1980s – statute empowers courts to rectify wills. Even so, these initiatives hardly undermine, but rather foster, freedom of testation, as the aim of rectifying a will is to give effect to the intention of the testator, which has been imperfectly expressed in its terms….
>
> [15.5] The chief statutory incursion into freedom of testation, though, is family provision legislation, an exclusively 20th-century phenomenon. …"

33 In *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) at page 411, Sir John Baker, writing about an interplay between the early common law and the work of ecclesiastical courts observed that "freedom of testation became universal in England in 1724". That was a reference to the church permitting chattels to pass by will unconstrained by earlier common law requirements for property to pass in fixed shares.

34 A case could be made out for attributing a modern concept of "freedom of testation" to enactment of the *Wills Act* 1837 (Eng), adopted in NSW in 1840. That is the good root of title for the law of wills currently enacted in the *Succession Act* 2006 NSW. Even then, will making was attended by formalities.

35 Throughout the 19th century, vestiges of feudal thought were abandoned as society moved from "status" to "contract" (HS Maine, *Ancient Law* (1861),

Chapter 5), becoming progressively more transactional and less constrained by the incidents of relationship categories. By the beginning of the 20th century, the *Married Women (Property) Acts* had removed legal constraints on women, divorce was becoming more readily available, and "dower" and "curtesy" had been abolished. Relationships within the family, and society at large, were the subject of profound change.

36 It was in that environment, with women and children at a social disadvantage *vis-a-vis* men, that there arose calls for what became family provision legislation.

37 It was not only a concern for the welfare of vulnerable members of a family that drove those calls. A factor taken into account in reform of the law was recognition that, if vulnerable members of family affected by death are not supported by resources available to the family, the economic burden of their support may fall on the public purse.

38 In that environment, and in the years since, expressions such as "testamentary freedom" and "freedom of testation" have meaning in a NSW context as a contrast to testamentary choices made free of interference by an exercise of jurisdiction to make a family provision order.

39 The family provision jurisdiction of the Supreme Court must be assessed in a context broader than itself.

THE NATURE AND SCOPE OF THE LAW OF SUCCESSION AND ITS INTERCONNECTED BRANCHES

40 In his classic text, *A Concise History of the Common Law* (5th ed, 1956), at pages 711, 743 and 746, Professor TFT Plucknett described "the law of succession" as "an attempt to express the family in terms of property".

41 The law of succession is interwoven with the law of property and family law. It generally arises from: (a) a perceived need for formality in the transfer of

property on, or in anticipation of, death; and (b) precedential reasoning upon determination of disputes about the inheritance of property.

42 The law of succession does not depend upon an exercise of jurisdiction by a court in the case of every person who dies. Some property can pass otherwise than by means of a court order. An illustration of this is the case of a person whose only property is personal property, physically held in possession, ownership of which can be transferred by delivery with intent to effect a transfer.

43 However, in a modern setting much property depends for its transfer (if not its existence) upon engagement with the record keeping and procedures of a bureaucracy (public or private), or formalities imposed by law. Take, for example, funds held in a book account. A grant of probate or administration of a deceased estate might be required because of the nature of property to be administered.

44 So too in relation to the family provision jurisdiction of the Court. In the case of a harmonious family there may be no impediment to beneficiaries, by agreement, distributing a deceased estate in a manner other than contemplated by the operation of a will or the rules of intestacy. However, absent agreement of all affected persons, a departure from the scheme of a valid will or the intestacy rules requires an application to the court – generally in the form of an application for a family provision order.

45 Succession law, as administered by the Supreme Court, is an amalgam of procedural and substantive law for the management of property either side of death. In every generation it takes colour from the society it serves, and that society's understanding of what constitutes "family", "property" and "proper arrangements" for the devolution of property on, or in anticipation of, death.

46 The law of succession in NSW is predicated upon an assumption that, at its core, there is an autonomous individual, living (and dying) in community. Within the constraints of community, and so far as can be ascertained, the law

endeavours to give effect to the intentions of a person who, by reason of incapacity or death, is unable to manage his or her own affairs.

47 In a modern setting, decisions about the devolution of property on death are often made by individuals who, in management of their affairs, plan for the possibility that they will suffer incapacity for self-management as a prelude to death. Routinely, such planning involves execution of an "enduring power of attorney" (governed principally by the *Powers of Attorney Act* 2003 NSW), an appointment of an "enduring guardian" (governed by the *Guardianship Act* 1987 NSW) and the execution of a will (governed by Chapter 2 of the *Succession Act* 2006 NSW), the preparation of which requires contemplation of the possibility that a person dissatisfied with the person's testamentary arrangements might, after the person's death, apply (under Chapter 3 of the *Succession Act* 2006) for a family provision order displacing them in whole or part.

48 Viewed through the prism of succession law "death" is now, more than formerly, less an event and more a process that may commence before, and extend beyond, physical death. The process commonly commences when a person plans for incapacity or death by the execution of an enduring power of attorney, an enduring guardianship appointment and a will. It commonly ends only when the prospect of an application being made for a family provision order becomes negligible.

49 In operation, the law of succession requires that decisions be made in recognition of this pattern, anticipating the potential course of events at the time a will and enduring instruments are executed (looking forward) and understanding at the end of the process (looking backwards) what may have happened in management of a deceased person's affairs affecting an orderly succession of property.

50 An illustration of a need to look forward is the desirability of a testator anticipating a family provision claim against his or her deceased estate in settling the terms of his or her will so as to avoid litigation. Even an estranged child might be left a legacy of a size sufficient to discourage him or her from

putting all at risk on an application for a family provision order which could fail and result in an adverse costs order. Constrained by the potential operation of family provision legislation, a testator might decide not to disinherit a person with an objective claim on his or her bounty but, rather, to make a small gift in the hope of preserving more of his or her estate for favoured beneficiaries.

51 An illustration of a need to look backwards is the possibility that an asset of a deceased estate may be property recoverable from an enduring attorney who, during the lifetime of the deceased, transferred property away from the deceased in breach of fiduciary obligations owed to the deceased.

52 Australian succession law is predicated upon the perspective of an autonomous individual living, and dying, in community, not the perspective of a family to which the rights and obligations of an individual are subordinated.

53 As summarised by Professor Ros Croucher in Chapter 11 of Diane Kirkby (ed), *Sex, Power and Justice : Historical Perspectives of Law in Australia* (Oxford University Press, 1995) at page 168:

> "In Australia today there is no concept of 'family property' as such, in the sense of assets that are considered to be owned jointly in some way between or among individuals because of their being related to each other as a 'family'. While such a concept exists in European jurisdictions, jurisdictions which have their legal roots in English law have generally preferred an individualistic system of property ownership, expressed in such principles as 'freedom of contract', 'freedom of property' and its offshoot, 'freedom of testation'. Generally speaking, this has meant that ownership of things is determined, not by virtue of the relationship between people, but because of purchase, gift or inheritance by individuals …."

54 The Report of the NSW Law Reform Commission (No. 28, 1977) that led to enactment of the *Family Provision Act* 1982 NSW recorded a lack of local interest in adoption of a system of inheritance based on fixed proportions of a deceased estate: paragraph 1.6.

55 In its 1987 Report No. 39, on *Matrimonial Property*, the Australian Law Reform Commission followed suit. It recommended against the introduction of a "community of property regime" in Australia, preferring to maintain (with

statutory modifications, embracing discretionary powers, where required) the system of "separate property during marriage" characteristic of the English tradition, recognising that, under the separate property regime operative in modern Australia, each spouse may own and deal with property in exactly the same way as an unmarried person: see Recommendation 24 and paragraphs 53 and 508 *et seq.*

56 The civil law concept of community of ownership arising from marriage has no place in modern Anglo-Australian common law: *Hepworth v Hepworth* (1963) 110 CLR 309 at 317-318; *Bryson v Bryant* (1992) 29 NSWLR 188 at 195-196.

57 The Anglo-Australian law of wills, probate and the administration of deceased estates (a core part of the law of succession) owes an historical debt to the Roman law tradition, not least because probate law and practice reflect even today the work of the English ecclesiastical courts before their integration with secular courts in the 19th century.

58 However, Australian law has moved away from – if it ever embraced – the Roman (civil) law concept of "forced heirship", the idea that a deceased estate should pass to the next generation, in whole or part, in fixed shares, constraining a person's testamentary freedom.

59 The Australian model (reflected in the seminal authority on the meaning of "testamentary capacity", *Banks v Goodfellow* (1870) LR 5 QB 549 at 563-566) recognises in the individual a right to dispose of property by will – a much vaunted "testamentary freedom" – subject to the availability of a discretionary power in a court to make an order that provision be made out of a deceased estate for a person found to have an unsatisfied claim on the deceased's bounty. In this way, Australian law seeks to balance competing claims of "the individual" and "family" (personification of a "collective" interest) in the Australian community.

DISTINCTIVE FEATURES OF NSW FAMILY PROVISION LAW AND HISTORICAL CONTEXT

60 Two features of Chapter 3 of the *Succession Act* which distinguish the family provision jurisdiction of the Supreme Court of NSW from similar jurisdiction vested in other state and territorial Supreme Courts are:

(a) the broad range of people who, by virtue of the definition of "eligible person", have standing to apply for a family provision order; and

(b) the "notional estate" provisions which empower the Court, for the purposes of making a family provision order, to claw back property which would otherwise be lost to the estate of a deceased person.

61 The history of the family provision jurisdiction in NSW is marked by the development of these two characteristic features of the State's governing legislation (namely, a widening of the concept of "family" eligible to apply for a family provision order, and a widening of the categories of "property" against which an order for provision can attach).

62 Both these features of the modern legislation involved a progressive expansion of the Court's jurisdiction to interfere with an individual's private arrangements for the disposition of property on, or in anticipation of, death.

63 Although Chapter 3 of the *Succession Act* does not, in terms, define a concept of "family", concepts of "family" are implicit, at least, in the definition of "eligible persons" in section 57 of the Act. An examination of the range of persons who have been recognised, over time, as having standing to make an application for a family provision order (however described) suggests that the family provision legislation is at the cutting of edge of the law's evolving understanding of what constitutes "family". An initial focus on a registered marriage between a man and a woman and children of their marriage has been progressively extended to de facto relationships between a man and a woman, same-sex relationships,

ex nuptial and adopted children and relationships of dependency or the like within a household setting.

64 As first enacted in 1916, NSW's family provision legislation conferred on the Supreme Court jurisdiction to make a family provision order, of sorts, in favour of a widow and minor children of a married man out of the deceased estate of the man; reflecting the title of the 1916 legislation ("Testator's Family Maintenance", etc), orders were made for the *maintenance* of widows and children.

65 As now enacted, in the *Succession Act*, the legislation confers on the Court jurisdiction to make a family provision order in favour of the several classes of person identified in section 57 as "eligible" to apply for an order, identifiable by reference to familial relationships not confined by gender, marriage or even conventional concepts of "family". The definition of "eligible person" includes, for example, a person who was at any time wholly or partly dependent upon the deceased and who was, at that time or any other time, a member of the same household as the deceased: section 57(1)(e). The focus of the jurisdiction has also shifted profoundly, from an initial concern with the provision of *maintenance* to routine provision of *a capital lump sum*.

66 The concept of "notional estate" was introduced in the *Family Provision Act* 1982 (along with an expanded concept of "eligibility" to apply for a family provision order) and retained in the *Succession Act*. A standard form claim for relief in originating process claiming a family provision order seeks an order for provision "out of the estate or notional estate" of a deceased person. That said, in many cases, an application for provision can be dealt with within the parameters of an *estate*, not requiring a designation of property as *notional* estate.

67 Common occasions for consideration of the availability of property for designation as notional estate are cases in which a substantial part of a deceased person's wealth takes the form of an interest in a superannuation fund or an interest in property held as a joint tenant.

68 Originally conferred to protect the interests of widows and children, the family provision jurisdiction is now regularly engaged to cater for a claim made by an elderly adult "child", long estranged from a deceased parent, concerned about the adequacy of his or her provision for retirement. An earlier generation's bias against adult males has been discarded, as has a paternalistic approach towards testamentary provision for females. Changes in focus and emphasis reflect not only changes in the text of family provision legislation, but also changes in the way the legislation has been applied by the Court in response to social change.

69 In the early days of its existence the Family Provision (more accurately, the Testator's Family Maintenance) jurisdiction was viewed as a means of minimising calls upon the public purse, in the form of social welfare, by compelling families to look after their own. Although that might continue to be an implicit public policy imperative, it is rarely articulated in modern discourse.

70 The tendency of the Court, and parties, in a modern setting is, wherever possible, to make orders for family provision structured in such a way as to enable the parties to disengage as soon as may be practicable. It is on that basis that a lump sum, rather an annuity, is generally favoured.

PARADOX AND PRINCIPLE IN ADJUDICATION OF FAMILY PROVISION APPLICATIONS

71 Although the family provision jurisdiction is statutory, the statutory criteria invite elaboration of guidelines or the like in their application to the facts of the particular case under consideration. However, any attempt at elaboration is at risk of including observations about family relationships liable to be characterised as an impermissible gloss on the statute. There is an inevitability about this that is paradoxical; but central concepts embedded in the legislation ("adequate", "proper", "ought") invite an exercise of intuitive judgement not always amenable to precise articulation, but prone to "error" in a world in which intuitive judgements easily differ.

72 In other areas of the law, judicial consideration of a statute is likely to inform construction of the statute in subsequent cases. That happens in family provision cases as well, but only to an extent. Every so often, general observations about “family”, “relationships”, “need” and “moral duty” (which are difficult to avoid in addressing the criteria for which Chapter 3 of the *Succession Act* provides) tend to be disclaimed by an appellate court as a “gloss” on the statute as attention is re-focussed on the text of the statute. It is by this means that the jurisdiction is constantly refreshed and adapted to social change.

73 One commonly hears the gravamen of a family provision case debated almost exclusively in terms not found in the text of the statute. Practitioners will commonly debate whether an applicant for family provision relief has, or has not, a proven “need” for provision – or whether the deceased did, or did not, have a “moral duty” to make provision (or further provision) for the applicant.

74 A case can be made out for reference to both “need” and “moral duty”. Section 60(2)(d) of the *Succession Act* 2006 invites the Court to consider “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.” Section 80(2)(b) of the Act requires the Court, on consideration of an application for designation of property as notional estate, to consider competing *moral obligations* on the part of a deceased person at the time an *inter vivos* transaction took effect.

75 However, practitioners commonly use the expressions “need” and “moral duty” as a shorthand way of referring to the criteria for which section 59(1)(c) and 59(2) of the *Succession Act* provide. There is no harm in this, provided one remains conscious of a need to begin, and end, every analysis of a particular case by reference to the text of the Act.

76 To succeed on a claim for a family provision order a plaintiff must establish that, viewed from a current day perspective he (or she) has been left without “adequate provision for his (or her) maintenance, education and advancement

in life" from the deceased's estate or notional estate and that further provision "ought" to be made for him (or her) from the estate or notional estate, as the case may be.

77 The concepts of "adequate" and "proper" embedded in the family provision legislation must be understood as relative to the facts of the particular case: *Pontifical Society for the Propagation of the Faith v Scales* (1962) 17 CLR 9 at 19. As generally understood, "adequate" is a word concerned with *quantum* whereas "proper" is a word directed to a *standard* of maintenance, education and advancement in life. Both words focus attention on the circumstances of the particular case viewed from the perspective of the deceased and contemporary community standards.

78 In the exercise of its statutory powers in the determination of an application for a family provision order (in particular, sections 59(1)(c) and 59(2) of the *Succession Act*), the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 17 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally consulting specific statutory criteria referred to in section 60(2) of the Act so far as they may be material.

79 Not uncommonly, judges remind parties (and themselves) that family provision legislation is not a charter for a court to re-write a will. Moreover, a counsel of caution is found in cases such as *Slack v Rogan; Palffy v Rogan* (2013) 85 NSWLR 253 at [127], approved in *Sgro v Thomson* [2017] NSWCA 326 at [1]-[2] and [83]-[87], which emphasise that a deliberate scheme of testamentary dispositions by a capable testator is entitled to respect. In the dialectic that characterises the jurisdiction, that may call into play a reminder that the statutory jurisdiction of the Court is to be given full operation according to its

terms, notwithstanding that it encroaches on testamentary freedom: *Steinmetz v Shannon* (2019) 99 NSWLR 687 at [97].

80 The fact that each of section 59(1)(c) and section 59(2) of the *Succession Act* mandates an assessment of a case for provision at the time of determination of the case may offer opportunities for a court, on contemporary evidence not available to a testator, to distinguish a testator's earlier expressed views of relationships, "moral duty" or "need". That is why it is perhaps appropriate to say that the court is not *bound* by a testator's assessment of a case for provision, but nevertheless counselled to afford it *respect.* A court needs to be mindful that its assessment of a case is generally based upon an adversarial presentation of evidence in the absence of the deceased whereas an assessment of the deceased may have been based upon a lifetime of observation.

PERENNIAL PROBLEMS UPON AN EXERCISE OF FAMILY PROVISION JURISDICTION

81 Notice has already been taken of the tendency of practitioners, including judges from time to time, to debate issues arising in connection with sections 59(1)(c) and 59(2) of the *Succession Act* in terms of "moral duty" and "need"; in these terms, a plaintiff must prove that the deceased owed a "moral duty" to make provision (or further provision) for him or her, and that he or she has a "need" that ought to be addressed by an order for provision. A perennial problem is that these terms of convenience tend to stand as (illegitimate) substitutes for the statutory criteria, diverting attention away from those (the governing criteria).

82 There are some differences of approach to decision-making in the determination of an application for a family provision order that judges occasionally notice without any need to choose between them. Three examples:

(a) Insofar as both section 59(1)(c) and 59(2) of the *Succession Act* focus attention on the adequacy of provision for the maintenance,

education and advancement in life of an applicant for a family provision order, minds differ as to whether the logical reasoning required by those two provisions necessarily involves “two steps” or “one”. In most cases it does not matter, but the requirement in section 59(1)(c) that the Court be satisfied of a particular state of affairs is jurisdictional in character whereas the power conferred by section 59(2) is discretionary in character. Although the operation of the two provisions may overlap, a conservative approach is to approach each provision, distinctly in its turn.

(b) Minds may differ about the perspective to be adopted by the Court in approaching evaluative decision-making. Traditionally, the Court viewed decision-making through the prism of the deceased, treating him or her as “wise and just rather than fond and foolish”. In more recent times, judges have adopted the perspective of current “community standards”, an expression regarded by some as meaningless. A compromise here commended is one that requires the Court to endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish, and making due allowance for current social conditions and standards. Wisdom and justice are criteria that should not lightly be disregarded, but an assessment of what is wise and just needs to be made not in the abstract or by reference to social conditions no longer prevailing, but by reference to contemporary times.

(c) Whether an “estrangement” in the relationship between an applicant for a family provision order and the deceased tells against, or for, the applicant’s case may depend on an (express or implied) attribution of fault for the breakdown of the relationship. The fact of “estrangement” impacts differently on different minds.

83 Despite corrective statements made by judges from time to time, some ideas persist in the minds of those who encounter the family provision jurisdiction. For example:

(a) Although an application for a family provision order is commonly seen by the lay community as "challenging the will" of a deceased person, the criteria to be applied by the Court on the hearing of a family provision application are directed to a determination whether there should be provision made out of an estate, or notional estate, not whether a will should be "set aside" or rewritten in some way. The distinction might not appeal to the lay mind, but it is critically important to correct decision-making.

(b) Contrary to the intuitive belief of many "eligible persons", a will-maker is under no general obligation to treat family members (or, in particular, children) "equally" or "fairly", expressions which can be deceptive in their application depending upon the comparative needs of competing claimants on the deceased's bounty and the provision, if any, made by a deceased person during his or her lifetime for those who may have had claims on his or her bounty.

(c) Despite pleas of judges, many, if not most, lay participants in family provision litigation (and, sadly, many advocates) cannot resist the temptation to canvass longstanding grudges or complaints in presentation of evidence for, or against, an application for a family provision order.

(d) Some plaintiffs (in support of an application for a family provision order) and defendants (in opposition to an application) fail to address the forensic realities of proceedings by persuading themselves that the case for which they contend is a vindication of the deceased's "true" testamentary intentions. Although the deceased is the central personality in family provision proceedings, the object of the proceedings is not to vindicate the

testamentary intentions of the deceased (actual or presumed) but to consider whether an order can, and should, be made for the plaintiff to receive provision, or further provision, out of the estate, or notional estate, of the deceased. Speaking broadly, whereas probate proceedings are directed to ascertaining, and giving effect, to a testator's testamentary intentions, family provision proceedings are directed to providing a safety net of one description or another for claimants on the bounty of the deceased who, for whatever reason, are (in the judgment of the Court, representing the community) left without "adequate provision for their proper maintenance, education and advancement in life" from resources attributable to the deceased's wealth.

84 How to deal with questions of costs incurred in connection with family provision proceedings is, or should be, a constant concern for everybody:

(a) The quantum of costs incurred in the conduct of family provision proceedings often appears prohibitively large, and disproportionate to the size of an estate and the complexity of questions in dispute. Although there appears to be no ready answer to the question, "how can the costs of family provision proceedings be contained?", if parties and their lawyers do not exercise restraint unpalatable answers might ultimately be found in capping entitlements to costs (on a solicitor/client basis, not merely a party/party basis), prohibiting any form of costs agreement that provides an "uplift" conditional upon success, or limiting the involvement of lawyers in the conduct of family provision proceedings.

(b) Although unsuccessful plaintiffs may be ordered to pay the costs of the proceedings, a common (and commonly misplaced) assumption is that, at the conclusion of contested proceedings, whatever their outcome, the Court will make the "usual" orders for

costs; namely, that the plaintiff's costs be paid out of the estate on the ordinary basis and that the defendant's costs be paid out of the estate on the indemnity basis. Although these orders can properly be characterised as "usual" orders in the case of a successful application for a family provision order, the general rule that "costs follow the event" (*Civil Procedure Act* 2005 NSW, section 98 and *Uniform Civil Procedure Rules* 2005 NSW, rule 42.1) is the logical starting point for analysis. Accordingly, an unsuccessful plaintiff should not be surprised when ordered to pay a defendant's costs. Although section 99 of the *Succession Act* empowers the Court to make an order that the costs of proceedings be paid out of an estate, or notional estate, it does not displace legislation governing costs generally.

(c) A judge who makes an order than an unsuccessful plaintiff pay the costs of the proceedings is unlikely to be unmindful of the possibility that payment of such costs may present a hardship for the plaintiff. Decisions about whether or not to make such an order in those circumstances can be hard for everybody. However, care needs to be taken not to impose upon estates the burden of unmeritorious applications for a family provision order or to encourage unmeritorious, speculative applications.

(d) Hard decisions of a similar nature may have to be made in circumstances in which a plaintiff has succeeded in obtaining a family provision order, but that order is less favourable to the plaintiff than an offer of compromise earlier made by the defendant (whether by a formal offer of compromise governed by UCPR Part 42 or by an offer made in "without prejudice" correspondence "save as to costs"). Ordinarily, a judge has no notice of settlement offers unless and until submissions are made as to the costs of the proceedings after determination of an application for a family provision order. This is so even though formulation of a family provision order might require anticipation of

the effect of a costs liability on the financial wellbeing of the plaintiff, if not also that of other persons affected by the proceedings.

THE CONDUCT OF A FAMILY PROVISION CASE

85 The conduct of a family provision case requires familiarity not only with Chapter 3 of the *Succession Act* 2006, and associated caselaw, but also with the Supreme Court's *Practice Note No. SC Eq 7 – Family Provision.*

86 Family provision claims are rarely pleaded. Proceedings are ordinarily commenced by a plaintiff's filing of a summons, reciting bare claims for relief, directed to a representative (usually an Executor or Administrator) of the deceased as defendant, unless a family provision claim is tacked on to a statement of claim filed in other (usually probate) proceedings. Even then, a claim for family provision relief is ordinarily asserted rather than pleaded.

87 In the first instance, questions for determination in a family provision case generally emerge from the plaintiff's primary affidavit (a template for which can be found in Annexure 1, required by clause 6, of the Practice Note) and the "administrator's affidavit" required of a defendant by clause 9.1 of the Practice Note.

88 The Practice Note, and case management procedures based on it in the Family Provision List, are directed to encouraging parties to exchange information at the earliest practical time so that they can each make a realistic assessment of their respective cases, leading (if not to an early settlement) to a compulsory mediation before allocation of a date for a final hearing.

89 In the presentation of a family provision claim, parties may best assist the Court by early identification of: (a) the deceased; (b) the age and date of death of the deceased; (c) the operative, and any other known, wills of the deceased; (d) the dates and terms of any grant of probate or administration affecting the estate of the deceased; (e) a family tree depicting personal relationships, with dates of births, deaths and marriages where material; (f) the pool of assets available, or

(if a claim is made for designation of notional estate) potentially available, for the making of a family provision order; (g) a list of “eligible persons”; and (h) evidence confirming that all eligible persons have been given due notice of the proceedings. Where an order is sought for designation of property as notional estate, confirmation is required as to the joinder of necessary parties other than an Executor of Administrator.

90 The written submissions which are invariably required for the final hearing of a family provision case should enable the Court to access this information without fuss.

91 It also helps if there is, ever so briefly, an identification of the principal elements required for proof of a claimed entitlement, treating (in a simple, standard case) the following list of sections as a checklist:

(a) Confirmation that the plaintiff’s originating process was filed within the time limited by the *Succession Act*, section 58(2); failing which the plaintiff’s originating process must include an application for an extension of time, as to which see *Warren v McKnight* (1996) 40 NSWLR 390 at 394E; *Dare v Furness* (1998) 44 NSWLR 493 at 500C..

(b) Identification of the ground, or grounds, upon which the plaintiff claims to be an eligible person: *Succession Act*, sections 57 and 59(1)(a).

(c) Where the plaintiff is otherwise than a “spouse” or child of the deceased, a statement of the grounds upon which the plaintiff contends that there are “factors warranting” the making of his or her application for relief: *Succession Act*, section 59(1)(b); *Re Fulop* (1987) 8 NSWLR 679 at 681; *Churton v Christian* (1988) 13 NSWLR 241 at 254.

(d) A summary statement of the grounds upon which the plaintiff contends that he or she has been left without provision for his or her maintenance, education or advancement in life: *Succession Act,* section 59(1)(c).

(e) A statement of the nature and quantum of relief which the plaintiff contends "ought" to be granted: *Succession Act*, section 59(2).

(f) A summary of the principal factors listed in section 60(2) of the *Succession Act* alleged to be material.

92 From the perspective of a judge, the conduct of family provision proceedings is facilitated if realistic submissions are made about the operation of sections 59(1)(c) and 59(2). Unfortunately, some defendants are loathe to make a concession in favour of a plaintiff in relation to section 59(1)(c), and many parties are reluctant to identify a range of orders that might realistically be made in favour of the plaintiff upon a consideration of section 59(2). There is a tendency on the part of many advocates to leave assessment tasks to the Court, without meaningful concessions.

93 In the conduct of a final hearing, all parties are counselled against making or persisting in unproductive objections to affidavits, and unnecessary cross examination of witnesses. Even if affidavit evidence is rejected on evidentiary grounds, experience teaches that it nevertheless often emerges in cross examination of the deponent. A vigorous cross examination of a competing claimant on the bounty of the deceased, whatever its purpose, may be entirely counter productive, arousing unwanted sympathy. Less is often best. Advocates are encouraged to have, and adhere to, a disciplined case theory.

THE OBJECTIVE PARAMATERS OF AN APPLICATION FOR A FAMILY PROVISION ORDER: WHAT TO LOOK FOR

94 An application for a family provision order is incidental to the administration of a deceased estate.

95 With that in mind, an assessment of a potential application for a family provision order requires a perspective that takes into account factors material to the administration of an estate, including identification of the following:

(a) The central personality (the deceased) through whose lens the world must be viewed.

(b) The nature and value of the estate to which that key personality was entitled at the date of his or her death, including any property that may be recoverable on behalf of the estate where, for example, property has been transferred away from the deceased during his or her lifetime in breach of fiduciary obligations owed to him or her by an attorney or financial manager.

(c) The existence or otherwise of any transactions effected by or on behalf of the deceased during his or her lifetime that might support a designation of property as notional estate, and the nature and value of property that might be available for designation as notional estate.

(d) The existence or otherwise of any and all legal instruments (broadly defined) that might govern, or affect, the disposition or management of the deceased person's estate: e.g., a will, an informal will, statutory "intestacy provisions", an enduring power of attorney or an enduring guardianship appointment, a financial management order or a guardianship order.

(e) The full range of persons whose "interests" may be affected by any decisions to be made:

(i) Family provision litigation is generally an adjunct to, or substitute for, probate litigation; its effective determination requires all competing interests and persons eligible to apply for relief to be identified and, generally, to be given

notice of proceedings on an application for a family provision order.

(ii) Family provision litigation generally requires notice of proceedings to be given to all persons who are, or may be, "eligible persons". It is also predicated upon an expectation that the representative of an estate charged with acting as contradictor to an applicant for a family provision order will consult with known beneficiaries of the deceased's estate.

(iii) This contrasts with, but complements, the approach to notification of interested parties in probate litigation. Probate litigation is "interest litigation" in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634; *Estate Kouvakis* [2014] NSWSC 786 at [212].

(iv) If an application for a family provision order is made in proceedings in which an application is also made for a grant of probate or administration, notice of the proceedings will ordinarily be required to be given to all parties interested in the application for a grant of probate or administration as well as those who, as an eligible person, might themselves have standing to apply for a family provision order.

(f) Whether any (and, if so, what) steps need to be taken to preserve the estate under consideration: for example, by an application in probate for an interim grant of administration or by an application for injunctive relief.

(g) Whether any (and, if so, what) steps need to be taken to ensure that all persons required to be notified of the proceedings are in fact notified or to confirm, or dispense with, service of notice of the proceedings on any person.

96 Requirements for the service of notice of proceedings (whether upon an exercise of probate or family provision jurisdiction) is no mere formality. Ultimately, it serves the purpose of ensuring that arrangements for succession to property can be implemented in a way that allows the title to property to pass in an orderly way without unnecessary exposure to successive claims.

EXAMPLES OF FAMILY PROVISION CLAIMS

97 In NSW, judgments of the Succession List Judge (Hallen J) in family provision proceedings regularly include updated summaries of "principles" applicable as "guidelines" for consideration of claims by particular categories of "eligible persons", identified in section 57(1) of the *Succession Act*. For example:

(a) Spouse: *Epov v Epov* [2014] NSWSC 1086.

(b) De facto spouse: *Sadiq v NSW Trustee & Guardian* [2015] NSWSC 716, affirmed in [2016] NSWCA 59.

(c) Child: *Kohari v NSW Trustee & Guardian* [2016] NSWSC 1372; *Clark v Ro* [2016] NSWSC 1877.

(d) Former spouse: *Geoghegan v Szelid* [2011] NSWSC 1440.

(e) Dependent grandchild/dependent person living in the same household as the deceased: *Austin v NSW Trustee and Guardian* [2016] NSWSC 1675; *Page v Page* [2016] NSWSC 1218 (and [2016] NSWSC 1323).

(f) Person with whom the deceased person was living with in a close personal relationship at the time of the deceased person's death:

Sadiq v NSW Trustee & Guardian [2015] NSWSC 716, affirmed in [2016] NSWCA 59.

98 In a jurisdiction in which "guidelines" are liable to change from time to time to accommodate social change, and in which there may be little scope for appealing to an earlier case as a form of precedent because all family provision cases are fact-sensitive, *Luciano v Rosenblum* (1985) 2 NSWLR 65 provides enduring guidance in dealing with the "entitlements" of a widow of a long marriage. In that case Powell J determined that, as a broad general rule, and in the absence of special circumstances, the duty of a testator under family provision legislation, to make "adequate provision for the proper maintenance … or advancement" of his widow requires that, to the extent to which his assets permit him to do so, he should ensure that she is secure in her home, that she has an income sufficient to permit her to live in the style to which she is accustomed, and that she has available to her a fund to which she might resort in order to meet any unforseen contingencies.

99 Cases involving estrangement between an applicant for a family provision order and a deceased person include *Andrew v Andrew* (2012) 81 NSWLR 656; *Burke v Burke* [2015] NSWCA 195; and *Underwood v Gaudron* [2015] NSWCA 269.v

100 In reviewing these cases it is important to remember that, because of the discretionary nature of the Court's jurisdiction to grant, or withhold, relief family provision cases tend to be fact-sensitive. Care needs to be taken not to "gloss" statutory criteria by formulation of working hypotheses about how applications for a family provision order are to be determined.

GCL

24 May 2021