

WHERE DEATH AND DIVORCE MEET: THE INTERSECTION OF FAMILY PROVISION AND FAMILY LAW

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Speech to the National Family Law Conference
October 2006

For many years, in all Australian jurisdictions, Testator's Family Maintenance ("TFM") legislation has authorised courts to make provision out of the estate of a deceased person for the proper maintenance, education, and advancement in life of certain categories of claimant. This places a limitation upon testamentary freedom, by enforcing the moral obligations of a testator to make proper and adequate provision for those for whom the community would expect such provision to be made, before being able to deal with his or her estate as the testator wishes. Although its precise scope varies from state to state, it confers rights on spouses, de facto and same-sex partners, children, step-children, grandchildren and persons who at some time have been dependent on the deceased and at that or some other time been a member of the same household as the deceased.

Family Provision, though ordinarily dealt with in state courts, is an essential element of family law practice. It pertains to the rights of family members to financial provision from the estate of another. In some cases, it may provide, for a spouse in whose favour an order for maintenance or property adjustment has been made, an opportunity for a second bite of the cherry. In others, it provides a remedy for one spouse to obtain a remedy after the death of the other from the estate of the other, so that since the amendment in 1983 of the (CTH) *Family Law Act* 1975 by the introduction of s 79(8),¹ providing for the continuation after the death of a party of proceedings in respect of property, there are two regimes under which courts may make orders dealing with the estates of deceased persons to provide for members of their families otherwise than in accordance with the will of the deceased person (or, where applicable, the rules of intestacy).

The relationship between the two regimes was considered by the High Court of Australia in *Smith v Smith* (1986) 161 CLR 217. In holding that there was no inconsistency between the two, in that the State TFM legislation did not enter upon a field that the Commonwealth legislation had evinced an intention wholly to cover, Gibbs CJ, Wilson and Dawson JJ said (at 231-233):

The extent of the relevant field in the present case can more easily be revealed by description than by definition. The *Family Law Act*, so far as material for present purposes, deals with the provision of maintenance for a party to a marriage, the determination of property rights in proceedings between the parties to a marriage and the variation of the interests of either or both parties to a marriage in the property of either or both of them. Although a party to a marriage is defined by s 4(2) to include a

¹ It should also be noted that the *Property (Relationships) Act* 1984 (NSW) ("PRA"), providing for discretionary property adjustment between de facto and domestic partners, contains a provision in respect of property proceedings substantially identical to *Family Law Act*, s 79(8).

reference to a person who was a party to a marriage that has been dissolved, annulled or terminated by death, it appears quite clearly from the provisions of Part VIII that no order for maintenance may be made against the personal representative of a deceased person who, while alive, was a party to a marriage and that, with the exceptions about to be mentioned, no order for the variation of property rights may be made against the personal representative of any such deceased person. Those exceptions are provided by s 79(8), which enables proceedings with respect to the property of the parties to a marriage or either of them which were pending at the death of a party to be continued by or against the personal representative of the deceased party and, subject to the conditions in s 79(8)(b), for an order to be made with respect to the property, and by s 79A(1C) which makes similar provision with regard to pending proceedings to set aside or vary an order made under s 79. ... If no order has been made, and no proceedings were pending at the time of the death of a party to a marriage, nothing in Part VIII enables proceedings of any kind respecting maintenance or property to be brought against the personal representative of a deceased party to a marriage.

The *Family Provision Act*, on the other hand, operates only after the death of a person whose estate (actual or notional) is sought to be made liable for the maintenance, education or advancement in life of an "eligible person", an expression which includes a former spouse. That Act may be regarded as a Statute governing succession, or as one which relates to the administration of deceased estates. It places restrictions upon the power of testamentary disposition which at common law was unfettered and enables the court to alter the ordinary course of intestate succession....

In *Johnston v Krakowski* this court held that there was no inconsistency between the provisions of the *Matrimonial Causes Act 1959* (Cth) and Part IV of the *Administration and Probate Act 1958* (Vic). There are dissimilarities between those Statutes and the Acts now in question, although they are not in our opinion material for present purposes. Certainly it is as true in this case as it was in that to say that the *Commonwealth Act* and the *State Act* deal with "entirely different problems": see *Johnston v Krakowski*, 566, 569. The former deals with the adjustment of rights to property and maintenance on the breakdown of a marriage; the latter enables persons (including former spouses) regarded as having a moral claim against a testator or an intestate to enforce that claim against his estate after his death. The situation with which the *State Act* is concerned arises at a different time, and in different circumstances, from those with which Part VIII of the *Commonwealth Act* deals, and the respective criteria provided by the *State* and *Commonwealth Acts* for the grant of relief are different.

Despite those observations of the High Court as to the different problems to which the (NSW) *Family Provision Act 1982* and the *Family Law Act* is addressed, there are not infrequently occurring circumstances in which the operation of one closely bears on the other. The *first* is where it is open to a surviving spouse to prosecute

proceedings under both Acts: that is, where property proceedings under the *Family Law Act* have already been instituted before the death. In those circumstances, an issue arises as to the impact of one set of proceedings on the outcome of the other, and how the courts in which they are brought should deal with them. The *second* is where a surviving spouse or former spouse has not instituted property proceedings before death of the other: this applies both to those who have separated, and those who have not. Such a spouse may only bring a claim under the *Family Provision Act*. The *third* is where, after a property settlement under the *Family Law Act*, one party dies and the other seeks to make a claim under the *Family Provision Act*. The *fourth* pertains to giving effect to the “clean break” principle, contained in *Family Law Act*, s 80, by the release of rights to make a family provision application.

This paper addresses the relationship between the two regimes, in the following manner:

- An overview of the two regimes, their similarities and differences.
- Approach where a spouse can claim under both regimes.
- Family Provision claims by spouses.
- Family Provision claims after property settlement.
- Releases of rights.
- Children’s claims.
- An introduction to the proposed uniform national laws.

In the following review of the operation of the two regimes, the focus is on the New South Wales *Family Provision Act* 1982, in which the family provision legislation is at its most adventurous. However, the applicable principles are the same in all jurisdictions, although there are at present significant differences as to what classes of person are eligible to make applications for provision.

Family Law Act, s 79(8)

Family Law Act, s 79(8), provides as follows:²

- (8) Where, before proceedings with respect to the property of the parties to a marriage or either of them are completed, either party to the proceedings dies:
 - (a) the proceedings may be continued by or against as the case may be, the legal person or representative of the deceased party and the rules of court may make provision in relation to the substitution of the legal purpose or representative as a party to the proceedings;

² (NSW) *Property (Relationships) Act* 1987, s 24 is to the same effect.

- (b) if the court is of the opinion -
 - (i) that it would have made an order with respect to property if the deceased party had not died; and
 - (ii) that it is still appropriate to make an order with respect to property

the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or other of them; and

- (c) an order made by the court pursuant to paragraphs (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

Section 79(8) applies only in respect of proceedings which have already been instituted. However, whether the parties have separated or not is irrelevant. The jurisdiction under s 79 does not depend upon the parties having separated. Proceedings for financial adjustment, under *Family Law Act*, Pt VIII, are authorised by the Act to be brought before as well as after separation or marital breakdown. The Act plainly envisages that proceedings under it may be brought before as well as after separation.³ Jurisdiction under s 79 does not depend upon the marriage having broken down. The relevant “matrimonial cause” is that defined in s 4(ca)(i) of the definition: proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings arising out of the marital relationship. So long as the proceedings arise out of the marital relationship, there is no requirement that there be proceedings for principal relief, nor that they relate to marital breakdown. Provided that the proceedings can be said to arise out of the marital relationship, it is not necessary that there have been a separation or marital breakdown.⁴ It is a mistake to see the Act - and in particular Part VIII - as being exclusively concerned with marital breakdown and its consequences. Matrimonial cause (ca) in general, and s 79 in particular, is supported by the marriage power [(ca)(i)], as well as by the divorce and matrimonial causes power [(ca)(ii), (iii)]. The 1983 amendments, permitting property proceedings before divorce, were founded on this basis.⁵ The Act is also concerned with the maintenance and adjustment of property interests of parties who are married - although, particularly in respect of the property power, because of the finality of s 79 orders, the Court may well, *as a matter of discretion*, be hesitant to exercise its jurisdiction if the parties had not yet separated, or if there were a likelihood of reconciliation, *and* further cohabitation might result in further contributions or economic consequences which would affect the justice of a s 79 order made at the time.⁶ It was for that very reason that the power of adjournment was conferred by s 79(1B) at the same time that the Act was amended to permit property proceedings to be brought before divorce. But while as a matter of discretion a Court might hesitate to exercise jurisdiction to make a permanent alteration of property interests if the parties were not yet separated or if they were a likelihood of reconciliation, that is not

³ S 75(2)(g), 79(1B).

⁴ *Jennings & Jennings* (1997) FLC ¶92-773.

⁵ See *Russell v Russell*; *Farrelly v Farrelly* (1976) 134 CLR 495; (1976) FLC ¶90-039.

⁶ As in *Jennings & Jennings* (1997) FLC ¶92-773.

so when one of the parties dies. The Court could, in proceedings *inter vivos*, exercise its power of adjournment under s 79(1B), but that is a matter of discretion, not jurisdiction, and not applicable in any relevant way to circumstances where one of the parties has died. The considerations that inform its application *inter vivos* are not relevant when one of the parties has died, because the death itself brings the marriage to an end.

It is sufficient to found continuation after death under s 79(8) that, at time of death, proceedings have commenced. Proceedings are commenced when the application is filed. It is not necessary that the application have been served before death.⁷

Section 79(8) does not apply to property proceedings which have not been instituted during the joint lives of the parties, nor where both (as opposed to one only) of the parties have died. Nor does s 79(8) apply to proceedings under s 44(3) for leave to institute property or maintenance proceedings out of time, because such proceedings are not "with respect to property" as required by the opening words of s 79(8), but with respect to leave to institute proceedings.⁸

Section 79(8) applies to "proceedings with respect to the property of the parties to a marriage". These are not limited to s 79 proceedings but extend to all proceedings that come within the scope of "matrimonial cause" (ca), including for a declaration under s 78 as well as an alteration of property interests under s 79, and any associated proceedings under ss 85 or 85A.⁹

Family Provision Act, s 7

The *Family Provision Act* authorises the Court, on application by an eligible person, to order that such provision be made out of the estate or notional estate of the deceased person as in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person: s7. The Court shall not make such an order unless it is satisfied that, at the time of the hearing the provision otherwise made by the deceased in favour of the eligible person, either during his lifetime or out of his estate, is inadequate for the proper maintenance, education or advancement in life of the eligible person: s 9(2).

Family Provision Act, s 7, creates and defines the right to apply for a family provision order, as follows:

⁷ This was authoritatively established in *Love & Love* (1994) FLC ¶92-441; *Mason v Mason*; *Mason-King* (1994) FLC ¶92-446, rejecting the trial judge's view to the contrary.

⁸ *Slater & Slater* (1985) FLC ¶91-641, 80173; *Rampling & Rampling* (1988) FLC ¶91-902, 76,556.

⁹ *Jacobsen & Jacobsen (deceased)*; *Auston & Jacobsen (executors)* (1988) FLC ¶91-901, 76,554; *Greal v Estate of the Late Greal*; *Sandalwood Lodge Pty Ltd (Intervenor)* (1990) FLC ¶92-132, 77,907. In this respect the provision in the *Family Law Act* differs from the equivalent in *Property (Relationships) Act*, the application of which is limited to adjustive property proceedings under s 20 and does not extend to declaratory proceedings under s 8.

7 Provision out of estate or notional estate of deceased person

Subject to section 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

The essential elements of this are:

- The application must be one “in relation to a deceased person”. So obviously enough proceedings *inter vivos* are not authorized (except for the approval of releases, discussed below).
- There must have been a grant of administration (although, it seems, not necessarily before proceedings are commenced, so long as it is obtained prior to the order being made¹⁰). This requirement is not universal;
- Standing to apply is conferred on an “eligible person”;
- An order may be made out of the estate or notional estate, or both, of the deceased person;
- The court is given a discretion to make such order as ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person. This use of the word “ought” is one of several markers in the Act of the concept of “moral obligation” which, in recent times, has been controversial.

The limitation imposed by s 9(2) is in the following terms:

(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,

...

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.

¹⁰ *Leue v Reynolds* (1986) 4 NSWLR 590; *Whalen v Byrnes* [2003] NSWSC 915, [29].

This imposes what is sometimes called, imprecisely, the "jurisdictional" requirement that before an order can be made, it must first be established that there is an inadequacy of provision.

Who may make an application?

Under the *Family Provision Act*, an application may be made by an "eligible person", which is defined by s 6(1) to have the following meaning:

eligible person, in relation to a deceased person, means:

- (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, or
- (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
- (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.

Thus, in short, the eligible applicants are:

- (Category A) the spouse or de facto spouse or domestic partner of the deceased at the time of his/her death;
- (Category B) children of the deceased;
- (Category C) former spouses of the deceased; and
- (Category D) persons who were sometime dependents and either grandchildren or members of the same household of the deceased.

In the case of a person who was eligible only by reason of being within the category C or D (that is, a former spouse, or a sometime dependant grandchild or household member), the court is required first to determine whether in its opinion, having regard to all the circumstances of the case (whether past or present), there are factors which warrant the making of the application, and shall refuse to proceed with the determination of the application and to make an order unless it is satisfied that there are those factors: s9(1). The "factors" referred to are those factors which, when added to the facts which make the applicant an "eligible person", give him or

her the status of a person who would generally be regarded as a natural object of testamentary recognition by the deceased.¹¹ In practice, this requirement rarely avoids the need for a full hearing.

A divorced spouse is an eligible applicant, under category C, although she or he must show "factors warranting" the making of an application. (Under the former *Testator's Family Maintenance & Guardianship of Infants Act 1916*, a divorced spouse was not an eligible applicant, although this differs between jurisdictions).

Children of the deceased are also eligible applicants under the *Family Provision Act*, without having to establish "factors warranting" the making of an application.

A child does not have standing to bring proceedings under *Family Law Act*, s 79, in respect of property of one or other of his or her parents.¹² This must apply equally to proceedings under s 79(8). However, children may intervene in property proceedings between their parents,¹³ and there is no reason why children could not be active intervening parties in proceedings between a surviving spouse and a deceased spouse's estate. In such proceedings, the Court could make an order for the benefit of a child of the marriage.¹⁴ This has the important consequence that once there are proceedings pursuant to s 79(8), the interests of any children as well as those of the surviving spouse may be addressed. However, those of other "eligible persons", particularly category D applicants, would not fall within s 79(8).

Section 79(8) of the *Family Law Act* applies to proceedings by the surviving spouse against the estate of the deceased spouse, but also to applications brought by the deceased spouse against the surviving spouse. And, in proceedings commenced or continued by the surviving spouse, the deceased may bring a cross-application.¹⁵ While this is a relevant distinction between proceedings under s 79(8) and those under the *Family Provision Act*, this paper is principally concerned with claims continued by a surviving spouse against the estate of a deceased spouse.

What property is available?

In proceedings under the *Family Provision Act*, the available property is:

- (a) that comprised in the estate of the deceased; and
- (b) that which may be designated as "notional estate" of the deceased. This is an anti-avoidance provision: property may be designated notional estate if the deceased has entered into a "prescribed transaction", or if there has been a

¹¹ *Re Fulop* (1987) 8 NSWLR 679, 681; *Churton v Christian* (1988) 13 NSWLR 241, 252.

¹² *Egan & Egan* (1985) FLC ¶91-608, 79,938.

¹³ *Krotofil & Krotofil* (1980) FLC ¶90-909; *Yates & Yates (No 1)* (1982) FLC ¶91-227.

¹⁴ *Gilbert v Estate of the late Gilbert* (1990) FLC ¶92-125, 77,833.

¹⁵ *Strelys & Strelys; Lukaitis (Executor)* (1988) FLC ¶91-961, 76,962, 76,966.

distribution from the estate after death. Prescribed transactions are essentially dispositions other than for full value:-¹⁶

22 Prescribed transactions

- (1) A person shall be deemed to enter into a prescribed transaction if:
- (a) on or after the appointed day the person does, directly or indirectly, or omits to do, any act, as a result of which:
 - (i) property becomes held by another person (whether or not as trustee), or
 - (ii) property becomes subject to a trust,whether or not the property becomes in either case so held immediately, and
 - (b) full valuable consideration in money or money's worth for the firstmentioned person's doing, or omitting to do, that act is not given.
- (2) Except as provided in subsections (5) and (6), a prescribed transaction referred to in subsection (1) shall, for the purposes of this Act, be deemed to take effect at the time property becomes held by a person or subject to a trust as referred to in subsection (1) (a).
- (3) The fact that a person has done, or omitted to do, an act as a result of which property became held by another person or subject to a trust shall not prevent a later act or omission by the first mentioned person (as a result of which the same property becomes held by another person or subject to a trust) constituting a prescribed transaction.
- (4) In particular and without limiting the generality of subsection (1), a person shall, for the purposes of subsection (1) (a), be deemed to do, or omit to do, an act, as a result of which property becomes held by another person or subject to a trust if:
- (a) the person is entitled, on or after the appointed day, to exercise a power to appoint, or dispose of, property which is not in the person's estate but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of the person's death or the occurrence of the other event:
 - (i) the property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately), or

¹⁶ *Family Provision Act*, s 22.

- (ii) another person becomes (whether or not immediately) or, if the person was previously entitled, continues to be, entitled to exercise the power,
- (b) holding an interest in property which would, on the person's death, become, by survivorship, held by another person (whether or not as trustee) or subject to a trust, the person is entitled, on or after the appointed day, to exercise a power to prevent the person's interest in the property becoming, on the person's death, so held or subject to that trust but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled,
- (c) holding an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, the person is entitled, on or after the appointed day, to exercise a power to extinguish the other interest in the property but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of the person's death or the occurrence of the other event, the other interest in the property continues to be so held or subject to that trust,
- (d) the person is entitled, on or after the appointed day, in relation to a policy of assurance on the person's life under which money is payable in consequence of the person's death or, as the case may require, in consequence of the occurrence of any other event to a person other than the executor or administrator of the person's estate, to exercise a power:
 - (i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy of assurance, or
 - (ii) to surrender or otherwise deal with such a policy of assurance on the person's life,but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled,
- (e) being, on or after the appointed day, a member of, or participant in, a body (corporate or unincorporate), association, scheme, fund or plan, the person dies and, as a result of the person's being such a member or participant and of the person's death or the occurrence of any other event, property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately), or

- (f) on or after the appointed day, the person enters into a contract providing for a disposition of property out of the person's estate (whether the disposition is to take effect before, on or after the person's death and whether in pursuance of the person's will or otherwise).
- (5) Except as provided in subsection (6), a prescribed transaction involving the doing of, or omitting to do, an act as referred to in subsection (4) (paragraph (f) excepted) shall be deemed to be entered into immediately before, and to take effect on, the death or the occurrence of the other event referred to in that subsection in relation to that act or omission.
- (6) Where:
 - (a) a prescribed transaction involves any kind of contract, and
 - (b) valuable consideration, although not full valuable consideration, in money or money's worth is given for the disponent's becoming a party to the contract,
 the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into.
- (7) Notwithstanding subsections (1) and (4), the making by a person of, or the omitting by a person to make, a will is not an act or omission referred to in subsection (1) (a) except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in the person's estate.

Property the subject of a prescribed transaction (or property into which it can be traced) can be designated as notional estate if the transaction took effect (1) within three years before death, the deceased entered into the transaction with intent to defeat or limit a claim under the Act, or (2) within a year before death, and at the time the deceased had a moral obligation to make provision for the eligible person substantially greater than any moral obligation to make the disposition, or (3) upon death. The passing of property by survivorship upon death is a prescribed transaction taking effect upon death, (including by survivorship, or through the nomination of a beneficiary of a superannuation benefit).¹⁷

The "property" of a party for the purposes of *Family Law Act*, s 79(8)(b), in the case of the deceased party, includes property which has passed to the estate by virtue of his or her death, and thus includes superannuation payments received by the deceased's estate, whether it became vested before or as a consequence of that death.¹⁸ The estate can be augmented by orders under s85 or s85A.

¹⁷ *Family Provision Act*, s 23.

¹⁸ *Evans & Public Trustee for the State of Western Australia* (1991) FLC ¶92-223, 78,550-2.

Approach to *Family Law Act*, s 79(8) application

The policy which underlies s79(8) is that a party to a marriage which has broken down, to the extent that property proceedings have been commenced, should neither profit, nor be disadvantaged, by the fortuitous death of the other prior to the determination of the proceedings.¹⁹

The first condition which must be satisfied before a Court makes a property order after the death of a party is that the Court be of the opinion that it would have made an order with respect to property if the deceased party had not died. The opinion which the Court is required to hold is simply that it would have made an order had the deceased not died, and the Court is not required to work out the precise order which it would have made.²⁰ In *North & North* (1987) FLC ¶91-831, Gee J held that the Court was to form this opinion as at the day before the death of the deceased party. His Honour's view was followed by Moss J in *Re Lane deceased* (1990) 103 FLR 101, 106; and in *Homsy & Yassa; The Public Trustee* (1994) FLC ¶92-442. In *Doyle & Doyle* (1989) FLC ¶92-027, Lindenmayer J (at 77,397) doubted this approach and thought it at least equally arguable that the question for the Court was whether, if the deceased were still alive at the date of the hearing, the Court would have made an order. Moss J discussed the competing constructions in *Mason v Hannaford* (1993) FLC ¶92-398, 80056, without deciding between them. However, it is now apparent that the question is not concerned with the procedural situation at any particular point of time, but with whether, apart from the death of the respondent, the applicant had a cause of action which would have entitled her or him to relief under s 79, and it is not to the point that the Court may not immediately have made an order if the parties had not separated but may have exercised a power of adjournment under s 79(1B).²¹

Next, the Court must be satisfied that it is "still appropriate" to make a property order, notwithstanding the death of a deceased party. The onus of establishing this lies upon the applicant for an order: *Tasmanian Trustees Ltd v Gleeson* (1990) FLC ¶92-156, 78,085. Relevant considerations may include:

- any consequence of the death of the deceased spouse on the financial position of the surviving spouse. If the surviving spouse benefits from the deceased's estate, further adjustment of property interests may be unnecessary;
- the circumstance that the deceased spouse has no continuing maintenance needs. Thus an order in favour of the estate, which would otherwise have been made simply on account of s 75(2) factors, might not be made, and to the extent that those factors might have reduced the order that would otherwise have been made in favour of the surviving spouse, there will be no such reduction.

¹⁹ cf *Doyle & Doyle* (1989) FLC ¶92-027, 77,398.

²⁰ *Allan & Allan* (1987) FLC ¶91-824, 76,210; *Randle & Randle* (1987) FLC ¶91-828, 76,230; *North & North* (1987) FLC ¶91-831, 76,248.

²¹ *Bourke & Bourke* (FamCA, Full Court, EA117/97, 11 June 1998).

In determining what order to make, the Court is required to take into account the factors referred to in s 79(4), and to make an order which is just and equitable as required by s 79(2): *Doyle & Doyle* (1989) FLC ¶92-027, 77398. One of the most significant differences between ordinary s 79 proceedings and those under s 79(8) is that in having regard to the s 75(2) factors, the Court cannot ignore the circumstance that one of the parties to the marriage has died, while the other is still alive, and consequently that the surviving spouse may have continuing maintenance needs whereas the deceased has none: *Doyle & Doyle* (1989) FLC ¶92-027, 77,398; *Menzies & Evans* (1988) FLC ¶91-969, 77,010; *Tasmanian Trustees Ltd v Gleeson* (1990) FLC ¶92-156, 78,085; *Mason v Hannaford* (1993) FLC ¶92-398, 80,054-5. For this reason, the final order which the Court makes pursuant to s 79(8) will not necessarily be the same as it would have made had both parties been alive.²²

In some circumstances, the consequences of the death of one estranged spouse might have such an effect on the financial position of the other (by provision under the deceased's will, or by right of survivorship of a joint tenant) as to result in an appropriate division of the property so that no further adjustive order is warranted.²³ As was said by the Full Court, in *Re Parrott v Public Trustee* (1994) FLC ¶92-473, the death of one party has a profound effect on the balance of s 75(2) factors. It was observed that in *Tasmanian Trustees v Gleeson* the Full Court had held that although it was rare to deprive a spouse of the entire share of property to which he or she may be entitled by reason of contribution having regard to the other spouse's needs, the death of the claimant spouse and the smallness of the property available may justify that course; this could be contrasted with *Menzies v Evans* where the estate was a sizeable one. While noting the comments of Lindenmayer J in *Doyle & Doyle* to the effect that it must be presumed, from the enactment of s 79(8), that the legislature intended that one party to a marriage which has broken down to the point that proceedings have been commenced for orders altering the interests of the parties in property should not profit by the fortuitous death of the other prior to the determination of those proceedings, their Honours added that it was nonetheless clear enough that the death of one party had a profound effect upon the balance of s 75(2) factors, as had been pointed out in *Tasmanian Trustees Ltd v Gleeson* where the Court, while distinguishing the decision of Smithers J in *Menzies v Evans*, agreed with his Honour's view that the deceased had a prima facie moral entitlement to the share gained by contribution during his or her lifetime and, if so desired, to dispose of the same by will to persons who are strangers to the marriage. This reference to "moral entitlement" is of interest, because of its similarity to the concept of "moral obligation" frequently referred to in the TFM cases.

In *Parrott*, the wife was 61 years of age, in ill health and in receipt of a pension. The estate was worth about \$91,000. The trial judge's finding that on the contributions the wife was entitled to 20%, (or \$18,230, of which she had already received \$17,265 and had assets of \$2,240, making a total of \$19,505), was neither attacked nor disturbed. The Full Court held that by reference to the s 75(2) factors she should receive \$50,000, being an additional \$48,725.

²² *Menzies v Evans* (1988) FLC ¶91-969, 77,009-010.

²³ See, for example, *Tasmanian Trustees Ltd v Gleeson* (1990) FLC ¶92-156.

In proceedings under s 79(8), the Court does not take into account the claims or financial circumstances of the beneficiaries of the deceased's spouse's estate.²⁴ Nor does the Court have regard to the provisions of, or claims of the surviving spouse, under the Family Provision legislation.²⁵ However, an order may be made pursuant to s 79(8) even though its benefit may be enjoyed by beneficiaries of the deceased's estate who may include non-family members.²⁶

Approach to Proceedings under Family Provision Act

In *Singer v Berghouse* (1994) 181 CLR 201, the High Court described the approach of a court to the exercise of jurisdiction under the *Family Provision Act* in respect of an eligible person as involving a two stage process, the first stage requiring a determination of the jurisdictional fact whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life, and the second, which arises only if the first is resolved affirmatively, requiring a discretionary decision as to what provision ought be made out of the estate for the applicant. However, as the High Court explained, similar considerations inform both stages of the process (at 208-210):-

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

...

The first question is, was the provision (if any) made for the applicant "inadequate for [his or her] proper maintenance, education and advancement in life"? The difference between "adequate" and "proper" and the inter-relationship which exists between "adequate provision" and "proper maintenance" etc were explained in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476. The determination of the first stage in the two stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.

²⁴ *Menzies v Evans* (1988) FLC ¶91-969, 77,010; *Re Berry & Berry* (1990) FLC ¶92-118, 77,779; *Mason v Hannaford* (1993) FLC ¶92-398, 80,055-7.

²⁵ *North & North* (1987) FLC ¶91-831, 76,255-6.

²⁶ *Fisher v Fisher* (1986) 161 CLR 438, 454, 462; (1986) FLC ¶91-767, 75,597, 75,602; *Menzies v Evans* (1988) FLC ¶91-969, 77,009; *Tasmanian Trustees Ltd v Gleeson* (1990) FLC ¶92-156, 78,085.

The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like *Ellis v Leeder* (1951) 82 CLR 645, where there were no assets from which an order could reasonably be made and making an order would disturb the testator's arrangements to pay creditors.

In *Re Fulop deceased* (1987) 8 NSWLR 679, McLelland J (as he then was) said in a paragraph which encapsulates the relevant considerations (at 680):

In an application for provision under the *Family Provision Act* 1982, s 7, the ultimate function of the Court is to determine first, whether the provision (if any) made in favour of the plaintiff by the deceased either during his or her lifetime or out of his or her estate (including, where applicable, any provision arising under the laws relating to intestacy), is inadequate for the proper maintenance, education and advancement in life of the plaintiff, and secondly, if so, what (if any) provision or further provision ought to be made out of the estate for those purposes. In each case the Court has regard to the circumstances at the time of the determination.

In making these determinations, the following principles apply: first, the Court should not interfere with the dispositions in the will (or, where applicable, arising under the laws relating to intestacy) except to the extent necessary to make adequate provision for the plaintiff's proper maintenance, education and advancement in life; secondly, the expression "proper" in this context connotes a standard appropriate to all the circumstances of the case; and thirdly, the Court may take into consideration any matter (whether existing or occurring before or after the death of the deceased) which it considers relevant in the circumstances, including (a) the nature and quality of the relationship between the plaintiff and the deceased (b) the character and conduct of the plaintiff (c) the nature and extent of the plaintiff's present and reasonably anticipated future needs (d) the size and nature of the estate of the deceased (e) the nature and relative strength of the claims to testamentary recognition of the deceased of those taking benefits under the will of the deceased (or where applicable under the laws relating to intestacy) and (f) any contribution, financial or otherwise, direct or indirect, by the plaintiff to the property or welfare of the deceased.

In *Stewart v McDougall* (NSWSC, 19 November 1987, unreported), Young J (as the Chief Judge in Equity then was) said:

It is important to state what the Family Provision Act permits a court to do and what it does not permit a court to do. The Act recognises that Australians have freedom to leave their property by their will as they wish, with one exception. The exception is that a person must fulfil any moral duty to make proper and adequate provision for those whom the community would expect such provision to be made before they can leave money as they wish. Thus in these cases one does not ask is the will fair, one does not ask why did the testatrix not divide her property equally; one does not as a judge say how would I have made a will had I been the testatrix? What must be asked is whether the testatrix by her will failed in her moral duty to those who had a claim on her? Even if the court comes to the view that that question should be answered in the affirmative, the court still does not remake the will, but only alters it to the extent that proper and adequate provision is made to the eligible person in respect of whom the testatrix failed in her moral duty.

Thus proceedings for provision out of an estate under *Family Provision Act*, s 7 involve a two-step process. The first step is to determine whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. This is a question of fact, and requires an assessment of what in all the circumstances was the proper level of maintenance, etc, appropriate for the applicant having regard inter alia to the applicant's financial position, the size and nature of the estate, the totality of the relationship between the applicant and the deceased (including any contributions made by the applicant to the deceased's estate and/or welfare), and the relationship between the deceased and other persons who have a legitimate claim upon his or her bounty. The second step, which only arises if the first is answered affirmatively, is to determine what provision ought to be made out of the estate for the applicant. This involves a discretionary judgment, in which the court considers all of the facts and circumstances in order to evaluate what provision community standards would require a person in the position of the testator to make for the applicant.²⁷

Because the considerations relevant to both stages in the process overlap, consideration of an application under the Act does not always divide neatly into the two questions, as Callinan and Heydon JJ pointed out in *Vigolo v Bostin* [2005] HCA 11, [122]; (2005) 221 CLR 191, 230-231. Nonetheless, in an application under the Act, the Court must consider, *first*, whether the Plaintiff is an eligible person; *secondly*, whether the Applicant has been left with inadequate provision for his or her proper maintenance, education and advancement in life; and *thirdly*, if so, what, if any provision (or further provision) ought to be made out of the estate for those purposes.

Where a spouse can claim under both regimes

In *Re Lane*, Moss J held that the question which must be addressed before making a

²⁷ *Singer v Berghouse (No 2)* (1994) 181 CLR 201, 208; *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191, [5], [74]-[75], [112]; *Lo Surdo v Public Trustee* [2005] NSWSC 1186, [44]-[50]; *Walker v Walker* (NSWSC, Young J, 17 May 1996).

relevant order pursuant to s 79(8)(b) is whether, taking the relevant matters into account as the particular circumstances require in the light of s 79 and in particular taking into account that one of the parties to the proceedings is dead, it is just and equitable to make the relevant order, and that a Court determining an application pursuant to s 79(8)(b) should always bear in mind the likelihood of an application in respect of relevant property under the *Family Provision Act*. His Honour continued (at 107):

Indeed, where, for example, it is the surviving spouse and children who are pursuing the estate, it may be important to have the State Statute in mind. This is because, depending on such matters as the size of the relevant estate, the surviving spouse may make a claim under both the provisions of s 79(8) and the provisions of the State Act. This was expressly recognised by the High Court in *Smith v Smith* (1986) 161 CLR 217 at 231-236 and 245-247. Where this is so, consideration may have to be given as to which application should be determined first, in order to avoid inconsistent orders, which might otherwise be made: see *Smith* (supra) at 233-236.

The problem of inconsistent orders does not appear to have arisen. Insofar as parallel applications under the *Family Law Act* and the *Family Provision Act* have been brought, an order under s 79(8) will ordinarily satisfy any moral obligation which otherwise would have been enforced pursuant to the *Family Provision Act*. This is what happened in *Re Berry* (1990) FLC ¶92-118, where after ordering pursuant to s79(8) an alteration of property interests such that the wife receive 55% and the husband's estate 45%, Treycvaud J concluded (at 77,780):

Having regard to the orders made in the *Family Law Act* proceedings, and the financial consequences of such order to the wife, which are above set out, I agree that in light of the changed financial circumstances brought about by my order, the moral duty owed by the husband to the wife cannot be said to have been breached.

In *Fisher v Fisher* (1986) 161 CLR 438, in rejecting a challenge to the constitutional validity of s 79(8), Brennan J (as he was then) said (at 457-458):

Section 79(8) does not confer jurisdiction on the Family Court to entertain proceedings commenced after the death of one of the parties to the marriage. The proceedings to which it relates are proceedings commenced between the parties to a marriage with respect to the property of those parties or either of them arising out of the marital relationship or otherwise falling within par (ca) of the definition of "matrimonial cause" in s 4(1) of the Act. The proceedings must have been a matrimonial cause commenced pursuant to s 79(1). The death of a spouse will not always extinguish or satisfy the moral claims of the surviving spouse and children to which effect would have been given if the proceedings had been completed. Section 79(8) empowers the Family Court to give effect to the moral claims made in respect of the property of the spouses which was made available to answer those claims by the commencement of the proceedings, provided "it is still appropriate to make an order with respect

to property": s79(8)(b)(ii). That qualification on the power, coupled with par (ca)(i) of the definition of "matrimonial cause", ensure that the jurisdiction is exercised only in cases where the moral obligations arising out of the marriage remain unsatisfied.

Section 79(8) provides machinery for the discharge of those moral obligations in priority to any rights in the property of a party to a marriage which arise by testamentary disposition of that party's property or by any other devolution of that property on that party's death....

That is not to say that the exercise of the jurisdiction under s79(8) is governed by precisely the same considerations as govern the making of orders under a testators' family maintenance Act, much less to suggest that there is any inconsistency between s79(8) and legislation of that kind: see *Smith v Smith* (1986) 60 ALJR 508, at p 519; 66 ALR 1, at pp 21-22. However, there will be occasions when an order made under s 79(8) will satisfy or go towards satisfying a moral obligation which might otherwise have warranted the making of an order or an order in a larger amount under testators' family maintenance legislation.

Again, the reference to "moral claims" is notable.

The effect of what Brennan J said in *Fisher v Fisher* is illustrated by the judgment of Trevaud J in *Re Berry*. In the light of the additional impact of s 75(2) factors in favour of a surviving spouse in proceedings under s79(8), it is unlikely that having succeeded in a claim under s79(8), the surviving spouse would thereafter succeed under the *Family Provision Act*.

There is obvious commonsense in all proceedings against the estate being heard and determined together; otherwise there is a risk that the outcome may be affected by whichever gets to trial first. While the cross-vesting scheme was in full operation, the family provision claims could be heard with the s 79(8) claim in the Family Court, and that sometimes occurred. It is arguable that the family provision proceedings – at least those brought by a surviving spouse - would fall within the accrued jurisdiction of the Family Court, although *Smith v Smith* stands as an obstacle to that view. It is doubtful that *Smith* would be decided the same way nowadays, in the light of *Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511. But it remains possible for all the proceedings to be heard together in the State Supreme Courts, since so much of the Cross-vesting scheme as vests the jurisdiction of the Family Court in the State Supreme Courts is still valid and effective.

Applications by spouses under Family Provision Act

In a paper delivered to the Fourth National Family Law Conference in 1990, the late Master Horton QC of the Supreme Court of Queensland argued that it was unfortunate that the Commonwealth legislature had not adopted a more adventurous position by providing for the commencement after death of a s 79 application by a spouse who was separated before death, rather than leaving such a

spouse to what the learned master called "the somewhat 19th century relief offered by the various state family provision legislation".²⁸ The Master said (at 390f):

Just what a remarkable dichotomy exists therefore between the position of a spouse who has, prior to the death of his/her partner, separated from that party and instituted an application for property settlement pursuant to s 79 and that of a spouse who has separated from his/her partner but not instituted a s 79 application prior to the death of the partner. Similarly disadvantaged too is a spouse who has lived in connubial bliss with his/her marital partner only to discover upon the partner's death that no or little provision has been made for him/her in the testator's Will. He/she is omitted [from] most or all of the property which they enjoyed, or at least acquired during the marriage registered in the deceased's partner's name. A spouse in this position is left only with a TFM application under the present law.

Master Horton's thesis depended upon the view that, unlike the *Family Law Act*, the family provision legislation does not recognise that each spouse deserves an interest in the fruits of the marriage, but merely seeks to ensure that each spouse discharges his or her legal obligations to maintain the other.²⁹

If that was ever a fair description of the scope of the TFM legislation, it is no longer the case. There are many statements of authority as to the yardstick for the award that ought to be made under Family Provision legislation, involving as it does a broad judicial discretion. Some of them favour the narrower view of that legislation as simply providing for maintenance. So in *Boyce v Humphreys* (1974) 48 ALJR 229, the High Court said, in a joint judgment of Menzies, Stephen and Mason JJ (at 232):

A widow, particularly a widow of the age of the applicant, is not entitled as a right to have a capital sum from the estate of her husband.

Barwick CJ said (at 229):

There is no necessity for a testator in every case, if he is to fulfil his moral obligation to his wife, to provide a capital sum.

In *White v Barron* (1980) 144 CLR 431, Stephen J said (at 440):

A trial judge has to place himself in the position of the testator and to consider what that testator "ought to have done in all the circumstances of the case": *Bosch v Perpetual Trustee Company Ltd* [1938] AC 463 at 478. No doubt this requires him to recognise and to apply prevailing community standards of what is right and appropriate since it is by those standards that the content both of the moral duty owed by a just husband and father

²⁸ D R Horton "Proceedings after Death - The Plight of the Widow", 4th National Family Law Conference Handbook (1990).

²⁹ At 391; see also J Wright "A Fair Share in the Assets - The Position of the Surviving Spouse" (1998) 2 AJFL 93, 107.

to his wife and children and of departures from it will be measured: *In Re Allardice; Allardice v Allardice* [1911] AC 730 at 734-735.

In the same case, Mason J (as he then was) said (at 444):

Circumstances are infinite in their variety and orders must be moulded to the circumstances of the particular case in order to ensure that the provision which is made is adequate for the proper maintenance of the widow, where that is possible. A capital provision should only be awarded to a widow when it appears that this is the fairest means of securing her proper maintenance. However, the provision of a large capital sum to a widow who is not young, may, in the event of her early death, result in a substantial benefit to her relatives, contrary to the wishes of the testator, when a benefit of another kind would have afforded an adequate safeguard to her personally, without leaving her in a position in which she could benefit her relatives from the proceeds of the legacy. In the present case I am unable to perceive the justification for the award of a legacy as large as \$75,000. It was unrelated to the established needs of the appellant and it certainly went beyond what was necessary to cure the provisions of the will of the disability that the annuity was inadequately protected from the consequences of inflation.

Statements such as these, reflective of the view that there should be a minimum of intrusion on testamentary freedom, and that in the TFM legislation the emphasis was very much on the "M", in the narrowest sense, formed the basis of Master Horton's argument that the Family Provision legislation did not in any way recognise any proprietary interest or claim in or to the assets of a spouse. But much water has flowed under the bridge since then.

Cases under the *Family Provision Act* measure what is "proper" provision according to prevailing community standards. It is clear, as Young J said in *Cotter v McPhee* (NSWSC, 7 May 1987, unreported) that the Act is not merely one to relieve the destitute, and that proper provision includes making provision for a reasonable standard of living. Although it is commonly referred to, the concept of "need" as such does not appear in the Act.³⁰ The test is not mere need, but inadequacy of proper provision, and the reference to "proper" provision has regard to the station in life of the applicant and the estate of the deceased. The amount to be provided is not to be measured merely by the "need" for maintenance. *Family Provision Act*, s 9(3), identifies as a relevant consideration which may be taken into account in determining what if any provision should be made for an eligible person:

- (a) any contribution made by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to:
 - (i) the acquisition, conservation or improvement of property of the deceased person, or
 - (ii) the welfare of the deceased person, including a contribution as a homemaker, ...

³⁰ *Samsely v Barnes* (1991) DFC ¶¶95-100, 76,310.

The similarities to s 79(4) are obvious, and indicate that a family provision claim may be based on contribution as well as on need. As will be seen, the proposed uniform model Bill incorporates an equivalent provision.

The Court has to consider what is *proper* provision for maintenance and advancement. This was established as early as *Bosch v Perpetual Trustee Company Ltd* [1938] AC 463, in which the Privy Council said (at 478-479):

The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the court were concerned merely with adequacy. But the court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration ...

Their Lordships agree that in every case the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father. This no doubt is what the learned judge meant by a just, but not a loving, husband or father. As was truly said by Salmond J in *Re Allen (deceased); Allen v Manchester* [1922] NZLR 218, 220: "The Act is ... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances."

Many of the leading cases under the testator's family maintenance legislation were decided before the commencement of the *Family Law Act*, or before it had long been in effect. Many of the cases (for example, Stephen J in *White v Barron*, and Young J in *Stewart v McDougall*) have referred to the relevance of prevailing community standards. As those standards have changed, so have the types of orders appropriate to be made under the *Family Provision Act*. The *Family Law Act* itself has brought about a significant change in community perceptions of what is proper provision for a spouse upon breakdown of marriage. In particular, it has recognised that conduct is not a consideration which should bear upon the financial adjustment between separating parties, and that a spouse generally has a claim not just to maintenance but to or in respect of the property which has been accumulated during the marriage. There is no reason why this community perception ought not be reflected in the measure of what is "proper" provision for the purposes of the *Family Provision Act*.

The primacy of a testator's obligation to make provision for his widow, and the content of that obligation, has often been stated.³¹ In *Elliott v Elliott* (NSWSC, Powell J, 18 May 1984, unreported; affirmed NSWCA, 24 April 1986) the plaintiff was a widow aged 79 who had had a happy marriage. Powell J gave the widow the whole of the relatively small estate, and the Court of Appeal indicated that not only was that within his Honour's discretion, but it was really the only proper order that could be made. Powell J (at 11), in a passage which was endorsed by Young J in *Court v Hunt* (NSWSC, 29 October 1987, unreported), described a testator's duty to his widow of a long-standing and harmonious marriage as requiring, as a minimum, provision of security in her home for the rest of her life, and the capacity to change it; an income sufficient to enable her to live in a reasonable degree of comfort; and a fund for modest luxuries and contingencies:

I take the view - which view I believe, is supported by the authorities - that, in a case such as this, where the marriage of a Deceased and his widow has been long and harmonious, where the widow has loyally supported her husband, and assisted him to build up and maintain his estate, the duty which the Deceased owes to his widow can be no less than (to the extent to which his assets permit him to achieve that result) first, to ensure that his widow be secure in her home for the rest of her life, and that if, either, the need arises, or the whim strikes her, she has the capacity to change her home; secondly, that she have available to her an income sufficient to enable her to live in a reasonable degree of comfort, and free from any financial worries; and, thirdly, that she has available to her a fund to which she might resort in order to provide herself with such modest luxuries as she might choose, and which would provide her with a hedge against any unforeseen contingency or disaster that life might bring.

This was echoed by the Court of Appeal in *Golosky v Golosky* (NSWCA, 5 October 1993, unreported), in which Kirby P, with whom Cripps JA agreed, said (at 16) that in the absence of special circumstances, it will normally be the duty of a testator to ensure that a spouse is provided with accommodation appropriate to that to which she has become accustomed, and (to the extent that the assets available permit) a fund to meet unforeseen contingencies:-

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

³¹ See, for example, *Luciano v Rosenblum* [1985] 2 NSWLR 65, 69; *O'Loughlin v O'Loughlin* [2003] NSWCA 99; and the cases referred to below.

unsatisfactory method of providing for a spouse, accommodation to fulfil the foregoing normal pre-supposition.

In *Court v Hunt*, Young J said:

In this day and age, a testator who only gives a life estate to his widow, and has no other direct claims on his bounty, is usually not making proper provision for the widow. At the very least, the testator should consider the fact that if the widow does not survive him for a number of years the health position will mean that she needs flexibility in her accommodation, and this sort of life estate almost always does not provide it.

In *Paton v Public Trustee* (NSWSC, 8 December 1988, unreported), Young J, in dealing with a long but relatively unhappy marriage, said:

Whilst if there was a very large estate it may be that there would be a different result in an application under the Act between a happy marriage and an unhappy marriage, there is a basic minimum which the community regards as necessary for testators to provide for their spouses where their marriage has been of medium to long term duration. Those basic necessities include a secure roof over the remaining spouse's head and at least a small capital sum.

Surviving wives have frequently been given the whole or a substantial part of the estates.

In my view, the proper measure nowadays of the community's expectation as the basic minimum which testators should provide for their spouses, even in an unhappy marriage, is that provision which the surviving spouse would have received pursuant to Part VIII of the *Family Law Act* had the parties separated and instituted such proceedings. In a happy marriage, the standard might well exceed this. However, recognition of the entitlement of a party under the *Family Law Act* as fundamentally reflecting community expectations as the minimum appropriate provision for such a spouse would ensure that there was no such dichotomy as Master Horton feared. The dutiful spouse who finds upon her husband's death that no or inadequate provision has been made for her is then in no worse position than a spouse who has separated before death and commenced property proceedings.

The circumstance that the *Family Provision Act* authorises (but does not require) the Court to take into consideration "the character and conduct of the eligible person before and after the death of the deceased person" does not mean that by reference to matters of conduct a different result should be reached than would pertain under the *Family Law Act*. Conduct may well be relevant to whether the minimum standard should be exceeded or not. But even under the old legislation, misconduct was not necessarily a bar to relief.³²

³² In *Coates v Thomas* [1947] NZLR 779, a widow succeeded notwithstanding her proved adultery; and mere separation was not sufficient to amount to disintitling conduct: in *Re Bradbury* [1947] QSR 171; *Toner v Lister* [1919] GLR 498; *Colquhoun v Public Trustee* (1911) 31 NZLR 1139; *Re Jackson* [1954] NZLR 175; *Re Johnstone* [1962] Tas SR 356.

There is neither social sense nor legal logic in a surviving spouse who has not instituted proceedings before the other dies being in a position worse than would have been the case had such proceedings been instituted. Even more so where the surviving spouse was not separated but remained happily married until the death of the other, should such spouses not be in a worse position vis-a-vis the estate of the other than had the marriage failed. Application of the principles applied in property division under the *Family Law Act* provides a guide to the minimum provision that the community would expect a testator to make for his or her spouse. The entitlement of a spouse in the event of divorce before death of the other is a matter which the Court determining a *Family Provision Act* can and should take into account pursuant to s 9(3)(d) of the *Family Provision Act*, as "any other matter which it considers relevant in the circumstances" when determining what if any provision ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person.

Applications by former spouses: a second bite of the cherry?

Young J dealt with an application by a former spouse in *O'Shaughnessy v Mantle* (1986) 7 NSWLR 142. There, following a thirty-year marriage, there had been divorce proceedings in England, where the court had sanctioned agreements and settlements of the former matrimonial property. His Honour held something more than the relationship of eligibility must be established in order to show factors warranting the making of application. His Honour said (at 147F):

Whilst again emphasising this list is non exhaustive and is no more than guidelines, it would seem to me that the following cases would clearly be ones where there would be factors warranting the court considering the application:

- (1) except where the Family Court itself gives relief, cases where there has been a divorce and a spouse has died before property matters have been resolved by the family court;
- (2) cases where the husband and wife have not finally settled all the property dealings at the time of the divorce;
- (3) cases where maintenance was being paid to the ex-spouse as at the date of the deceased's death and the orders for maintenance were inadequate to provide for the ex-spouse after death of the paying spouse;
- (4) cases where despite the divorce there was dependency on the deceased as at the date of death. An example of this would be where some years after the divorce the present plaintiff fell ill and because of a residue of affection the now deceased spouse provided moneys for medical treatment or living expenses.

A fifth class of cases is rather hard to define. Under the *Testators Family Maintenance and Guardianship of Infants Act* there were a series of cases

where persons whose marriage had got into problems had signed separation deeds or had maintenance orders against them or had had a decree nisi which had not become absolute by the date of death. In such cases it was consistently held that what a spouse is entitled to under the *Testator's Family Maintenance and Guardianship of Infants Act* cannot be concluded merely by considering whether the plaintiff would have been entitled in the spouse's lifetime to an order for maintenance; see, eg, *Delocour v Waddington* (1953) 89 CLR 117; *Re Mayo* [1968] 2 NSW 709. Unreported decisions where these problems have been considered included *Gray v Peil* (Holland J, 11 February 1976, unreported) and *Groth v Perpetual Trustee Co Ltd* (Powell J, 16 October 1978, unreported); see also *Re Howard* (1925) 25 SR (NSW) 189; 42 WN 34 and *Re Clissold* [1970] 2 NSW 619. In almost all of these cases, despite a limited maintenance order, a more generous order was made under the *Testator's Family Maintenance and Guardianship of Infants Act* because as was pointed out by almost all the judges, the issue in the maintenance proceedings and the issue in the *Testator's Family Maintenance* proceedings was different, though of course, many factors overlapped. The probability is that these cases will continue to be followed in applications under the *Family Provision Act* where the applicant is a widow or a widower as opposed to being a former spouse. Apart from one type of case, it seems to me difficult to see how there are any special circumstances involved in such cases, especially where there has been an order of the Family Court of Australia in respect of property, because the *Family Law Act* (Cth), s 81, is aimed at finally breaking all financial relations between the parties.

The one type of case in this category where there may be some special factor involved, is where there is a very small estate and whilst the parties are alive it was only possible to give a pittance to the claiming spouse because the other spouse needed funds to maintain his own life but that now one spouse is dead, the barrier to giving the other spouse the whole of the family property has finished. However, I merely raise these matters and leave this fifth class of case for decision if a case comes to the Court raising those particular problems...

Clearly on the other side of the line is a case where there has been a determination between the spouses on a final basis by a competent court, and the orders of the court or the agreement between the parties sanctioned by the court have been performed and there has been no material change in circumstances other than the death of one of the parties. Somewhere between this type of case and the other five classes of case which I have discussed, the line must be drawn in respect of applications by ex-spouses - just where may be able to be determined with more precision after there have been a large number of cases before the court.

His Honour held that the case before him did not establish factors warranting, the relevant issues having been raised in the English divorce proceedings and determined against the plaintiff; orders having been made in those proceedings on

the principle that there should be a clean break between these spouses; the agreement and settlement for the English courts having been consummated and the plaintiff having received a sum of money; and there having been no relevant change of circumstance. The length of the marriage - some thirty years - did not by itself warrant the making of the application. Young J's decision was considered by the Court of Appeal in *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639, and, at least to some extent, disapproved. Kirby P said (at 651E-652F):

Fifthly, the respondent, picking up one of the themes of Mr Landa's comments, urged that s 9(1) of the Act was to be read in the light of the policy of the law to promote the finality of settlements of property disputes by orders made in the Family Court. Where such orders had been made, an order under the Act in the case of a former spouse should be exceptional. Only if this approach was adopted would the policy of the *Family Law Act (CTH)* be fully achieved. That policy is that parties whose marriage has been dissolved and in respect of whom orders have been made disposing of their matrimonial property, could go their separate ways. Save for the rare and exceptional cases provided under the *Family Law Act (CTH)*, such parties should henceforth face no financial obligation from one to the other. This public policy was referred to by Young J in *O'Shaughnessy* (at 149). It was also stressed by His Honour in the present case. There is no doubt that in most cases, the achievement of the final property settlement in the Family Court would be seen by the parties, in current social circumstances, as terminating any moral claim of a former spouse provision in the will of the other. Confronted by the news that he or she had been excluded from the will of the former spouse, the response would, in the overwhelming majority of cases, be: "Our marriage was dissolved. We settled our financial affairs. We can each start a new life. That was the whole point of the family court proceedings." To this extent, I agree with what Young J has written in *O'Shaughnessy* and in this case.

However, that public policy, important though it is, must adapt itself to the new provisions of the Act, with its reforming inclusion of a specific entitlement of a former spouse to claim. That provision contemplates that there will be cases where such a claim will succeed, notwithstanding the public policy referred to by His Honour. As Young J acknowledged, the facts of each relationship are unique. The circumstances which may give rise to a claim for provision will vary in accordance with the circumstances of the case. Where the statute is expressed in such broad terms, there are dangers in attempting to limit the cases which may "warrant the making of the application" under s 9(1) of the Act to preconceived classes or categories. This danger exists even where the categories are described as non-exclusive "guidelines". The "public policy" in finality of financial dealings by property settlements ordered by the Family Court must likewise now be read in conjunction with the competing public policy expressed by parliament in the Act. This public policy could not be clearer. It is that, in certain circumstances and subject to certain procedures, former spouses may, notwithstanding such Family Court orders, seek orders for provision under the Act. A construction of the Act which

impeded the achievement of this competing policy would impermissibly afford primacy to the policy of finality which must henceforth compete "in all the circumstances of the case" with the claim by an ex-spouse for provision under the Act.

The High Court of Australia has held that the *Family Provision Act*, being addressed to a different problem, is not inconsistent with the *Family Law Act*; see *Smith v Smith* (1986) 161 CLR 217 at 238, 246. In the judgment of Mason, Brennan and Deane JJ (at 245), there is an acknowledgment that there are "persuasive reasons which might well have prompted Parliament to insist on the preservation of a party's entitlement to make an application under a statute such as the *Family Provision Act*". Their Honours refer to the differences in the nature of the claims arising under the two acts and the criteria by which they are determined. They acknowledge that the circumstances of the parties may change substantially between the date of determination under the *Family Law Act*, s79, and the death of a party. These remarks, offered in the context of considering the suggested constitutional invalidity of the State Act, throw light upon the anticipated relationship between the policies of the two statutes. They must be reconciled and harmonised when a claim is made for provision under the State Act, notwithstanding earlier orders under the *Family Law Act*.

More recently, Young CJ in Eq has returned to the issue, in *Ernst v Mowbray* [2004] NSWSC 1140.³³

[32] I considered in *O'Shaughnessy v Mantle* (1986) 7 NSWLR 142 the effect of the Family Law Act on an application by a divorced spouse. I there indicated that ordinarily with a divorce, especially in the light of s 81 of the Family Law Act 1982, the Court should consider there to be a complete break between the parties on divorce. However, the ex-spouse might obtain an order under limited circumstances such as where the parties have not finally settled all their property dealings at the time of the divorce, or where there is continued financial dependency after the divorce. Mr Livingstone points out that in the instant case although the testator would give the plaintiff money on occasions to repair her car etc, there was no financial dependency or any maintenance order after separation.

[33] O'Shaughnessy's case was not looked on with favour by the Court of Appeal in *Dijkhuijs v Barclay* (1988) 13 NSWLR 639 at 651 where Kirby P said: "There is no doubt that in most cases, the achievement of a final property settlement in the Family Court would be seen by the parties, in current social circumstances, as terminating any moral claim of a former spouse to provision in the will of the other. Confronted by the news that he or she had been excluded from the will of the former spouse, the response

³³ See also *Davis v Hore* [1999] NSWSC 1265; *Penfold v Perpetual Trustee Co Ltd* [2002] NSWSC 648; *Thyssen v Pottenger* [2003] NSWSC 787; *Wilson v Public Trustee* [2006] NSWSC 32.

would, in the overwhelming majority of cases be 'Our marriage was dissolved. We settled our financial affairs. We can each start a new life. That was the whole point of the Family Law proceedings'. To this extent, I agree with what Young J has written in *O'Shaughnessy* and in this case. However, that public policy, important though it is, must adapt itself to the new provisions of the Act, with its reforming inclusion of a specific entitlement of a former spouse to claim. That provision contemplates that there will be cases where such a claim will succeed, notwithstanding the public policy referred to by his Honour".

[34] His Honour also referred to *Smith v Smith* (1986) 161 CLR 217, where the High Court pointed out that there was a very real difference between settling financial affairs between living persons under the Family Law Act and the preservation of a person's entitlement to make an application under a statute such as the Family Provision Act.

[35] Be that as it may, the existence of the s 86 deed and the fact that it was instigated by the plaintiff, the way in which the testator's notes show that he understood it as making a clean break and the added matter that after the s 86 deed the testator only ever made provision for the plaintiff in a very summary way, are most relevant matters on this application.

On any view, a former spouse who notwithstanding dissolution of the marriage had not yet instituted proceedings under Part VIII of the *Family Law Act* would have little difficulty in establishing "factors warranting" the making of an application under the *Family Provision Act*. One who is the beneficiary of a continuing maintenance order also is likely to have prospects of success. The classes of cases described by Young J continue to provide a useful indication of those in which a surviving ex-spouse might well be able to sustain a family provision claim.

Releases of rights

Under the NSW legislation, an eligible person may, subject to the approval of the Court, release his or her rights to make an application for provision out of the estate of a deceased person, before or after the death of the deceased person. Section 31 provides as follows:-

31 Release of right to apply for provision

- (1) A reference in this section to a release by a person of the person's rights to make an application in relation to a deceased person is a reference to a release by a person of such rights, if any, as the person may have to make such an application and includes a reference to:
 - (a) an instrument executed by the person which would be effective as a release of those rights if approved by the Court under this section, and
 - (b) an agreement to execute such an instrument.

- (2) A release by a person of the person's rights to make an application in relation to a deceased person has no effect except as provided in subsection (3).
- (3) A release by a person of the person's rights to make an application in relation to a deceased person, being a release in respect of which the Court has given its approval under this section, shall have effect to the extent to which the approval has been given and not revoked and shall, for the purposes of this Act, be binding on the releasing party.
- (4) Proceedings for the approval of a release of rights to make an application in relation to a deceased person may be commenced before or after the death of the person.
- (5) In proceedings for the approval of a release, the Court shall have regard to all the circumstances of the case, including whether:
 - (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release,
 - (b) it is or was, at that time, prudent for the releasing party to make the release,
 - (c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and
 - (d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.
- (6) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a deceased person.
- (7) Except as provided in subsections (8) and (9), the Court shall not revoke its approval of a release given under this section.
- (8) The Court may revoke its approval of a release given under this section if it is satisfied:
 - (a) that its approval was obtained by fraud, or
 - (b) that the release was obtained by fraud or undue influence.
- (9) The Court may revoke its approval of a release given under this section or that approval in so far as it affects the whole or part only of the estate or notional estate of a deceased person if it is satisfied that all such persons as, in the opinion of the Court would be sufficiently affected by the revocation of the approval, consent to the revocation.

The usual approach of the Court to the approval of releases under s 31 in a case where there has been a family law settlement was addressed in two relatively early

cases. In *McMahon v McMahon* (NSWSC, 2 August 1985, unreported), Young J, having said that an order of approval would not follow just because all the papers had agreed that such an order should be made, and that the Court had to look into the facts and circumstances so far as relevant to a possible claim under the *Family Provision Act*, said:

Although I am not aware of any important reported decision on s 31, I am aware that on at least two occasions since the *Family Provision Act* came into force judges in this division have made an order under s 31 as an adjunct to approving a settlement of proceedings brought in a family property dispute. The view that has been taken is that [the members of] a family come to an all-up settlement and once and for all release each other from liabilities and wish to go their separate ways and they are all sui juris and advised by competent counsel and solicitor, then it is in the public interest that the disputes between them be put to an end forever by also releasing the rights under s 31 of the *Family Provision Act*. A prodigal son who takes his inheritance and also releases his rights under s 31 with the approval of the Court can thereafter not expect any fatted calf upon his return to the family property.

In my view, the attitude previously taken is the correct one, although parties should not automatically assume when they have settled a family dispute that the Court will make an order under s 31. ...

In *Gallagher v Gallagher* (NSWSC, Master Gressier, 3 April 1984, unreported), the Master after referring to s 31 said:

A question to which I must direct attention is the extent to which I should have regard to the circumstance that the agreement which is before me is linked with an agreement which has been approved by the Family Court of Australia pursuant to the provisions of s 87 of the *Family Law Act 1975* (Cth).

The Master then set out the terms of s 87 and continued:

Clearly the approval under s 87 is a circumstance to which I should have regard in the present proceedings. On the other hand, it is not, in my view, a circumstance which leads inevitably to the giving of the approval now sought. The Family Court was concerned with the respective and present financial positions of two living persons between whom there were various financial matters in dispute. This Court is concerned, in effect, with the position of the defendant in some unknown time in the future if, and only if, she survives the plaintiff. The task of this Court is, to that extent, more difficult than that of the Family Court. Evidence cannot establish what the defendant's financial position will then be or, indeed, what the plaintiff's then testamentary obligations and financial position will be. ...

Having regard to the facts that the parties have been separated for some twelve years and that the plaintiff has been remarried for some six years, and to my assessment, in the light of present circumstances, of the

defendant's likely chances of success in any application under the Act in relation to the estate of the plaintiff, I am satisfied that the orders sought should be made. ...

In *Ridley v Ridley* (NSWSC, Young J, 13 December 1988, unreported), the Court considered applications for approval of releases under s 31, together with cross-vested applications for approval of a maintenance agreement under *Family Law Act*, s 87. His Honour said (and it holds good, even after *Re Wakim*):

Prior to the *Cross-Vesting Acts* the present application that is before me would have to be made in two separate courts. Now, it is clear that this Court may not only give relief under s 31 of the *Family Provision Act* but also deal with applications for approval under the *Family Law Act*. Whilst the Court is not looking for any further work ... it is obviously sensible where the parties have agreed that this Court deal with both approval matters at the one time. ...

The principle that has been adopted under s 31 is that if the parties have each been properly advised and have considered all the pros and cons and have voluntarily reached an arm's length settlement, ordinarily it is appropriate to make an order under s 31 of the *Family Provision Act*. ...

It has often been the practice to obtain s 31 releases in consent orders, maintenance agreements or binding financial agreements, but not to make an application to the Court for approval of the release, on the basis that such an application can be made if necessary after the death of the deceased person. While that is so, it has risks, because the eligible person can change his or her mind in the meantime and that in some cases can be problematic. For example, in *Russell v Quinton* [2000] NSWSC 322, two de facto parties had entered into a cohabitation agreement which included a s 31 release. No application was made for its approval until after the death of the male partner. The female partner then brought an application for provision out of his estate, and the executor cross-claimed for approval of the release. It emerged that the female partner had apparently been given incorrect advice as to the effect of the cohabitation agreement, and in particular that it only operated for five years; principally for that reason Bergin J declined to approve the release and proceeded to make orders for further provision out of the deceased male partner's estate.

Children's applications

Relevant factors in considering whether a child has a moral claim to provision from a deceased's parent's estate include:-

- whether the child provided assistance to conserve or improve the deceased's parent's property without receipt of significant recompense or reward;³⁴
- whether the child provided significant personal services or financial assistance

³⁴*Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147; *Goodman v Windeyer* (1980) 144 CLR 490, 497-8, 501.

to the deceased parent;³⁵

- whether the child can expect to be maintained from some other economic source, for example by his or her own spouse;³⁶
- any hopes and expectations entertained by the testator concerning the child's career or future, for example that he or she would follow a particular vocation which requires financial assistance to enter;³⁷
- whether the child wishes to engage in a course of education or training for which financial assistance from the deceased parent might reasonably be expected;³⁸
- any present financial needs of the child due to unemployment or some other misfortune;³⁹
- any reasonable expectations by the child of future assistance from the testator, for example that the child would be allowed to continue to reside in a particular property owned by the parent.⁴⁰

Although there is powerful authority for the view that a person who is capable of self support has at least a limited if any claim to provision from a deceased's estate, even that of his or her parent,⁴¹ more recently there has been a departure from this approach.⁴² In an influential judgment in *Gorton v Parks* (1989) 17 NSWLR 1, Bryson J said (at 10), with reference to Dixon CJ's decision in *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9:-

Dixon CJ did not expound the weight which he gave to the bare fact of paternity and nothing else; I regard the bare fact as of very great importance in morality. The idea that the moral obligations arising from paternity are diminished or do not exist if the parent withholds acknowledgement of the obligations or of the child appears to me to be an idea from a distant age.

The old line of authorities which held that an "able-bodied son" was not entitled to

³⁵*Re Butler* [1948] VLR 434, 435; *Re Lockwood* [1960] Tas SR 46, 49; *Lloyd v Nelson* (1985) 2 NSWLR 291.

³⁶*Re Hodgson* [1955] VLR 481, 484, 494-5.

³⁷*Re Butler* [1948] VLR 434, 435; *Kleinig v Neal (No 2)* [1981] 2 NSWLR 532, 541-2.

³⁸*Re Adams* [1967] VR 881, 886.

³⁹*Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147.

⁴⁰*Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 148.

⁴¹*Re Sinnott* [1948] VLR 279, 280; *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19-20; *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147; *McCosker v McCosker* (1957) 97 CLR 566, 576.

⁴²*Kleinig v Neal (No 2)* [1981] 2 NSWLR 532, 541, 542-3, 545-6; *Gorton v Parks* (1989) 17 NSWLR 1, 7-8; *Re Clift* [1963] NSWLR 1313, 1314-5 (but cf 1326, 1330-1); *Samsely v Barnes* [1991] DFC 95-100, 76-305-6.

provision has, with shifts in societal attitudes, been discarded such that Kirby P in *Golosky v Golosky* was able to say:-

... the previous rule that an 'able-bodied son' was disentitled to a claim ... for that reason alone...has been abandoned in this State.

Thus it can now be said that an able-bodied son is not *per se* disentitled to claim, and the fact of paternity alone is something a matter to which the Court will give weight when determining what community expectations are. Adult children are probably now the largest single class of claimants in contested family provision litigation.

The proposed uniform national model Bill

The Standing Committee of Attorneys-General has established a national committee to review existing State laws relating to succession, and to propose model national uniform laws. This project has been underway since 1995, and has been coordinated by the Queensland Law Reform Commission. The project has five elements: the law of Wills; family provision; the administration of estates; the recognition of interstate and foreign grants; and intestate estates. Issues papers and discussion papers have been published on most, and reports have been published on Wills and Family Provision.

The proposed model national legislation on family provision was set out in NSW LRC 110, issued in May 2005. It is likely to be referred back to the national committee for further consideration of some aspects which have attracted comment. Some issues worthy of note are discussed below.

The draft Bill contains provisions, modelled on the New South Wales provisions, enabling the Court to designate as notional estate property alienated by testators prior to or upon death. The New South Wales legislation has contained such provisions, which are intended to prevent a testator from defeating a potential claim by alienating property before, or in some cases upon, death, since 1982. However, there is apparently strong opposition in Queensland and Tasmania to the inclusion of notional estate provisions.

In the quest for uniformity, the draft Bill would necessarily change to some extent the criteria for eligibility. It is proposed to create, in effect, two classes of eligible applicants, "family members who are entitled to make applications",⁴³ and "other family members or persons owed responsibility entitled to make applications".⁴⁴ These are defined as follows:

⁴³ Draft Bill, s 6.

⁴⁴ Draft Bill, s 7.

6. Family members who are entitled to make applications.

- (1) The following members of the family of a deceased person may apply to the Court for a family provision order in respect of the estate of the deceased person:
 - (a) The wife or husband of the deceased person at the time of the deceased person's death,
 - (b) A person who was, at the time of the deceased person's death, the de facto partner of the deceased person,
 - (c) A non-adult child of the deceased person,
- (2) In this section: non-adult child of a deceased person means a child of the deceased person who was a minor when the deceased person died or who was born after the deceased person died, but does not include a step-child of the deceased person.

7. Other family members or persons owed responsibility entitled to make applications.

- (1) A person to whom a deceased person owed a responsibility to provide maintenance, education or advancement in life may apply to the Court for a family provision order in respect of the estate of the deceased person.
- (2) An application may be made under this section by a person whether or not the person is a child or other member of the family of the deceased person.

The concept of defining the scope of eligible applicants by those to whom a deceased person "owed a responsibility to provision maintenance, education or advancement in life" is somewhat circular. On the other hand, this wide description may be preferable to the rather arbitrary criteria of some time dependants and some time membership of a common household in the (NSW) 1982 Act. Presumably, the question is to be addressed and answered as at the time of death, since otherwise all adult children would automatically be eligible, as there would at some stage in the past have been a time when the deceased had a responsibility to provide maintenance for them. On the one hand, the proposed change in definition of eligibility requirements shifts adult children from those who have an absolute right to make an application into the class of those who have to show some additional requirement, namely that the deceased owed them a responsibility to provide for their maintenance, education or advancement in life. However, the draft Bill contains no equivalent of (NSW) s 9(1), so that there is no "factors warranting" hurdle for such an applicant to clear. In reality, this would not likely involve a significant change.

The draft Bill contains, in s 11, a lengthy list of matters to which the Court "may have regard" for the purpose of determining whether a person is entitled to make an application under s 7, and whether to make a family provision order and the nature of any such order. The list – which specifies matters which the Court may, not must,

have regard to - is far more extensive than that contained in s 9(3) of the (NSW) 1982 Act, although it covers what was in s 9(3). They are:

- (a) Any family or other relationship between the person in whose favour the order is sought to be made (the proposed beneficiary) and the deceased person, including the nature and duration of the relationship,
- (b) The nature and extent of any obligations or responsibilities owed by the deceased person to the proposed beneficiary, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
- (c) The nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
- (d) The financial resources (including earning capacity) and financial needs, both present and future, of the proposed beneficiary, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
- (e) Any physical, intellectual or mental disability of the proposed beneficiary, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
- (f) The age of the proposed beneficiary when the application is being considered,
- (g) Any contribution, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the proposed beneficiary to the acquisition, conservation, and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family,
- (h) Any provision made for the proposed beneficiary by the deceased person, either during the deceased person's lifetime or any provision made from the deceased person's estate,
- (i) The date of the Will (if any) of the deceased person and the circumstances in which the Will was made,
- (j) Whether the proposed beneficiary was being maintained, either wholly or partly, by the deceased person before the deceased

person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,

- (k) Whether any other person is liable to support the proposed beneficiary,
- (l) The character and conduct of the proposed beneficiary or any other person before and after the death of the deceased person,
- (m) Any relevant Aboriginal or Torres Strait Islander customary law or other customary law,
- (n) Any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

The draft bill would impose a time limit for making applications of twelve months from the date of death, "unless the Court otherwise directs". Unlike current (NSW) s 16 – which imposes a period of eighteen months from date of death - the section does not prescribe the grounds on which the Court might "otherwise direct", but presumably they will include some explanation for the failure to make an application within time, and considerations of balance of prejudice.

Conclusion

Despite what was said in *Smith v Smith*, aspects of the *Family Law Act*, particularly property proceedings after death pursuant to s 79(8), operate in the same field as the *Family Provision Act*. Together, the Acts operate to ensure that what Brennan J in *Fisher v Fisher* called the moral obligations arising out of the marriage are satisfied and discharged in priority to any rights in the property of a party to a marriage which arise by testamentary disposition of that party's property.

Where it is open to a surviving spouse to prosecute proceedings under both Acts - that is, where property proceedings under the *Family Law Act* have already been instituted before the death – the proceedings should generally be heard together, and orders made pursuant to s 79(8) will usually discharge any moral duty of the deceased and make superfluous any *Family Provision Act* claim by the surviving spouse. Where a surviving spouse or former spouse has not instituted property proceedings before death of the other – whether or not there has been a separation – that spouse's entitlement under the *Family Law Act* provides a strong indication of what is the minimum "proper" provision for the surviving spouse for the purposes of the *Family Provision Act*. Where, after a property settlement under the *Family Law Act*, one party dies and the other seeks to make a TFM claim, the circumstances referred to by Young J in *O'Shaughnessy v Mantle* provide a useful general indication of the types of case in which the surviving spouse might have prospects of success - including, relevantly, where there is a continuing maintenance order under the *Family Law Act*. And where there is a clean break settlement under the *Family Law Act*, there should usually be little difficulty in having a release of rights to make a family provision claim approved.

If the outcome did in fact depend upon the chance of whether property proceedings had or had not been instituted before death, or resulted in a "dutiful" spouse who remained happily married to the deceased being worse off than if he or she had separated from the other, there would be justifiable cause for complaint. However, the concept of "proper maintenance, education and advancement in life" is governed by prevailing community standards; those standards are nowadays set by the *Family Law Act*. The rights which a spouse would have enjoyed under that Act can and should be taken into account by a Court hearing an application under the *Family Provision Act* as indicative of the minimum provision which ought to be made in favour of the surviving spouse. In this way the two regimes can work in association to ensure that the enforcement of moral obligations arising out of a marriage are discharged after death of a party according to a consistent principle and not depending upon whether a surviving spouse has previously commenced proceedings.