

FAMILY PROVISION IN AUSTRALIA: ADDRESSING INTERSTATE DIFFERENCES AND FAMILY PROVISION LAW REFORM

Address given at the Queensland Law Society conference on Family Provision by the Hon Justice Roslyn Atkinson

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INTRODUCTION

In the 19th Century, Australian succession laws were broadly uniform.¹ This uniformity began to weaken in the 20th Century, as the former colonies began to enact their own legislation, and we have reached a point where no two states' or territories' succession laws are the same.² Family provision legislation was introduced incrementally throughout Australia from 1906.³ Consequently, complete uniformity has never been achieved in this area of the law.

To practise successfully in succession law requires cross-jurisdictional expertise. Since most succession practice is concerned with reducing the cost of administering deceased estates, many of which may have connections throughout Australia, it is ordinary people who suffer the increased costs associated with divergent laws between states.⁴

Uniformity across states has been encouraged by the High Court, with Dixon CJ clearly stating in 1956 in *Coates v National Trustees Executors and Agency Co. Ltd*:⁵ 'The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided.'

The National Committee on Uniform Succession Laws

Following this sentiment, there have been ongoing discussions about the need for a consistent approach to family provision legislation in Australia.⁶ In 1992, the Queensland Law Reform Commission was asked to coordinate a joint project with the Standing Committee of Attorneys

¹ National Committee on Uniform Succession Law, 'The National Committee's Final Report to the Standing Committee on Family Provision' (MP 28, December 1997) (ii).

² Ibid.

³ M McGregor-Lowndes & F Hannah (2008) *Every player wins a prize? Family provision applications and bequests to charity*. The Australian Centre for Philanthropy and Nonprofit Studies, Brisbane, Queensland, 12 citing *Widows and Young Children Maintenance Act 1906* (Vic); *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW); *Testator's Family Maintenance Act 1914* (Qld); *Testator's Family Maintenance Act 1918* (SA); *Testator's Family Maintenance Act 1912* (Tas); *Guardianship of Infants Act 1920* (WA) s 11; *Administration and Probate Ordinance 1929* (ACT) Pt VII; *Testator's Family Maintenance Ordinance 1929* (NT).

⁴ National Committee's 1997 report, above n 1, (ii).

⁵ (1956) 95 CLR 494 at 507.

⁶ M McGregor-Lowndes & F Hannah, above n 3, 17.

General to investigate uniform succession laws.⁷ Family provision was one of four stages of the project, and several papers have been produced. In 1995, the Queensland Law Reform Commission published Issues Paper WP47: The Law of family provision.⁸ In December 1997, the National Committee published its Final Report to the Standing Committee on family provision,⁹ containing recommendations for model legislation for the Australian states and territories. Finally, in July 2004, The National Committee published its Supplementary Report on family provision.¹⁰ The report included a model Family Provision Bill and considered issues that were not addressed in its original report.¹¹ The National Committee also reconsidered its recommendations from the earlier report, in light of amendments to family provision legislation in various Australian jurisdictions.¹²

Broadly, the National Committee considered issues arising in the areas of:

- eligibility to apply for family provision;
- determination of applications;
- property subject to family provision; and
- practical and procedural considerations.

These categories provide a structure for consideration of the current state of the law in Australia's various jurisdictions, including key remaining differences and, where applicable, the National Committee's recommendations for reform.

ELIGIBILITY TO APPLY FOR FAMILY PROVISION

The original purpose of family provision legislation was to provide for widows and dependent children.¹³ As noted by Lord Simon of Glaisdale in *Schaefer v Schuhman*:¹⁴

“Men and women necessarily have different functions to perform...The social function carried out by women in the bearing and upbringing of children puts them at an economic disadvantage...Moreover, the rights and obligations do not necessarily come to an end on the death of the husband and parent.”

⁷ National Committee's 1997 report, above n 1, (i).

⁸ National Committee on Uniform Succession Law, 'Issues Paper W47: *The Law of Family Provision*' (WP 47, 1995).

⁹ National Committee's 1997 report, above n 1.

¹⁰ National Committee on Uniform Succession Law, 'Supplementary Report on Family Provision' (R58, July 2004).

¹¹ National Committee on Uniform Succession Law, 'Supplementary Report on Family Provision' (R58, July 2004) [1.5].

¹² *Ibid* [1.6].

¹³ M McGregor-Lowndes & F Hannah, above n 3, 25.

¹⁴ [1972] A.C. 572, 595-596.

Following women's evolving 'social function' and consequent financial independence, there has been a consistent broadening of eligibility in all jurisdictions, although differences remain at the margins and in the details of the various definitions.¹⁵

In all jurisdictions except Victoria, the legislation specifies categories of people entitled to apply for provision.¹⁶

Table 1: Eligibility in Australian states and territories¹⁷

	Spouse/ partner	De facto (including same-sex)	Former spouse (if dependent)	Child (including adopted or step)	Grandchild (if dependent)	Parent (if dependent or if no spouse, partner or child)	Other
ACT	x	x	x	x	x	x	
NSW	x	x	x	x	x		'person living in a close personal relationship'
NT	x	x	x	x	x	x	
QLD	x	x	x	x		x	
SA	x	x	x	x	x	x	sibling (because of care for the deceased)
TAS	x	x	x	x		x	
VIC							'person for whom the deceased had a responsibility to make provision'
WA	x	x	x	x	x	x	

All jurisdictions allow applications by a spouse or partner, including de facto, and children. This includes adopted or stepchildren.¹⁸ Dependent former spouses are also eligible in all

¹⁵ G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [16.1].

¹⁶ National Committee's 2004 report, above n 10, 3 citing *Family Provision Act 1969* (ACT) s 7; *Succession Act 2006* (NSW) s 57; *Family Provision Act* (NT) s 7; *Succession Act 1981* (Qld) s 41(1); *Inheritance (Family Provision) Act 1972* (SA) s 6; *Testator's Family Maintenance Act 1912* (Tas) s 3A; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(1) (now *Family Provision Act 1972* (WA) s 7(1)).

¹⁷ Modelled off table appearing at page 23 of M McGregor-Lowndes & F Hannah, above n 3.

¹⁸ *Family Provision Act 1969* (ACT) s 7; *Succession Act 2006* (NSW) s 57(1); *Family Provision Act* (NT) s 7(1); *Succession Act 1981* (Qld) s 41; *Inheritance (Family Provision) Act 1972* (SA) s 6; *Testator's Family Maintenance Act 1912* (Tas) s 3A; *Family Provision Act 1972* (WA) s 7(1); *Administration and Probate Act 1958* (Vic) s 91.

jurisdictions.¹⁹ Dependent grandchildren are eligible in all states and territories except Tasmania,²⁰ although South Australia is the only jurisdiction without qualifications to the eligibility of grandchildren. Parents are expressly eligible in all states and territories except New South Wales, though only if they are being maintained or if the deceased had no partner or children.²¹ New South Wales also includes a more general category of eligibility for a person living in a ‘close personal relationship’ with the deceased at the time of the death.²² South Australia allows application by a brother or sister (because of care given to deceased).²³

In contrast to other jurisdictions, Victoria has the sole eligibility criteria of: ‘a person for whom the deceased had responsibility to make provision’.²⁴ This section is open to wide interpretation,²⁵ however, Harper J in *Schmidt v Watkins*²⁶ viewed the change as ‘merely expanding the boundaries of the old’.²⁷ Although this provision no longer requires a particular blood or marriage-like relationship to establish eligibility, moral duties owed outside of a family relationship are generally perceived as weaker.²⁸ Consequently, the courts will look for family-like traits in relationships. For example, in ordering provision in *Unger v Sanchez*,²⁹ Kaye J noted that the relationship between the neighbours was ‘closely akin to that of a daughter to an elderly mother’.³⁰ In contrast, in *Schmidt v Watkins*,³¹ a business relationship between did not give rise to a moral duty to make provision, as the concept of ‘dependence’ remains relevant.³²

The National Committee sought to streamline these provisions, recommending a ‘hybrid’ approach to eligibility,³³ dividing eligible persons into two categories:³⁴

¹⁹ *Family Provision Act 1969* (ACT) s 7; *Succession Act 2006* (NSW) s 57(1); *Family Provision Act* (NT) s 7(1); *Succession Act 1981* (Qld) s 41; *Inheritance (Family Provision) Act 1972* (SA) s 6; *Testator’s Family Maintenance Act 1912* (Tas) s 3A; *Family Provision Act 1972* (WA) s 7(1); *Administration and Probate Act 1958* (Vic) s 91.

²⁰ *Family Provision Act 1969* (ACT) s 7(3); *Succession Act 2006* (NSW) s 57(1)(e); *Family Provision Act* (NT) s 7(3); *Succession Act 1981* (Qld) s 40; *Inheritance (Family Provision) Act 1972* (SA) s 6(h); *Family Provision Act 1972* (WA) s 7(1)(d); *Administration and Probate Act 1958* (Vic) s 91.

²¹ *Family Provision Act 1969* (ACT) s 7(4); *Family Provision Act* (NT) s 7(4); *Succession Act 1981* (Qld) s 40; *Inheritance (Family Provision) Act 1972* (SA) s 6(i); *Testator’s Family Maintenance Act 1912* (Tas) s 3A(c); *Family Provision Act 1972* (WA) s 7(1)(e); *Administration and Probate Act 1958* (Vic) s 91(1).

²² *Succession Act 2006* (NSW) s 57(1)(f).

²³ *Inheritance (Family Provision) Act 1972* (SA) s 6(j)

²⁴ *Administration and Probate Act 1958* (Vic) s 91.

²⁵ M McGregor-Lowndes & F Hannah, above n 3, 24.

²⁶ [2002] VSC 273

²⁷ *Schmidt v Watkins* [2002] VSC 273 at [12].

²⁸ E Dal Pont and K F Mackie, above n 15, [16.48] citing *Corbett v State Trustees Ltd* [2010] VSC 481.

²⁹ [2009] VSC 541.

³⁰ *Ibid* at [74].

³¹ [2002] VSC 273.

³² *Ibid* at [25].

³³ E Dal Pont and K F Mackie, above n 15, [16.2].

³⁴ National Committee’s 1997 report, above n 1, Appendix 1 ‘Drafting Instructions’, 2; See also E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis Butterworths, 2013), 503.

1. Those entitled to apply as of right – namely, a spouse, a de facto spouse and a non-adult child; and
2. Those whose eligibility depends upon the court determining the deceased owed them a responsibility ‘to provide maintenance, education or advancement in life’.

The second category is modelled on the sole eligibility criterion in Victoria.³⁵ It should be noted that in a recent review of Victoria’s succession laws tabled in Parliament in October 2013, the Victorian Law Reform Commission recommended replacing the ‘responsibility’ test with a test based on the New South Wales test for eligibility, but extended to include stepchildren.³⁶ It was suggested that this amendment would increase certainty and decrease the number of opportunistic claims, while still providing sufficient flexibility for eligible applicants.³⁷

Eligibility – specific classes of applicant

De facto partners? Same sex?

Consistent with the National Committee’s recommendation, reforms throughout Australia have aligned the rights of de facto partners with those of married couples, allowing for family provision.³⁸ This can extend to same sex partners, if they are persons in a close or genuine domestic relationship, or are otherwise entitled to be maintained by the deceased.³⁹

³⁵ E Dal Pont and K F Mackie, above n 15, [16.2].

³⁶ Victorian Law Reform Commission, ‘Succession Laws: Report’ (October 2013), 6.8.

³⁷ *Ibid*, 6.2.

³⁸ National Committee’s 2004 report, above n 10, [2.9] citing *Property (Relationships) Legislation Amendment Act 1999* (NSW); *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT); *Discrimination Law Amendment Act 2002* (Qld); *Relationships Act 2003* (Tas), *Relationships (Consequential Amendments) Act 2003* (Tas); *Statute Law Amendment (Relationships) Act 2001* (Vic); *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA). In the Australian Capital Territory, the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) has had a similar effect. Though, the surviving partner of a same-sex de facto relationship was already eligible to apply for provision under the (now omitted) definition of “eligible partner” in s 4(1) of the *Family Provision Act 1969* (ACT).

³⁹ M McGregor-Lowndes & F Hannah, above n 3, [3.3.2]; See also John de Groot & Bruce Nickel, *Family Provision in Australia* (Lexis Nexis Butterworths, 4th ed, 2012) [4.12] citing ACT: *Family Provision Act 1969* (ACT) ss 7(1)(a) ‘partner’ and 7(9) ‘civil partner’, *Legislation Act 2001*, Dictionary definition of ‘civil partner’; NSW: *Succession Act 2006* (NSW) s 3(3) and s 57(1)(f) ‘Eligible persons’; NT: *Family Provision Act* (NT) s 7(1)(a) ‘de facto partner’; Qld: *Succession Act 1981* (Qld) s 41(1) ‘spouse’, *Acts Interpretation Act 1954* ss 32DA(5)(a), 36; SA: *Inheritance (Family Provision) Act 1972* (SA) s 6(ba) ‘domestic partner’, *Family Relationships Act 1975* ss 11, 11A; Tas: *Testator’s Family Maintenance Act 1912* (Tas) s 3A, definition of spouse in s 1, *Relationships Act 2003* s 4; Vic: *Administration and Probate Act 1958* (Vic) s 91(1) where the court finds that the deceased has a responsibility to make provision for the applicant; WA: *Family Provision Act 1972* (WA) s 7(1)(a) ‘de facto partner’, *Interpretation Act 1984* s 13A(1), (3).

Stepchildren

Stepchildren are eligible to make family provision claims in all Australian jurisdictions, though they are explicitly listed as eligible to apply in the ACT, NT, QLD, SA and Tasmania.⁴⁰ In Tasmania and Queensland, this is through the definition of ‘child’, which includes ‘stepchild’. In the ACT, NT and SA, the stepchild must have been maintained by the deceased immediately before death. While there is no specific provision in New South Wales, stepchildren can fall within the general criteria of a ‘person living in a close personal relationship’.⁴¹ Similarly in Victoria, stepchildren may be eligible when classified as a ‘person for whom the deceased had a responsibility to make provision’. The National Committee recommended that stepchildren not be included in the list of applicants eligible as of right, but rather, the model legislation should require stepchildren to establish eligibility under the second limb of those to whom the deceased owed a responsibility ‘to provide maintenance, education or advancement in life’.⁴²

The significance of traditional Aboriginal and Torres Strait Islander relationships

The National Committee recommended that among the matters to be considered by the court in determining the application should be “any relevant Aboriginal or Torres Strait Islander customary law or other customary law”. This addresses the problem identified by the Court of Appeal in *Eatts v Gundy* [2014] QCA 309.

DETERMINATION OF APPLICATIONS

The law of family provision was developed to address circumstances where an eligible applicant has not been provided ‘adequate’ and ‘proper’ maintenance from the deceased’s estate. These words – ‘adequate’ and ‘proper’ are used throughout all Australian jurisdictions, however, descriptions of what must be provided vary from state to state.

Table 2: Provision descriptors in Australian states and territories⁴³

Jurisdiction	Legislation	Provision
ACT	S 8(2) <i>Family Provision Act 1969</i>	‘Maintenance, education or advancement in life’
NSW	S 59(2) <i>Succession Act 2006</i> Note: this Act replaces the <i>Family Provision Act 1982</i> (NSW)	‘Maintenance, education or advancement in life’
NT	S 8(1) <i>Family Provision Act 1970</i>	‘Maintenance, education or advancement in life’
Qld	S 41(1) <i>Succession Act 1981</i>	‘maintenance and support’

⁴⁰ ACT: *Family Provision Act 1969* (ACT) ss 7(1)(d) & (2); NT: *Family Provision Act 1970* (NT) ss 7(1)(d) & (2)(b); QLD: *Succession Act 1981* (Qld) s 40; SA: *Inheritance (Family Provision) Act 1972* (SA) s 6(g); TAS: *Testator’s Family Maintenance Act 1912* (Tas) s 2(1)(b).

⁴¹ *Succession Act 2006* (NSW) s 57(1)(f).

⁴² National Committee’s 1997 report, above n 1, 26.

⁴³ Modelled off table appearing at pages 13-14 of M McGregor-Lowndes & F Hannah, above n 3.

SA	S 7(1)(b) <i>Inheritance (Family Provision) Act 1972</i>	‘Maintenance, education or advancement in life’
Tas	S 3(1) <i>Testator’s Family Maintenance Act 1912</i>	‘maintenance and support’
Vic	S 91(3) <i>Administration and Probate Act 1958</i>	‘maintenance and support’
WA	S 6(1) <i>Family Provision Act 1972</i>	‘Maintenance, support, education or advancement in life’

The ACT, NSW, NT and SA provisions use the words ‘maintenance, education or advancement’ or ‘advancement in life’, while Queensland, Tasmania and Victoria refer to ‘maintenance and support’. The Western Australian legislation incorporates all of these descriptors.

There are important differences in these terms. While support, maintenance and education are traditionally associated with the expenditure of income, ‘advancement’ has related to the expenditure of capital, such as setting up a business.⁴⁴ Consequently, in order to achieve consistency, the National Committee recommended including provision for ‘maintenance, education or advancement in life’ in the model legislation.⁴⁵

Determination of applications – other relevant differences

Need and moral claim

In addition to the need of the applicant, a key focus in family provision applications is the applicant’s ‘moral claim’ on the estate.⁴⁶ Terms such as ‘moral claim’ and ‘moral duty’ are not commonly found in the legislation,⁴⁷ with the exception of New South Wales, which refers in s 80(2)(b) to the deceased’s ‘moral obligation to make adequate provision’.⁴⁸ Courts have been discouraged from using these terms,⁴⁹ however, Courts of Appeal in South Australia, Victoria and Western Australia have accepted the validity of use of the terms ‘moral obligation’ and ‘moral duty’.⁵⁰

The National Committee recommended that the model legislation should not include an equivalent provision to New South Wales.⁵¹ They noted that the scope of the duty is reflected in the matters which the court must have regard to in determining a ‘special responsibility’, and warned that

⁴⁴ National Committee’s 1997 report, 50.

⁴⁵ *Ibid*, 65.

⁴⁶ John de Groot & Bruce Nickel, above n 39, 11 citing *Re Elwell* [1977] Qd R 141.

⁴⁷ *Ibid*, 13.

⁴⁸ *Succession Act 2006* (NSW) s80(2)(b) relating to notional estate orders.

⁴⁹ John de Groot & Bruce Nickel, above n 39, 13 citing *Hughes v NTE&A* (1979) 143 CLR 134 at 158.

⁵⁰ *Ibid*, 14 citing *Bowyer v Wood* (2007) 99 SASR 190; *Blair v Blair* (2004) 10 VR 69; *Kitson v Franks* [2001] WASCA 134.

⁵¹ National Committee’s 1997 report, above n 1, Appendix 1, ‘Drafting Instructions’, 12.

further legislating may lead the courts to feel restricted in the application of their very wide discretion.⁵²

Relevance of circumstances at the date of death or date of order?

In all jurisdictions except New South Wales, the question of whether the deceased has made adequate and proper provision for the applicant is determined upon the circumstances existing at the time of death, having regard to the circumstances existing at the time of the order,⁵³ and matters which could have been reasonably foreseen at the date of death.⁵⁴ In contrast, in New South Wales, it is the date of the order rather than the date of death that is relevant.⁵⁵

This is a notable difference, as the date at which circumstances are assessed can have a significant impact on the application. In their 1995 report, the National Committee provided the hypothetical example of a testator leaving a surviving spouse a share portfolio sufficient at date of death for provision. Within a year of the death, and before the shares have been transferred to the spouse, their value is significantly reduced by a stock market crash. Should that be ignored, or might it be considered a ‘reasonably foreseeable’ event?⁵⁶

The National Committee noted the adverse effects of such an example and recommended that the determination should be based on the circumstances of the eligible person and the deceased at the date of the order, rather than date of death.⁵⁷

Disentitling Conduct

Legislation in all Australian jurisdictions, except for the ACT, New South Wales and Victoria, provides that the court may refuse an order in favour of an applicant where the applicant’s character or conduct is such that that person should be disentitled.⁵⁸

In the ACT, New South Wales and Victoria, the character and conduct of the applicant is a factor taken into consideration in determining the extent, if any, of provision.⁵⁹ Conduct which would have historically been regarded as disentitling includes drunkenness or drug-taking, adultery,

⁵² Ibid, Appendix 1, ‘Drafting Instructions’, 11-12.

⁵³ John de Groot & Bruce Nickel, above n 39, 29 citing *Re Brown* [1952] St R Qd 47.

⁵⁴ *White v Barron* (1980) 144 CLR 431 per Mason J at 447.

⁵⁵ *Succession Act 2006* (NSW) ss 59(1)(c) and 60(2).

⁵⁶ National Committee’s 1995 paper, above n 8, 25.

⁵⁷ National Committee’s 1997 report, Appendix 1, ‘Drafting Instructions’, 11.

⁵⁸ John de Groot & Bruce Nickel, above n 39, 35 citing *Family Provision Act* (NT) s 8(3); *Succession Act 1981* (Qld) s 41(2)(c); *Inheritance (Family Provision) Act 1972* (SA) s 7(3); *Testator’s Family Maintenance Act 1912* (Tas) s8(1); *Family Provision Act 1972* (WA) s 6(3).

⁵⁹ *Family Provision Act 1969* (ACT) s 8(3)(a); *Succession Act 2006* (NSW) s 60(2)(m); *Administration and Probate Act 1958* (Vic) s 91(4)(o).

separation.⁶⁰ More recent cases make it clear that disentitling conduct must be truly “outrageous or egregious”⁶¹ to cause a court to override the testator’s moral duty to provide for dependants in need. For example, murder,⁶² extreme domestic violence,⁶³ blackmail causing the deceased’s suicide⁶⁴ or an attempt to institutionalise a sane testator.⁶⁵

Consent to distribution disentitles - Qld

In Queensland, if a potential applicant, with full legal capacity, notifies the personal representative that he or she consents to the distribution of the estate or does not intend to make an application that would affect distribution, he or she is disentitled from bringing an application.⁶⁶

Release of right to apply for provision – New South Wales

In New South Wales, a person can formally relinquish his or her right to make a family provision application.⁶⁷ The release becomes effective once approved by the court. In granting approval, the court exercises its discretion and consequently, such orders cannot simply be made by consent.⁶⁸

The National Committee recommended adopting an equivalent provision in the model legislation. It was said that the negative effects associated with the potential for undue pressure being placed on some people to contract out of future entitlements was outweighed by the advantages of allowing parties to settle family affairs through a simple and inexpensive procedure.⁶⁹

PROPERTY SUBJECT TO FAMILY PROVISION

The general rule is that family provision can only be made from the estate of the deceased.⁷⁰ This means that certain property is not available to applicants, as it does not form part of the deceased’s estate. For example:

- property held under joint tenancy, where there is an automatic right of survivorship,⁷¹ although this position has been modified in New South Wales through notional estate provisions;

⁶⁰ M McGregor-Lowndes & F Hannah, above n 3, 39 citing *Bienke v Bienke* [2002] NSWSC 804; *Herszlikowicz v Czarny* [2005] VSC 354; *O’Dea v O’Dea* [2005] NSWSC 46; *Fletcher v Fletcher* [2007] NSWSC728; *Underwood v Underwood* [2008] QSC 159.

⁶¹ *Ibid*, 39.

⁶² *Troja v Troja* (1994) 35 NSWLR 182.

⁶³ *Re Estate of Stewart; Murphy v Stewart* [2004] NSWSC 569.

⁶⁴ *Boniadian v Boniadian* [2004] NSWSC 499.

⁶⁵ *Draper v Nixon* [1999] NSWSC 629.

⁶⁶ John de Groot & Bruce Nickel, above n 39, 42 citing *Succession Act 1981* (Qld) s 44(2).

⁶⁷ *Succession Act 2006* (NSW) s 95.

⁶⁸ John de Groot & Bruce Nickel, above n 39, 45 citing *Neil v Jacovou* [2011] NSWSC 87.

⁶⁹ National Committee’s 2004 report, above n 10, 107.

⁷⁰ M McGregor-Lowndes & F Hannah, above n 3, 45.

⁷¹ National Committee’s 2004 report, above n 10, [3.9] citing Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (6th ed, 2000) at [9-003].

- property disposed of *inter vivos*; and
- property the subject of a *donatio mortis causa* (a gift made in contemplation of death),⁷² although this has subsequently been overturned by statute in Queensland⁷³ and New South Wales.⁷⁴

Although contentious, certain property can be made available to applicants because it has been held to be part of a deceased's estate, or because of statutory intervention.⁷⁵ For example:

- property disposed of *inter vivos* which was given as part of an unconscionable bargain; and
- property which is part of the 'notional estate' of the testator.

Property disposed of inter vivos as part of an unconscionable bargain

While family provision does not normally deal with property disposed of by the testator prior to death, the decision in *Bridgewater v Leahy*⁷⁶ makes it clear that unconscionable bargains will cause property to come back into an estate, and be available for family provision in all states and territories.

Property which is part of the 'notional estate' of the testator

In New South Wales, the court may designate non-estate property as the deceased's 'notional estate'.⁷⁷ Notional estate has been described by Einstein J of the Supreme Court of New South Wales as: 'property which would have become part of the deceased's estate, had it been dealt with, or had it not been dealt with, in a particular way, and in particular circumstances, prior to his or her death.'⁷⁸ The relevant provisions of the New South Wales Act grant broad powers to the court to make notional estate orders.⁷⁹ However, there are many preconditions to be satisfied.

'Relevant property transaction'

Notional estate can be designated where property has been the subject of a 'relevant property transaction' (previously 'prescribed transaction') as defined in s 75 of the New South Wales Act. This includes circumstances where a person 'does directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:

⁷² *Emery v Clough* (1886) 63 NH 552; 4 A 796.

⁷³ *Succession Act 1981* (Qld), s 41(12).

⁷⁴ Where such gifts will be part of a deceased's notional estate; *Succession Act 2006* (NSW) s 76.

⁷⁵ M McGregor-Lowndes & F Hannah, above n 3, 45.

⁷⁶ (1998) 194 CLR 457.

⁷⁷ John de Groot & Bruce Nickel, above n 39, 46 citing *Succession Act 2006* (NSW) s 3(1) – defines notional estate; ss 79, 80 and 81.

⁷⁸ *Galt v Compagnon; Re Estate of John Galt (formerly Compagnon)* (SC(NSW) Eq Div, Einstein J, No 4668/95, 12 March 1998, unreported).

⁷⁹ *Succession Act 2006* (NSW) ss 79, 80, 81.

- a) held by another person (whether or not a trustee), or
- b) subject to a trust,

and full valuable consideration is not given to the person for doing or not doing that act.⁸⁰

The relevant transaction must have taken effect:⁸¹

- within 3 years before the date of the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order;
- within one year before the date of the death of the deceased person and was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction;
- on or after the deceased person's death.

Where these preconditions are satisfied, the court may designate any of the defendant's property as the deceased's notional estate, regardless of whether the property was the subject of the relevant property transaction,⁸² and regardless of whether the property was owned by the defendant during the lifetime of the deceased, or acquired after their death.⁸³

There are numerous restrictions on this designation power,⁸⁴ including that designation is necessary for the making of provision⁸⁵ The court must also consider matters such as avoiding interfering with reasonable expectations in relation to property, substantial justice and the merits of making or refusing the order.⁸⁶

Importantly, the definition of 'relevant property transaction' covers both acts and omissions, so that a failure to act can trigger the notional estate provisions. For example, if a person fails to deal with a life insurance policy or fails to exercise a right to extinguish an interest in joint property.⁸⁷

⁸⁰ *Succession Act 2006* (NSW) s 75(1).

⁸¹ *Succession Act 2006* (NSW) s 80(2).

⁸² *Succession Act 2006* (NSW) s 80(3).

⁸³ John de Groot & Bruce Nickel, above n 39, 47 citing *Nicholas v Nicholas* [2006] NSWSC 1244.

⁸⁴ *Succession Act 2006* (NSW) ss 83, 87, 88, 89 and 90

⁸⁵ *Succession Act 2006* (NSW) s 89(2).

⁸⁶ *Succession Act 2006* (NSW) s 87.

⁸⁷ See eg *Colantuono v Colantuono* [2009] NSWSC 1445; *Wade v Harding* (1987) 11 NSWLR 551; *Cameron v Hills* (Unreported, Supreme Court of New South Wales, Needham J, 26 October 1989); *Kinkade v Kinkade* (Unreported, Supreme Court of New South Wales, McLaughlin M, 24 April 1998); *Sinclair v Griffiths* [1999] NSWSC 491; *Barker v Magee* [2001] NSWSC 563; *Petschelt v Petschelt* [2002] NSWSC 706; *Golan v Frey* [2002] NSWSC 848.

However, the failure to sever a joint tenancy will not constitute a relevant property transaction if the person receives full valuable consideration in respect of that omission. The case of *Wade v Harding*⁸⁸ broadened the scope of what constitutes valuable consideration and thereby narrowed the scope of the notional estate provisions. In that case, an adult son brought an application for provision out of his mother's very small estate. The application could only succeed if the Court designated certain property the deceased held as a joint tenant with her husband as notional estate. In considering the question of what would constitute valuable consideration for the omission to sever the joint tenancy, Young J noted that, if the deceased had severed the joint tenancy, she would still have been entitled to possession of the whole of the property, but would have lost the opportunity to take by survivorship if her husband had predeceased her. On the facts, his Honour found that because immediately before the deceased's death, there was an even chance that the deceased or her husband would die first,⁸⁹ she had received valuable consideration.

Wade v Harding was distinguished on the basis of the particular facts in *Cameron v Hills*⁹⁰ and *Barker v Magee*,⁹¹ as there was no prospect that the deceased would survive the other joint tenant.

Notional estate and superannuation

Nomination of superannuation benefits can also be caught by the 'failure to act' notional estate provisions.

In *Pope v Christie*,⁹² a portion of the super entitlement of the deceased father was the subject of a Notional Estate order in favour of his daughter. This order was made despite the fact that the widow had already received and re-invested the deceased's superannuation entitlement. Young J found that the words of the Act were so broad as to exclude the need for any actual act by the deceased. Specifically, if the testator is a member of a superannuation scheme and, on the making of a decision by trustees under that scheme, money is paid to a person, then immediately before the person's death, the person is deemed to have entered into a relevant or prescribed transaction for the purposes of notional estate.

This appears to be of particular significance, as often the value of the superannuation benefits will exceed the value of the estate. However, it should be noted that the availability of binding death nominations since 1999 has allowed members of superannuation funds to determine the

⁸⁸ (1987) 11 NSWLR 551.

⁸⁹ *Ibid* at 556.

⁹⁰ (1989) (Unreported, Supreme Court of New South Wales, Needham J, 26 October 1989).

⁹¹ [2001] NSWSC 563 (28 September 2001) at [45].

⁹² (1998) 144 FLR 380

disposition of his or her benefits on death to a dependant.⁹³ As Commonwealth legislation, it could be said that this Act overrides the New South Wales notional estate provisions.⁹⁴

‘Distributed estate’

The court also has power to designate ‘distributed’ estate as notional estate, where, as a result of the distribution from the estate of the deceased, property becomes held by a person or subject to a trust.⁹⁵

‘Subsequent dispositions’

Finally, section 82 essentially allows an order to be made against a third party where there are subsequent dispositions to a third made by the person who receives the property.⁹⁶

Reform

The key rationale behind notional estate provisions is to deter people from evading their family provision responsibilities by divesting their property during their lifetime, or by failing to take action to cause the property to accrue to their estate.⁹⁷ Noting the importance of these goals, the National Committee endorsed the adoption of the New South Wales notional estate provisions. However, while noting that the New South Wales legislation is ‘expertly drafted’, the National Committee recommended that the provisions be redrafted in plain English, reorganised and slightly modified.⁹⁸ Specifically, the National Committee recommended:⁹⁹

- that a person’s omission to sever a joint tenancy should be expressly referred to as a ‘relevant transaction’;¹⁰⁰
- that the model legislation should include a provision to negative the effect of *Wade v Harding* in regard to what constitutes full valuable consideration for a person’s omission to sever an interest in property held as a joint tenant.¹⁰¹ It is suggested that this could be achieved by providing that “a person who dies without having severed an interest in property held as a joint tenant is not given ‘full valuable consideration’ for their omission

⁹³ *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A).

⁹⁴ John de Groot & Bruce Nickel, above n 39, 49.

⁹⁵ *Succession Act 2006* (NSW) ss 79, 87 and 88.

⁹⁶ *Succession Act 2006* (NSW) s 82; see eg *Hardcastle v Perkuhn* [1999] NSWSC 860.

⁹⁷ National Committee’s 2004 report, above n 10, 14.

⁹⁸ National Committee’s 1997 report, above n 1, 94.

⁹⁹ National Committee’s 2004 report, above n 10, Ch 3.

¹⁰⁰ *Ibid*, [3.26].

¹⁰¹ *Ibid*, [3.27].

merely because the person thereby retained, until his or her death, the benefit of the right of survivorship in respect of that property”;¹⁰²

- The previous 1982 New South Wales legislation also referred to notional estate as that property which ‘is held by or on trust for’ a specified person.¹⁰³ The National Committee noted the uncertainty in this provision as to whether property can be notional estate of a deceased if the person for whom the property is held by or on trust has died.¹⁰⁴ This point was demonstrated in *Prince v Argue*¹⁰⁵ where the deceased’s interest in a home had passed to his second wife by joint tenancy survivorship. When the wife died, she left her estate to her children from a previous marriage. The applicants, children of the deceased, argued that their father’s failure to sever the joint tenancy before his death amounted to a prescribed transaction, meaning the home became part of his estate and passed to them. The court dismissed this argument as the widow had herself died, and consequently the property was no longer ‘held by or on trust for’ her. Noting the unfairness and arbitrary results stemming from this provision, the National Committee recommended that the model legislation should ensure that where:¹⁰⁶

- ‘immediately before the death of a person (the *deceased transferee*), the court had the power to make an order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person; and
- since the relevant property transaction or distribution that gave rise to the court’s power to make the order was entered into or made, the deceased transferee entered into a prescribed transaction; and
- there are special circumstances that warrant the making of the order,

the court may make a notional estate order, designating as notional estate of the deceased person, property that is held by, or on trust for:

- a person by whom property became held (whether or not as trustee) as the result of the subsequent prescribed transaction; or
- the object of a trust for which property became held on trust as the result of the subsequent prescribed transaction.’

This recommendation has been adopted in New South Wales, with section 82 of the *Succession Act 2006* (NSW) overturning *Prince v Argue*.

¹⁰² *Ibid*, [3.28].

¹⁰³ *Family Provision Act 1982* (NSW) ss 23, 24, 25.

¹⁰⁴ National Committee’s 2004 report, above n 10, [3.32 – 3.37].

¹⁰⁵ [2002] NSWSC 1217.

¹⁰⁶ National Committee’s 2004 report, above n 10, [3.51]; See the model *Family Provision Bill 2004* clause 27(2)(a).

PRACTICAL/PROCEDURAL CONSIDERATIONS

Alternative Dispute Resolution

Mediation before trial is required in both New South Wales and Queensland.¹⁰⁷ In New South Wales, this is provided for in section 98(2) of the *Succession Act 2006*, and Part 4 of the *Civil Procedure Act 2005*. In Queensland, Practice Direction 8 of 2001 requires an ADR process to be provided for in the draft directions orders.

Table 3 - Time limits

Jurisdiction	Legislation	Time limit
ACT	S 9 <i>Family Provision Act 1969</i>	12 months from grant of administration
NSW	S 58(2) <i>Succession Act 2006</i>	12 months after death of the testator
NT	S 9 <i>Family Provision Act 1970</i>	12 months from grant of administration
Qld	Ss 41(8) and 44(3) <i>Succession Act 1981</i>	9 months from date of deceased's death
SA	S 8(1) <i>Inheritance (Family Provision) Act 1972</i>	6 months from the grant of probate or administration
Tas	S 11 <i>Testator's Family Maintenance Act 1912</i>	3 months from the grant of probate
Vic	S 99 <i>Administration and Probate Act 1958</i>	6 months from the grant of probate
WA	S 7(2) <i>Family Provision Act 1972</i>	6 months from the grant of administration

Time limits for making an application for family provision vary in each jurisdiction, ranging from 3 to 12 months from the date of death or probate.¹⁰⁸ Additionally, the legislation gives the court the power to grant extensions.¹⁰⁹ Extensions have been granted where the applicant:

- was unaware of the deceased's death, as in *Re O'Connor*;¹¹⁰
- was unaware of his or her right to claim provision or did not fully appreciate the nature of that right, as in *In the Estate of Barry*;¹¹¹ and
- was under a legal disability, as in *Re Lawrence*.¹¹²

Noting that the reason for time limits is to require the applicant for provision to act promptly,¹¹³ the National Committee recommended that an application for family provision should be made

¹⁰⁷ John de Groot & Bruce Nickel, above n 39, 275.

¹⁰⁸ M McGregor-Lowndes & F Hannah, above n 3, 59.

¹⁰⁹ *Family Provision Act 1969* (ACT) s 9(2); *Succession Act 2006* (NSW) s 58(2); *Family Provision Act 1970* (NT) s 9(2); *Succession Act 1981* (Qld) s 41(8); *Inheritance (Family Provision) Act 1972* (SA) s 8(2); *Testator's Family Maintenance Act 1912* (Tas) s 11(2); *Administration and Probate Act 1958* (Vic) s 99; *Family Provision Act 1972* (WA) s 7(2)(b).

¹¹⁰ [1931] QWN 39.

¹¹¹ (1974) 9 SASR 439.

¹¹² [1973] Qd R 201.

within 12 months of the death of the deceased, with the court maintaining an unfettered discretion to extend this time, following section 41(8) of the *Succession Act 1981* (Qld).¹¹⁴

Costs

Costs are a major issue in family provision law, as often the cost of making an application is prohibitive in smaller estates.¹¹⁵ The issue of costs in family provision applications is specifically dealt with in the NSW legislation. Section 99 of the *Succession Act 2006* (NSW) essentially provides that the court may award costs out of the estate or notional estate where the court thinks fit.¹¹⁶ Section 78 provides that the court may only make an order that the applicant's costs be paid from the notional estate where the applicant is successful in obtaining a family provision order. The National Committee recommended that the court should retain an unfettered discretion in relation to awarding costs in family provision proceedings, and the model legislation should not include an equivalent provision to New South Wales.¹¹⁷ However, the model legislation should include costs provisions empowering the court to:

- designate property as notional estate of a deceased person for the purpose of making an order that the whole or part of the costs of a party to the proceedings be paid out of the deceased person's notional estate; and
- order that the whole or part of the costs of a party to the proceedings be paid out of property that has been designated as notional estate of the deceased person.¹¹⁸

Consistent with the New South Wales legislation, such orders should not be made unless the court makes or has made a family provision order in favour of the applicant.

Protection of personal representatives

The National Committee noted the need for family provision legislation to include protections for a personal representative who distributes the estate before a family provision application is made.¹¹⁹ Highlighting the importance of affording eligible applicants due opportunity to apply, the National Committee recommended that a personal representative should be required to give public notice of an intended distribution before they would qualify for protection from liability.¹²⁰ Such notice requirements are currently provided for in section 93 of the *Succession Act 2006* (NSW).¹²¹

¹¹³ National Committee's 2004 report, above n 10, 58 citing *Re Guskett* [1947] VLR 212.

¹¹⁴ National Committee's 1997 report, above n 1, 42-43; National Committee's 2004 report, above n 10, 79.

¹¹⁵ National Committee on Uniform Succession Law, 'The National Committee's Final Report to the Standing Committee on Family Provision' (MP 28, December 1997) 135.

¹¹⁶ Previously *Family Provision Act 1982* (NSW) s 33.

¹¹⁷ National Committee's 2004 report, above n 10, 76.

¹¹⁸ *Ibid*, 80.

¹¹⁹ National Committee's 1997 report, above n 1, 95.

¹²⁰ *Ibid*, 101.

¹²¹ Previously *Family Provision Act 1982* (NSW) s 35(1).

In terms of time limits, the National Committee noted that, in Queensland, a personal representative is protected from liability in respect of a distribution that takes place 6 months or more after the death of the deceased, and without notice of any application for family provision¹²² Combining the features of both the New South Wales and Queensland legislation, the National Committee recommended the model legislation provide that a personal representative who properly distributes any part of the estate of a deceased person will not be liable in respect of that distribution if:¹²³

- the personal representative gives public notice, at least one month before the date of intended distribution, of his or her intention to distribute the estate;
- the distribution takes place at least one month after the giving of the public notice and at least six months after the date of death of the deceased person; and
- at the time the distribution was made the personal representative had no notice of any application or intended application for family provision.

The National Committee also recommended the introduction of an equivalent provision to section 44(1) of the *Succession Act 1981* (Qld). This section protects a personal representative who makes an early distribution of property for the maintenance or support of persons who were wholly or substantially dependent on the deceased person.¹²⁴ The only variation was that the model legislation should refer to ‘maintenance, education and advancement in life’ to maintain consistency. Further, model legislation should include an equivalent provision to Western Australia, providing that the distribution must be “immediately necessary”.¹²⁵ It was noted that this limitation is consistent with the rationale of facilitating the “urgent needs” of a dependant.¹²⁶

Similar protection provisions are found in the legislation of all other states and territories, with slight differences in the language used to describe the purposes for which a personal representative may make an early distribution without incurring liability.¹²⁷

The National Committee noted the desirability of facilitating early distribution of estates without prejudicing the interests of those eligible to apply for family provision.¹²⁸ Consequently, it was recommended that an equivalent provision to sections 44(2) and (3)(b) of the *Succession Act 1981*

¹²² National Committee’s 1997 report, above n 1, 102 referring to s 44(3)(a) of the *Succession Act 1981* (Qld).

¹²³ National Committee’s 2004 report, above n 10, 42 - 43.

¹²⁴ National Committee’s 1997 report, above n 1, 103.

¹²⁵ *Family Provision Act 1972* (WA) s 11.

¹²⁶ National Committee’s 2004 report, above n 10, 45.

¹²⁷ *Ibid*, 44.

¹²⁸ *Ibid*, 48.

(Qld) should be included. Section 44(2) provides that a personal representative will be protected from liability where they have been notified that the eligible person either consents to the distribution, or does not intend to make a family provision application. Section 44(3)(b) of the *Succession Act 1981* (Qld) protects a personal representative from liability to a person who gives notice of intention to bring a family provision application, but who fails to make the application in time. The National Committee recommended that the provision should refer to a distribution made not earlier than twelve months after the deceased's death, as this is consistent with the time limit for making an application proposed by the model legislation.¹²⁹

CONCLUSION

While there is general consistency between the states and territories, small variations exist in terms of eligibility to apply for family provision, determination of applications, property subject to family provision, and other practical and procedural issues. Law reform should seek to achieve uniformity and consistency between states and territories' legislation in pursuing the goals of the regime. The law of family provision has two broad objectives: to allow substantial testamentary freedom in the disposition of property and to ensure that those with a legitimate moral claim on the estate are adequately provided for.¹³⁰ Law reform must seek to find an appropriate balance between these two often competing objectives, in light of changing societal circumstances. In addition, law reform should seek to reduce the number of opportunistic claims, while ensuring that those with legitimate claims are not improperly excluded¹³¹ and to reduce the complexity created by the different regimes in the various states and territories.

¹²⁹ *Ibid.*

¹³⁰ National Committee's 2005 paper, above n 8, 1.

¹³¹ Victorian Law Reform Commission, 'Succession Laws: Consultation Paper – Family Provision' (February 2013) [2.98].