This research deals with the interaction of family provision law and charitable bequests in wills, including qualitative research relating to the practical issues arising with both legal practitioners and charities’ bequest officers.

In recent years challenges to charitable bequests by testators’ family members have become more common in Australia. Courts are vigorous in upholding proper family provision as against charitable bequests, portraying this provision as based on moral obligation.

Proper provision for family and other dependants is supported by both legislation and the courts on public policy grounds. This concept is confined to Australia, New Zealand, Canada, and to a lesser extent England, which are the only countries with comprehensive family provision legislation.

In more recent years, as the concept of ‘family’ has been extended to include de facto partners, same sex partners, wider family, and various dependants not envisaged by the framers of the original legislation, the primacy of family claims has become even more difficult for charities to overcome.

The original purpose of family provision law was to enforce the proper maintenance and support of a testator’s spouse and children. In the 108 years since their introduction in New Zealand, family provision laws have had their influence extended through judicial interpretation and active promotion of the priority of family claims on a testator’s estate as part of public policy. Testamentary freedom, although never completely dominant in English law, is now seriously challenged in Australia.

Charities are seeking to position themselves strategically to benefit from the expected intergenerational wealth transfer from the baby-boomer generation. Bequests from this source are needed to resource the increasing capital requirements required by charity as the welfare system is wound back due to demographic and fiscal pressures.

That the clearly stated philanthropic intentions of a testator should be overturned in favour of family members or other claimants is a contentious issue in family provision jurisdictions. The generational transfer of wealth by baby-boomers over the coming decades provides a scenario for increasing conflict between families and charities over bequests.

The significant findings of this research are:

1. WHY IS THERE AN APPARENT INCREASE IN FAMILY PROVISION APPLICATIONS?

Charities and estate law practitioners both report that there is an increase in applications. The reasons they advance for this trend include:

A. CHANGES IN THE CONCEPT OF ‘FAMILY’

- Multiple marriages, with partners and children of each blended family vying for shares of the estate of a deceased, especially in the case of wills made some time ago which fail to take into account the situation at time of death
- Changing notions of what constitutes a ‘family’ relationship
- Increasing numbers and legal recognition of de facto and same sex partnerships leading to claims on estates from partners and children of these relationships
- Growing numbers of elderly and dependent parents
EXECUTIVE SUMMARY

- Growing numbers of Generation Y young people living at home into their 20s and 30s who may be classed as ‘dependent’ or ‘under a disability’
- More cultural groups in Australia who value and support extended family arrangements, with associated possibilities for findings of dependency

B. CHANGES IN EXPECTATIONS AND VALUES
- Growing numbers of persons expecting a share of an estate as of right, but who are not included as beneficiaries of a will and so file an application for provision
- Changing value systems which mean that it is no longer considered inappropriate behaviour to challenge a will

C. CHANGES IN THE LEGAL ENVIRONMENT
- The wide range of permitted applicants in the legislation and wide discretion allowed to judges to decide on the award which is appropriate in all the circumstances of the case
- A perception of increasing numbers of ‘plaintiff’ law firms competing for work in the family provision area, particularly where cost caps or other limits have been applied to personal injuries claims

D. CHANGES IN LEVELS OF WEALTH
- Increasing general wealth levels in Australia with consequent larger estates available
- Increasing real estate prices in Australia with consequent effects on what might previously have been very modest estates

2. WHAT CAN CHARITIES DO TO PUT THEMSELVES IN THE BEST POSITION WITH A DONOR BEFORE THE DONOR DIES?
- Ensure they have appropriate policies for bequest solicitation and disputed bequests, informed by specialist legal advice
- Encourage gift-giving while donors are alive. This can be done by donations and other direct gifts, or by encouraging donors to establish a tax-effective vehicle for gift-giving such as a Prescribed Private Fund (PPF) or ancillary fund (sometimes known as a ‘gift fund’, ‘community foundation’ or ‘donor advised fund’)
- Encourage people to:
  - make a will
  - seek independent professional legal advice
  - keep their will current
  - under no circumstances use a ‘DIY will’
- Make sure there is independent legal advice for the will-maker who intends to make a bequest to charity – this may be crucial to a successful defence to a family provision claim in order to avoid accusations of undue influence
- Have an arms length relationship between the charity and the will-maker, without any undue influence, harassment, intimidation or coercion from the fundraiser to the donor while the donor is alive (these things can give rise to a claim in equity under the doctrine of undue influence/unconscionable conduct/unconscionable dealings, or the possibility of a claim of unconscionable bargain which could result in the bequest being invalid and brought back into the estate after the donor’s death)
• In appropriate circumstances, have a family member or legal personal representative present during bequest negotiations to avoid any allegations of undue influence or coercion

• If the testator is near death, or is elderly, or is incapacitated physically or mentally, the measures above are absolute requirements

• Encourage will-makers to let your charity know about their bequests

• Where the charity is aware of the bequest, make sure that the will states the full legal name of the organisation that will receive the bequest, and uses appropriate words to indicate the type of bequest, including use of a recommended form of bequest clause – this will avoid the need for an application to the court to clarify the bequest, or for a cy-près application, which may fail in the light of a family provision application

3. WHAT CAN CHARITIES DO TO PUT THEMSELVES IN THE BEST POSITION WHEN A FAMILY PROVISION CLAIM IS NOTIFIED?

SUBJECT TO LEGAL ADVICE:

• Charities are usually disadvantaged by their attitude of taking the path of least resistance, so stand up for your bequests – engage a qualified legal advisor, take their advice, and if appropriate, file an affidavit defending the bequest at the least. Although this is not free (unless legal advice is given pro bono), it usually represents a better position than adopting a ‘wait and see’ attitude to obtaining something from a will

• Always appear personally at mediations with your lawyer (unless advised otherwise). Explain clearly what the money is to be used for, and the public benefits of your organisation

• Instruct your lawyers clearly of any demonstrable connection to the testator making the bequest. Charities have very little competing moral claim as the law stands – provision for family comes first, and the only hope of improving that position is to show a history of previous connection which is both strong and provable. Did that person have a prior connection with your charity? A prior history of donations? Or a history of services provided by or to the charity?

• Keep good file notes of contact and discussions, a record of regular donations, a record of regular contact via membership or receipt of newsletters, and preferably a record of continuous contact from the time the bequest is made in the will until the time of death. Be able to provide your legal advisor with an orderly complete record – this will save you legal costs

• If more than one charity is involved in the bequest (e.g. each has been left an equal share of the residual estate), then those charities should consider adopting a common stance

• Put the pursuit of bequests on a more business-related footing e.g. it may be desirable for groups of charities to place a law firm on retainer for the purpose of ensuring that bequests are obtained by the group, thus sharing legal costs and obtaining better quality legal advice
4. MOVES TO REFORM THE LAW OF FAMILY PROVISION

There is a uniform *Family Provision Bill 2004* drafted as part of a review of family provision law in Australia. The uniform bill recommends that applicants as of right be limited to spouses, de facto spouses (which may include same sex partners at the discretion of the states), and adult children over 18 years. This would considerably limit the pool of applicants for family provision in Australia, if matters to be taken into account only applied to those applicants. New South Wales has adopted the uniform measures in the new Chapter 3 of the *Succession Act 2006* (NSW), except that it has not adopted the limited pool of applicants as of right. Thus the reform involved, though attempting to confront excessive costs, and some technical legal matters, does not address the issues of adult child applicants, and the increase in the number of claims through moral duty arguments. Other states have not yet made any reform moves.
## Table of Contents

**Executive Summary**

**Glossary**

**Introduction**

**Section 1**

*Overview of the Historical Development of Inheritance Law*

1. History of family provision law

**Section 2**

*Current Legislation and Reform Initiatives for Family Provision in Australia and Other Jurisdictions*

1. Australian jurisdictions
2. Other jurisdictions
3.2. Reform of family provision law – uniform legislation proposals in Australia

**Section 3**

*The Operation of Family Provision Law in Australia*

1. Jurisdiction
2. Differences in wording of legislation among jurisdictions
3. Appropriate applicants
   - 3.3.1 Spouses
   - 3.3.2 De facto and same sex partners
   - 3.3.3 Adult children
   - 3.3.4 Adult children who are disabled
   - 3.3.5 Adult children who are ‘lame ducks’
   - 3.3.6 Step children
   - 3.3.7 Killers and other applicants with moral deficiency
3. Moral duty
4. Property available in a family provision claim
   - 3.5.1 Inter vivos transactions which are unconscionable bargains
   - 3.5.2 Property the subject of mutual wills, contractual arrangements or prenuptial agreements
   - 3.5.3 Notional estate

**Section 4**

*Practical Considerations in Family Provision Claims*

1. Costs
2. Alternative dispute resolution
3. Time limits and other practical issues
# TABLE OF CONTENTS

## SECTION 5
**Family Provision and Gifts to Charity in Wills**
- 5.1 Charitable giving in wills 61
- 5.2 Charitable giving in wills in Australia 67

## SECTION 6
**The Views of Estate Lawyers and Charity Bequest Officers**
- 6.1 What is practitioners’ experience with wills and bequests generally? 72
  - 6.1.1 Lawyers and charity advertising 72
  - 6.1.2 Charities and advertising 74
- 6.2 What is practitioners’ experience with family provision claims? 75
- 6.3 How do charities respond to family provision applications? 78
- 6.4 What has been charities’ mediation experience? 79
- 6.5 What is the view of mediators? 82
- 6.6 Can charities deal with family provision claims more effectively? 83

## SECTION 7
**Recommendations for Charities**
- 7.1 Prevention 87
- 7.2 A professional attitude to family provision matters 88
- 7.3 Law Reform 90

## APPENDIX A
Selected cases on family provision law in Australian and New Zealand jurisdictions which have involved charities 101

## APPENDIX B
Question framework for CPNS project: Family provision and Philanthropy 103

## REFERENCES
105
Administration of an estate – term used for the work of the executor in carrying out the terms of a will

Ancillary fund – a public fund that is established under a will or instrument of trust that invests its funds only as permitted by Australian law applying to trustees and is established or maintained solely for:
- the purpose of providing money, property or benefits to DGRs; or
- the establishment of DGRs

Ancillary funds are often known popularly as ‘gift funds’, ‘community foundations’ or ‘donor advised funds’

Beneficiary – person or organisation benefiting under a will

Bequest – gift of an identifiable asset (not money) to person/organisation in will. However, the terms bequest and legacy are often used interchangeably in general usage

Blended family – a family formed by a combination of two or more families following remarriage(s) after divorce

Civil law jurisdiction – a jurisdiction using European civil law as its basic legal system

Codicil – a change or addition to an existing will

Common law jurisdiction – a jurisdiction using English common law as its basic legal system (e.g. Australia, New Zealand, England and Wales, Canada (except for Quebec), and the United States (except for Louisiana))

Community foundation – see ancillary fund

Consanguinity – relationship based on shared family blood lines

Contingent bequest – gift of an asset dependent upon an event occurring

Curtesy – provision for a widower (no longer applies)

Deductible gift recipient (DGR) – a DGR is an entity that is entitled to receive income tax deductible gifts. All DGRs are endorsed by the Australian Taxation Office

Discretionary jurisdiction – a legal jurisdiction which allows judges to make the decisions on essential matters based on the particular facts of a case

Donor advised fund – see ancillary fund

Dower – provision for a widow (no longer applies)

Estate – the totality of the property which the deceased owned or had some interest at the time of death

Estates in fee simple or in fee tail – legal terms denoting real estate

Equity – a part of the English law system, based on principles of fairness, originally separate from common law, but now part of the overall system used in Australia and in other common law countries

Executor (m)/executrix (f) – a person appointed by a will-maker to ensure that the intentions in a will are carried out. It is no longer essential to differentiate these terms on the basis of gender. However, judges still often do so in judgements.

Family provision – term used in Australia and New Zealand for provision made for family members in a will

Family protection – term used in New Zealand for family provision; alternative term used is testator’s family maintenance

Forced share – a fixed share of an estate left to a family member
Glossary

Forfeiture – the loss of the right to an inheritance by egregious conduct e.g. killing the testator
Inter vivos – while alive
Intestate – Dying without leaving a will, or leaving an invalid will, so that the property of the estate passes by the laws of succession rather than by the direction of the deceased
Legacy – a gift of money to a person/organisation in will
Life interest – a lifetime gift, such as giving someone the right to live in a property until that person’s death. On the death of the person given the life interest, the asset or capital is distributed according to the will.
Mortmain – literally ‘dead hand’; originally referred to act of parliament which sought to prevent the bequest of land and buildings to the Church; in later succession law referred to acts of parliament which prevented bequests to charity, originally of land and buildings, and later, of money. Mortmain never applied in Australian law, and no longer applies in English law.
Mutual wills – wills which leave assets to each person in the same way (commonly applies between spouses)
Notional estate – assets which are returned to the estate of the deceased after death because they should not have been disposed of before death. This increases the estate for distribution (currently applies only in New South Wales)
Patrimony – traditionally, inheritance from a father’s estate; in modern terms, the total inheritance in an estate
Pecuniary legacy – fixed sum of money expressed as a gift in a will
Pretermitted child – a child omitted from the will of a testator because it had not been born at the time the will was made
Privy Council – an English court which hears appeals from former colonies of Britain (no longer applies in Australia)
Probate – the granting of the right to administer a will
Residuary legacy – remainder of your (money) estate left as a legacy after bequests and specific legacies have been distributed and all debts cleared
Residue of estate – possessions, property and money remaining after all debts and gifts are distributed in accordance with the will
Reversionary legacy – a legacy consisting of the assets or money left after a life interest has been fulfilled.
Specific bequest – the gift of an identifiable asset such as jewellery or furniture
Succession law– the law relating to wills and estates
Testate – dying having made a will
Testamentary – referring to a will
Testation – the statements of intent in a will
Testator (m) /testatrix (f) – person who makes a will. It is no longer essential to differentiate these terms on the basis of gender. However, judges still often do so in judgements.
Testator’s family maintenance – alternative (older) term for family provision
Will – a legal document expressing the intentions of a person for the distribution of their assets after death
Will-maker – a plain English term now sometimes used instead of testator or testatrix
The purposes of this paper are three-fold. Firstly, to examine the operation of family provision law and the interaction between family provision law and the freedom of a testator to leave a bequest to charity in a will; secondly, to investigate family provision practice through interviews with practitioners and representatives of charities; thirdly, to suggest to charities how best to deal with family provision applications which might otherwise deprive them of bequests in wills, including a consideration of current law reform proposals.

In recent years legal challenges to charitable bequests by testators’ family members have become more common in Australia. Many charities faced with the prospect of a disputed bequest have been reluctant to pursue the matter in the courts. A review of leading reported cases involving charitable bequests in wills reveals that the courts are vigorous in upholding proper family provision as against charitable bequests, portraying this provision as based on moral obligation. Proper provision for family and other dependants is supported by both legislation and the courts on public policy grounds. This concept is confined to Australia, New Zealand, Canada, and to a lesser extent England, which are the only countries with comprehensive family provision legislation. The generational transfer of wealth by baby-boomers over the coming decades provides a scenario for increasing conflict between families and charities over bequests.

The original purpose of family provision law was to enforce the proper maintenance and support of a testator’s spouse and children. In the 108 years since their introduction in New Zealand, family provision laws have had their influence extended through judicial interpretation and active promotion of the priority of family claims on a testator’s estate as part of public policy. Testamentary freedom, although never completely dominant in English law, is now seriously challenged in Australia.

In more recent years, as the concept of ‘family’ has been extended to include de facto partners, same sex partners, wider family, and various dependants not envisaged by the framers of the original legislation, the primacy of family claims has become even more difficult for charities to overcome. At the same time, charities are seeking to position themselves strategically to benefit from the expected intergenerational wealth transfer from the baby-boomer generation to their children and grandchildren. Bequests from this source are necessary to resource the increasing capital requirements of the charity sector as an ageing population’s care needs increase, and the welfare system is wound back due to demographic and fiscal pressures.

This paper first briefly examines the historical development of inheritance law in both civil and common law jurisdictions to provide a context for the subsequent discussion (section 1). This is followed by a brief consideration of the scope of the legislation, including a discussion of current law reform proposals (section 2). The paper then considers in detail the way in which family provision laws operate in Australian jurisdictions, demonstrating the primacy of family and of moral claims to provision (section 3). The paper then turns to practical considerations in family provision claims, including costs and dispute resolution procedures (section 4). The contest between charitable bequests in wills and family provision law in Australia is covered next, illustrating that although the position has varied widely historically, it is now firmly entrenched not only in testamentary duty, but also moral duty to a wide range of dependants (section 5). This is followed by an analysis
of the views of lawyers and charity bequest officers obtained through interviews about family provision and charitable bequests (section 6), and recommendations for charities which are suggested by the outcomes from this research (section 7).

Appendix A contains a review of major reported cases involving family provision applications and charitable bequests. This shows that charities have been deprived of bequests, or had bequests substantially reduced, as a result of the primacy of family claims.

Fact sheets from the research contained in this paper are available at www.bus.qut.edu.au/research/cpns/publications/currentissue.jsp.

Further information is also available from https://wiki.qut.edu.au/display/cpns/planned+giving+++bequests
OVERVIEW OF THE HISTORICAL DEVELOPMENT OF INHERITANCE LAW

HISTORY OF FAMILY Provision LAW

In developed legal systems, testamentary freedom is never absolute. The right to inherit is limited by either relationship or by amount. Either the group of related persons on whom inheritance may devolve is limited, or the amount any one person can receive from inheritance is limited. In addition, it seems to be an accepted norm in most cultures that inheritance should be linked to blood ties, but legal systems vary as to the amount of freedom permitted in disinheriting family members.

The English common law system originally required that estates in fee simple and in fee tail general be bequeathed to the eldest son of the testator, with all other children being excluded. However, it was possible even in the earliest common law times to deprive an heir by *inter vivos* transfer. After *The Statute of Wills* was passed in 1540, a testator could also deprive his heir by will, and after 1646 all children could be deprived of land inheritance. Widows were protected by the law of dower, which allowed a widow the use for her life of one-third of her husband’s real property, and widowers by curtesy, which allowed a widower with a child of the marriage the use for life of all of his wife’s land. Neither dower nor curtesy could be defeated by will or by *inter vivos* transfer.

As to personal property, at common law all of a wife’s personal property passed to her widower absolutely, unless he consented to a different disposition in her will, or by *inter vivos* transfer. A deceased husband’s personal property was subject to forced (fixed) shares. A surviving wife was entitled to half of her deceased husband’s net personal property by forced share where there were no children of the marriage. The remaining half of the personal property could be left by will as the testator pleased. Where a wife and children survived, the wife was entitled to a one-third forced share, and the children to a one-third forced share, with the remainder to be disposed of by will as the testator wished. Forced shares were first recognised in 1215, but had largely fallen out of use in England by 1400, in Wales by 1696, and were completely abandoned in all areas of England in 1724.

---

2 In the period between 1290 and 1540. See generally: William F. Fratcher, ‘Protection of the Family against Disinheritance in American Law’ (1965) 14(1) The International and Comparative Law Quarterly 293, 294.
3 Ibid. The land which could be left elsewhere was two-thirds of land held by military tenure and all land held by socage. After 1660, all military tenure was converted to socage, so that all land could be left away from the heir by will.
4 Forced shares for widows could be reduced by jointure or settlement, both of which were commonly used, and by advancements for children.
5 *Magna Carta* Ch 26: ‘If anyone holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed us, it shall be lawful for our sheriff or bailiff to attach and enroll the chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of law worthy men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfill the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.’
6 The only remaining area where these applied after 1696 was in London.
As the 19th century progressed, the idea of testamentary independence became more embedded in the common law. The Dower Act 1833 (UK) allowed a husband to overturn his wife’s dower by will or by inter vivos transfer. In the absence of forced shares, this allowed husbands to leave their entire estates away from their widows and children if they so wished. After the Married Women’s Property Act 1882 (UK), wives could likewise leave all their property away from their widowers and children.

Civil law jurisdictions have traditionally favoured the forced share approach to testamentary dispositions, with spouses and children entitled to definite shares of an estate by statute, or by custom. This Roman law concept is still seen today in many jurisdictions, including in most European countries, most South American countries, Japan, Scotland, South Africa, in a modified form in Quebec in Canada and in Louisiana in the USA, and to a partial extent in Ireland. The relevant Roman law principles are those of terce (the right of a surviving spouse to a life interest in one-third of the reality of the estate), jus relictae (the right of a surviving spouse to one-half of the moveable property of a deceased spouse if there are no children, or to one-third if there are children) and legitim (the right of children to one third of the parent’s moveables if there is a surviving parent and to one-half if there are no surviving parents, all to be shared equally). In civil law jurisdictions, these were often expressed in the law of dower.

In modern civil law terms, dower has been abolished. In Quebec, for example, the term used is now ‘family patrimony’, and a surviving spouse is entitled to half the value of the divisible patrimony. The remaining half is distributed according to the will, or the intestacy rules of the Code Civil du Quebec. In Scotland, the terms now used are ‘prior rights’ and ‘legal rights’ to property. Prior rights only apply in the case of intestacy, and allocate specific amounts to a spouse or children. There are also ‘legal rights’ to moveable property applicable in intestacy. Legal rights can also apply if there is a will, but the beneficiary has to choose between the legal rights and the amount left in the will. In Japan, there is a statutory division of the estate of half to a spouse and half to all lineal descendants. If there are no lineal descendants, then the statutory division is two-thirds to a spouse and one-third to any lineal ascendants. If there are no descendants or ascendants, then the division is three-quarters to a spouse and one-quarter to living brothers and sisters. There is no allowance for testamentary independence unless a specific will is made.

---

9 Succession (Scotland) Act 1964 sections 8 and 9 read with The Prior Rights of Surviving Spouse (Scotland) Order 2005.
The situation in the US is mixed, and confusing. The *Uniform Probate Code*\(^\text{11}\) has been adopted in 16 states of the US,\(^\text{12}\) although in various Revisions. Some states have adopted the Code in part in their legislation, but most have their own legislation on provision by elective forced shares.\(^\text{13}\) Louisiana, still retaining a civil law system, has a forced share, the *legitime*, for children under 23, or who are mentally infirm or otherwise disabled from inheritance.\(^\text{14}\) In the *Uniform Probate Code*, in intestate succession a spouse is entitled to all the deceased’s estate unless there are surviving parents or descendants not also the descendants of the spouse.\(^\text{15}\) In effect, this disinherit the children of the marriage. Where there is a will, the Code provides for an elective share amount for a surviving spouse of between 3% and 50% of the estate depending on the length of the marriage.\(^\text{16}\) This variable forced share applies regardless of the terms of the will.

The modern forced share approach can be contrasted with that of statutes in a small group of common law countries which give a wide discretion to the Courts to divide an estate under dispute, commonly referred to as either family or dependants’ provision or testator’s family maintenance. Family provision legislation confers rights on applicants, typically spouses, de facto spouses, children (including adopted and stepchildren), grandchildren and parents, to apply to the court to overturn bequests in wills which do not adequately provide for the maintenance and support of the applicants. This is clearly an interference with testamentary freedom, and is supported by both legislation and the courts on public policy grounds. The notion of total testamentary freedom was a construct of the nineteenth century, an offshoot of the style of English laissez-faire liberalism fashionable at the time. However, it was recognised late in the nineteenth century that testamentary freedom of this type allowed some testators to ignore their responsibilities to close family, particularly spouses and children. This was regarded as particularly a problem in the then newly developing, but very wealthy, dominions of Australia, New Zealand and Canada, and was fanned by an indignant press which reported several notorious cases of wealthy men leaving their widows and children unprovided for in their estates.\(^\text{17}\)

\(^{11}\) Original version 1969, with Revisions in 1989 and 1990.
\(^{12}\) Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.
\(^{13}\) Elective share statutes allow the surviving spouse to take either an elective (forced) share of the estate, or to take whatever share they have been left in the will. See generally: Lawrence Waggoner, ‘Spousal Rights in our Multiple Marriage Society: The Revised Uniform Probate Code’ (1992) 26 (4) *Real Property, Probate and Trust Journal* 683; Ronald Chester, ‘Should American children be protected against disinheritance?’ (1997) 32(3) *Real Property, Probate and Trust Journal* 405.
\(^{15}\) Article II, Part 2, 2-102.
\(^{16}\) Article II, Part 2, 2-202.
The legislation introduced into the law of the various Australian states was based on innovative New Zealand legislation, the *Testator’s Family Maintenance Act 1900*, which attracted much attention in the common law world at the time and was later copied for both testate and intestate situations in English law, and the provinces of Canada (except Quebec). The New Zealand legislation of 1900 had its genesis in an 1877 Act which enabled illegitimate children under 14 to apply for maintenance out of the estate of deceased parents, the *Destitute Persons Act 1894* (NZ), and the *Native Land Court Act 1894* (NZ) which provided that Maori applicants were to be left with ‘sufficient land for their maintenance’ after claims alienating Maori land reserves to white settlers. It is also possible that the introduction of the legislation was intimately connected with New Zealand’s *avant garde* approach to social welfare, with old age pensions being introduced in New Zealand in 1898, and widows’ pensions in 1911. It could be argued that these state pensions encouraged even wealthy testators to leave their estates away from their spouses, especially wives.

The first incarnation of the legislation was in 1896, when a Bill on the Limitations of Disposition by Will was introduced into the New Zealand legislature by Sir Robert Stout, later Chief Justice of New Zealand. This Bill proposed a type of civil law forced share arrangement by which only one third of a testator’s estate could be disposed of by will if he left a wife and children, and one half if he left only children. This Bill was not approved because of its too obvious interference with testamentary freedom. A variation introduced in 1897 increased the amount to be disposed by will to one half in all cases, but was also unsuccessful. In 1898, the idea of forced shares was abandoned, and the first draft of totally discretionary testator’s family maintenance legislation was introduced, with a second draft Bill being introduced in 1900. This latter Bill became the *Testator’s Family Maintenance Act 1900* (NZ).

19   This Act provided that in the case of intestacy, a widow was to receive one-third of any estate, and the children equal shares of one third of the estate.
20   Section 131(2). See Waitangi Tribunal, *The Te Roroa Report 1992*, Te Roroa Claim, 03 Nga Whenua Rahui (Reserves), 3.1 Official Attitudes and Policies at www.waitangi–tribunal.govt.nz/reports/, accessed on 11 October 2007. No doubt the Maori claimants would not have seen this as appropriate. As the Report states: ‘By the time of the Native Land Court Act 1894 the 50 acre guideline (the original amount of land set aside for each Maori claimant)] had been watered down to a requirement that ‘the owners have sufficient land left for their maintenance’. It was, of course, entirely up to the Government Officials to decide how much land would be ‘sufficient’. This Act also provided in section 46 that: ‘If a native leaves children without enough land to maintain then, his will disposing of his land otherwise is invalid’.
The relevant provision of the 1900 Act was:\textsuperscript{23}

Should any person die leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband, or children, the Court may, at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the said Court shall seem fit shall be made out of the estate of the said deceased person for such wife, husband or children: Provided that the Court may attach such conditions to the order made as it shall think fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this section.

This original New Zealand legislation of 1900 was replaced by the Testator’s Family Maintenance Act 1906, which extended the time period for applications from six months to twelve months from the date of probate, and allowed for provision to be made in the form of either lump sums or periodical payments.\textsuperscript{24} This Act was in turn repealed, and replaced by the Family Protection Act 1908.\textsuperscript{25} Meanwhile, the idea of family provision quickly spread throughout Australia, and eventually to Canada and the UK.

\textsuperscript{23} Section 33(1).


\textsuperscript{25} The testators’ family maintenance provisions were contained in Part II of the Family Protection Act 1908 (NZ), particularly at section 33. This latter Act was repealed by the current legislation, the Family Protection Act 1955: see section 16(1) of the 1955 Act and the Schedule to that Act.
The first jurisdiction to copy the New Zealand legislation was Victoria in the Widows and Young Children Maintenance Act 1906, and then Tasmania in the Testator’s Family Maintenance Act 1912, Queensland in the Testator’s Family Maintenance Act 1914, Victoria (consolidating) in the Administration and Probate Act 1915, sections 108-117, New South Wales in the Testator’s Maintenance and Guardianship of Infants Act 1916, South Australia in the Testator’s Family Maintenance Act 1918, Western Australia in the Guardianship of Infants Act 1920 section 11, British Columbia in the Testator’s Family Maintenance Act (R.S.B.C. 1924 c.256),26 the Australian Capital Territory in the Administration and Probate Ordinance 1929, Part VII, the Northern Territory in the Testator’s Family Maintenance Order 1929,27 and England in the Inheritance (Family Provision) Act 1938. The English act differed from the other legislation in that the discretion allowed to the Court was much more restricted in monetary terms, though the statute required that the Court could intervene when the will did not make ‘reasonable provision’ for the maintenance of dependants.


27 The provisions relating to family provision in each jurisdiction in Australia (and elsewhere) were later extended to intestate estates: for Australia, see the Conveyancing, Trustee and Probate (Amendment) Act 1938 (NSW), and the Administration of Estates Act 1954 (NSW); the Testator’s Family Maintenance Act 1957 (Tas); the Administration and Probate Act (Family Provision) Act 1962 (Vic); Succession Acts Amendment Act 1968 (Qld); Family Provision Ordinance 1969 (ACT); Family Provision Ordinance 1970 (NT); Inheritance (Family Provision) Act 1972 (SA); Inheritance (Family and Dependents Provision) Act 1972 (WA). Family provision applications can therefore be made whether the deceased died testate or intestate. Note that the New South Wales Law Reform Commission has reviewed intestacy law in that state and published Report 116 (2007) – Uniform Succession Laws: Intestacy including a draft Intestacy Bill 2007. This law, if adopted, will be a further amendment to the Succession Act 2006 (NSW).
CURRENT LEGISLATION AND REFORM INITIATIVES FOR FAMILY PROVISION IN AUSTRALIA AND OTHER JURISDICTIONS

2.1 AUSTRALIAN JURISDICTIONS

As the issue of family provision is a state responsibility constitutionally, each state in Australia has separate family provision legislation, and there are differences in wording of the relevant sections in each jurisdiction:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Act</th>
<th>Section</th>
<th>Wording</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>Succession Act 2006, Chapter 3 (on commencement) – note</td>
<td>59(2)</td>
<td>…for the maintenance, education or advancement in life of the eligible person, having regard</td>
</tr>
<tr>
<td></td>
<td>that this Act replaces the Family Provision Act 1982 (NSW),</td>
<td></td>
<td>to the facts known to the Court at the time the order is made.</td>
</tr>
<tr>
<td></td>
<td>The Succession Amendment (Family Provision) Bill 2008 passed</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>the Legislative Council on 24 September 2008, and was</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>passed to the Legislative Assembly on that date for</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>concurrence.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victoria</td>
<td>Administration and Probate Act 1951</td>
<td>91(1)</td>
<td>…the Court may order that provision be made out of the estate of a deceased person for the</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>proper maintenance and support of a person for whom the deceased had responsibility to make</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>provision.</td>
</tr>
<tr>
<td>Queensland</td>
<td>Succession Act 1981</td>
<td>41(1)</td>
<td>…adequate provision is not made from the estate for the proper maintenance and support of</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>the deceased person’s spouse, child or dependant</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Inheritance (Family and Dependents Provision) Act 1972</td>
<td>6(1)</td>
<td>…is not such as to make adequate provision from the estate for the proper maintenance,</td>
</tr>
<tr>
<td></td>
<td>(Note that amendments to this Act are currently under</td>
<td></td>
<td>support, education or advancement in life of any the person [eligible]…</td>
</tr>
<tr>
<td></td>
<td>consideration – see the Inheritance (Family and Dependents</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Provision) Bill 2007 (WA)). These proposed amendments are</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>not substantive.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Australia</td>
<td>Inheritance (Family Provision) Act 1972</td>
<td>7(1)(b)</td>
<td>…a person entitled to claim the benefit of this Act is left without adequate provision for his</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>proper maintenance, education or advancement in life.</td>
</tr>
</tbody>
</table>
### Section 2

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Act</th>
<th>Section</th>
<th>Wording</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>Testator’s Family Maintenance Act 1912</td>
<td>3(1)</td>
<td>...any person by whom or on whose behalf application for provision may be made under this Act is left without adequate provision for his proper maintenance and support... having regard to all the circumstances of the case.</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Family Provision Act 1970</td>
<td>8(1)</td>
<td>... if the Court is satisfied that adequate provision is not available... for the proper maintenance, education and advancement in life of the person...</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Family Provision Act 1969</td>
<td>8(2)</td>
<td>...adequate provision for the proper maintenance, education or advancement in life of the applicant is nor available...</td>
</tr>
</tbody>
</table>

As can be seen, Queensland, Tasmania and Victoria refer to ‘proper maintenance and support’. New South Wales, South Australia, and the Australian Capital Territory use the term ‘proper maintenance, education or advancement in life’, the Northern Territory has ‘for the proper maintenance, education and advancement in life’, while the Western Australian legislation has the term ‘proper maintenance, support, education or advancement in life’. These differences in wording have not caused undue confusion since there has been encouragement to uniformity of interpretation across the States by the High Court of Australia in its decisions on appeal on the issue of family provision in wills.

---

28 Succession Act 1981 (Qld) section 41; Testator’s Family Maintenance Act 1912 (Tas) section 3(1); Administration and Probate Act 1958 (Vic) section 91.

29 Succession Act 2006 (NSW) section 59(2); (previously) Family Provision Act 1982 (NSW) sections 7, 8, and 9(2); Inheritance (Family Provision) Act 1972 (SA) section 7(1); Family Provision Act 1969 (ACT) section 8(1).

30 Family Provision Act 1970 (NT) section 8(1).

31 Inheritance (Family and Dependants Provision) Act 1972 (WA) section 6(1).

32 In Coates v National Trustees Executors and Agency Co. Ltd (1956) 95 CLR 494 at 507, Dixon CJ said: ‘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.’
2.2 OTHER JURISDICTIONS

The only countries with family provision legislation are Australia, Canada, New Zealand and the UK. India and Ireland have partial provision requirements. The current applicable Acts in other jurisdictions are:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Act</th>
<th>Section</th>
<th>Wording</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>Family Protection Act 1955</td>
<td>4(1)</td>
<td>…adequate provision is not available from his or her estate for the proper maintenance and support of the persons…</td>
</tr>
<tr>
<td>England and Wales</td>
<td>Inheritance (Provision for Family and Dependents) Act 1975</td>
<td>2</td>
<td>…is not such as to make reasonable financial provision for the applicant…</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979</td>
<td>3(1)</td>
<td>…on the ground that the disposition of the deceased’s estate…is not such as to make reasonable financial provision for the applicant.</td>
</tr>
<tr>
<td>Canada: Alberta</td>
<td>Family Relief Act 2000</td>
<td>3(1)(a)</td>
<td>…for the proper maintenance and support of the person’s dependants…</td>
</tr>
<tr>
<td>Canada: Ontario</td>
<td>Succession Law Reform Act 1990</td>
<td>58(1)</td>
<td>Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them…</td>
</tr>
<tr>
<td>Canada: Saskatchewan</td>
<td>Dependants’ Relief Act 1996</td>
<td>3</td>
<td>…for an order to provide reasonable maintenance for the dependant.</td>
</tr>
<tr>
<td>Canada: British Columbia</td>
<td>Wills Variation Act 1996</td>
<td>2</td>
<td>…make adequate provision for the proper maintenance and support of the testator’s spouse or children…</td>
</tr>
<tr>
<td>Canada: Manitoba</td>
<td>Dependants Relief Act 1990</td>
<td>2(1)</td>
<td>If it appears to the court that a dependant is in financial need, the court… may order that reasonable provision be made… for the maintenance and support of the dependant.</td>
</tr>
<tr>
<td>Canada: Nova Scotia</td>
<td>Testators’ Family Maintenance Act 1989</td>
<td>3(1)</td>
<td>Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant…</td>
</tr>
<tr>
<td>Canada: Newfoundland and Labrador</td>
<td>Family Relief Act 1990</td>
<td>3(1)</td>
<td>…without having made in his or her will adequate provision for the proper maintenance and support of his or her dependants or 1 of them…</td>
</tr>
<tr>
<td>Canada: New Brunswick</td>
<td>Provision for Dependents Act 1991</td>
<td>2(1)</td>
<td>…are not sufficient to provide adequately…for the maintenance or support of the dependant or dependants.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Act</td>
<td>Section</td>
<td>Wording</td>
</tr>
<tr>
<td>------------------------------</td>
<td>------------------------------------------------------------------</td>
<td>---------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Canada: Prince Edward Island</td>
<td>Dependants of a Deceased Person Relief Act 1988</td>
<td>2</td>
<td>Where a deceased has not made adequate provision for the proper maintenance and support of his dependants or any of them...</td>
</tr>
<tr>
<td>Canada: Yukon Territory</td>
<td>Dependants’ Relief Act 2002</td>
<td>2</td>
<td>…for the proper maintenance and support of the dependants or any of them.</td>
</tr>
<tr>
<td>Canada: Northwest Territories</td>
<td>Dependants’ Relief Act 1988</td>
<td>2(1)</td>
<td>…for the proper maintenance and support of his or her dependants or any of them...</td>
</tr>
<tr>
<td>Canada: Nunavut</td>
<td>Dependants’ Relief Act 1988</td>
<td>2(1)</td>
<td>…for the proper maintenance and support of his or her dependants or any of them...</td>
</tr>
<tr>
<td>Ireland (a hybrid system of partial provision and partial forced shares)</td>
<td>Succession Act 1965 (read together with the Intestates’ Estates Act 1954, s5)</td>
<td>56</td>
<td>A spouse has a forced share (called a legal right share) of one half the estate if there are no children, and one third if there are children. This is to be enforced over all other bequests and devises, or shares on intestacy. However, section 56 allows a surviving spouse to require appropriation of the dwelling he or she occupied with the deceased, and household chattels, out of the estate to her/ his use, as part of the above share.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>117</td>
<td>This section allows a Court to decide that if a testator has ‘failed in his moral duty to make proper provision for the child in accordance with his means, whether by his Will or otherwise’, to order such provision for the child out of the testator’s estate as it thinks just. This applies to all children born in or out of marriage. The Court must consider this application from the point of view of a prudent and just parent. This is not to affect the legal right share of the surviving spouse.</td>
</tr>
</tbody>
</table>
2.3 REFORM OF FAMILY PROVISION LAW – UNIFORM LEGISLATION PROPOSALS IN AUSTRALIA

Discussion has been ongoing on the need for a uniform approach to family provision legislation in Australia. The Queensland Law Reform Commission has been coordinating a joint project with the Standing Committee of Attorneys General to investigate uniform succession laws for some time. The project is divided into four stages, of which one is family provision. The papers so far produced on family provision have been:

- The National Committee’s Final Report to the Standing Committee on Family Provision (No. 28, December 1997)
- Supplementary Report on Family Provision, (No. 58, July 2004); also published by the Law Reform Commission of NSW as Report 110 (May 2005), including a model Family Provision Bill.33

In the 1997 report, the National Committee recommended the curtailment of family provision in the uniform laws in that the only appropriate applicants would be a husband, wife, a non-adult child,34 and a person for whom the deceased person had a responsibility to make a provision (as defined in the Victorian Administration and Probate Act 1958). De facto spouses were not included. However, in the supplementary report of 2004, de facto spouses were included,35 and this was reflected in the Family Provision Bill 2004 which accompanied the report. Clause 6(1) of that Bill lists:

- the wife or husband of the deceased person at the time of the deceased’s death,
- a person who was, at the time of the deceased person’s death, the de facto partner of the deceased person,
- a non-adult child of the deceased person.

Clause 7(1) further provides that a person to whom the deceased owed a responsibility to provide maintenance, education or advancement in life may apply for provision.

The recommended approach therefore combines a status criterion and a circumstances criterion for application.36 The status of the applicant as wife, husband, de facto partner or minor child will be considered, or, if persons other than those listed in clause 6(1) apply, a circumstances approach based on whether the deceased had responsibility to make provision for the applicant will be used. Adult children would clearly fall into the ‘circumstances’ category in this regime, presumably based on dependency. The issue of whether same sex partners should be included in either the clause 6(1) category, the clause 7(1) category, or not at all, has been left for each separate jurisdiction to decide.

33 New South Wales has adopted the model provisions as Chapter 3 of the amended Succession Act 2006 (NSW) – see the Succession Amendment (Family Provision) Bill 2008, introduced into the New South Wales parliament on 26 June 2008. The Act was passed by the New South Wales Legislative Council on 24 September 2008, and sent to the Legislative Assembly on the same date for concurrence. The Act repeals the previous Family Provision Act 1982 (NSW).
34 This meant a child less than 18 years of age.
Clause 6(2) defines a ‘non-adult child’ as a child of the deceased person who was a minor when the deceased person died, or who was born after the deceased person died,37 but does not include a step-child of the deceased person in the definition. The time limit for applications is not later than 12 months after the deceased’s death: clause 9(1). Clause 10(1) is the operative provision allowing the court to make an order for provision if the person is an appropriate applicant, and the will has not made adequate provision for the proper maintenance, education or advancement in life of that person. The numerous matters to be taken into account by the court are listed in clause 11(2).

The National Committee also recommended that the concept of a ‘notional estate’ in the New South Wales legislation be adopted nationally. Notional estate refers to assets of the estate which are brought back into an estate after having been disposed of by the testator before death. In particular, the recommendations promote the necessity of severing joint tenancies before death in appropriate situations,38 and the clarification of the situation when the recipient of provision subsequently dies and passes the provision assets on to third parties.39 These issues are discussed further below at section 3.5.3.

It should be noted, however, that agreement on the inclusion of notional estate is far from uniform across the various state law societies. For example, the Queensland Law Society believes that notional estate provisions are not a necessary reform,40 given the decision in Bridgewater v Leahy.41 However, New South Wales has now adopted the model provisions (except as to permitted applicants) as Chapter 3 of the amended Succession Act 2006 (NSW) – see the Succession Amendment (Family Provision) Bill 2008, introduced into the New South Wales parliament on 26 June 2008, and passed by the Legislative Council on 24 September 2008.42 This amendment repeals the former Family Provision Act 1982 (NSW), and may give impetus to the adoption of the model provisions, or some of them, in other states.

At the same time as the Australian review has been taking place, the New Zealand Law Commission has reviewed the family provision legislation in that country and has recommended that adult children should not be appropriate applicants on the basis that such children are seldom in need and that a moral basis for provision for adult applicants over 19 is absurd, and a mere gloss on the legislation unsupported by the parliament.43 No action has been taken on any of the recommendations made in New Zealand to date.

---

37 This refers to what is currently called in some jurisdictions a child en ventre sa mere, the traditional legal term for an unborn child.
38 Clause 27(2)(b).
39 Clause 27(2)(a).
41 (1998) 194 CLR 457, where property disposed of inter vivos was held to be subject to claims in equity under the doctrine of undue influence and of unconscionable bargains. See further at 3.5.1 below.
42 The bill was sent to the Legislative Assembly for concurrence on the same date.
In Canada, the Uniform Law Conference of Canada (ULCC) produced a uniform Dependants’ Relief Act in 1974 which was enacted by Ontario, Manitoba, New Brunswick, Prince Edward Island, North West Territory and Yukon Territory, and adopted in similar form in the Code Civil du Quebec. Apart from Manitoba, which was the last province to adopt the uniform Act in 1990, the other Canadian jurisdictions which enacted the uniform legislation have renamed, reviewed, or adapted it since it was first implemented. Although the uniform Dependants’ Relief Act remains as a recommendation of the ULCC, no further adoptions have occurred since 1990. In addition, British Columbia has produced the Report on Statutory Succession Rights, from which there have been no resulting alterations to the law, and Manitoba the Report on Wills and Succession Legislation which recommended some very minor alterations to the law of family provision. As only Alberta, British Columbia, Manitoba, Nova Scotia and Saskatchewan have law reform commissions in Canada, any strong impetus to reform family provision law has not been observable beyond academic writings.

However, most of the Canadian provinces already do not allow applications for family provision from adult children, unless disabled in some way, or from step-children, and some restrict applications from de facto and same sex partners. Nevertheless, this type of restriction in family provision laws could be difficult to implement in Canada because of the operation of the Canadian Charter of Rights and Freedoms, especially article 15(1), and it seems that the interaction of family provision law and the non-discrimination provision of the Charter has not been fully worked through to date.

---

47 Saskatchewan is alone in having a ‘needs’ category for children over 18, while British Columbia, Nova Scotia, Newfoundland and Labrador, and Ontario do not specify an age for the definition of ‘child’. Five provinces specify a ‘child under 18’, although Yukon has a ‘child under 16’, and the North West Territories and Nunavut have a ‘child under 19’.
48 Ontario, Manitoba, the North West Territories and Nunavut have categories of ‘dependant’ which could include a step-child, though this is not made explicit.
49 Nova Scotia and Newfoundland and Labrador. This can also depend on the definitions used. For example, in Alberta, the definition that could include a de facto is that of ‘adult interdependent partner’, but not all de facto spouses will fit this description.
50 Same sex partners are excluded in all provinces except Prince Edward Island.
51 Article 15 (1) states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
In England, Wales and Northern Ireland, the Inheritance (Provision for Family and Dependents) legislation requires that applicants be awarded ‘reasonable financial provision’ from an estate. Whilst there is a large pool of applicants, the provision awarded is more restricted than in Australia, New Zealand or Canada. This is because provision for spouses (as defined) is awarded at a reasonable level in the circumstances, whether or not it is required for their maintenance, but for other applicants provision is limited to an amount appropriate for maintenance only. The UK is not currently reviewing family provision laws as they apply in England, Wales and Northern Ireland, but an increasing number of high profile family provision claims has recently made news in the British press.\footnote{Olivia Gordon, ‘Inheritance disputes: where there’s a will there’s a war’ The Telegraph (London), 20 August 2008. In that article, one firm is quoted estimating an increase of 200\% in family provision cases in the past three years.} One case yet to be decided in court is illustrative of a similar situation for charities in Britain as in Australian case law reports. In that case, an adult daughter is seeking provision from her parents’ will in which they left an entire estate of £2.3 million to the RSPCA. On the facts as presented, the daughter has a very good case for a large share of the estate.\footnote{The claimant is Dr Christine Gill, aged 58. The case will be heard in November 2008.}
Family provision law is a discretionary jurisdiction, and outcomes vary from case to case depending on the particular circumstances of the family in question. However, there are overarching principles to be discerned from consideration of the case law. Some of these principles are relatively fixed, while others are still unsettled or in flux because of changing social conditions and expanding notions of what constitutes a family in Australia.

3.1 JURISDICTION

Determining jurisdiction in family provision cases has been held to be a two-stage process in Australia.\(^\text{54}\) The two issues to be resolved are, respectively, jurisdictional and discretionary. The court has first to determine whether the applicant is an appropriate applicant, and if so, if the applicant has been left without adequate provision for his or her proper maintenance and support. The second issue is whether the court will exercise its discretion to make an order in the particular circumstances, and the nature of that order. This neat division is subject, however, to any moral claims which are found to be present (see 3.4 below), and a consideration of all the relevant circumstances.\(^\text{55}\)

3.2 DIFFERENCES IN WORDING OF LEGISLATION AMONG JURISDICTIONS

The courts have been consistent in emphasising that the differences in wording of family provision legislation among the various jurisdictions in Australia (and indeed elsewhere) are not to be regarded as crucial to outcomes. This means that the legislation is interpreted widely. In *Coates v National Trustees Executors and Agency Co Ltd*,\(^\text{56}\) Dixon CJ made this clear, stating that: ‘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…’ (at 506-507, emphasis added). In the same case, Fullager J, at 517, said that ‘…the searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach’ (emphasis added).\(^\text{57}\)

---


\(^{56}\) (1956) 95 CLR 494.

\(^{57}\) See also on the same point: *Bosch v Perpetual Trustee Co (Ltd)* (1938) AC 463; *Pontifical Society for the Propagation of the Faith v Scales* (1961-62) CLR 9, 18.
Whilst true uniformity of interpretation cannot be guaranteed in these cases, since each will turn on its facts to some extent, and the jurisdiction is wholly discretionary, the only word regarded as really important in the cases seems to be ‘proper’. Has the provision made to the applicant been proper? In *McCosker v McCosker*, Dixon CJ and Williams J, in a joint judgement, said: 58

‘The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life. As the Privy Council said in *Bosch v Perpetual Trustee Co (Ltd)* 1938 A.C. 463, the word ‘proper’ in this collocation of words is of considerable importance. It means ‘proper’ in all the circumstances of the case…If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator’s testamentary dispositions to the necessary extent.’

There has also been discussion of the difference in meaning between ‘proper’ and ‘adequate’. In *Bowyer v Wood*, 59 in a unanimous decision, the Full Court of South Australia said:

‘When determining whether the testatrix has failed to make adequate provision out of her estate for the proper maintenance of the plaintiff, it is necessary to consider what is meant by the words ‘adequate’ and ‘proper’. This meaning has been considered on many occasions. The words ‘adequate’ and ‘proper’ are always relative…There are no fixed standards and the court is left to form opinions upon the basis of its own general knowledge and experience of current social conditions and standards…The word ‘proper’ connotes something different from the word ‘adequate’…The word ‘proper’ connotes an ethical position as to what allowance should be made.’

This follows on from the words of Privy Council in *Bosch v Perpetual Trustees* in 1938: 60

‘The use of the word ‘proper’ in this connection is of considerable importance. It connotes something different from the word ‘adequate’. A small sum may be sufficient for the ‘adequate’ maintenance of a child, for instance, but, having regard to the child’s station in life and the fortune of his father, it may be wholly insufficient for his ‘proper’ maintenance. So, too, a sum may be quite insufficient for the ‘adequate’ maintenance of a child and yet may be sufficient for his maintenance on a scale that is ‘proper’ in all the circumstances. A father with a large family and a small fortune can often only afford to leave each of his children a sum insufficient for his ‘adequate’ maintenance. Nevertheless, such sum cannot be described as not providing for his ‘proper’ maintenance, taking into consideration ‘all the circumstances of the case’ as the sub-section requires shall be done.’

---

58 (1957) 97 CLR 566, at 571-572.
60 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, at 476.
The comparison has also been alluded to by the High Court in the following terms:\textsuperscript{61}

‘Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors.’

It seems clear that ‘proper’ and ‘adequate’ are not to be considered as having the same meaning, but although not all jurisdictions use the same combination of words in their family provision legislation, these words individually are to be interpreted consistently.

### 3.3 APPROPRIATE APPLICANTS

The original purpose of the legislation was to provide for widows and dependent children of testators who disinherited them, or left them without adequate provision for a normal life. However, again the courts have been liberal in their interpretation, and legislators have followed the trend, so that the pool of applicants has steadily widened.

**TABLE 3: APPLICANTS PERMITTED IN EACH JURISDICTION IN AUSTRALIA**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Spouse</th>
<th>De facto (or similar (same sex))</th>
<th>Former spouse (if dependent)</th>
<th>Child (includes stepchild)</th>
<th>Grand-child (if dependent)</th>
<th>Parent (if dependent on the spouse, partner, or child)</th>
<th>Other dependent (may include same sex partner)</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Victoria</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>‘Person for whom the deceased had responsibility to make provision’</td>
</tr>
<tr>
<td>Queensland</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x (limited – see paragraphs below)</td>
</tr>
<tr>
<td>South Australia</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x (includes brother or sister entitled because of care given to deceased)</td>
</tr>
<tr>
<td>Western Australia</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Tasmania</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
<td>x</td>
</tr>
</tbody>
</table>

\textsuperscript{61} Vigolo v Bostin [2005] HCA 11, per Callinan and Heydon JJ at paragraph [122].
Although summarising the situation generally, this table does not reflect the subtle differences in the wording pertaining to applicants permitted in the various state provisions. For example, Victoria only has ‘a person for whom the deceased had responsibility to make provision’ which clearly can be widely interpreted. New South Wales previously had an ‘eligible person’ which is a term defined to include a spouse, a person in a domestic relationship, a child of those relationships, a former spouse, a grandchild (if dependent), or a member of the deceased’s household (if dependent). The new Chapter 3 of the Succession Act 2006 (NSW) lists at section 57 a spouse, a de facto spouse, a child of those relationships, a former spouse, a person who was wholly or partly dependent on the deceased person, a grandchild who was a member of the deceased person’s household, and a person in a close personal relationship with the deceased at the time of the death. Many of these terms can be interpreted by the court. The New South Wales Attorney-General, in his second reading speech for the new legislation in New South Wales, specifically noted that New South Wales had not adopted the suggested claimant list from the model Bill of 2004 because the New South Wales listing, seemingly wide though it is, was more specific. He said:

‘The model bill restricts the list of those who are automatically entitled to make an application for provision to spouses, de facto partners and non-adult children of the deceased. It contains a ‘catch-all’ category of claimant permitting anyone to whom the deceased owed a responsibility to provide maintenance, education or advancement in life to apply to the court for a family provision order. Such a change may lead to a flood of new claims being made on estates from people who are not currently entitled to apply in New South Wales. Adult children would also be forced to demonstrate the requirement of the deceased’s responsibility to them. This may lead to more lengthy and expensive litigation, as adult children seek to prove they meet this requirement. The bill, therefore, does not adopt the model bill eligibility provisions.’ (emphasis added)

In Queensland, the issue is one of dependency – a claimant can be a spouse, defined to include a de facto spouse, or dependent former spouse, a child, defined to include an adopted or step child, or a dependant. The latter term is defined to be a parent, a parent of a surviving child, or a child less than 18 years. South Australia allows application by a spouse, divorced spouse, de facto partner, child, child of a spouse or de facto partner who is entitled to be maintained, grandchild, parent entitled to provision (because of care given to deceased), or brother or sister entitled to provision (because of care given to deceased). Western Australia lists spouse, de facto partner, former spouse or de facto partner, child (including en ventre sa mere), grandchild if parent dead, even if only en ventre sa mere, and parent. Tasmania permits application by a spouse (includes de facto spouse), children (includes adopted and step children), parents (if no spouse or children), or an ex-spouse or ex-de facto spouse entitled to receive maintenance at the time of the death.

The Australian Capital Territory allows application by a partner, a person in a domestic relationship for more than two years, child, step-child (if being maintained), grandchild (if the parent who is child of the deceased is dead, or the grandchild is not being

maintained by parent or parents), or parent (if being maintained, or there is no partner or child of the deceased). The Northern Territory has spouse or de facto partner, former spouse or de facto partner, children of those relationships, step-child (if being maintained), grandchild (if parent has died or parents are not providing), parent (if being maintained or there is no spouse, partner or child). In New Zealand, the home of family provision law, applications are permitted by a spouse or civil union partner, a de facto spouse, children, grandchildren living at the time of death, step-children entitled to be maintained immediately before the death of testator, parents (if being maintained before death of testator, or if there is no spouse, civil union partner, de facto spouse or children of these relationships).

Clearly this multiplicity of expressions could be streamlined. The model bill provisions allow applications as of right only by a spouse, a de facto spouse, or a non-adult child, with an extra provision for those falling under a general rubric of dependency. The new legislation in New South Wales does not adopt this formula at section 57, but rather maintains the status quo as to the permitted applicants in that state. There are no proposals to alter the situation as to applicants in any other state or territory.

3.3.1 Spouses

The purpose of family provision legislation was originally to provide support for widows and children of testators who might have willed their estates away from their immediate families for whatever reason, but particularly to charities, strangers, or to those remoter family members who might have unduly influenced the making of the will. In this sense, the legislation introduced into New Zealand and then Australia, Canada and the UK was somewhat in the vanguard of legal history in that it was aimed, in the context of its time, at the protection of women.

In introducing the Bill for what became the 1916 Act, the New South Wales Attorney-General said:

‘It is remarkable that in Australia, where the rights of women have developed so rapidly in the matter of property, we have wiped out whatever right a woman has in the estate of her husband. The dower which existed here for many years exists no longer. It was abolished in the year 1890, and to-day a man may leave the whole of his property, both real and personal, to any stranger to whom he chooses to leave it. The wife may have been with him as a partner for forty or fifty years. She may have assisted him in acquiring whatever wealth he possesses; yet he, dying, may will the property away and leave her dependent on the kindness of friends or the charity of the State. During his lifetime he cannot do that, for it is incumbent on him to maintain his wife. The object of the bill is to secure that after her husband’s death the right of the wife to get sufficient from his estate to maintain her shall continue, and the right of his children shall be equally preserved.’

63 Indeed New Zealand, and to a lesser extent Australia, have always been in the vanguard on like issues. For example, New Zealand first introduced old age pensions in 1898 and widows’ pensions in 1911. Some argue that one of the drivers for New Zealand’s legislation on family provision was the wealthy testators could leave nothing to their widows expecting that they would receive the widow’s pension. However, as the legislation was introduced in 1900, the driver in this context could not have been the widow’s pension but rather the old age pension.

64 New South Wales, Parliamentary Debates, Legislative Assembly, 30 August 1916, 1239 (Attorney-General).
This remained the thrust of the legislation in relation to widows until relatively recent times. In *Schaefer v Schuhman* Lord Simon of Glaisdale said: 65

‘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. The wife’s needs and, generally, her economic impairment subsist...Most societies enforce by law the husband and parent’s duty to provide for dependants not only during joint lives but after death as well...The legislative intention cannot therefore be in doubt; it was to prevent family dependants being thrown on the world with inadequate provision...’

Of course, in the light of the equality and financial independence gained by women over the 108 years since family provision legislation was first introduced, we might argue that such paternalism is unnecessary in the 21st century, but the case law does not support that contention. A testator’s duty to his widow is still to ensure that she is secure in her home, that she has enough to permit her to live in the style to which she is accustomed, and that she has a fund to meet any unforeseen contingencies.66 This duty has changed very little in the case law since it was first enunciated in *Allardice v Allardice* in 1910 as consisting of such maintenance as a wife has been accustomed to during the life of her husband, taking into account the station in life of the parties, the means of the testator, the personal property and income of the widow, her age and health, and the general circumstances in which she finds herself at the time of the testators’ death.67 Moreover, this duty is above all others including any desire to be generous to charity.68

In general, the same principles apply in the case of widowers, but nature having provided a longer life span for women, the majority of the cases in this category concern the position of widows. The seminal case on the position of widowers is *Nosworthy v Nosworthy*.69 In that case, the testatrix left two sizeable legacies to charity and the residue of her estate to her husband. His application for further provision resulted in a reduction of the legacies to charity in his favour. The court took into account his financial circumstances and his age in making this provision. This position has also changed very little in 102 years.70

---

67 (1910) NZLR 959, 969.
68 *Orr v Public Trustee* [1930] NZLR 732, 735. See on the same point: *Pulleng v Public Trustee* [1922] NZLR 1022, 1029; *Collins v Public Trustee* [1927] NZLR 746, 750.
69 (1906) 26 NZLR 285.
However, some recent case law has cast doubt on the validity of the *Allardice* style duty to widows and widowers. In *Marshall v Carruthers*\(^71\) and *Bladwell v Davis*,\(^72\) views were expressed by the court that the duty enunciated in *Luciano v Rosenblum* to provide a home, a similar lifestyle to the situation before widowhood, and a fund for unforeseen contingencies,\(^73\) was too widely stated, especially for widowers, and also for widows ‘not in a position of economic disadvantage’, or where the marriage had been short-term.\(^74\) Despite this, the discretionary nature of family provision means that most widows are continuing to be provided for on a *Luciano v Rosenblum* basis,\(^75\) while others have some inroads made into their provision in order to provide legacies for children.\(^76\) It is particularly notable that a life interest is seldom seen as a suitable mode of provision for a spouse, for the reason that the house may be needed to raise a bond for an aged care hostel entry fee. It was said in *Golosky v Golosky*, by Kirby P. (as he then was):\(^77\)

‘A mere right of residence will usually be an unsatisfactory method of providing for a spouse’s accommodation...because a spouse may be compelled by sickness, age, urgent supervening necessity or otherwise, with good reason, to leave the residence.’

Nevertheless, there are circumstances where life interests are awarded to claimants, particularly in cases of marriages of short duration, or where conduct has been found to be inappropriate, but not disentitling.\(^78\)

In the case of former spouses, the key to obtaining provision is dependence on the testator immediately before his or her death. In these cases, ‘dependence’ means more than financial, economic or material dependence, but can include, in addition to those categories, emotional dependence.

\(^71\) [2002] NSWCA 47.
\(^72\) [2004] NSWCA 170.
\(^73\) (1985) 2 NSWLR 65, 69-70.
\(^75\) *O’Loughlin v Low* [2002] NSWSC 222; *Reynolds v Stanley* [2004] NSWSC 685; *Oun v Brimelow* [2006] NSWSC 1115. This is also true in other jurisdictions. In Canada e.g. *Tataryan v Tataryan* [1994] 2 S.C.R. 807, an appeal to the Supreme Court of Canada from British Columbia; and *Erlichman v Erlichman* [2002] 45 ETR (2d.) 215 (British Columbia Court of Appeal).
\(^78\) See *Abrego v Simpson* [2008] NSWSC 215, at [23].
3.3.2 DE FACTO AND SAME SEX PARTNERS

All jurisdictions in Australia allow for de facto partners, as defined in each jurisdiction, to apply for family provision. Such applications are not, in general, controversial. In most jurisdictions 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. In the 2007 case of Nelligan v Crouch, the claimant for provision had been left nothing in the will of the deceased, and, because of the failure of a bequest to the executor, the whole estate was left to the Royal Flying Doctor Service (RFDS). The plaintiff had been the same sex partner of the deceased for a long period of time, though they had for some years been separated by the demands of personal and family illness. The judge determined that they were not living together in the sense of de facto partners, nor were they in a ‘close domestic relationship’ at the time of death. However, he found that the claimant had been part of the deceased’s life for more than 30 years, and that:

‘It was the fact that they lived together for a long time, the fact that the relationship did not cease even though they lived separately and apart after 1997 in the sense that the contact remained and the care and consideration for each other still remained in those years thereafter. There were also the obvious contributions to the property...’

The judge awarded the claimant $100,000 from an estate of approximately $180,000 after costs. The RFDS received the remainder, which represented a third of the original legacy.

However, in an almost identical same sex partner situation in Queensland, decided the month before Nelligan, the claimant failed to prove a relationship analogous to that of a de facto partner, and thus to a spouse, and could not obtain provision. This illustrates one area of family provision law, which, because the concept of ‘family’ is fluid in the 21st century, has not been worked through fully.

The complexities in this area can be illustrated more vividly by the Victorian case of Bentley v Brennan; Re Bull (dec’d). In that case, the applicant for provision was an adult male who had maintained a same sex relationship for twenty years in adulthood with the deceased who had also abused the applicant for eight years as a minor. Was the applicant entitled to provision? Was this to be a means of, in effect, compensation for a crime? Section 91(1) of the Victorian legislation allows provision to be made for the proper maintenance and support of any person for whom the deceased had responsibility to make provision. Despite the circumstances, the judge concluded that the applicant was not someone in this position. He said:

---

79 Summers v Garland [2006] QSC 85 and Houston v Butler [2007] QSC 284 are examples of substantial provision being made for a de facto partner. Underwood v Underwood [2008] QSC 159 is an example of further provision being made for a de facto spouse of only three years, but who had cared for the testator in his last illness.
80 [2007] NSWSC 840 at paragraph [60].
81 Barker v Linklater [2007] QSC 125.
83 [2006] VSC 113 at [24] and [31].
‘...reference to accepted community standards requires a consideration of what those standards of the general community are...They may change from time to time. For example, I would have little difficulty in concluding today that a relationship between the testator and an unmarried heterosexual partner or between a testator and a homosexual partner would today be seen by the general community as one which might give rise to a moral obligation just as a relationship with a spouse. The challenge presented by a case such as the present arises at a different level. I am required to...form an assessment of the true relationship which existed between the deceased and the claimant in order to determine the existence or not of the moral duty...Difficulty arises where this is a relationship between members of a community with which the judge is not familiar. This may be a particular ethnic or social community; it may be a community whose bond is that of sexual orientation...the judge must do the best he or she can, bringing to bear wisdom, an openness of mind drawing upon long experience of life and human conduct and attitudes, and above all, resisting the temptation to apply perceived stereotypes. Another temptation to be resisted is to assume that all members of the community think and conduct themselves like the judge and share the same values and moral imperatives...It is here that one must be cautious of the concept of moral obligation. Doubtless on his deathbed the wise and just testator might be encouraged to see as his moral obligation to hold out a hand of friendship to those whom he had wrongfully rejected; a hand of forgiveness to those who had wronged him; and to make good, if this be possible, any damage which he has caused to another in his lifetime. It may be that the general community would applaud his decision to make provision in his will for such a person by way of atonement. But this is not the role of Part 4 of the Administration and Probate Act 1958...’ (emphasis added).

It seems clear then that the purpose of this type of legislation is to make provision for those left without proper maintenance and support. It is not to make good any familial or moral lapses, despite its discretionary nature. To make family provision laws a means of compensation, revenge, or atonement would be to take the discretionary element too far.

### 3.3.3 ADULT CHILDREN

The most contentious category of applicant is that of adult children, especially adult sons. The position of adult children was first discussed in the New Zealand decision of Allardice v Allardice.84 In that case, the testator had been married twice, with four adult married daughters and two adult sons by his first wife, and a widow and six children from his second marriage. He left his entire estate to his second family, with no provision for the adult children. At first instance, the Supreme Court denied any provision to all of the six adult children of the testator’s first marriage. However, on appeal to the New Zealand Court of Appeal, three of the married daughters were granted provision of small amounts by monthly instalments. The court was not entirely dismissive of the claims of the adult sons, but felt that they should be self-supporting, stating:

‘As to the sons, I have doubts whether some provision ought not to be made for them. They are, however, physically able...If they had any push, they should, considering their age, have ere this done something for themselves, and to settle money on them now might destroy their energy and weaken their desire to exert themselves.’

84 (1910) 29 NZLR 959, at 969-975.
In Australia, the adult son issue was discussed by Fullager J in *In re Sinnott*:\(^85\)

‘No special principle is to be applied in the case of an adult son. But the approach of the Court must be different. In the case of a widow or an infant child, the Court is dealing with one who is prima facie dependent on the testator and prima facie has a claim to be maintained and supported. But the adult son is, I think, prima facie able to ‘maintain and support’ himself, and some special need or some special claim must, generally speaking, be shown to justify intervention by the Court under the Act.’

McTiernan J in *Pontifical Society for the Propagation of the Faith v Scales*,\(^86\) stated that:

…the fact that an applicant is an adult son does not necessarily mean that relief in applications of this character must be refused. But such cases present special difficulties and, of course, before relief can be granted it must appear that the circumstances are such that the applicant is …left without ‘adequate provision for his proper maintenance and support’. But what is ‘adequate’ and what is ‘proper’ must be determined in the light of all the circumstances of the case’.\(^87\)

The special need requirement has been gradually lessened, however. Gibbs J in *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* said:\(^88\)

‘In some cases a special claim may be found to exist because the applicant has contributed to building up the testator’s estate or has helped him in other ways. In other cases a son who has done nothing for his parents may have a special need. This may be because he suffers from some physical or mental infirmity, but it is not necessary for an adult son to show that his earning powers have been impaired by some disability before he can establish a special need for maintenance and support. He may have suffered a financial disaster; he may be unable to obtain employment; he may have a number of dependants who rely on him for support which he cannot adequately provide from his own resources. There are no rigid rules: the question whether adequate provision has been made for the proper maintenance and support of the adult son must depend on all the circumstances…’(emphasis added).

Later cases (see Appendix A) established that there are no strict principles in awarding provision to adult sons, or to adult children generally.\(^89\) Each case is subject to judicial discretion with the circumstances of the adult child, whether of health, finances or any other relevant issue, being discussed in some detail before the judge awards whatever provision he or she thinks ‘proper’.

---

\(^{85}\) (1948) VLR 279, at 280.

\(^{86}\) (1961-62) 107 CLR 9, at 18.

\(^{87}\) See also on the same point: *McCosker v McCosker* (1957) 97 CLR 566; *Stott v Cook* (1960) 33 A.I.R. 447; *Hughes v National Trustees, Executors and Agency Company of Australasia Ltd* (1979) 143 CLR 134.

\(^{88}\) (1979) 143 CLR 134 at 147.

The more recent reviews by law reform bodies of family provision laws have all recommended that adult children should not be appropriate applicants for family provision. The New Zealand Law Commission (NZLC) has pointed to anomalies in the Family Provision Act 1955 (NZ) stating:

‘Claims by adult children under the Family Provision Act 1955 are often made on the basis not of need but on the basis that the will-maker breached an undefined moral duty. This regime is indefensible because will-makers cannot determine and comply with its requirements in advance, and because it may disregard moral imperatives of the will-maker that are not shared by whichever judge is called upon to decide the claim. Will-makers, during their lifetime, are required by law to provide economic support only to certain children under 19.’

The NZLC is making it clear that it favours the same provision being required before and after the death of the will-making parent. Two cases are discussed in the report to illustrate what the NZLC sees as judicial over-expansion of the original concept of family provision. In Re Blakely, the judge found that an adult son did not require any provision because he was not in any need. His father’s will, which had left a large part of his estate to charity, was therefore not interfered with to make provision for the adult son, since the father had fulfilled his obligations to his widow and children. However, in Re Forward, the judge did not permit the testator to leave his money as he chose because of a breach of moral duty to his two adult sons. The effect of this expansion of the law over 40 years is that adult children in New Zealand now have a right to apply for a share in their parents’ estate, whatever their age or financial position.

The NZLC therefore recommends in its report that only children, as defined, be entitled to make a ‘support claim’ under family provision legislation. Adult children should be denied the right of claim in all but three situations:

- Where adult, independent children have conferred valuable benefits on a parent during the parent’s lifetime
- Where there is genuine need, and it is possible to meet the claim without unfairness to other beneficiaries, to allow periodic payments to the adult child to alleviate their need (designated a ‘needs claim’ for a ‘needs award’)
- Where what is sought by the adult child is no more that a memento or keepsake of modest value.

---

91 [1957] NZLR 875, 877.
92 Unreported, High Court of New Zealand, 1996, 6.
94 Ibid, ‘Overview of the draft act’, paragraph 70, defines children as ‘minors, or under 25 and undertaking educational or vocational training, or unable to earn a reasonable, independent livelihood because of a physical, intellectual or mental disability which occurred before the child reached 25’.
95 Ibid, paragraphs 72, 77.
Stepchildren are recommended to be denied claims unless the will-maker ‘has assumed in an enduring way, the responsibilities of a parent’. No other relatives are to be permitted to make claims.  

The Queensland Law Reform Commission, as lead agency in the Australia-wide review of succession law, also recommends that adult children not be able to make a claim for provision, or increased provision. In clause 6 of the proposed model legislation, the eligibility for claim is limited to the wife or husband, a de facto partner (as defined in each jurisdiction in Australia), and non-adult children. Clause 7 additionally permits a claim by a person to whom a deceased person owed a responsibility to provide maintenance, education or advancement in life. Clause 11 lists matters to be taken into account, which may include:

- 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,
- 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,
- 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,
- 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,
- 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,
- the age of the proposed beneficiary when the application is being considered,
- 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,
- 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,
- the date of the will (if any) of the deceased person and the circumstances in which the will was made,
- 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.

96 Ibid, paragraph 79.
97 These matters are modelled on the current Victorian legislation, the Administration and Probate Act 1958 (Vic), section 91(4) (e)-(p).
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.

3.3.4 ADULT CHILDREN WHO ARE DISABLED

A subset of applicants who are adult children are those adult children who have a recognised physical or mental disability, or are otherwise unable to look after themselves. It may be argued that children in this category of claimant have a priority claim on a parent’s estate, particularly where they have substantial care needs or are in a care home.

In addition, if disabled adult children are in receipt of a pension, any provision they receive may affect the pension entitlement. In Warland v Reece,98 the New South Wales Court of Appeal said that the loss of pension entitlement in such cases was something ‘which ought to be avoided at all costs’. The general position in the cases seems to be that where the estate is capable of properly providing for the disabled child, it should do so and provision or further provision will be made accordingly. Where the estate is a small one, the pension entitlement should be preserved. In Whitmont v Lloyd,99 it was stated that:

‘The protection of public funds from claims by indigent persons is not a purpose of family provision legislation but they are incidentally protected by the legislation, which was not enacted solely for the protection of private interests and serves public policy. ... In my opinion, the availability of Aged Pensions and other social benefits is a circumstance which should be regarded, and particularly in small estates it may be appropriate to leave an applicant wholly or partly dependent on them or to mould the provision made so that their availability is preserved in whole or in part’. (emphasis added)

More recently, in Gunawardena v Kanagaratnam Sri Kantha100 Young CJ said:

‘The question as to how far, if at all, courts should take into account benefits that may flow to applicants and beneficiaries by way of pensions and other public benefits given to the poor is one which has not yet been finally settled. In Parker v Public Trustee, 31 May 1988, unreported, I indicated that, generally speaking, the object of the legislation is to compel persons to make provision for their dependants and not throw the maintenance of the dependants upon the public purse, though a testator has no duty to organise his or her affairs so that the beneficiaries receive the maximum benefit from his estate so long as he or she makes adequate provision for them...Ordinarily, when one has a very disabled person, it does not take much for one to draw the conclusion that that person should have the whole estate. However, as in Ridge’s case, providing the whole estate to the plaintiff in the instant case does very little good in view of my finding that he is better cared for in the...Nursing Home.’ (emphasis added).

100 [2007] NSWSC 151 at paragraph [57].
Therefore, it seems that the provision of government benefits is just one more factor which needs to be taken into account when determining the question of adequate provision from an estate. Whether the amount awarded causes the applicant to lose his or her pension entitlement needs to be balanced with the (moral) obligation of the testator to provide a ‘proper’ sum for the maintenance of a disabled adult child. This obligation probably only arises in the case of very large estates.

Even in cases of large estates, it is possible to preserve government pension entitlements by the use of a Special Disability Trust (SDT) set up under the Social Security Act 1991 (Cth). An SDT can be set up inter vivos or by will. This type of trust allows a family to set aside up to $500,000 in the trust to provide for care and accommodation for a disabled family member, without affecting the disabled person’s pension entitlements. Only persons with a ‘severe disability’ can make use of this exception to the normal means test requirements of the Social Security Act, and there have consequently been few SDTs set up to date. There is currently a Senate Inquiry into SDTs looking at their low take up rate, restrictive application, and taxation treatment.

3.3.5 ADULT CHILDREN WHO ARE ‘LAME DUCKS’

Another subset of adult children as claimants in family provision cases is that of children often crudely characterised by the courts as ‘lame ducks’ or ‘life’s losers’. This category of claimant perhaps represents a clear example of the courts seeing charity as beginning at home, and may to some extent overlap the categories of disabled adult children and those who are disentitled from provision because of moral deficiency or other reasons. The category has always been recognised in family provision cases. In the 1943 case of Re Hatte, Philp J said:

‘... I do not think that the Legislature intended that provision under the Act should be given rather to those who are efficient and successful than to those who are not. A just father’s moral duty is to assist the lame ducks amongst his offspring, provided they be not morally or otherwise undeserving.’

102 Defined in section 1209M. A person with a ‘severe disability’ will be either a ‘profoundly disabled child’ under the Social Security Act or a person over 16 years of age who is entitled to a disability support pension, has a carer entitled to a carer’s payment, or who lives in a care home funded by the Commonwealth.
103 There were 26 SDTs set up as at 31 March 2008 under the Social Security Act 1991 (Cth). There are probably many more set up in wills (e.g. the Public Trustee of Western Australia reported 29 SDTs set up in wills under their control as at June 2008), but these have not yet been activated.
104 Parliament of Australia, Senate, Inquiry into Special Disability Trusts. The inquiry was established on 15 May 2008, and the closing date for submissions was 13 June 2008. A report is expected in late September 2008.
105 See for example, Charlesworth v Herring [2007] NSWSC 312 where it was held that the testator had no obligation to a disabled son because of a long period of estrangement, and because he was not in need.
Even more pointedly, it was said in *Killiner v Freeman;* 107

‘[The plaintiff] presented as a pathetic creature, who, despite the financial benefits which he has received from his father and despite the various incidents of unfilial conduct of which he was clearly guilty, appeared, both medically and emotionally, to be one of life’s losers. It is for just such a person that the exercise of the discretion of the Court should be available. It should be emphasised that an order for provision is not made as a reward for good conduct; neither is such an order (if otherwise justified) withheld as a punishment for bad conduct.’

Similar value judgements abounded in *Benham v Benham;* 108

‘I intend no discourtesy to him when I describe the Plaintiff as one of life’s losers... At the age of fifty-four the Plaintiff has little in the way of assets. He has even been bankrupt. He has no qualifications. He is employed in a lowly paid position. He suffers significant health problems. He cannot afford a necessary health procedure or the acquisition of a hearing aid.’

Lame duck adult children are consistently adjudged to be entitled to their parents’ testamentary charity, even ahead of other siblings, in order to redress their various lacks. 109 Whatever characteristics render them ‘lame’ or ‘losers’ are not so morally deficient as to disentitle them from provision or further provision, but rather represent an illustration of the court’s interpretation of testamentary duty of testator parents as a moral duty to their heirs.

3.3.6 STEP CHILDREN

In all Australian jurisdictions stepchildren can make family provision claims. The usual issue in these cases is family property which has passed by joint tenancy survivorship to the surviving step-parent. On the death of the step-parent, the question the court has to consider is whether the step-parent gained an advantage by the survivorship which should now be passed to the stepchild, even if an adult. In *Powell v Monteath,* 110 this issue was resolved by a consideration of the surrounding circumstances. The applicant stepson was in relatively necessitous circumstances and the court’s decision that he had been left without adequate maintenance and support was arrived at despite the fact that the claimant was 63 years old. In *Freeman v Jacques,* 111 the applicants were seven stepchildren, aged between 53 and 61, seeking provision from their deceased stepmother’s estate. The children had never been in a familial relationship with the deceased, and had already benefited from their father’s estate. The testatrix’s estate of $1 million was left to a friend and carer of 30 years. At first instance, only two of the seven stepchildren had been awarded provision, on the basis of their necessitous circumstances. This was upheld unanimously on appeal.112

109 *Underwood v Underwood* [2008] QSC 159 at [38] and [39].
112 [2005] QCA 423, per Keane J at paragraphs [27] and [28].
‘The appellants’ contention is that the learned trial judge erroneously applied a test of ‘extreme need’ in order to determine the jurisdictional issue… In my respectful opinion, the appellants’ contention in this regard seeks to put an impermissible gloss on the reasons of the learned primary judge. Her Honour was plainly not applying a test of ‘extreme need’ in relation to the determination of the jurisdictional issue. Rather, her Honour was making the point that necessitous circumstances would be necessary to give rise to a moral claim on the bounty of a stepmother, who has had no familial relationship at all with the claimant, where the claimant has already received a distribution from the estate of his or her natural parent, and where the estate of the stepmother substantially reflects her contribution to the joint wealth of herself and her deceased husband…’ (emphasis added).

In the New South Wales jurisdiction, issues relating to joint tenancy survivorship can be more complicated, because New South Wales is the only State which has adopted the idea of ‘notional estate’. The notional estate of a deceased can include property the subject of a joint tenancy which should have been severed before the testator’s death. This issue is discussed further in 3.5.3 below.

3.3.7 KILLERS AND OTHER APPLICANTS WITH MORAL DEFICIENCY

Should a person who kills the testator benefit from the killing under the testator’s will? The original position was that the answer to this question in succession law generally turned on the degree of culpability of the killer,113 but these were in cases of forfeiture rather than family provision. Forfeiture means that a beneficiary will not take a bequest under a will where it would be unjust and unconscionable to benefit by his or her crime. This is clearly a position of public policy. This principle remains a common law principle in most jurisdictions in Australia,114 but in New Zealand the principle has now been expressed in a statute, the Succession (Homicide) Act 2007 (NZ).115 The New Zealand Act provides that any person who recklessly or intentionally kills a testator cannot inherit anything from the estate of the testator killed, nor can the killer make an application under the Family Protection Act 1955 (NZ) for provision from the estate of the victim.116


114 Legislation has been enacted in New South Wales and the Australian Capital Territory. See the Forfeiture Act 1995 (NSW) and the Forfeiture Act 1991 (ACT). The UK also has enacted the Forfeiture Act 1982 (UK).

115 This Act is a response to the New Zealand Law Commission, Report 38: Succession law – Homicidal Heirs (July 1997), and is intended to clarify the common law rule and allow for certainty in its application.

116 Succession (Homicide) Act 2007 (NZ), sections 7-9.
It is clear that the forfeiture rule in Australia can be modified, particularly where the killers are young and perhaps vulnerable. But the need for flexibility in the application of the forfeiture rule has also been raised, though less successfully, in the context of the killing of abusive partners by women. No doubt there is a difference to be discerned between a child or very young person who kills under provocation, distress or through lack of understanding, and an adult woman of full understanding who may be under the same influences of abuse and distress, but as an adult should deal with these influences differently. Flexibility in application of the forfeiture rule is obviously necessary in such cases, given the difficulties of proof and that the deceased cannot give evidence.

Argument has even been raised that abuse (physical, emotional or financial) of an elderly testator should invoke the forfeiture rule, or a ‘reverse family provision application’. This would mean that an abusive beneficiary’s bequest would be set aside by the court. Since this is an extension of the current common law or legislative rule relating to forfeiture, legislation would be required to implement it. The idea of an abusive ‘unworthy heir’ has been adopted in various states of the US including California and Illinois. However, this idea fits better into US law since the right of disinheritance of heirs is almost absolute in estate law in the US. In family provision jurisdictions, alleged abusive behaviour towards the testator does not often result in disentitlement to provision, unless it is truly egregious.

There have also been cases of family provision applications being made by persons who killed the deceased. Should such a person be successful in claiming family provision? Whatever the state of flexibility of the forfeiture rule, in Troja v Troja it was held that in a family provision case there was no room for a successful application by the killer of the deceased. This has continued to be the public policy principle applied. In Batey v Potts, it was stated that:

‘...[the] rule provides that where a person who would otherwise obtain a benefit by the death of another, has brought about that other’s death by violent means, he shall not be entitled to take that benefit. The rule is usually invoked where a perpetrator kills a testator or testatrix...The public policy against benefiting from one’s crime is not limited to fixed categories. Nor does it focus upon the manner in which the felony results in benefit to the perpetrator. As Meagher JA pointed out in Troja ... its principle is founded in public abhorrence of homicide. In Troja, the Court of Appeal held that the rule applied irrespective of the motive of the perpetrator, was absolute in its operation and there was no scope for its discretionary application.’

117 See e.g. R v R (unreported, 14 November 1997, Supreme Court of New South Wales) where a 13 year old killed his mother and sister, but was granted his share of his mother’s estate because of the surrounding circumstances of abuse by his father; Leneghan-Britton v Taylor [1998] NSWSC 218, Supreme Court of New South Wales where the plaintiff killed her grandmother, but could still inherit her share of the grandmother’s estate because of her previous care and support of her grandmother.


120 See e.g. Abrego v Simpson [2008] NSWSC 215.

121 (1994) 33 NSWLR 269 per Meagher JA.

Where the situation is one where an applicant for provision has committed a crime, but not that of killing the deceased, the situation will turn on its facts, an appropriate response in a discretionary jurisdiction. In *Hoadley v Hoadley*, the applicant had a troubled and serious criminal history, but this had been precipitated by the attempted murder of his mother by his father, now the deceased. His criminal history did not affect the applicant’s standing to apply, but the judge constructed the award in such a way that he should be encouraged to remain out of prison, or forfeit his increased inheritance. Similarly, in *Batey v Potts*, the beneficiary did not kill the testatrix, his mother, but had killed his father prior to his mother’s death, thus accelerating his inheritance under his mother’s will. He was not disentitled from inheritance per se by his actions, but the judge held that his enjoyment of his inheritance should be postponed for the length of his father’s life expectancy, which expires in 2015. However, in *Price v Roberts*, the applicant for provision had murdered her husband, but was applying for provision from her mother’s will, from which she had been excluded. The court concluded that she was disentitled from provision by her own conduct in killing her husband, which had itself caused her necessitous circumstances. Lesser crimes will not usually disentitle otherwise entitled applicants from provision, though their provision may be reduced.

The concept of disentitling conduct is contained in the relevant Australian statutes, but has been interpreted by the courts differently over time as general views of what might be disentitling conduct have changed. For example, issues such as hostility or disharmony between the deceased and the applicant, disappointment in the life choices of the applicant, unfilial conduct or even isolated incidents of violence directed towards the deceased have been held not to be disentitling. Conduct which was disentitling in

---

123 *Unreported, Supreme Court of New South Wales, 17 February 1987, Young J, following the decision in* *Green v Perpetual Trustee* (see Appendix A).
124 *Unreported, Court of Appeal of New South Wales, 23 September 1992.*
125 See e.g. *Fletcher v Fletcher* [2007] NSWSC 728.
126 *Succession Act 1981* (Qld) section 41(2)(c); *Testator’s Family Maintenance Act 1912* (Tas) section 8(1); *Administration and Probate Act 1958* (Vic) section 91(4)(c); *Succession Act 2006* (NSW) section 60 (2) (m); previously, *Family Provision Act 1982* (NSW) section 9(3) (b); *Inheritance (Family Provision) Act 1972* (SA) section 7(3); *Family Provision Act 1970* (NT) section 8(3); *Family Provision Act 1969* (ACT) section 8(3)(a); *Inheritance (Family and Dependants Provision) Act 1972* (WA) section 6(3).
the past, but would not be now includes adultery, separation or desertion, drunkenness or drug-taking. In the current context of decisions in the area, disentitling conduct must be truly outrageous or egregious to cause a court to override what it considers to be the moral duty of a testator to provide for dependants in financial or other need.

3.4 MORAL DUTY

The underlying public policy in family provision law has become infused with the notion of moral duty, in addition to legal rights. Because the area is one of almost total discretion for judges, to unravel the moral duty concept involves a detailed review of case law in the various Australian jurisdictions. A review of the major reported cases involving bequests to charity reveals that the courts are vigorous in upholding ‘proper’ family provision as against all other bequests, portraying this provision as based on moral claims, moral obligation, or moral duty.

In the High Court case of Vigolo v Bostin, Gleeson CJ stated that:

“These basic features of what is commonly called testator’s family maintenance legislation have existed in Australia for almost a century. Such legislation is imbued with concepts of entitlement and disentitlement, claims and obligations, propriety and fitness, related to questions of inheritance...In its original form, the legislation conferred upon courts, in limited circumstances, a discretionary power to interfere with the exercise of freedom of testamentary disposition. Where such an interference was regarded as justified, it defeated the intention of a testator, and conferred a benefit upon an applicant at the expense of others whom the testator intended to benefit. From the beginning, a number of fundamental issues were obvious. Was this an extensive power to re-write a testator’s will to make it conform to a judge’s idea of how an estate should be distributed, or was it more limited, and, if so, in what way? Were issues of adequacy and propriety to be decided by reference only to minimum standards of subsistence? Was this merely a power to relieve the state of the burden of supporting indigent people? What account was to be taken of the expectations and needs of persons other than an applicant where a testator had made provision for such persons? In what circumstances should a testator’s decision to disinherit a family member on grounds of character or conduct prevail? ....By hypothesis, the testator had the legal right to dispose of his estate as he thought fit, and the person or persons left without adequate provision had no legal right to inherit beyond the extent


129 Troja v Troja (1994) 35 NSWLR 182 (murder of testator by applicant); Draper v Nixon [1999] NSWSC 629 (attempt to institutionalize a sane testator); Re Estate of Stewart; Murphy v Stewart [2004] NSWSC 569 (continuous and extreme domestic violence towards deceased spouse); Boniadian v Boniadian [2004] NSWSC 499 (blackmail of deceased by applicant, causing deceased’s suicide) Allen v Public Trustee [2006] NSWCA 49 (extreme criminal violence towards the deceased).

130 See Appendix A.

provided for in the will. The justification for conferring upon a court a discretionary power to intervene, and to make an order modifying the legal effect of the will, was explained in terms of familial obligation, not unnaturally or inappropriately described as moral...Of all the cases that have come to this Court under the testator's family maintenance legislation of the various States, I have been able to find only three in which there is no reference in any of the judgments to concepts of moral claims or moral obligations' (emphasis added).

The general principles to be applied in family provision cases have been discussed widely in the cases. The seminal case in the discussion of moral duty in family provision is Allardice v Allardice. In that case, Stout CJ (referring to the Family Protection Act 1908 (NZ)) stated that the principles applicable to family provision applications included that the Act was for the purpose of more than just an extension of the inter vivos obligations of persons to maintain family members; that the Act was not for the purpose of allowing the court to make a new will for the testator; that the Act permitted the court to alter a will to make adequate provision for a husband, wife or children of the testator; that in the case of a widow the court would make a more ample provision than for children, if the children were able to support themselves; and that even if the will was most unjust from a moral point of view, that is not enough to alter the will’s disposition of property – rather it is a question of whether there is sufficient maintenance and support for the applicant. This seems an appropriate statement of principle in the context of the history preceding the introduction of family provision legislation.

However, Edwards J in the same case said: ‘It is the duty of the Court, so far as possible to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not loving, husband or father owes towards his wife or towards his children...’ (emphasis added).

Argument has ensued ever since as to whether the addition of a moral dimension into family provision law was ever intended by the various enacting parliaments, or whether it is merely some sort of judicial gloss on the bare words of the statutes. In Re Allen, another New Zealand decision, reference was made to enforcing the moral obligation of a testator to provide proper support for his wife and children, having regard to his means, to the means and deserts of the applicants, ‘and to the relative urgency of the various moral claims on his bounty’. Both these decisions were cited with approval by the Privy Council in Bosch v Perpetual Trustees. Canadian cases also refer to this principle, with the earliest case introducing the moral duty concept being Walker v McDermott in 1931.

---

133 (1910) 29 NZLR 959 at 972-973.
134 [1922] NZLR 218, at 220 per Salmond J.
In Australia, this moral dimension seemed accepted until the decision in Singer v Berghouse in 1994. In that case, references to ‘moral duty’ and ‘moral obligation’ were characterised as being no more than a gloss on the statutory language. However, as this part of the decision was not binding, other courts continued to apply a moral duty test in family provision applications. Kirby P (as he then was) in Permanent Trustee Co Ltd v Fraser referred to academic argument concerning the moral obligation gloss which characterises the way in which family provision cases had been decided as favouring ‘partisan idealised family sentiment (love?) rather than any objective view of justice’, and as ‘unsatisfactory and inappropriate’ in the light of ‘the current social, philosophical, political and economic climate, and people’s understanding of the family’. However, whatever the philosophical underpinnings of family provision, and whether or not family life should be thought of in terms of duty, or there is a familial right to inheritance, Australian courts have continued to apply the moral obligation concept with approval.

The High Court reconsidered the moral duty issue in Vigolo v Bostin in 2005. The applicant received no provision from a large estate which was divided equally among his four siblings. The applicant was wealthy, having assets in excess of $2 million. In referring to the decision in Singer, Gleeson CJ said:

‘Their Honours went on to describe references to ‘moral obligations’ as a gloss on the statutory text. If, by that, they meant that such references are not to be used as a substitute for the text, I agree. If they meant that such references are never of use as part of an exposition of legislative purpose, then I regret that I am unable to agree’.

See e.g. Bosch v Perpetual Trustee [1938] AC 463, at 477 (on appeal from NSW); Worland v Doddridge (1957) 97 CLR 1, at 11; Hughes v National Trustees, Executors and Agency Co. of Australasia Ltd. (1979) 143 CLR 158; Goodman v. Windeyer (1980) 144 CLR 490.

Singer v Berghouse (1994) 181 CLR 201.

Per Mason CJ, Deane and McHugh JJ, where the remarks are obiter, and therefore not binding. The idea that the moral duty concept was a mere gloss had first emerged in the judgements of Murphy J in both Hughes at 158 and Goodman at 504-505. Murphy J saw the moral dimension in family provision as unwarranted and inconsistent with the language of the statutes, and as causing confusion when judges came to consider the adequacy of the applicant’s provision.

See the discussion in Permanent Trustee Co Ltd v Fraser (1995) 36 NSWLR 24, per Kirby P.

Ibid.


See further at section 4.


221 CLR 191 at paragraph [21].
The other four judges were equally divided about the use of the concept to guide courts in family provision claims. They reflected the prevailing arguments that the moral claim concept is either an appropriate construction which refers to the history and philosophical ideas behind the statutes, or has become an inappropriate ‘shorthand’ way to express the language of the statutes which has become misleading. Thus, although the majority decision favoured the moral duty approach in Vigolo, the underlying argument has not been fully resolved.

However, in decisions subsequent to Vigolo, judges have continued to be enthusiastic in their embrace of the moral claim focus in assessing the adequacy of a testator’s provision. In the 2007 case of Bowyer v Wood, the Full Court of South Australia said:

‘In Vigolo v Bostin a majority of the High Court held that it was helpful, when making the value judgment required on the jurisdictional question whether adequate provision had been made to a plaintiff, to have regard to considerations of moral claim and moral duty. It is a consideration which connects the general but value-laden language of the statute to the community standards which give it practical meaning... Moral duty and moral obligation may, according to circumstances, be relevant and within the contemplation of the Act but a moral claim cannot be a claim founded upon considerations not contemplated by the Act... However, considerations of moral duty and moral claim cannot be a substitute for the text of the Act... [in this case] The failure of the judge to consider whether the plaintiff had a moral claim was a serious omission especially given the substantial provision made by the testatrix for charities and her siblings... the judge erred in failing to give consideration to the moral claim of the plaintiff upon the bounty of her mother’ (emphasis added).

Moral duty to dependants can be reversed by disentitling conduct on the part of those dependants. However, the disentitling conduct has to be quite extreme in Australia to reverse the duty. The case of Edwards v Terry is illustrative of the position in

---

147 Callinan and Heydon JJ at paragraphs [113-121].
148 Gummow and Hayne JJ at paragraph [63].
152 There are numerous cases considering disentitling conduct such as violence, domestic violence, killing, and many other categories. These are often matters incapable of proof after the death of the deceased, and so are not always of importance in the discretionary jurisdiction. See for example, Curran v Duncan [2006] WASC 8, Green v Holtom and Spence [2006] WASC 1, and Abrego v Simpson [2008] NSWSC 215 at [21]. However, compare Re Estate of Stewart; Murphy v Stewart [2004] NSWSC 569 where continuous domestic violence was disentitling conduct.
153 [2002] NSWSC 835. For a similar case where an only son had a very poor relationship with the will-maker, his mother, see Wheatley v Wheatley [2006] NSWCA 262.
Australia. In that case, the testatrix left 40% of her estate to the Salvation Army, 40% to the Royal Blind Society, 5% to the executrix and 15% to her only child, a son aged 56 at the time of the application. On application for further provision, the son, in very necessitous circumstances, was granted 71% of the estate, which, with the 5% to the executrix, limited the charities to 24% of the estate instead of the original 80%. This was despite the fact that the son had a troubled relationship history with his parents, including assaults on both, and an apprehended violence order being in place at one point. The judge did not see this as disentitling, but rather followed the two stage process described by the High Court in *Singer v Berghouse*:154 was the applicant one permitted by the Act; and was the provision provided in the will adequate? His Honour concluded that it was not and ruled accordingly.

It could be argued that this is not an appropriate ruling. Why was the son not disentitled by his violence towards his aged and frail parents? Why did the judge ignore the fact that the testators, husband and wife in turn, had deliberately limited the amount left to their son? However, his Honour’s reasoning that the son’s diagnosed attention deficit hyperactivity disorder was sufficient to forgive all transgressions, including his violence, is entirely in line with authority, which is clear that a poor relationship with a parent or parents does not mean that an applicant will not be entitled to provision.155 There are many similar cases in the reports, and, despite many affirmations of the proposition that it is not within the courts’ power ‘to recast the testator’s will or to redress inequalities or fancied injustice...’,156 the position in relation to such cases remains as it was expressed in the early New Zealand case of *Welsh v Mulcock*:157

‘No doubt the effect of the statute is to decree that a man’s will may be no more than a tentative disposition of his property and that the function of ultimately settling how his estate shall devolve must be exercised by the Court.’

In early cases on family provision, while disentitling conduct was taken more seriously by the courts, its effect was never regarded as fatal in all cases. As Mr Justice Edwards said in *Plimmer v Plimmer*:158

‘I do not think that the statute was intended to enable the Court substantially to make such a new will for the testator as it considers...ought to have been made. I do think that the powers conferred upon the Court ought to be exercised with very great caution. In the case of a widow the difficulties that surround the exercise of these powers are comparatively small. There are few persons who will not think that every testator, whatever may have been the difference between his wife and himself, ought to provide for his widow in a reasonable manner, unless she has clearly been guilty of some grave breach of the law or of conventional morality. The statute provides that, if she has, such matters may be brought before the Court in answer to her claim. In the case of adult children the case is

157 [1924] NZLR 673, at 682 per Herdman J.
158 (1906) 9 Gazette Law Reports 10, at 21 (New Zealand).
far more difficult. No one can ascertain, and it is quite incapable of proof, what circumstances may justify a parent in disinheriting his child. Habitual disrespect, an evident determination not to devote himself to useful pursuits but to live upon the proceeds of his father’s labours rather than his own, or an idle, useless life, may well justify a father in leaving his son wholly unprovided for by his will…Yet it could be quite impossible to bring such matters before the Court in a tangible shape. It is of the breath of family life that the family skeleton be kept in the family cupboard.’

The New Zealand Law Commission has taken a firm view on this very flexibility recommending in its 1997 report that both the size of the applicant pool and the moral claim basis of awards be curtailed. The Report states: 159

‘The test of a will-maker’s ‘moral duty’ has never been expressly approved by Parliament as a test for entitlement. The test assumes that there is a general acceptance of the exact content of a will-maker’s moral duty to adult children. No social inquiry the Commission knows about supports this assumption. The test also makes a second incorrect assumption: that New Zealand society is culturally and ethnically homogenous…The consequences of the absence of any norm of this kind are that a deceased’s perception of his or her moral duty is overruled by a particular judge’s assessment of current social norms. This assessment is necessarily based on the judge’s personal sense of the fitness of things…Failure by the courts to articulate (beyond the obscure concept of moral duty) why precisely they are altering a will-maker’s arrangements results in a situation where wills are varied according to the subjective values of the particular judge who chances to deal with the matter. This makes it difficult to assess whether the court’s distribution is more commendable than the will-maker’s…’

The Law Reform Commission of British Columbia, on the other hand, in its review of family provision law in that province in 1982 argued that the moral obligation dimension was important, stating that ‘a broad discretion under the Wills Variation Act is essential to protect the integrity of the family unit by ensuring that what is really family property is not disposed of to strangers’. 160


3.5 PROPERTY AVAILABLE IN A FAMILY PROVISION CLAIM

The property available in a family provision claim has also been subject to varying interpretations by the courts. The basic principle is that family provision can only be made out of the estate of the deceased. Property which is not available to claimants, because it is not part of a deceased’s estate includes:

- Property held under joint tenancy, which has an automatic right of survivorship attached (e.g. a house owned by a husband and wife under joint tenancy would automatically become the property of the survivor when either husband or wife dies)\(^{161}\)
- Property the subject of a *donatio mortis causa* (a gift made in contemplation of death), although this has been overturned by statute in Queensland,\(^ {162}\) New South Wales\(^ {163}\) and New Zealand\(^ {164}\)
- Property disposed of *inter vivos* (while the deceased was living)

Property which can be available to claimants, because it has been held to be part of a deceased’s estate, or because of statutory intervention, includes:

- Property disposed of *inter vivos* which was given as part of an unconscionable bargain
- Property which is the subject of a mutual will, or other contractual arrangement
- Property which is part of the ‘notional estate’ of the testator

All three of the latter categories may be regarded as contentious.

3.5.1 *INTER VIVOS* TRANSACTIONS WHICH ARE UNCONSCIONABLE BARGAINS

Normally, property disposed of by the testator before death is not subject to family provision claims. However in *Bridgewater v Leahy*,\(^ {165}\) property disposed of *inter vivos* was held to be subject to claims in equity under the doctrines of undue influence and unconscionable bargain. The property, a farm, had been disposed of by the deceased to a favoured nephew at a considerable undervalue, with the object of retaining the farming properties in the family line, as the deceased had no sons. The applicants, the deceased’s wife and four daughters, although provided for in the will, objected to the bargain which the nephew had made in acquiring a property worth $696,811 for the amount of $150,000. After the applicants had lost the case and its appeal in Queensland, the High Court, by a majority of three to two, agreed that this was an unconscionable bargain, and the property was declared to be part of the estate as to the amount of the undervalue. Thus, although this was not a family provision case as such, payments from the estate to the wife and daughters were to be considerably increased. The principle arising from the case is that although *inter vivos* disposals of property are normally not part of an estate, unconscionable bargains will cause property to come back into an estate, and be available for family provision.

\(^{161}\) For the position in New South Wales on this point, see below.
\(^{162}\) *Succession Act 1981* (Qld), section 41(12).
\(^{163}\) Where such gifts will be part of a deceased’s notional estate; *Succession Act 2006* (NSW) section 76; previously, *Family Provision Act 1982* (NSW), section 22.
\(^{164}\) *Family Protection Act 1955* (NZ) section 2(5).
3.5.2 Property the Subject of Mutual Wills, Contractual Arrangements or Prenuptial Agreements

In *Barns v Barns*, the High Court was faced with the choice from diametrically opposed decisions of the Privy Council in *Dillon v Public Trustee of New Zealand* and *Schaefer v Schuhmann*. In *Dillon*, a case from New Zealand, the Privy Council had held that a contract to leave property by will could refer to property available for an order under family provision, while in *Schaefer*, the Privy Council had held that it could not. In *Barns*, the High Court decided that the approach in *Dillon* was correct. In the latter case, Dillon had made a contractual arrangement with the children of his first marriage to leave them the family farm. In his will, this arrangement was honoured, and only the residue of the estate was left to his second wife. The second wife applied under the then New Zealand statute, the *Family Provision Act 1908*, on the basis that the will did not make adequate provision for her proper maintenance and support. The children of the first marriage argued that the will could not be varied as it merely gave expression to the prior contractual arrangement. The Privy Council ruled that this argument was incorrect. The contract had been fulfilled when Dillon had left the farm as he had promised in his will. Once the farm was left in the deceased’s will, it became part of the deceased’s estate, and open to a family provision application. The Judicial Committee said:

‘The manifest purpose of the Family Protection Act ...is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do’ (emphasis added).

In *Schaefer v Schuhmann*, the Privy Council was considering a case from New South Wales. The testator was an elderly man, who had recently taken on a new housekeeper, Schaefer. He promised to leave her his house, but she was otherwise unpaid for her work. He put this promise into his will by codicil. After he died, some six months later, one of his seven children applied for a family provision order. Street J in the NSW Supreme Court, followed *Dillon* and held that the house was part of the estate, and awarded provision to three of the deceased’s daughters. The Privy Council overturned *Dillon*, and found that the house was transferred under an enforceable contract. This meant that the house was not part of the deceased’s estate, and could not be available for a family provision award. The Privy Council was here characterising the house transaction as both contractual and *inter vivos*, and separating it out from the will completely. This characterisation places such a promise in the ‘property disposed of *inter vivos*’ category, and thus property not available for a family provision order.

The High Court, in *Barns v Barns*, took the view that the approach in *Dillon* was correct. Barns had made mutual wills with his wife, pursuant to a contractual deed that the wills would be made in a particular form and would not be revoked. The purpose of these wills was to ensure that the family farm devolved ultimately to the couple’s son, and that their daughter received no provision. Not unnaturally, the daughter applied for a family
provision order when Mr Barns died. The High Court found that the property subject to the contract was part of the property subject to a family provision award, on the basis of construction of the relevant statute.\textsuperscript{170} There was no disposal of property \textit{inter vivos}, so that the family farm formed the ‘estate’ for the purpose of family provision. The contractual obligation was to make a will in a certain way and no more. Once this was done, the property in the will was the estate. Gleeson CJ said:\textsuperscript{171}

‘The effect of the legislation could have been avoided by a disposition \textit{inter vivos} so that the deceased died with no estate; that is inherent in the scheme of the legislation. But the \textbf{effect of the legislative restriction on freedom of testamentary disposition} cannot be avoided by a promise to make a certain disposition.’\textsuperscript{1} (emphasis added).

The current principle arising here is that property purportedly subject to contractual arrangements or promises before death, later expressed in a will, is part of the deceased’s estate and thus available for family provision orders.

In addition, any prenuptial agreements as to finances or testamentary intentions which purport to prevent or exclude a later family provision claim are void for public policy reasons. However, such agreements can be taken into account as one of a large range of circumstances in determining an award, particularly in the context of short duration marriages.\textsuperscript{172} In \textit{Hills v Chalk}, in agreeing that a husband had been adequately provided for in a will in accordance with a prenuptial agreement, Keane JA said that:\textsuperscript{173}

‘There is no suggestion in the authorities that an agreement reflecting the mutual intentions and expectations of the parties, as expressed in the pre-nuptial agreement in this case, should not have a bearing on the evaluation which must be made as to whether the provision made for an applicant in the position of Mr Hills falls short of the adequate provision for his proper maintenance and support… In this case, the voluntary statement of the parties of their mutual intentions and expectations in a form intended to be binding affords a reliable conspectus of the totality of the relationship of the parties and of their respective relationships with others who have a claim on their bounty. \textit{In my opinion, the court should have regard to such a voluntary statement by the parties of their intentions and expectations, unless there is good reason for the court to conclude that these intentions and expectations would not have shaped the thinking of the wise and just testator or testatrix} postulated by the Act. There may be cases, for example, where the length of time and change in circumstances between the making of a pre-nuptial agreement and the death of one of the parties is such that the pre-nuptial agreement is no longer a true reflection of the parties’ relationship. Or it may be that the evidence shows that the execution of the pre-nuptial agreement was procured by economic or other pressure’ (emphasis added).

\textsuperscript{170} \textit{Inheritance (Family Provision) Act 1972} (SA).
\textsuperscript{171} (2003) 214 CLR 169, at 171
\textsuperscript{173} \textit{Hills v Chalk} [2008] QCA 159 at paragraphs [45] and [46].
3.5.3 NOTIONAL ESTATE

The decision in *Barns* settles for the moment the question of what constitutes the ‘estate’ for the purposes of family provision, in the absence of legislative intervention. However, it had been suggested in *Schaefer* that whether or not *inter vivos* transactions or testamentary dispositions made pursuant to contracts should be open to family provision applications is a matter of policy which should be dealt with by statute, but only New South Wales responded to that suggestion, formulating the concept of a ‘notional estate’ in the *Family Provision Act 1982* (NSW), now continued in the *Succession Act 2006* (NSW) at Part 3.3, sections 74–86. The notional estate concept partly embraces the decisions in *Dillon* and *Barns*, in that property the subject of a contract to make a will is not part of the estate as such, but will be ‘notional estate’.

Part 3.3 of the *Succession Act 2006* (NSW) describes notional estate in terms of ‘relevant property transactions’, which are transactions for which full valuable consideration has not been given. Sections 80 (2) and (3) provide that the relevant property transactions are:

(a) a transaction that took effect 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,

(b) a transaction that took effect 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,

(c) a transaction that took effect or is to take effect on or after the deceased person’s death.

(3) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:

(a) a person by whom property became held (whether or no as trustee) as the result of a relevant property transaction, or

(b) the object of a trust for which property became held on trust as the result of a relevant property transaction, whether or not the property was the subject of the relevant property transaction.

This concept even extends to the failure to sever a joint tenancy during the deceased’s life: section 76(2)(b).

Currently, only New South Wales has the notional estate concept in its legislation. However, the on-going review of succession law by the National Review Committee in Australia has completed its review of family provision law, and recommended that the idea of notional estate should be adopted nationally. In its Family Provision Report, the National Committee expressed the view that, although it generally favoured the
adoption of the New South Wales notional estate provisions, section 22(4)(b) of the (then) Family Provision Act 1982 (NSW) would need to be ‘reworded and clarified’ in light of the existing case law,\(^{174}\) which has had difficulty in determining whether in any one factual situation, a joint tenancy should have been severed before death. The National Committee has recommended that the nationally adopted form of previous section 22(4) (b) refer explicitly to a failure to sever a joint tenancy, and that it be worded to overcome the effect of *Wade v Harding*.\(^{175}\) The Committee recommended that: 176

‘The effect of that decision would be overcome if the model legislation were to provide that a person who dies without having severed an interest in property held as a joint tenant is not given full valuable consideration for not severing that interest merely because the person thereby retained, until his or her death, the benefit of the right of survivorship in respect of that property.’

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. The National Committee stated that this does not make clear whether property can be notional estate of a deceased if the person for whom the property is held by or on trust has died. The case of *Prince v Argue*\(^{177}\) illustrated the point. In that case, the applicants sought provision from their father’s estate. His interest in a home had passed to his second wife by joint tenancy survivorship. She died fifteen months later, leaving her estate, including the home in question, to her children from a previous marriage. The applicants argued that their father’s failure to sever the joint tenancy before his death amounted to a prescribed transaction under the notional estate provisions in New South Wales, so that the home became part of his estate and passed to them. The court held that this could not be so, since the widow had herself died, and the property was no longer ‘held by or on trust for’ her.

The National Committee criticised this interpretation of the notional estate provisions since it limits their application, and can result in unfair and arbitrary results for applicants. The Committee recommended that a provision should be included in the national legislation referring to property forming part of a ‘deceased transferee’s’ estate, which

\(^{174}\) See *Wade v Harding* (1987) 11 NSWLR 551; *Cameron v Hills* unreported, Supreme Court of New South Wales, 26 October 1989; *Barker v Magee* [2001] NSWSC 563. Whether or not full valuable consideration had been given for the survivorship under the joint tenancy seems to have presented some difficulties for judges.

\(^{175}\) (1987) 11 NSWLR 551. See Queensland Law Reform Commission, *Commentary on model family provision legislation*, Chapter 3, Property that may be the subject of a family provision order, paragraph 3.23.

\(^{176}\) Ibid, paragraph 3.28. See the model *Family Provision Bill* 2004 clause 27(2)(b).

\(^{177}\) [2002] NSWSC 1217.
should be available for family provision awards. In the National Committee’s view, the model legislation should ensure that where:\textsuperscript{178}

- 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.

*Prince v Ague* is overturned by section 82 of the *Succession Act 2006* (NSW). This section allows the court to designate as notional estate property that has been transferred to a person who has subsequently died, even if the property in question has been transferred to the dead person’s legal representative or has been distributed from the dead person’s estate. Thus, New South Wales has adopted the National Committee’s recommendation on notional estate. Whether other states will follow suit has not been made clear.

\textsuperscript{178} Queensland Law Reform Commission, *Commentary on model family provision legislation*, Chapter 3, Effect of the death of a person whose property could have been the subject of a notional estate order, paragraph 3.51. See the model *Family Provision Bill 2004* clause 27(2)(a).
PRACTICAL CONSIDERATIONS IN FAMILY PROVISION CLAIMS

Whilst the statutes and reported cases discussed above construct the framework of family provision law, more mundane practical issues can influence whether such a framework is robust or weak, or leans in one direction, or is ever used for its intended purposes. In this section we examine some practical issues which influence the law in this area such as costs, alternative dispute resolution and time limits. Costs are a particularly important factor in family provision application behaviours.

4.1 COSTS

It is usually the case that no costs order will be made in a family provision case, and the costs of the parties will be borne by the estate. However, the increase in applications which the courts view as vexatious or frivolous, or without a reasonable prospect of success, and spiralling legal costs generally, make this proposition one which is under judicial review. The area of family provision law is not one which is entirely risk free for the applicant, though this might have been the traditional view.179

The issue of costs in family provision claims has come increasingly into focus since the 2005 New South Wales case of Sherborne Estate.180 In that case, the claimants were two adult daughters and one adult granddaughter of the testatrix. The granddaughter’s claim was dismissed, but the two adult daughters had their provision increased from $20,000 each to $300,000 and $100,000 respectively. Thus a total of $360,000 extra had to be paid from the estate to the adult daughters. The judge ordered that this be paid from notional estate, a house which had been transferred to their half-brother under a joint tenancy agreement with the testatrix, valued at $490,000. This may appear uncontroversial on the facts, but the costs incurred by the granddaughter and the adult daughters were more than $400,000. The defendant half-brother, who had inherited the bulk of the estate, had costs of $205,000, so that total costs of the action were more than $605,000. Palmer J described these costs as ‘enormous’, stating: 181

‘While this litigation is of great importance to the parties themselves, it must nevertheless be borne in mind that this is not a commercial dispute between corporations, involving millions of dollars. It is a family dispute between people of quite modest means; the amounts which all three of the Plaintiffs might reasonably have hoped to obtain by further provision from the deceased’s estate could never have come anywhere near the sum of $600,000 which has been expended in this litigation. What has happened in this case is a dark stain on the administration of justice. One might wonder whether anything has changed since Dickens’ Bleak House.’

---

181 Re Sherborne Estate (No 2) (2005) NSWLR 268 at paragraph [16].
However, his Honour declined to cap the costs under any of the possibilities presented to him, and also declined to deny costs to one of the daughters, who had rejected a more advantageous offer prior to trial, and to the granddaughter, who had presented a seemingly hopeless claim. Therefore the costs were borne by the unsuccessful half-brother. His Honour said:

‘I have made no order as to what notional estate should bear the burden of the costs orders. It is for [the half-brother] alone as to what assets he marshals to pay the costs, whether or not those assets would be notional estate.’

The outcome of this case caused the New South Wales Attorney General to announce that he would introduce new legislation to cap legal costs in family provision cases. The new Chapter 3 of the Succession Act 2006 (NSW) has now been passed by the New South Wales parliament. Section 99 provides that the court will have power to order costs as it thinks fit, and that regulations can be made to cap costs. Section 99 and regulations made under it will prevail to the extent of any inconsistency with the Legal Profession Act 2004 (NSW) as to costs. Presumably this will discourage applications made in the belief that the estate will always bear the costs of the application, making litigation no longer virtually risk-free. Moreover, the new legislation also allows for regulations to be made to encourage settlement of family provision claims, and to control advertising by lawyers looking for family provision work. There is a general perception, which may or may not be correct, that the latter issue has greatly exacerbated the frequency of family provision applications in New South Wales in recent years.

In this context, in his second reading speech the New South Wales Attorney-General said:

‘The majority of lawyers work hard to achieve a fair outcome for their clients. There is, however, a minority of practitioners who exploit the highly emotionally charged nature of these cases to their own benefit, on the assumption that all costs are paid out of the estate. The Supreme Court has recognised this problem and is currently implementing its own strategies, including intensive case management, the introduction of a new practice note for family provision, and a more restrictive

---

182 Uniform Civil Procedure Rules 2005 rule 42.4(1); Civil Procedure Act 2005 (NSW) section 98(4)(c). His Honour declined to use either of these alternatives on the basis that they could not relate to costs already incurred. See generally: The Honourable Mr Justice John P Hamilton, Containment Of Costs: Litigation and Arbitration, Address to the Bar at the opening of the Law Term, 1 June 2007.

183 Re Sherborne Estate (No 2) (2005) NSWLR 268 at paragraph [69].


185 The legislation passed the Legislative Council on 24 September 2008, and was sent to the Legislative Assembly for concurrence on the same date.

approach to the recovery of costs... The bill also contains the power to make regulations regarding advertising of legal services in connection with proceedings for family provision: advertising that is often aggressive, unrealistic and seeks to exploit the vulnerable.

Costs can be capped already in New South Wales under the Uniform Civil Procedure Rules 2005 rule 42.4(1) and the Civil Procedure Act 2005 (NSW) section 98(4)(c), but as evidenced by the Sherborne Estate case, these cannot always be used since they are not retrospective. The Supreme Court of New South Wales has recently made orders capping legal costs in several family provision matters. In Dalton v Paull (No. 2),\textsuperscript{187} the plaintiff’s legal costs were capped at $25,000 from a small estate of $207,444, while in Blanchfield v Johnston,\textsuperscript{188} costs were also capped at $25,000 after total costs of $74,000 were incurred where the estate was worth only $70,000. In Gill v Smith,\textsuperscript{189} the Court capped costs for three plaintiffs at $40,000, and in Dinnen v Terrill\textsuperscript{190} a defendant executor’s costs of $92,000 were capped at $50,000 after total costs of $74,000 were incurred where the estate was worth only $70,000. Costs have also been capped from quite large estates. In Abrego v Simpson\textsuperscript{191} the estate was worth more than $600,000 but the total costs of the claimant (of $60,000) were capped at $50,000. In the latter case, Windeyer J commented:\textsuperscript{192}

‘[The plaintiff’s] costs in connection with the present proceedings are estimated at approximately $60,000. That is an extraordinary amount in an action where, apart from hospital records, the plaintiff’s evidence consisted of two affidavits of the plaintiff, one of seven pages and the other of three pages with some annexures, together with two other affidavits each or three or four pages. That is not to say that the case does not raise some quite difficult questions, but nevertheless the sum of $60,000 is, I consider, out of proportion, considering the amount involved and the type of case it is.’

Cost capping is not always of benefit however. In Zappia v Parelli,\textsuperscript{193} costs were capped at $100,000 (from total costs of $197,494). However, these costs obliterated the plaintiff’s provision award of $100,000 from an estate of only $130,349. This was an action with no apparent benefit to anyone except the lawyers involved. It is clear that plaintiffs can be left with significant shortfalls in total costs payable where there are costs caps on the amount payable out of the estate, since lawyers will not necessarily limit their costs to the amount of the cap.\textsuperscript{194}

It has been suggested that costs in family provision cases have escalated in New South Wales because of the cap on personal injuries damages in that state. This has resulted in increasing litigation in family provision cases pursued by plaintiff lawyers in lieu of personal injuries work.\textsuperscript{195} Whether this is perception or reality, it is certainly the case that there are far more court cases on family provision in New South Wales than in

\textsuperscript{187} [2007] NSWSC 803.  
\textsuperscript{188} [2007] NSWSC 143.  
\textsuperscript{189} [2007] NSWSC 832.  
\textsuperscript{190} [2007] NSWSC 1405.  
\textsuperscript{191} [2008] NSWSC 215.  
\textsuperscript{192} [2008] NSWSC 215 at paragraph [4].  
\textsuperscript{193} [2007] NSWSC 972.  
\textsuperscript{195} Personal interviews with partners of law firms, 2008.
other states, possibly because of the notional estate provisions in the New South Wales legislation. It is possible that a fixed maximum scale for legal costs for family provision matters will be introduced by the Supreme Court even in the absence of the proposed new legislation. Such a scale would be for small estates where the value of assets in the estate does not exceed $750,000.

Judicial commentary on costs was also evident in the South Australian case of Bowyer v Woods where Debelles J said:

‘...In my opinion, the legislature has made it clear that in appropriate cases a costs order can be made against an applicant, and some of the old cases must now be approached with care. The old rule which, as I say, was a common practice not to award costs against the plaintiff who failed, can no longer be accepted as a general proposition...’ There is, therefore, a substantial body of consistent opinion as to the rules which ordinarily operate in relation to an unsuccessful application. The principles are that, generally speaking, there will be no order as to costs of an unsuccessful application. The court may in its discretion make an order in favour of an unsuccessful applicant who makes a reasonable application founded on a moral claim or obligation. While it is unnecessary to decide the issue in this case, the cases also suggest that the court may in its discretion order an unsuccessful applicant to pay costs where the claim was frivolous or vexatious or made with no reasonable prospects of success or where the applicant has been guilty of some improper conduct in the course of the proceedings.’

The attempt to normalise legal costs throughout the jurisdictions of Australia has not been an easy task. Despite the model legislation resulting in Legal Profession Acts in each state except South Australia there are difficulties in implementation which make some Acts more effective than others. This is despite the common requirement in each Act that costs be disclosed to clients before, or as soon as possible after, the retainer. Rather than similarity, there are differences in each state in dealing with costs issues. For example, in New South Wales, costs assessment under the Legal Profession Act 2004 (NSW) currently does not apply to beneficiaries under a will, though this will presumably be overcome by new section 99(3) of the Succession Act 2006 (NSW).

196 Lisa Carty, ‘Laws to cut costs in family disputes’, Sydney Morning Herald (Sydney), 27 January 2008, reports that there are about 600 family provision cases in New South Wales each year, of which only about 250 are settled out of court. However, in Queensland for example, where early mediation is compulsory in these cases, there are few cases proceeding to court.

197 See generally: The Honourable Mr Justice John P Hamilton, Containment Of Costs: Litigation and Arbitration, Address to the Bar at the opening of the Law Term, 1 June 2007.


199 Legal Profession Act 2004 (NSW); Legal Profession Act 2004 (Vic); Legal Profession Act 2006 (ACT); Legal Profession Act 2006 (NT); Legal Profession Act 2007 (Qld); Legal Profession Act 2007 (Tas); Legal Profession Act 2008 (WA). The Legislative Council of South Australia passed the Legal Profession Bill 2007 on 26 February 2008, but it is subject to a deadlock in the South Australian Parliament as at July 2008.

In Queensland, the *Legal Profession Act 2007 (Qld)* requires that costs of an action be assessed by an independent accredited assessor, a requirement which has caused some difficulties in finding sufficiently experienced assessors. Since early mediation is compulsory in family provision cases in Queensland, very few family provision cases proceed to trial. Nevertheless, there has also been critical judicial comment on the issue of costs in family provision cases in Queensland. In *Manly v The Public Trustee of Queensland* McMeekin J said:

‘I wish to say two things about the costs position. The costs are said to have amounted, if one includes all parties, to the sum of approximately $180,000. Firstly, they are out of proportion to the work and difficulty involved in this case. Secondly, there is little point to litigation in these modest estates. The executor is entitled and, save perhaps in a clear case, duty-bound to uphold the Will. Parties and their legal advisors would be well advised to bear this firmly in mind before embarking on litigation in such circumstances.’ (emphasis added)

In *Manly*, the costs amounted to about 40% of the value of the estate, but McMeekin J did not ultimately make an order for costs, even though he considered the applicant’s claim to be entirely without merit:

‘The applicant’s claim for costs seems to me to be entirely without merit. Further, in my view, the beneficiaries and the respondent have a strong case for their costs to be met by the applicant. Her failure in the application, the modest size of the estate, her rejection of an offer, which on my findings was plainly reasonable, and her lack of candour in conducting the application, all provide powerful reasons why I should consider that the overall justice of the case should result in her bearing the burden of the costs. However I have come to the view that I should not order the applicant to pay the beneficiaries’ costs.’

This was reversed on appeal, with the applicant having to pay her costs. Daubney J observed (McMurdo P and Mackenzie AJA concurring):

‘As to the question of costs, there is, in my view, no reason why the unsuccessful appellant should not pay the respondents’ costs of the appeal...the value of this modest estate has already been significantly diminished by reason of the costs properly incurred in the challenge at first instance. It would, in my view, be quite unjust for this appellant to be relieved from the usual consequence of paying the successful respondents’ costs of this appeal, particularly if that were to be accompanied by an order which had the effect of even further diminishing the value of the estate’ (emphasis added).

---

204 *Manly v The Public Trustee of Queensland (No 2)* [2008] QSC 47 at [14] and [15].
206 *Manly v The Public Trustee of Queensland* [2008] QCA 198 at [41] and [42].
The comments in *Manly* at first instance were clearly also directed at the lawyers involved. Similarly, in *Oswell v Jones*[^207] Chesterman J commented unfavourably on the amount of costs, which totalled around 50% of the value of the estate, with one applicant’s costs much larger than the others. Chesterman J somewhat acridly remarked that ‘the applicant, it appears, has chosen to litigate expensively’.[^208]

In Victoria, the case of *Re Thompson (dec’d): Lundstrom v Attorney General for the State of Victoria*[^209] illustrated the costs controversy in a case where the testatrix had left one quarter of her residuary estate to the Victorian State Opera (VSO). However, at the time of her death this company had ceased to exist. In the resulting indecorous squabble between Opera Australia (which had taken over the business of the VSO), and two minor opera companies seeking a cy-près settlement, at the expense of family members who might have taken on intestacy due to the lapse of the gift, costs of over $1 million were incurred. Though not a family provision case, the costs issue has perhaps become generalised in wills cases. Hansen J said:[^210]

‘…whatever apprehension the estimate might reasonably have induced in the residuary beneficiaries could only have been increased by the suggestion that costs were now in the order of $1 100 000. This, at least prima facie, seems high stakes indeed for what is, after all, a proceeding for the answer to certain questions concerning a testamentary gift that could not take effect and where it was not argued that the gift lapsed to pass on an intestacy, or that it passed to the other residuary beneficiaries, or that there was not a general charitable intention. The ‘contest’ became one between OA, MO and MCO who vied to be a recipient to the greatest extent of the VSO share, and in this process costs have been incurred. The residuary beneficiaries have not been involved in this process yet, on OA’s submission, they should bear three-quarters of the costs occasioned thereby…Considering the matter overall, and having regard to all that counsel has said, I conclude that in the very particular circumstances of this matter and for the reasons advanced by the residuary beneficiaries and the Attorney-General in their written and oral submissions, the just and equitable approach is that submitted by counsel for the Attorney-General. What was reasonably commenced as an administration proceeding with tolerably clear answers, became, following the joinder (at their request) of OA, MO and MCO and as between them, akin to an adversarial contest over the fund with attendant and substantial cost and expense and the substantial displacement of the usual role of the Attorney-General. On the basis suggested by the Attorney-General the costs of OA, MO and MCO relating to the cy-près aspect would be taxed as between solicitor and client and paid out of the VSO share.’

South Australia allows for a Master to deal with applications in small estates on the papers, but Victoria, Western Australia and Tasmania have not done anything specific (apart from the model legislation mentioned above) to control costs escalation in court cases relating to wills to date.

[^208]: [2007] QSC 384 at [8].
[^210]: [2006] VSC 313 at [42] to [47]
Solicitor or executor negligence can also contribute to high costs in will cases. In *Dimos v Skaftouros*, Dimos, a solicitor acting as executor of the will of Skaftouros, was found to have been slow and recalcitrant in dealing with the property under the will, and in paying the beneficiaries. In part, this led to excessive costs being incurred. Dimos was ultimately removed as executor. The same sorts of issues can arise in specific family provision cases, which can add to overall costs. In family provision matters costs can escalate because of unnecessary affidavit evidence being produced, often as a result of inexperience or incompetence by law firms newly engaging in this area of the law. Executors will inevitably have lower costs, since the burden is on the applicant to provide appropriate and relevant affidavit evidence, but executors should not incur unnecessary expenses in pursuing evidence, or in cases of small estates. In states which do not require early compulsory mediation, this will involve executors making clear that costs may waste the entire estate and making attempts at an early compromise or settlement.

The costs issue is definitely problematical in every jurisdiction. It has been suggested that truly uniform costs disclosure rules would be an advantage in Australia, but the means of achieving these, given that there has already been a model bill adopted in each state, is not clear. Another round of ‘uniform model bill’ adoption is the only way forward if states are really committed to uniformity on this issue.

4.2 ALTERNATIVE DISPUTE RESOLUTION

Mediation in family provision cases should arguably reduce costs, since the issue would not go to court if successfully mediated. In Queensland, some kind of early alternative dispute resolution (ADR) is compulsory under Practice Direction 8 of 2001 which has the object of ‘encouraging the early consensual resolution by all parties’ and ‘to reduce cost and delay’. The relevant requirement is that there should be an ‘early and inexpensive resolution’ of the issues by submission to ‘an ADR process such as mediation or case appraisal as agreed between the parties or as may be ordered by the Court’. However, some practitioners interviewed for this research have pointed out that the process of ADR is not necessarily inexpensive, with average fees around $100,000, and daily fees of $4000-7000. Others though claim that these sorts of fees for mediation are excessive and evidence of price-gouging. In the absence of fixed fees, it is difficult to know what a fair fee level for compulsory mediation is. It may be that in states where mediation is compulsory, fees should be set to enable certainty for applicants and executors.

---

211 [2004] VSCA 141.
214 At clause 2.
215 At clause 8(b).
216 Interviews with partners of law firms, 2008.
Another form of alternative dispute resolution which could be available in family provision disputes is ‘collaborative law’. This is a process where, unlike in a mediation, there is no third party to help decide the issue, but rather the parties to the dispute and each of their lawyers collaborate to bring about a settlement. The process involves a series of round table meetings, usually each of two hours, which are held by the parties and their respective lawyers until a settlement is reached. The lawyers are not able to begin court proceedings or to threaten to take the issue to court during the process, and if a settlement is not reached cannot later represent their clients in court proceedings. The object of this process is to come to ‘creative’ settlements. Costs should be lower in this process because there is much less paper work involved – few letters, no affidavits, no court documents and no pleadings. All the necessary work is done in the meetings, and if a settlement is reached in three or four meetings then clearly costs should reflect that fact. However, as with mediation there are no set levels of costs in this process, and some law firms will charge much higher rates than others.

4.3 TIME LIMITS AND OTHER PRACTICAL ISSUES

Time limits for application vary in each jurisdiction, and although these can be extended with leave of the court, the technicalities attached to them may result in claims for negligence against solicitors. For example, applications and their accompanying affidavits must be filed and served within the time limits laid down. Despite these time limits, mediation commonly will not be finalised until 18 months to two years after the death of the deceased, and court cases until two to three years after the death of the deceased. Moreover, some applicants have been permitted to make applications...
after extraordinarily long periods of time have passed since the death of the testator, as evidenced by the Ansett estate applications. It is not clear whether these applications, 26 years after the testator’s death, are entirely based on change of circumstances, or just lack of knowledge by the applicants of their ability to apply. However, given that both applicants were provided for at the time of Ansett’s death, and that one of the current applicants was a lawyer, the decisions allowing the applications seem unduly generous. This is more so perhaps given that any further provision to the applicants will inevitably come from the charitable trust share of the estate. Whilst applications against charitable trusts can be made, and charitable trusts can fail for drafting or other technical reasons, this would be a harsh outcome for any benefiting charities after so long a period of time.

Although time limits are measured from the date of death or probate, the circumstances of the applicant to be taken into account are those present at the date of mediation or trial. The reason for this is that a will may have been made a long time before the death of the deceased, and the deceased’s circumstances may have substantially changed before his or her death. In particular, circumstances and events which are reasonably foreseeable at the date of death may be taken into account in determining whether proper provision has been made for the applicant, and then an order made which reflects the value of the estate at the date of the hearing. This necessitates an updated valuation of the estate at the time of mediation or trial.

Orders made in each jurisdiction can also vary. In all jurisdictions except Queensland, an order of the court by way of settlement takes effect as a codicil made by the testator immediately before death. In Queensland, the estate is held subject to the order even though the order may be an effective variation of the will.

---

222 See for example, Ashhurst v Moss [2006] VSC 287, and Ansett v Moss [2007] VSCA 161; finally in Ansett v Moss [2008] VSC 277, the applicants have been permitted to make application for further provision 26 years after the testator’s death.


FAMILY PROVISION AND GIFTS TO CHARITY IN WILLS

In this section the paper turns to examining the nature and history of charitable bequests in our law and the attitudes of judges to testamentary freedom to give to a charity rather than to family. There has been an ebb and flow over the centuries of the line that is drawn by the state or judges. Finally, the scant statistics on charitable bequests in Australia are examined to provide further context to the discussion of family provision contests affecting charities.

5.1 CHARITABLE GIVING IN WILLS

Although inheritance is, in general, linked to family blood ties either by forced shares or by requirements of family provision, there are limits placed on both. In addition, the right to inherit within a family can be restricted by the right of bequest to non-family members or to charity. Bequest law has its origins in Roman law, but the reasons for its introduction in Roman law no longer apply, and some testators might regard the right of bequest to be very wide. However, this is not supported by legislation in family provision jurisdictions, which require provision for the family ahead of bequests to non-family members or to charity.

Therefore, although not primarily introduced to deprive charities of philanthropic bequests, a survey of the case law reveals that this has been one of the effects of family provision legislation over time (see Appendix A). Theoretically, a deceased’s wishes are supposed to be honoured, no matter how inappropriate or outlandish these may seem to be in a family’s eyes. In Grey v Harrison, the Victorian Court of Appeal said:

‘It is one of the freedoms that shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit. Rights and freedoms must, of course, be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity, as it were, to interfere with the testator’s dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator’s bounty and give it to someone else. In conferring the discretion in the wide terms found in section 91 [of the relevant Victorian Act], the legislature intended it to be exercised in a principled way. A breach of moral duty is the justification for curial intervention and simultaneously limits its legitimate extent.’

226 Gifts in wills can refer to devises of real property, and legacies or bequests of personal property. In this section, the term bequest has been used as a general term for gifts in wills.

227 This was often to provide heirs where there were no immediate relatives. Incorporation of non-relatives as heirs into a family, by adoption or even manumission, was common in Roman times. This was often the only way of introducing new blood lines into restricted family genetic pools, particularly of patrician families, but over time, even in powerful plebeian families.

228 (1997) 2 VR 359, at 366
Although international human rights treaties do not refer directly to the disposal of property on death, all refer to the family as the fundamental ‘group unit of human society’, and to the right to privacy in relation to one’s affairs in relation to family, home or correspondence. However, succession law, which includes family provision law, is not governed by any public international law regime, such as those contained in human rights treaties, so the term is used loosely in the above quote from Grey. If there are international aspects to a particular will, this is a matter for private international law, and is governed by the provisions of the Hague Convention on the Conflicts of Laws Relating to Testamentary Dispositions as expressed in domestic laws of those countries who are parties to it, or in some countries by domestic laws giving a similar effect.

Charitable giving law is commonly traced back to the Charitable Uses Act 1597, which was revised in 1601. The background to this enactment in England was a fast developing secular nation state during Elizabethan times, with corresponding wealth and desire for improvement. The accepted norm of the sixteenth century became that the poor were a proper charge on society, and that if private charity failed to provide the necessary support, the state should intervene. Where the Church had been the trustee of charitable funds before the Reformation, in more secular times it was seen as appropriate that charities also be secular in nature. This culminated in substantial charitable giving in the period 1601-1640, most from the increasingly wealthy merchant classes. The rise in philanthropy and the positive effects this had on poverty and ignorance unfortunately came to a halt when the civil war and all its consequences reduced England again to mediaeval standards of provision for its poor and homeless.

Moreover, the possible impetus to both inter vivos giving and charitable bequests in wills given by the Charitable Uses Act 1601 was later limited by successive Mortmain Acts operative between 1736 and 1960 in the UK. Although Mortmain Acts had been in place since the Statute of Mortmain 1279, they had at first been aimed at preventing land from falling into the ‘dead hand’ of the Catholic Church. Since land equates with power, the transfer of land from secular to religious purposes was naturally of

---

229 Universal Declaration of Human Rights 1948, Articles 12 and 16(3); International Covenant on Economic, Social and Cultural Rights 1966, Article 10; International Covenant on Civil and Political Rights 1966, Articles 17 and 23.


231 39 Eliz.1, c.6 (1597)


233 In 1480-1490, about 65% of charitable benefaction was religious in nature, while in the 60 years of the Elizabethan period only 7% of benefactions were for religious purposes. See: W.K. Jordan, ‘The English Background to Modern Philanthropy’ (1961) 66(2) The American Historical Review 401, 402.

234 Ibid, 403. Jordan, in investigating all the wills lodged in selected counties of England and Wales between 1480 and 1660, found that wealthy merchants gave on average 17% of their wealth to charity, contributing 43% of the total charitable funds during Tudor times. He estimates that this equates to the huge sum of over £6 million donated to charity in that time.

235 The last Act in the series was The Mortmain and Charitable Uses Act 1888 (UK).
concern to the state authorities in England. The purpose of the Statute was to prevent this happening, particularly by bequests in wills. However, the purpose of the Statute became progressively clouded as the state authorities allowed land to be alienated to the Church by the selling of royal licences on payment of a fine. Thus, there appears an early example of a well-founded policy of government converted to a revenue-raising mechanism.

In the time of Henry VIII, two statutes were enacted to limit the passage of land to chantries in wills.236 A 1532 Act provided that devises of land to chantries for periods of more than 20 years were ‘prejudicial to the King and other landholders’ and lands so devised would be escheat to the mesne lord (would revert to the freeholder, if any, or to the Crown). A 1545 Act appropriated all lands owned by chantries to the Crown. The Act’s preamble ‘alleged mismanagement of chantry property, self-dealing by donors and patrons, and perversion of the purposes for which chantries had been established’.237 The preamble also referred to the crippling cost of various wars, and of the maintenance of the royal estate. Thus, we have an example of government policy which allows expropriation of private property, given for charitable purposes, without compensation, in favour of the Treasury. Thankfully the Elizabethan period was not so riven with hypocrisy, giving a wide meaning to ‘charitable uses’.

The Charitable Uses Act 1601 defined charitable purposes and did not affect the already established custom of creating charitable trusts which protected against the law of mortmain, and could project into perpetuity the charitable impulses of a testator. However, the Mortmain Act 1736 invalidated charitable gifts of land or buildings, and acted to protect heirs from disinheritance by charitable benefaction in wills.238 The result of this Act was that judges progressively widened the definition of ‘charitable uses’, so that a variety of charitable bequests could be invalidated in wills in order to protect heirs. The impetus to this change in policy regarding charity was the 18th century mode of thinking about personal responsibility. When the Hanoverians came to the throne and the Whigs took control of parliament, the notion that the state owed anything to the poor, or indeed, that any wealthy individual owed anything to those less well-endowed died away. The Whigs embraced a form of economic rationalism which awarded the victor the spoils, and made charitable giving less fashionable. This was taken to the extreme in the early 19th century, until the Victorian era, when subscribing to charity while living and testamentary independence for the will-maker again encouraged philanthropy. In the 19th century, while freedom of testation was unlimited in England and its dominions, a more reasoned approach was taken in US commentary with suggestions that to consider the right of bequest to be without limits or ‘an almost natural right’ had ethical ramifications beyond what might have been an accurate statement of the common law at the time.239

236 Chantries were chapels on private land usually given over to the singing of masses for the dead. After the Reformation, this use was regarded as superstitious.
239 Max West, ‘The Theory of Inheritance Tax’ (1893) 8 (3) Political Science Quarterly 426, 429. West gives the example of a Wisconsin statute (Laws of 1891, chapter 359) which limited the freedom of bequest by providing that no person leaving a widow, child or parent could bequeath more than half his estate to any benevolent, charitable, literary, scientific, religious or missionary society.
The subsequent move between 1900 and 1938 to limit testamentary independence by family provision legislation in some common law jurisdictions had the undoubted effect of reducing some charitable bequests in wills. Of course, many argue that this sort of legislation is not an infringement on testamentary independence, because its original purpose was to provide family maintenance only, and testamentary freedom was to be otherwise retained. But the case law shows that the courts have gradually expanded their discretion, using the moral duty argument.

Clearly, the impetus to philanthropy in wills has varied in each historical period, depending on the mood of the times. In the 21st century, should the right to make bequests to charity again be unlimited? Or should provision for family take precedence? This expresses the philosophical nub of the family provision argument. Is accumulated wealth within a family the property of the family in perpetuity? Or should a testator have the freedom to alienate family wealth to charitable or other causes? The human rights treaties mentioned above all provide that the family is the central unit of human organisation and that its interests should be actively protected and promoted. If this is so, it is possible to argue that the maintenance of family wealth within the family unit through inheritance is important to both the perpetuation of the family and of society itself. Total freedom of testation would threaten this process.

It is possible to argue more narrowly that consanguinity is an end in itself. This is certainly the original basis of family provision law, that consanguinity, if nothing else, binds the generations of a family. Obligations to the ‘call of blood’ have supported the moral claim notion in family provision law – a parent has a moral duty to his or her children, even from beyond the grave, and even if their relationship while living was less than satisfactory. Testamentary freedom might permit this obligation to be ignored.

On the other hand, human rights treaties also protect individual rights as personal rights, and testamentary freedom is presumably one of these personal rights. Testamentary freedom embodies the concept of ownership of property and the right to pass on property by will even though the testator is dead. The testator’s ownership survives his or her death, which can seem a bizarre notion, but is one which is crucial to dealing with property in all systems of political organisation which are not based on community property. Testamentary freedom is really about control of property by the dead person, and can also lend itself quite readily to control of the living by the dead person. The testator can either provide for the members of his or her family, or not. He or she can attach conditions to the bequests made, provided they are not against public policy. He or she can make commentary on any relations, exact revenge, and assert his or her personality in ways which may not have been possible in life.

In the 19th century the individual right to testamentary freedom was expressed to be:

> The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given... The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to

---

240  *Banks v Goodfellow* (1870) 5 LR QB 549, at 563-565, per Cockburn CJ.
be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law... (emphasis added).

The original family provision legislation in New Zealand was not meant to be other than a statutory adjunct to the expression of this form of testamentary freedom. A testator might dispose of his property as he saw fit, but not before he had responded to his 'moral responsibility' for proper provision for his widow and children. Having thus ensured by statute that he had adequately followed his 'instincts, affections and [the] common sentiments of mankind', he was free to engage in whatever testamentary frolic he chose. However, as with all discretionary legislation, family provision law soon took on a life of its own. What was proper? What was adequate? What was the content of a testator's moral responsibility? What persons were family members? What property was the estate for provision purposes?

In the 21st century, total testamentary freedom is not found in any organised legal system, so the choice is really one between a discretionary system of family provision law and a system of forced shares, with the testator having the freedom to dispose of the residue to the benefit of any person or cause. Does either system lend itself more easily to charitable bequests?

It is difficult to say that the US elective forced share system itself promotes philanthropy at death. Many influences are at work in relation to charitable bequests in wills in the US, most notably the estate tax. In the US system of elective forced shares, it is clear that after the widow’s share is provided for, any or all children may be disinheritcd almost with impunity,241 so that bequest of the residue to charity is made easier. Perhaps this accounts in part for the size of philanthropic testament in the US, in addition to an estate tax system which allows spousal and charitable exemptions of 100 percent. However, even in the US children can use the common law doctrines of undue influence,242 insane delusion, testamentary libel and lack of testamentary capacity to challenge a parent’s will.243 There is also provision for the pretermitted child (a child born or adopted after a will is made, and omitted entirely from that will), who may be able to apply for his or

---

241 This does not apply to Louisiana, which, with a civil law system, has a forced share (the legitime) for children under 23. However, pressure was brought to bear on Louisiana to reduce the legitime age limit to 23.

242 See for example, Carpenter v Horace Mann Life Ins. Co. 730 S.W. 2d 502 (Arkansas Court of Appeal, 1987).

243 Ronald Chester, ‘Should American children be protected against disinheritance?’ (1997) 32(3) Real Property, Probate and Trust Journal 405, 412. However, these are rare events in US jurisprudence.
her share of an estate as if the deceased had died intestate.  

Indeed, it could perhaps be argued that undue influence cases in the US, though not a common occurrence, operate in a quasi-family provision manner to support the courts’ view that family should be provided for before non-family, or even charities. In *Carpenter v Horace Mann Life Insurance Co.*, the Arkansas Court of Appeal stated:

> ‘Where the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart, to the dictates of parental affection, to natural justice, to solemn promises, and to moral duty, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence.’ (emphasis added).

This could be a statement from any case in family provision jurisdictions of the past 100 years, and similar cases in the US argue for a strong cultural bias, based on moral duty, towards family protection when the issue is brought before the US courts. Grappling with the particular circumstances of each case was something which gave the original family provision legislation, in the view of some American commentators, a strong ethical appeal, in addition to its emphasis on awards based on need. Since the American system is one of elective forced shares to specific family members, usually spouses, US commentators are almost universally impressed with the judicial discretion allowed in family provision laws, particularly in relation to the flexibility of applicant permitted, moral claims, and the way such laws can deal with changing social circumstances.

It is clear that bequests to charity in Australia and other family provision countries will always be reviewable by the courts. It can never be said that a will is the final word in a discretionary system of family provision law. As the Privy Council expressed it in *Bosch v Perpetual Trustee Co.*:

> ‘The task of exercising the power must always be one of great difficulty and delicacy. It must always be one largely of guesswork, especially in a case like the present, which is concerned with children of tender age of whose needs in the future nothing can be predicted with certainty.’

However, their Lordships then had no difficulty at all in predicting with a great deal of certainty what they considered would be an appropriate amount for each child, even though the children were, at the time of the case, only 5 and 6 years of age. The bequest of £257 000 to the University of Sydney was reduced by a total of some £100 000 plus the costs of the action. This sort of decision is commonplace in family provision law.

---

244 Uniform Probate Code (US) Article II Part 3, 2-302. In some states of the US, a child born before the will is made may also be covered by pretermitted child legislation.


246 Ibid. 268.


248 [1938] AC 463, at 483 per Lord Romer.
5.2 CHARITABLE GIVING IN WILLS IN AUSTRALIA

While it is obvious from the case law that the family provision laws themselves will affect charitable bequests, this is not the entire picture in Australia. An estimated 58% of adult Australians have made a will and charitable bequests can only come from those wills.249 Charitable testation has not been the norm in Australia in the past, and in current surveys many Australians do not expect to be able to leave a legacy to their children when they die, much less to charity, because of the rising cost of health and aged care.250 In research for the Australian Housing and Urban Research Institute, Olsberg and Winters found that only 7% of respondents overall had made a charitable bequest in their will. Of baby boomers, only 5% had made such a provision, though 10.8% of those aged over 75 had done so, and 13.4% of those living alone. The findings included:

TABLE 4: WILL-MAKERS’ INTENTIONS AS TO CHARITABLE BEQUESTS IN AUSTRALIA

<table>
<thead>
<tr>
<th>Demographic Characteristic</th>
<th>Charitable bequest of some type in will (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall</td>
<td>7.0</td>
</tr>
<tr>
<td>Male</td>
<td>5.5</td>
</tr>
<tr>
<td>Female</td>
<td>8.6</td>
</tr>
<tr>
<td>Age 50-59</td>
<td>5.5</td>
</tr>
<tr>
<td>Age 60-74</td>
<td>7.3</td>
</tr>
<tr>
<td>Age 75 and over</td>
<td>10.8</td>
</tr>
<tr>
<td>Living with spouse/partner</td>
<td>3.5</td>
</tr>
<tr>
<td>Living with family/other</td>
<td>8.3</td>
</tr>
<tr>
<td>Living alone</td>
<td>13.4</td>
</tr>
<tr>
<td>Working full-time</td>
<td>5.7</td>
</tr>
<tr>
<td>Working part-time</td>
<td>7.0</td>
</tr>
<tr>
<td>Self-funded retiree</td>
<td>9.1</td>
</tr>
<tr>
<td>Pensioner/part-pensioner</td>
<td>8.9</td>
</tr>
<tr>
<td>Own home – no mortgage</td>
<td>7.2</td>
</tr>
<tr>
<td>Own home – mortgage</td>
<td>4.8</td>
</tr>
<tr>
<td>Renting privately</td>
<td>8.9</td>
</tr>
<tr>
<td>Renting publicly</td>
<td>6.3</td>
</tr>
<tr>
<td>Retirement village</td>
<td>14.8</td>
</tr>
</tbody>
</table>

Source: Diana Olsberg and Mark Winters, Ageing in Place: intergenerational and intrafamilial housing transfers and shifts in later life, a report prepared for the Australian Housing and Urban Research Institute, AHURI Final Report No. 94, October 2005, 65-66, 90-93.

250 Diana Olsberg and Mark Winters, Ageing in Place: intergenerational and intrafamilial housing transfers and shifts in later life, a report prepared for the Australian Housing and Urban Research Institute, AHURI Final Report No. 94, October 2005, 65-66, 90-93. The research was based on a survey of 6789 respondents, integrated and correlated with qualitative data from focus groups and internet chat rooms. For similar findings from the UK, see Karen Rowlingson, “Living Poor to Die Rich?’ Or ‘Spending the Kids’ Inheritance’? Attitudes to Assets and Inheritance in Later Life’ (2006) 35(2) Journal of Social Policy 175, 176-177.
Similar outcomes were found in research looking at patterns of transmission at death in Victoria. This research sampled wills in 2005-06 and found that 6.9% of testators left a charitable bequest, in line with the intentions expressed in the data above. These bequests totalled 1.79% of the gross value of estates sampled, and 4.21% of the non-property value of the estates sampled. The largest estates (over $2 million) were most likely to include a charitable bequest (23.9% of the estates in this category included a charitable bequest), but these bequests were the least in value, at 1.34% of the total value of the estates. This contrasts with findings in the US, and with research on inter vivos giving in Australia. Of the smaller value estates (less than $0.5 million), only 5.71% made charitable bequests, but these amounted to 1.81% of the value of the estates.

Most testators (85%) left their estates to their children in equal shares, with only 1% generation-skipping, and fewer than 15% leaving estates to children in unequal shares, or to other beneficiaries than their children (e.g. siblings, friends). Again, this concurs with the findings of Olsberg and Winters as to intentions of their respondents, despite some observations from respondents referring to the ingratitude and selfishness of children. Apparently, even the latter observations do not drive an increase in philanthropy in Australian wills in practice. Similar findings and observations were made in research from the UK and Japan, suggesting that cultural and legal mechanisms are difficult to overcome in the quest to increase philanthropy at death.

These findings agree in part with those of less formal ‘lifestyle’ research which identifies varying percentages of Australians as having left, or intending to leave, a charitable bequest in their wills. For example, the Australian Lifestyle Survey identified the following testamentary intentions:

---

253 It is possible too that baby-boomers are spending or have spent large sums on the education or housing costs of their children. On the issue of investment in human capital of this type see: John H. Langbein, ‘The Twentieth-Century Revolution in Family Wealth Transmission’ (1987-88) Michigan Law Review 722, 734-736.
255 Australia Post, Australian Lifestyle Survey, an ongoing survey which can be accessed at https://www.firstdirectsolutions.net.au/default.aspx. The purpose of this survey is to determine Australia Post consumers’ preferences in direct mailings.
TABLE 5: TESTAMENTARY INTENTIONS IN LIFESTYLE SURVEYS

<table>
<thead>
<tr>
<th></th>
<th>Will leave a legacy to charity (%)</th>
<th>May possibly leave a legacy to charity (%)</th>
<th>Will or may leave a legacy to charity (%)</th>
<th>Will not leave a legacy to charity (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>3.4</td>
<td>17.2</td>
<td>20.6</td>
<td>19.6</td>
</tr>
<tr>
<td>Queensland</td>
<td>3.2</td>
<td>18.3</td>
<td>21.5</td>
<td>23.0</td>
</tr>
<tr>
<td>Victoria</td>
<td>3.0</td>
<td>15.8</td>
<td>18.8</td>
<td>22.1</td>
</tr>
<tr>
<td>Western Australia</td>
<td>2.9</td>
<td>17.2</td>
<td>20.1</td>
<td>20.7</td>
</tr>
<tr>
<td>South Australia</td>
<td>2.9</td>
<td>16.2</td>
<td>19.1</td>
<td>23.7</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2.8</td>
<td>16.6</td>
<td>19.4</td>
<td>16.7</td>
</tr>
</tbody>
</table>


Other consumer research identifies 14% of Australians over 60 as having left a charitable bequest.256

Since most testators in the formal research state that they have left their estates to their children in equal shares, the possibilities for family provision applications would seem limited, and this has certainly been the case in Australia. Although family provision applications are increasing in Australia, applications involving bequests to charity are not commonplace, but when they do occur can have serious implications for the charities concerned. Is the fear of litigation amongst family members, or between family members and charities the reason why so few will-makers in Australia include a charitable bequest in their wills? Certainly, it is not a lack of wealth, since wealth is increasing in Australia.257 It is more likely to be that will-makers take a particular view about property rights as discussed above – family property belongs to family, not to ‘outsiders’.

If charities wish to increase philanthropy at death, how can they change this view? Whilst wealth levels are important, these will not necessarily convert to testamentary charity. As at 30 June 2006, total net private wealth in Australia was $7464 billion at market prices, representing net private wealth of $361 000 per person, having grown at an average of 11.2% per year in the ten years from 1996. By the beginning of 2007, this had increased to $362 300 per person, with about 10% of households having wealth of more than $1 million. The growth in household wealth in 2005 – 2006 alone was 19% in nominal terms, 15.4% in real terms, and 13.9% per capita.

256 See www.includeacharity.com.au quoting research conducted by Instinct and Reason, a Sydney based research and consultancy firm. Includeacharity.com.au is a website sponsored by the Australian Red Cross, Mission Australia, the Heart Foundation and the Cancer Council Australia to raise awareness of and offer guidance on charitable bequests in wills. The page entitled *Facts and Figures* contains references to several informal studies of testamentary intentions (accessed 4 January 2008).

Of this wealth, dwelling assets represent 55%, business assets 38%, consumer durables 3%, government securities and other investments 2%, and money assets 1%. Of the 1% in money assets, 55% is tied up in superannuation, 26% in equity investments such as shares, and 19% in currency, deposits and bonds. The problem for charities in this data seems obvious. Most Australian individual wealth is tied up in housing assets or business assets, neither of which is easily the subject of bequests, unless converted into charitable trusts on death or other tax preferential vehicles such as prescribed private funds while the donor is still alive.

Charities need to note that Australians are cash and securities poor, having been dissavers for much of the last twenty years. Nor are there any tax incentives for charitable bequests of cash or securities in wills. Much of the literature on attracting bequests is American, and of marginal use in Australia since the US estate tax system, very high medical costs for a last illness and cultural differences present a substantially altered landscape for attracting bequests, particularly from older Australians.

THE VIEWS OF ESTATE LAWYERS AND CHARITY BEQUEST OFFICERS

As part of this research, the views of estate lawyers and charity bequest officers were sought to help provide some insight into the nature of the forces and dynamics present in family provision disputes generally. More specifically, views were also canvassed on the impact of family provision law on charitable bequests. We were keen to draw on the practical experience of both groups to develop a list of strategies to improve the position of charities in obtaining and retaining charitable bequests.

There appears to be little research about the charity-lawyer relationship generally, so we took the opportunity to explore the opinions of estate lawyers about the strategies that charities use to increase charitable bequests, and their professional dealings with charities when making wills with charitable bequest provisions. We also sought the views of charity bequest officers not only about family provision contests, but also their attempts to market bequests to a lawyer’s clients through lawyers.

Given the lack of previous empirical research in this area, the exploratory nature of this research and the difficulty of administering a survey-based instrument, we decided on a qualitative research strategy of personal interviews through a series of open ended questions. The strategy was to interview lawyers who were regarded as specialists in estate law in Queensland, New South Wales and Victoria. The professional legal bodies either have ad hoc advisory committees of expert members to advise them on estate matters or lists of accredited senior estate practitioners from which we could identify suitable candidates for interview. In one case it was possible to take an hour of a regular advisory committee meeting to hold a focus group style discussion on the research issues. Most interviews were done in person, but some for convenience were by telephone and all were about 30-60 minutes in length. Bequest officers from large national charities were interviewed in each state, and these interviews sometimes included their in-house legal counsel.

Towards the end of the interviews it became apparent that so-called ‘plaintiff lawyers’ were being mentioned frequently by both specialist estate lawyers and bequest officers as being a driver of the increase in family provision litigation. We arranged additional interviews with lawyers through the plaintiff lawyers’ professional association to explore these claims further.

A semi-structured interview framework was used which contained questions on background demographics, the interviewee’s experience with wills and charitable bequests generally, and the interviewee’s experience with family provision claims and bequests (see Appendix B). These questions were first piloted with estate law staff of two specialist estate law practices in Brisbane. The interviews were taped and transcribed to provide accuracy of quotes and to assist post-interview reflection by the researchers.

The qualitative data were analysed using a multi-stage content analysis approach. Initially, responses to each group of questions were reviewed. Single complete thoughts represented the unit of analysis in this study. Transcripts were inspected and thoughts (sentences and phrases) identified and represented on a single piece of paper each. Narratives were subsequently analysed using a paper and piles method with each categorised and coded by creating piles representing the emergent and similar concepts and themes. To determine the themes, categories identified that had similar themes were collapsed to reduce the total number of categories. Lastly, the remaining categories were labelled with a title that reflected each group's meaning.

To ensure that bias did not influence the analysis all qualitative data were coded by two raters: the researcher and one person for whom the purpose of the study was unknown. Major initial differences in coding were discussed and rationalised between the raters in order to reach agreement. If agreement could not be reached the narratives in question were excluded from the analysis.

The research was conducted between the beginning of February 2008 and the end of June 2008. Interviewees were representative of senior practitioners in estate law in law firms from Sydney, Melbourne and Brisbane (17), a plaintiff law association (1), plaintiff law firms from Sydney, Melbourne and Brisbane (4), barristers acting both for clients and as mediators (4), government and private trustees (3), representatives of large charities (7), and a law society committee (7).

We present the findings of these interviews under the following headings. First we examine the attitudes of estate practitioners towards charitable bequests generally and charities’ marketing attempts to lawyers. Second, we examine the estate lawyer’s experience of family provision claims generally. Third, we report the response of bequest officers to family provision claims and their experiences of mediation of such claims. Fourth, the views of mediators who often deal with such matters are examined, and finally, this section of the paper draws together the suggestions made by interviewees about how charities might deal more effectively with family provision claims.

6.1 WHAT IS PRACTITIONERS’ EXPERIENCE WITH WILLS AND BEQUESTS GENERALLY?

‘Of all the thousands of wills I have prepared, I could count on one hand the number that have included a bequest to charity…’

6.1.1 LAWYERS AND CHARITY ADVERTISING

All practitioners interviewed regarded the will with a charitable bequest as an exception to the norm. Whilst many of these practitioners are also involved in creating increasing numbers of prescribed private funds for their clients, the same could not be said of charitable bequests.


How can charities improve their position? Practitioners pointed to the issue of the actual numbers of wills being made in Australia. Intestate estates cannot of course contain any charitable bequest, so without a will being made, charities are probably missing out on the possibility of bequests from almost half of Australians dying in any given year.263 Even where a will is made, practitioners commented on the rarity of charitable bequests in wills, with one saying that of all the ‘thousands of wills she had prepared, she could count on one hand the number that had included a bequest to charity’. This was the common view, that nearly all testators would rather leave their estate to the remotest or most estranged relative than to charity. Certainly, statistics show this ‘bias to family’ to be true, with research showing that only about 7% of wills in Australia contain a charitable bequest,264 although of course some of these bequests will be both large and significant. Why is this reluctance so wide-spread?

Some practitioners suggested that charities did not advertise enough, so that will-makers (as opposed to lawyers) were not aware of them, or just did not think about them when they were making their wills. Some suggested that charities did not need to advertise, but rather to engage in some effective PR, promoting in the mass media the ‘good news stories’ which arose in the course of their work. Other practitioners were firm in the belief that advertising just did not work for charities, since all bequests, in their experience, were based either in personal ‘stories’ such as family illness, or personal connections with the charity concerned (perhaps through volunteering or inter vivos giving), or on mass media coverage of discrete events which put the work of the charity ‘in the face’ of the bequestors. A couple of practitioners suggested that bequest marketing by charities was poorly segmented, so that the wrong groups were targeted for bequests.

However that may be, there were some comments from practitioners that charities were not highly thought of by clients, and so were never likely to benefit by bequests from will-makers with these opinions. The comments included that most people leave a bequest to charity as a last resort, because they consider everyone else but a charity to be more deserving; that charities have incompetent bureaucracies, are inefficient, are not really charitable, or have unreasonable and burdensome administrative costs; and that charities are a ‘rip-off’ and not trusted by clients to make proper use of any bequest. These are serious credibility issues for charities to deal with in order to improve their bequest income, and it is an issue for the whole sector.

It appears that few clients ask for advice on charitable bequests, with most coming through the legal office door with the specific charity firmly in mind. In any event, practitioners were clear that they would not give any specific advice on charities and bequests, since that would be ethically improper. Two practitioners who could remember a situation where a client had asked for assistance in finding a charity did use annual charity books saying:

‘on the odd occasion when the client would say, well I’m interested in leaving some money, say for cancer research, you just hand them the book and say, well here’s the cancer section, go tell us which one you want to leave it to.’

263 ACOSS, Giving Australia: Research on Philanthropy in Australia, October 2005, 35. This research estimates that only 58% of adult Australians have made a will.

264 See section 5.2 above.
Given the many years of practice of such specialist estate lawyers this is sobering for those bequest officers who might have a different conception of a ‘paternal’ trusted family lawyer guiding his clients to make a wise choice between competing charities.

Many practitioners thought that advertising activities directed at them by charities were sub-optimal. Their almost universal view was that advertising by charities in legal journals was really a total waste of time and money if directed at them, that charity handbooks and similar publications were seldom used, and that letters and brochures ‘went straight into the bin.’ Some admitted that material was put onto a general file, or charity handbooks were placed in the firm library.

The reason given for these actions was that charity publications of this type were of little use to the lawyers. Firstly, they did not share them with clients because the issue of choosing a charity never arose, or the lawyer would not offer such assistance to a client. Secondly, the main reason for a lawyer to have reference to a charity is to obtain the correct ‘legal’ name of the charity for the purposes of a charitable bequest, and few would rely on such publications as an indication of the correct legal name. This is because often the ‘trading’ or ‘common name’ of a charity is not their legal name required in a will. For example, many leave a gift to the ‘Salvation Army’, but this would not be the appropriate term to use in a well-drawn will as the preferred charity might be: THE SALVATION ARMY AUSTRALIA SOUTHERN TERRITORY GENERAL WORK; The Trustee for THE SALVATION ARMY (NSW) PROPERTY TRUST; THE SALVATION ARMY (WA) PROPERTY TRUST; or even THE SALVATION ARMY TRADING COMPANY LIMITED; and many other variations, all of which are charities.

Lawyers telephoned, emailed or used charity websites to try to ascertain the correct name of a charity for the will. There were some comments that the websites were badly designed and impenetrable for a person seeking information on bequests. The latter point could be discounted by the lack of skills of senior practitioners of a certain age who seldom turn on a computer, or have personal assistants who do such tasks for them. However, even younger practitioners commented on the relative uselessness of many charity websites, particularly in easily finding whether the charity had deductible gift recipient (charitable) status. Most practitioners who wished for clarification on bequest clauses used the telephone to contact bequest officers directly on the point. Some mentioned that their phone calls were not returned by charities and that often receptionists had difficulty finding the appropriate person in the organisation for the lawyer to talk to about the naming issue.

One lawyer recounted an exchange with charity staff who were trying to ascertain the identity of their client which went past what they considered to be polite. Lawyers would not reveal such instructions without the express consent of their client and suspected that the charity staff knew this, but still persisted relentlessly to the point of irritation.

6.1.2 CHARITIES AND ADVERTISING

Many charities advertised in legal journals and charity handbooks, all had websites with bequest information on them, and some sent out letters or brochures to legal firms. Charities seldom investigated the true effectiveness of these activities, although one large charity representative said that they ‘appeared to be getting their money’s worth’. Another representative of a large charity said that advertising had no value since bequests were based on personal relationships. All had bequests officers or similar personnel who dealt with bequest queries, with large charities having bequest departments dedicated to this activity. In addition, all charities had recommended
bequest clauses on their websites, and available in their brochures and letters, and from bequest officers by telephone. They ensured the telephone receptionist knew about bequests, why lawyers might ring and how to handle such inquiries.

It is left for further research to investigate the benefit of charity-listing publications which have larger audiences than just lawyers. An issue worth investigating is that non-estate specialist lawyers may use the publications, as may individuals before they visit lawyers to have wills made and those wishing to make a gift whilst living. They may also have a place for those will-makers who write their own wills.

6.2 WHAT IS PRACTITIONERS’ EXPERIENCE WITH FAMILY PROVISION CLAIMS?

Experience with family provision claims varied from a few per year to as many as 30 per year, but all practitioners had the perception that claims were increasing in number. Legal practitioners, mediators and trustees nominated the following drivers of family provision disputes:

- Greed
- Family agendas exacerbated by greed
- Unresolved anger and other emotional issues left open within the family which become merged into greed as the application proceeded – ‘greed takes over the emotional landscape and emotion is reduced to dollars and cents’
- The attitude of ‘entitlement to inheritance’ which now pervades the culture (rather than seeing an inheritance as unexpected, or a windfall bonus)
- Changing value systems which mean that it is no longer considered inappropriate behaviour to challenge a will
- The wide-ranging nature of the permitted applicants in the legislation and wide court discretion allowed
- Multiple marriages, with partners and children of each blended family vying for shares of the estate of a deceased
- Increasing numbers and legal recognition of de facto and same sex partnerships leading to claims on estates from partners and children of these relationships
- Lack of closeness in families of all kinds
- Growing numbers of elderly and dependent parents
- Growing numbers of Generation Y young people living at home into their 20s and 30s who may be classed as ‘dependent’ or ‘under a disability’
- More cultural groups in Australia who value and support extended family arrangements, with associated possibilities for findings of dependency
- A generous community interpretation of need and moral worth, reflected in court decisions
- Moral claims of family being treated as paramount
- More wealth and consequent larger estates
Rising real estate prices leading to increasing wealth in otherwise modest estates, and a need for an inheritance to enter a rising real estate market

The superannuation guarantee levy and encouragement to greater superannuation savings resulting in larger estates for people who might otherwise have remained in modest circumstances

The entry of plaintiff law firms into the area of family provision applications, using advertisements to increase awareness of rights of claim, and running the actions as if they were speculative personal injuries claims.

Nearly every practitioner immediately nominated ‘greed’ as the driver behind family provision claims, with the other nominated drivers seen as subsidiary to greed. The greed agenda was said to be exacerbated by the family dynamics/emotional issues category, where family members were engaged in internecine conflict based on past hurts or perceived parental slights which added malice to the mix in family provision cases. As one practitioner expressed it, ‘greed takes over the emotional landscape, and emotion is then reduced to dollars and cents’.

The issue of blended families was held by some to be a driver, while others only nominated this category when prompted. In this case, the dispute often resulted when a will was made in the early stages of a new blended family, and:

‘What was a short term relationship after five or 10 years becomes a long term relationship and therefore more provisions should be made. It’s not easy to get it right.’

However, all practitioners mentioned increasing wealth, particularly in the context of real estate prices and superannuation savings, as a relatively new impetus to claims. This was particularly evident in Sydney. One senior Sydney practitioner noted:

‘claims which in the past, if you had a house, it might have been worth $200 000 20 years ago, the legal costs mightn’t have been that different to run a Family Provision Act claim, it may not have been worthwhile doing so financially. These days that house might be worth a million dollars, the costs aren’t that different, it is worth having a shot at it, especially because in general terms the costs are paid by the estate.’

Those who had given more philosophical consideration to the issues behind increasing claims mentioned the ‘entitlement’ culture and the treatment of moral duty by the courts as a cause of claims. With the courts seeing testamentary duty, particularly of parents, as a moral duty to support children by inheritance, it is perhaps only natural that more adult children and other categories of claimant should consider their right to inheritance as absolute. Such a view propels more claimants into the family provision pool of applicants.

265 The overall rate of divorce for those married is 33%. Of those divorced, 56% of men could expect to remarry, and 46% of women. This represents a relatively large potential number of blended families over increasingly long life-spans. Blended families can give rise to claims in family provision between step-children and step-parents, but the specific number of such claims is not capable of quantification. The recognition of same sex arrangements also adds to this pool: Australian Bureau of Statistics, *Divorces, Australia 2006*, released 7 August 2007; Australian Bureau of Statistics, *Australian Social Trends 2007*, ‘Lifetime Marriage and Divorce Trends’, released 7 August 2007.
Most practitioners, particularly those with some family law experience, noted that they could not help feeling that some of their clients could benefit from relationship counselling to assist them to deal with past hurts and perceived injustices that were often part of the desire to pursue a family provision application. Some clients actually looked forward to their ‘day in court’ where a judge could make a determination about their issue. Others noted that in mediations there were conflicting objectives running: the mediator was looking for a figure that would satisfy all concerned, whereas some applicants had one eye on the amount to be awarded, but the other on a process of vindication. We heard the following sentiments in many interviews:

‘especially relating to disputes between siblings or relatives and that’s some seem to want to use the money as a point, if you like, to demonstrate that the testator loved them as much as their other sibling that may have been left more money in the Will or something along those lines. So tensions which are perhaps more often seen in the Family Court can be brought out in Family Provision Act matters…’

Senior practitioners took a somewhat negative view of applicants in many cases, particularly where plaintiff law firms were involved. They saw these firms as inexperienced and costs-hungry, advertising for clients, and then being overly aggressive in pursuing claims. In the opinion of senior practitioners, barristers, and mediators, plaintiff firms generated inappropriate and unnecessary affidavits, thus driving up costs and causing judges to comment adversely on their practices. Moreover, although these actions are not really speculative, since if you are entitled to claim, you are likely to obtain an award, plaintiff law firms sometimes treat them as such, looking for a quick settlement of about $30,000 or $40,000 as ‘go away money’. This would equate to a day’s costs in some jurisdictions, especially in New South Wales. Others suggested that if the applicant could not demonstrate need, then $10,000 or $20,000 was sufficient ‘go-away money’, depending on the size of the estate. So even if an applicant is not economically needy, they can still win a prize, which suggests undue generosity built into the system of family provision law.

Cost capping by state governments or future adverse costs decisions in courts will become crucial in this process, as both will affect the practice of law firms in charging costs. However, even long-established firms differed widely in their costs, with some having strict and limited costs schedules, and others using their discretion as to costs to charge substantially more. This represents a costs lottery for applicants, but in one sense involves no immediate pain because at present costs are borne by the estate in almost all cases. All that happens is that the size of the estate for distribution is reduced accordingly, sometimes to very little or nothing. Hence the notion that ‘every player wins a prize’, although the size of the prize may, as in the lottery, be disappointingly small. Indeed, in the emotional storms that can be family provision claims it can be argued that ‘really everyone loses’.

266 Advertisements include statements such as ‘Have you been left out of a will? We can pursue your legal rights to inheritance on a no win-no fee basis’ or ‘See us to win your rights under a will’.
267 See section 4.1 above.
268 See the amended Succession Act 2006 (NSW) at sections 99(2) and 99(3), and as an example of an adverse costs decision, Manly v The Public Trustee of Queensland [2008] QCA 198 at [41] and [42].
269 See the pointed comments of Chesterman J in Oswell v Jones [2007] QSC 384, particularly at [8], on this issue.
Following frequent mention by both practitioners and charity bequest officers of the role of ‘plaintiff lawyers’ during our interviews, we sought to interview plaintiff lawyers about family provision applications. Our interviews with senior practitioners in the national plaintiff law firms quickly established that family provision work was not part of the strategic direction of their firms. Some would not undertake such work or it was only a minor part of an individual practitioner’s work.

Further inquiries reveal that much smaller firms with litigation practitioners are becoming more active in this field of estate law. They often advertise in suburban ‘throw away’ papers. They appear to be ‘tagged’ as plaintiff lawyers by the fairly stable and cohesive group of practitioners who have been estate and will specialists for many years. Some of the comments of the established estate lawyers and bequest officers about ‘plaintiff lawyers’ need to be placed in the context of lawyers who have not until recently been practising in this space. It is likely that some of the new entrants have been on a learning curve and also challenging some unwritten practices or assumptions of the more experienced lawyers. Some suggest that plaintiff lawyers’ advertising for those discontented with a will to come forward should be banned. However, as one practitioner noted:

‘...why shouldn’t people know about their rights?...is it correct to restrict a person’s right to know their legal rights?’

It is in our view difficult to lay the blame on ‘plaintiff lawyers’ when it is the law itself which allows such claims to be made. Clearly there are issues for the profession about appropriate conduct of proceedings and costs, as well as the law. This has been recognised in New South Wales. The new Chapter 3 of the Succession Act 2006 (NSW) which replaces the previous Family Provision Act 1982 (NSW), has as one of its objects ‘to enable the making of regulations to control costs and advertising of legal services in relation to [family provision] applications’. In his second reading speech on the new legislation, the New South Wales Attorney-General said:

‘The bill also contains the power to make regulations regarding advertising of legal services in connection with proceedings for family provision: advertising that is often aggressive, unrealistic and seeks to exploit the vulnerable.’

6.3 HOW DO CHARITIES RESPOND TO FAMILY PROVISION APPLICATIONS?

‘Charities are no different from any other beneficiary – they are all subject to family provision applications...claimants without money can overturn testamentary freedom entirely.’

Bequest officers interviewed saw the drivers of the increasing numbers of family provision claims which disadvantage them as:

- A wider class of applicants being allowed to apply by legislators, or by the interpretation of legislation by the courts
- Self-interest by claimants – ‘it’s not the money, it’s the principle’
- An entitlement culture, with the right to inheritance being seen as more absolute than previously

270 Succession Amendment (Family Provision) Bill 2008 (NSW), Explanatory note, at 1.
Increasing numbers of blended families and therefore of step-children entitled to apply
Lack of respect for the wishes of the deceased, particularly by baby-boomer
applicants now benefiting from their parents’ estate
More awareness of these applications from advertising by plaintiff law firms
Charity representatives expressed their frustration that ‘no one is ruled in and no one is
ruled out’ of family provision claims, and that they ‘needed to dig their heels in’ about
bequests without really knowing how this could be achieved. They felt frustration too that
‘no one is doing anything about legal costs’ which they felt were disproportionate, but
over which they had no real control. As one officer stated:

‘The least it’s cost us recently...[is] about $1600, the most is probably...nearly a
quarter of a million. On average it’s probably...costing, between $1000 and $10,000.’

And,

‘We’ve always lost something. There isn’t one where the defendant has – where
the plaintiff has gone away and said, no, we won’t take anything back. I think it’s –
once you get mediation, you know that, if you’re going to walk out of there, you’re
going to have to pay something...We’re going to have to pay. I’ve never been
anywhere where it looked like we wouldn’t pay.’

However, charities had done no research on these matters, merely experiencing an
increasing number of claims, and having to make informed guesses at the causes behind
this increase. The drivers charities nominated may well be the actual causes of the increase
in family provision applications, but evidence is needed of these alleged drivers. Moreover,
they adopted a kindly stance, suggesting that family provision disputes at mediation or
in court can result in the exposure to scrutiny and airing of unresolved emotional issues
within families. Mediation in particular can bring about ‘emotional reconciliation and a
means of recognition’ of marginalised family members with a share of any available estate
‘as the conduit to achieve this’. Whilst it might be useful that mediation can be a ‘cathartic
experience’, judges have made the point that family provision applications should not be
used as a means of family or sibling emotional point-scoring.²⁷²

6.4 WHAT HAS BEEN CHARITIES’ MEDIATION EXPERIENCE?

‘Charities don’t want to be vultures on a deceased’s estate, but need to take part
in mediation, show interest in it, and not be nebulous, just expecting windfalls...on
the basis of que sera, sera’.

Charities faced with a family provision claim which will affect a bequest made to them
had varied responses. We were interested in their procedures, policies and strategies for
dealing with family provision cases and if they had found any preventative strategies.

On the issue of bequests to charity generally, the findings do not augur well for charities.
As previously mentioned, case law surveys show clearly that few reported cases result in
a positive outcome for charities.²⁷³ Representatives of charities interviewed for this

²⁷² Bentley v Brennan; Re Bull (dec’d) [2006] VSC 113 at [24] and [31].
²⁷³ See Appendix A.
research reflected that view. Their experience of the compulsory mediation which precedes litigation in family provision claims always involved the charity giving up some of the bequest willed to them. One charity representative expressed the general frustration of the charitable sector with this situation by saying that ‘they never allow that a charity could just win’. The position seems to be that charities will always give way in the face of a family provision application, even to the extent that they will be generous to the applicant or applicants, since ‘charities are supposed to be charitable’.

One charity interviewed took what it saw as a principled approach, agreeing that family came first, and that bequests should be treated as windfalls. There was also a theologically inspired argument that everyone can be forgiven no matter what they do, so that the charity would not be part of any punishment of, for example, an adult child who should have been a beneficiary but was punished by a parent by being left out of a will. This position was not supported by others however, who took the view that charities should not treat bequests as windfalls, but as another source of income. As income, it should be pursued – indeed, the directors of a charity should see it as their duty to pursue bequests in order to fulfil the will-maker’s wishes.

Charities can make mediation work for them by always attending mediations in person (not just by their lawyers), and making it plain that the bequest would be used for the public benefit. Some reported that ‘what is missing in the case of mediations is attendance with attitude’ on the part of many charities. Non-attendance or attendance with the obvious adoption of a supine acceptance of a poor outcome does not assist the process. As judges have recently pointed out, charities need to submit affidavits of their worthiness, pointing out the work that they do and that it is in the public interest, or that it saves governments money, or that it is for the greater good.274

Records needed at the mediation are all documents and correspondence relating to the bequest, a copy of the will, a copy of the grant of probate (if needed), any progress reports from lawyers, and copies of affidavits etc. Good records are needed by charities because of turnover of bequest officer staff. Keeping and producing sufficiently detailed records of the history of the bequest was often important for their lawyers to argue issues, but not a critical point in most instances. One ‘war story’ that was told several times by different bequest officers was of the family provision applicants having no inkling of the relationship of the deceased with the charity. They were often taken completely by surprise with the regularity and size of donations, volunteering, or services rendered over the years. In certain situations, lawyers could skilfully gain ground by bringing such a situation to light, but this is not anywhere near a sure fire strategy.

However, as one legal practitioner acting for charities pointed out, records should not be so detailed that they become a weapon against the charity in the family provision claim. Several very experienced practitioners pointed out that it was a fine line between good record keeping and going too far.

274 Auckland City Mission v Brown [2002] NZLR 650; [2002] NZCA 33. See also: Nicola Peart and Bill Patterson ‘Charities and the FPA: a turning tide’ (2007) New Zealand Law Journal 53, 56. Peart and Patterson surveyed all the New Zealand decisions post Auckland City Mission to the end of 2006 and found that courts to that date had become less ‘generous’ in family provision claims to adult children, which, where charities were also beneficiaries, was definitely advantageous to them.
Another lawyer suggested that charities are treated by executors as ‘mushrooms’, left in the dark as to everything from being notified about the bequest, obtaining a copy of the will (to which they have a right only in New South Wales, Queensland, Victoria, and the Northern Territory), and other documents such as affidavits, copies of grants of probate, and information as to interim distributions.

Along with this theme were a number of instances of bequest officers reporting what appears to be quite unprofessional behaviour. For example:

‘The other thing that we came across recently this question of the fact that there’s no supervision of an executor and we’ve had a couple, one in particular where we were alerted by another charity that (name of organisation deleted) and this other charity were the beneficiaries under a will and we’d never been notified by the executor who was a lawyer in a small practice in the suburbs in Sydney. That was one where we exerted a little bit of pressure and the other charity had some friends in high places that also exerted some pressure and lo and behold the money turned up. But it was very fortuitous that we actually found out and it just sort of brought home to me the fact that there’s no oversight that an executor actually disburses the money.’

Some charities have policies in place to deal with family provision claims, particularly those who rely on bequests, and/or have large bequest incomes. These larger charities recognised the need for good file notes, independent legal advice for bequestors, and to encourage bequestors to discuss the bequest with family beforehand. However, even though some charities were involved in the subsequent drafting of the will containing a bequest, they did not want to seem rapacious, counting the public relations implications of family complaints about coercion to be too great a cost.

Attendance at mediations and sound record keeping are well-advised, but the issue of legal costs for charities is paramount. Costs in mediations, not to mention litigation, can be high, and charities pointed out that they needed to be ‘commercially realistic’ about outcomes and costs. If other charities were involved there was the chance to share legal advice and representation to contain legal costs. As one senior estate practitioner said:

‘I’ve had a number where the charities and I’ve attended with the charities as their representative attending mediation, if only to put a face to a name because it’s always easier to take something away from somebody who’s just a name on a sheet of paper as opposed to somebody who’s flesh and blood and representing the organisation and who can give some chapter and verse about the works that the organisation does which can often be quite compelling.’

And another:

‘I do think that they ought to probably take a more active interest in how the proceedings go and yeah stick in their two bobs worth, as you suggested, and if there is a connection with the testator pointed out – they’re always served with the documents – so they should turn up at the – you know they could appoint counsel or just send someone along – I mean it’s just a matter of showing an interest because I think it affects people’s – it affects the parties’ attitude to how things should turn out.’

Given that they cannot ‘just win’, costs must always be a consideration. Costs were described by charities as ‘destructive’ and ‘excessive’, and they had the unavoidable policy of ‘not throwing good money after bad’. This being so, their position was
undermined from the start in that they had to adopt a position of compromise in order to minimise their own costs. Many saw costs of plaintiffs as disproportionate, with some seeing costs vaporise whole estates (costs of both sides are almost always paid out of the estate) because of entrenched positions of enmity between family members, family members wanting ‘their day in court’ regardless of the legal realities, or positions of anti-charity bias from overly aggressive plaintiff lawyers.

6.5 WHAT IS THE VIEW OF MEDIATORS?

‘In mediation, you get what you pay for – a mediator who charged less than $2000 per day would not be worth hiring…’

Mediators naturally had a more positive view of the role of mediation, while acknowledging that it always involved a compromise from applicants and charities. Some practitioners (but certainly not all) and all mediators interviewed felt that early mediation was the key to successful outcomes at mediation. While mediation is compulsory after filing in Queensland, other states have court-ordered mediation as part of the litigation process. This was felt by both practitioners and charities to be too late in the proceedings. Once the court process has begun, greed takes a leading role, and positions at mediation are consequently more entrenched. Mediators and some practitioners agreed that early mediation led to a more collaborative settlement, and that this was always better than ‘a court-ordered disaster’.

The view of mediators on the issue of costs was that ‘you get what you pay for’. While they agreed that costs quoted by some practitioners of $100,000 for a mediation might be excessive, they felt that if mediators were to charge any less than $2000 per day they would not be worth their hire, and that $4000-$7000 quoted by some solicitors as an example of mediation costs was high, but probably appropriate for senior barristers acting as mediators. Capping of costs was universally condemned, with some practitioners suggesting that judges who criticised costs in family provision cases were ‘out of touch with practice’.

Other issues raised by practitioners and mediators were that mediation is a skilled process, requiring much ‘life experience’, so that older mediators were more successful. Even if age is not the best indicator of a mediator’s skills, he or she must be both well-prepared and sensitive in dealing with the often very difficult family problems raised. Indeed, in Queensland, because of the early mediation requirement, 95% of mediations in family provision cases are successful, with very few cases proceeding further. This can be compared with a success rate of mediation of about 42% in the approximately 600 cases going to court each year in New South Wales, which does not have the same type of early mediation intervention which is compulsory in Queensland.

275 Although one large charity had experienced mediation costs of between $1000 and $10,000. Court costs for the same charity in a family provision case had run as high as $750,000.

276 There have been only 39 reported cases in Queensland in the last ten years. Last year, there were more than 600 cases in family provision commenced in New South Wales courts, of which about 250 were settled by court-ordered mediation: see Lisa Carty, ‘Laws to cut costs in family disputes’, Sydney Morning Herald (Sydney), 27 January 2008.

277 This should change in New South Wales via a new Supreme Court practice direction in the wake of the new legislation on family provision law discussed above.
Only two of the practitioners or mediators interviewed had any knowledge or experience of collaborative law as it is now being practised in some states, as an alternative to mediation. Collaborative law began in Australia in 2005 and is a process where, unlike in a mediation, there is no third party to help decide the issue, but rather the parties to the dispute and each of their lawyers collaborate to bring about a settlement. The process involves a series of round table meetings, usually each of two hours, which are held by the parties and their respective lawyers until a settlement is reached. The lawyers are not able to begin court proceedings or to threaten to take the issue to court during the process, and if a settlement is not reached cannot later represent their clients in court proceedings. The object of this process is to come to ‘creative’ settlements. Costs should be lower in this process because there is much less paper work involved – few letters, no affidavits, no court documents and no pleadings. All the necessary work is done in the meetings, and if a settlement is reached in three or four meetings then clearly costs should reflect that fact. However, as with mediation there are no set levels of costs in this process, and some law firms will charge much higher rates than others.

Whether collaborative law will improve costs and outcomes in family provision disputes remains to be proven, since it is primarily used in family law cases (dissolution of marriage and related matters) at present. Certainly the barristers and mediators interviewed for this research had a negative view of the collaborative law process when it was raised with them, but this may be regarded as vested interest perhaps.

6.6 CAN CHARITIES DEAL WITH FAMILY PROVISION CLAIMS MORE EFFECTIVELY?

‘Make reasonable and proper provision for those for whom you should make reasonable and proper provision…just be fair…otherwise, do you really want to leave your money to the legal profession?’

Whether because of the wide range of permitted applicants or not, the number of applications for family provision is rising in Australia. For example, family provision applications in Queensland dealt with by the Public Trustee rose by 77% in 2006-2007. Is it possible for charities to put policies in place which will completely avoid family provision claims in Australia? The short answer is no. Can these claims be dealt with more effectively? The short answer is only in very limited ways. Practitioners asked about ways of avoiding family provision applications in general, universally replied that there were ‘none’. They stated that a solicitor should advise the client about the possibility of family provision claims, but could not in the end stop a client from making a foolish or improvident will, or one which contained an ineffective/ abusive/ defamatory statement.

of reasons as to why a particular person was omitted from the will. Their advice also included:

- Make a will, as there can be no bequests to charity in intestacy.
- But do not use a home-made, store-bought or on-line will kit (these were universally condemned by legal practitioners, mediators, trustees, and charities as causing more problems than anything else they had to deal with): these were regarded by lawyers ‘as great news for lawyers’, or as (ironically) ‘excellent fun – part of the do-it-yourself culture of Australia’ or ‘Oh I love them (DIY Wills), I think they should be actively promoted, they bring the most fascinating court cases you can ever imagine.’ On-line wills done pro bono for charities are regarded as equally poisonous by lawyers. One bequest officer leaned over to the side of his desk to a large filing tray and indicated that this was his nightmare tray of DIY wills with bequests to his charity. The cost of a well-drawn will is worth every cent in the opinion of all respondents, including large charities.
- Make a defensive will – leave assets to all children equally, no matter how unworthy they might seem: ‘make reasonable and proper provision for those for whom you should make reasonable and proper provision’.
- Give comprehensive instructions, so that a solicitor has a clear idea of who might make a family provision claim.
- If leaving (say) one child out of a will, it may be desirable to give a statement of reasons outside the will, as permitted under section 100 of the New South Wales Act (previously section 32 of the 1981 Act). However, this can be a ‘double-edged sword’ in litigation, and has to be viewed with caution as appropriate advice. It is better to be fair in the first place, so that omitted family members do not react with shock that they have been left out of the will, and so seek ‘unnecessary’ redress in order ‘to prove that the testator loved them as much as their siblings’.
- Place assets in an inter vivos trust or a joint tenancy (this will not necessarily be effective in New South Wales because of notional estate provisions).
- Give away everything before you die – ‘die with nothing’. On this point, it is possible to establish a Prescribed Private Fund (PPF) or ancillary fund while you are alive. This is a tax-effective way to place money or property in a vehicle which will benefit eligible deductible gift recipients (DGRs) in Australia. The terms PPF and DGR are defined for tax purposes, and the requirements must be strictly adhered to, but a PPF presents a means of ‘dying with nothing’, but benefitting many.
- Never remarry (this point and the previous one may be regarded as based on experience, but not in expectation of being the norm).
- Give everything you wish to give to charity while you are alive.
- Discuss the will with family if that is appropriate to your cultural context. It was suggested that this is only useful in a patriarchal family situation, and where undertaken inappropriately could cause family tensions to ‘explode’. Several senior estate practitioners cautioned against this as a ‘magic bullet’ from bitter experience of their clients. As one remarked, ‘I’ve had one instance where a father sat everyone around and said this is what’s happening. You have to have a somewhat patriarchal environment for that to work and I have seen instances where that has caused all the tensions of the past to explode during a person’s lifetime rather than before. So that’s, there’s no magic formula in any of this.’
• Involve the family in charitable giving while you are alive, and set up charitable trusts or PPFs while you are alive with the agreement and active involvement of family members. It was pointed out by bequests officers interviewed that family members often do not know of the connections between the deceased and his or her preferred charities, and react with shock on two levels – that they have been left out of a will, and that the deceased was so involved with charitable giving, or a charity’s activities.

• Avoid discretionary trusts in wills (but these may be more useful while a donor is alive).

• Do not allow persons holding power of attorney to have unfettered freedom – it was suggested that some holders of powers of attorney will run down estates purposely while the testator is dying. This was a common theme of some bequest officers who saw large amounts of the estate dispersed via such mechanisms while the will-maker was alive, leaving little in the estate upon death.

• Do not try to totally avoid family provision claims by, for example, changing your name and moving interstate, so that family members will not know that you have died. This was described by one lawyer as ‘just sad’.

General advice to charities from solicitors, barristers, mediators and trustees included:

• Stand up for your bequests – file an affidavit defending the bequest at the least. Although this is not free (unless legal advice is given pro bono), it represents a better position than adopting a ‘wait and see’ attitude to obtaining something from a will. Charities are definitely disadvantaged by their attitude of ‘letting well alone’, but are very vulnerable to costs ‘rip-offs’ in taking a sterner attitude to obtaining bequests. As one lawyer put it, ‘deal with family provision claims boldly, but also professionally and commercially’.

• Always appear personally at mediations, and not just by your lawyers. Explain clearly what the money is to be used for and how it will benefit the public.

• Try to show a demonstrable connection to the testator making the bequest. Did that person have a prior connection with your charity? A prior history of donations? Or a history of services provided by or to the charity? Charities have very little competing moral claim as the law stands – provision for family comes first, and the only hope of improving that position is to show a history of previous connection which is both strong and provable via good file notes of contact and discussions, a record of regular donations, a record of regular contact via membership or receipt of newsletters, and preferably continuous contact from the time the bequest is made in the will until the time of death. Of course, it is more difficult for a person of modest means to have established this type of contact with a charity, and yet such a person may leave a bequest in his or her will. This will present greater difficulty for a charity.

---

280 See for example, Townsend v Nichols [2008] NSWSC 466 at [46] where Associate Justice Macready said: ‘... nor was there any evidence of the deceased’s relationship with the charities benefited under the will. However, having regard to the nature of the deceased’s disabilities it is obvious that the deceased wished to benefit a number of charities who assist people afflicted as he was afflicted after his car accident. I should mention that the plaintiff does not suggest that any provision for her should come from the children’s share but should fall on the share passing to the charities’ (emphasis added).
If more than one charity is involved in the bequest (e.g. each has been left an equal share of the residual estate), those charities should adopt a common stance.

It may be desirable for groups of charities to place a law firm on retainer for the purpose of ensuring that bequests are obtained by the group, thus sharing costs and obtaining better quality legal advice. This and other types of concerted action puts the pursuit of bequests on a more ‘business-related footing’.  

Suggestions for improving family provision outcomes generally included:

- To make the jurisdiction national (using the federal court system), rather than state-by-state, or a uniform jurisdiction through uniform succession law.
- To introduce mandatory mediation very early in the process (on the Queensland model) so that more collaborative outcomes could be achieved. This could utilise counsellors and/or independent solicitors, and could be government or law society funded (this suggestion is really suggestive of the collaborative law model).
- To ignore the detail of family provision law as it currently stands in reviewing the law, or trying to make it uniform, and instead look at inheritance law generally in Australia. Inheritance law should not be bogged down in the detail of family relationships – indeed it was suggested that the whole model of family provision law taken from New Zealand was flawed because its genesis was in a situation that applied only in New Zealand in 1900. Given the complexity of relationships which can occur in the 21st century, perhaps thought should be given to a fixed share system in Australia.

These suggestions were not widely supported, however, when put to other interviewees. The national model, which would require a referral of power to the commonwealth, was felt by some to not give any real advantages, since federal courts in each state have their own ‘quirks’ and interstate assets can easily be dealt with in the Supreme Court, as at present. Most interviewees had a poor opinion of the uniform succession law (including family provision law) proposals which have been afloat for almost fifteen years without any noticeable progress, though most felt that they would eventually be put in place, following the current New South Wales model (but minus the notional estate provisions, which seem to be regarded as a New South Wales legal frolic). The second suggestion is a collaborative law proposal, so it may be that collaborative law could form a useful part of the family provision law alternative dispute resolution armoury. The third proposal would require a major overhaul of the law in each state, which seems an unlikely outcome, though not necessarily an undesirable one.

---

281 See e.g. www.includeacharity.com.au, a combined bequest-raising website for the Red Cross, the Cancer Council of Australia, the Heart Foundation and Mission Australia.

282 See section 1 above.
RECOMMENDATIONS FOR CHARITIES

One of the aims of this paper was to provide some practical assistance to charities about how best to deal with family provision applications. There are three ways in which we suggest that charities can seek to deal with this issue. First, to have good internal policies in place, as well as actually implemented, in order to prevent disputes about bequests. However, this will not prevent disputes. Second, to have a considered and professional attitude to dealing with family provision disputes once they arise. Third, advocacy for law reform should be considered because there are significant current national law reform proposals open for discussion and charities need to be advancing their cause in any such discussions. Estate lawyers should not be the only significant voices at the table.

7.1 PREVENTION

Clearly prevention is the best cure, but the strategies are limited as most charities have little idea that they may receive a particular bequest. Those charities which actively seek bequests should ensure that their policies and procedures are current and appropriate to the changing nature of wills and estate law, as well as implemented. The main issues that we have identified are:

1. having independent legal advice for the testator making a bequest to charity – this may be crucial to a successful defence to a family provision claim in order to avoid accusations of undue influence. Some charities offer free will-making services which may give rise to allegations of undue influence and care should be taken in such undertakings;

2. having an arms length relationship between the charity and the testator, without any undue influence, harassment, intimidation or coercion from the fundraiser to the donor while the donor is alive (these things can give rise to a claim in equity under the doctrine of undue influence/unconscionable conduct/unconscionable dealings, or the possibility of a claim of unconscionable bargain which could result in the bequest being invalid and brought back into the estate after the donor’s death);

3. where appropriate, having a family member or legal representative present during bequest negotiations to avoid any allegations of undue influence or coercion;

4. if the testator is near death, or is elderly, or is incapacitated physically or mentally, the measures in 1-3 above are absolute requirements;

5. having a realistic bequest policy that acknowledges that a person should provide for those who are in actual fact dependent upon them and only after they have been looked after should charities receive any proceeds.

6. stating the full legal name of the organisation that will receive the bequest, and using appropriate words to indicate the type of bequest, including use of a recommended form of bequest clause (approved by lawyers) – this will avoid the need for an application to the court to clarify the bequest, or for a cy-près application, which may fail in the light of a family provision application. Such information should be readily available on the charity’s web site and systems should be in place to have lawyers’ questions answered prompted by the designated person.
Clearly a good place to start to develop such policies is the Standard of Bequests Fundraising Practice published by the Fundraising Institute Australia in 2007. One of the clauses recommends that a potential donor seek independent legal advice.\textsuperscript{283} This is crucial to a successful defence to a family provision claim, as any evidence of undue influence will be fatal to the charity’s defence to a claim. Clause 7 of the Standard deals with the necessity for an arms length relationship, without the presence of undue influence, harassment, intimidation or coercion from the fundraiser to the donor. Clause 7.3(e) refers to the important matter of having a family member or legal personal representative present during bequest negotiations. Clause 5.1 of the Standard recommends that a donor must state the full legal name of the organisation that will receive the bequest, and use appropriate words to indicate the type of bequest.

While these matters can never guarantee that a family provision claim will not succeed as against a charity, they may assist a court to balance the many factors which need to be taken into account. Indeed, there are few reported cases in Australia where the integrity of the charity in question is impugned during a family provision application case. Two cases involving evangelical churches have raised these matters, but in one case the applicant was wholly unsuccessful, and in the other the applicants were partially successful in clawing back some of the \textit{inter vivos} donations as notional estate. One case involving the aged care home the testatrix lived in also raised this issue, and in that case the applicant son was awarded the entire estate in lieu of the aged care home.\textsuperscript{284} Therefore, the cases rarely revolve around the nature and style of the charities concerned, but are wholly concerned with whether the testator or testatrix has made proper provision for the applicants before the court.

7.2 A PROFESSIONAL ATTITUDE TO FAMILY PROVISION MATTERS

The clear message from lawyers and mediators is that charities need to adopt a professional and considered approach to dealing with family provision disputes when they arise. Charities that regard bequest income as a ‘mere windfall’ or have had a blanket policy of not being involved in any way in such disputes in any circumstances should revisit this policy. In some cases where the estate is small and the facts establish that there is a clear case, such an approach may be sustainable. However, in other circumstances, other strategies may be clearly appropriate to put forward the charities’ case in a professional and measured way. This may range from merely examining the documents surrounding the matter, to appearing at the mediation, or to joining with other mentioned charities to formally make submissions to the court. This is a delicate balancing act with internal diversion from core mission, often requiring input from the governing body. In addition, legal costs and reputational risks need to be managed by staff. Our interviews suggested that charities who were managing in this fashion, and particularly those who attended mediations as appropriate, were saving more of their bequests. They also believed that they were still ahead despite the direct and indirect costs of doing so. The other clear message is that this is a specialist area of the law and you should choose your lawyer accordingly.

\textsuperscript{283} FIA \textit{Standard of Bequests Fundraising Practice}, Clause 4.1 (c) regarding the use of promotional materials, http://www.fia.org.au/Content/NavigationMenu/Advocacy/Documents/Standard

\textsuperscript{284} See Appendix A.
In New Zealand, it has been suggested that following the decision in *Auckland City Mission v Brown*, charities should move beyond a merely supine acceptance of the decision of the court in a family provision case, but should actively pursue their interests in the case by submitting affidavits and other documentation to inform the court of the nature of the work and its importance to society. In that case, Richardson P, delivering the judgement of the court, said:

‘As well, charities such as the Cancer Society, the City Mission and the Salvation Army are regarded under our laws as serving the public good. In contemporary less closely knit communities affected by the economic and social changes of the last 15 years, charities may properly be regarded by altruistic testators as having an enhanced role. It is not unreasonable that the charities draw the attention of the court to their work and the benefits for the public which they can achieve with the support of substantial donations.’ (emphasis added)

This may be so, but subsequent decisions in *Henry v Henry* and *Montgomerie v Public Trust* do not necessarily support an aggressive stance by charities. Uncertainty of outcome in a discretionary jurisdiction makes costs a consideration, and even if New Zealand courts have shown themselves to be less willing to entertain family provision claims which seem to them unnecessary, they have made no real change to the underlying moral duty basis of provision, nor have Australian courts yet evinced any change in their approach to such claims.

---

286 Nicola Peart and Bill Patterson ‘Charities and the FPA: a turning tide’ (2007) *New Zealand Law Journal* 53, 56. Peart and Patterson have surveyed all the New Zealand decisions post *Auckland City Mission* to the end of 2006 and find that courts have become less ‘generous’ in family provision claims to adult children, which, where charities were also beneficiaries, was definitely advantageous to them.
287 [2002] NZCA 33 at [40].
288 [2007] NZCA 42
289 [2007] NZHC 804
290 Some commentators in New Zealand see a more forceful move by the courts towards testamentary freedom, particularly in the case of large estates. See: John Caldwell, ‘The war of the wills’ *New Zealand Lawyer*, Issue 84, http://www.nzlawyermagazine.co.nz/LinkClick.aspx?link=763&tabid=146, viewed on 23 September, 2008. Caldwell suggests that 10% of the estate has become an unofficial benchmark for adult children claiming provision based on psychological grounds (a moral claim), and 20% of the estate where there are both financial and psychological grounds. See also: Nicola Peart and Bill Patterson ‘Charities and the FPA: a turning tide’ (2007) *New Zealand Law Journal* 53. Peart and Patterson have surveyed all the New Zealand decisions post *Auckland City Mission* to the end of 2006 and find that courts have been less ‘generous’ in family provision claims to adult children, with 22% of cases unsuccessful for the adult children, a threefold increase on the failure rate in 1995.
7.3 LAW REFORM

As discussed earlier in this paper, there has been considerable proposed national law reform with respect to family provision issues for well over a decade. This culminated with the model *Family Provision Bill 2004*. However, the model Bill as a whole has not been adopted in any jurisdiction. The closest approximation to the model Bill is the New South Wales amendment to the *Succession Act 2006* (NSW), the *Succession Amendment (Family Provision) Bill 2008* (NSW), which was passed by the Legislative Council on 24 September 2008, and sent to the Legislative Assembly on the same day for concurrence. The model Bill’s provisions seem to suggest that by limiting the permitted applicants to a spouse, de facto spouse and a non-adult child, there will be narrowing of the current law which will benefit charities by limiting the possibility of bequests to charity being overturned by applications from other family members or dependants. However, the model Bill allows that applications to be made by persons who may have a claim through dependency. Clause 10(1) of the model Bill allows the court to make an order for provision if the person is an appropriate applicant, and the will has not made adequate provision for the proper maintenance, education or advancement in life of that person. The numerous matters to be taken into account by the court in this situation are listed in clause 11(2). If the matters to be taken into account are applied only to the three categories of applicant, the applicant list will indeed be narrowed. This contrasts with the situation in Victoria where a similar list is provided in the legislation, but without a list of eligible applicants. The list of matters is so wide that it could be argued that applications could be made in Victoria by persons who do little more for the deceased than provide regular neighbourly assistance.

The new legislation in New South Wales has not altered the possible applicants for provision from the previous New South Wales law, except in one way. It has attempted to narrow the ability of persons in a close personal relationship to apply by altering the nature of the definition of a person in a ‘domestic relationship’. Under the New South Wales provisions in the new Chapter 3 of the *Succession Act 2006*, a de facto spouse will be able to apply as of right (as is currently the case), but a person in a close personal relationship with the deceased (not being a spouse or a de facto partner) will only get an order if in all the circumstances making the application is warranted (which changes the current position). Section 60 sets out the matters to be taken into account by the court in determining whether an applicant is an eligible person, which are the same matters as in the model Bill. However, these matters may only be taken into account in respect of the eligible persons listed in new section 57. The New South Wales Attorney-General took the view that the model Bill’s clause 10(1) was intended as a separate category of applicant, and one which was extremely wide. In his second reading speech he said:

---

291 See section 3.3.3. These matters are modelled on the current Victorian legislation, the *Administration and Probate Act 1958* (Vic), section 91(4) (e)-(p).

292 *Succession Amendment (Family Provision) Bill 2008*, Explanatory note, 3.

293 Section 59(1)(b).

‘The model bill restricts the list of those who are automatically entitled to make an application for provision to spouses, de facto partners and non-adult children of the deceased. It contains a ‘catch-all’ category of claimant permitting anyone to whom the deceased owed a responsibility to provide maintenance, education or advancement in life to apply to the court for a family provision order. Such a change may lead to a flood of new claims being made on estates from people who are not currently entitled to apply in New South Wales. Adult children would also be forced to demonstrate the requirement of the deceased’s responsibility to them. This may lead to more lengthy and expensive litigation, as adult children seek to prove they meet this requirement. The bill, therefore, does not adopt the model bill eligibility provisions.’ (emphasis added)

In any event, the 2004 model bill does not represent major law reform. If inheritance law was to be completely reviewed, then it is possible that more testamentary freedom would be appropriate in the circumstances of the 21st century, including a comprehensive social security system. It is difficult to understand why, in 2008, an adult of full capacity and understanding cannot choose to leave the entirety of his or her estate to a charity of his or her choosing, after providing for any surviving spouse (including a de facto or same sex partner of more than 2 years standing) and dependent children (defined as those under 25 or under some disability). Major law reform could involve a system of fixed shares for spouses and dependent children, and freedom for the remainder, or testamentary freedom with a family provision requirement for spouses and dependent children only. While some might argue that this casts the burden of caring for hapless relatives onto the social security system, and therefore taxpayers generally, it can equally be argued that increased bequest income would relieve the social security and charitable subsidy systems of at least the same amount, and with less uncertainty attached.

In the absence of more profound law reform proposals on inheritance law generally, it would seem advisable that charities should support the current uniform family provision law proposals. They could suggest that the model bill to be adopted, minus the notional estate provisions which do not generally assist charities in pursuing bequests, and with the proviso that the applicant pool be restricted rather than widened by the clause 11(2) list of matters to be taken into account. This would provide a more limited applicant pool, and be a move towards testamentary freedom to leave a charitable bequest in a will.
# Appendix A

## Selected Cases on Family Provision Law in Australian and New Zealand Jurisdictions Which Have Involved Charities

The cases listed below are all the major reported cases in family provision law involving bequests to charity. As bequests to charity in wills are rare in Australia, there are not a large number of cases to be considered. Most family provision disputes are intrafamilial in nature, and do not involve legal points of interest, so are not included in the law reports. The cases below include all the cases on bequests to charity and family provision considered by the High Court of Australia and by the Courts of Appeal of the various states and territories. Some states have very few reported cases on the point (e.g. Queensland) while some have a great many cases, not all of which are reported (e.g. New South Wales). It is evident from a consideration of these cases that there are few principles to be discerned in these cases, which are very factually based. The main principle which has arisen over time has been the primacy of moral claims propounded and applied by the High Court (see Section 3 above).

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Year</th>
<th>Court</th>
<th>State</th>
<th>Claimant</th>
<th>Charity/ies involved</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal North Shore Hospital v Crichton-Smith</td>
<td>1938</td>
<td>High Court NSW</td>
<td>Widow</td>
<td>Six charities in all</td>
<td></td>
<td>The widow was not entitled to maintenance expressed in the will since she already had such maintenance because of a deed of separation. The charities received her share.</td>
</tr>
<tr>
<td>Bosch v Perpetual Trustee Co</td>
<td>1938</td>
<td>Privy Council NSW</td>
<td>Two minor sons left legacies of £15,000 each</td>
<td>Remainder of estate of £257,000 left to the University of Sydney</td>
<td>Legacies to sons increased from £15,000 each to £25,000 each; residue to the university after costs.</td>
<td></td>
</tr>
<tr>
<td>Dehnert v Perpetual Executors and Trustees Association of Australia Ltd</td>
<td>1954</td>
<td>High Court VIC</td>
<td>Adopted daughter</td>
<td>Charities not named</td>
<td></td>
<td>The adopted daughter had the will varied in her favour to three times the original legacy.</td>
</tr>
<tr>
<td>Thomas v Perpetual Trustee Co Ltd</td>
<td>1955</td>
<td>High Court NSW</td>
<td>Daughter and granddaughter</td>
<td>Eight charities in all</td>
<td></td>
<td>After expiry of a trust, proceeds of will declared to be under intestacy. Daughter and granddaughter appropriate beneficiaries as against charities.</td>
</tr>
<tr>
<td>Pontifical Society for the Propagation of the Faith v Scales</td>
<td>1962</td>
<td>High Court QLD</td>
<td>Widow and adult son</td>
<td>Ten charities in all</td>
<td></td>
<td>At first instance, widow provided with the income from £20,000, and adult son with £3000 and £10,000 on the death of his mother; adult son’s provision denied in toto on appeal.</td>
</tr>
<tr>
<td>Hughes v National Trustees Executors and Agency Company of Australia Ltd</td>
<td>1979</td>
<td>High Court VIC</td>
<td>Only son of a testatrix who left entire estate to charity</td>
<td>Bethlehem Home for the Aged, Bendigo</td>
<td></td>
<td>Entire estate awarded to son despite some evidence of bad relations between the testatrix and the son.</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
<td>Court</td>
<td>State</td>
<td>Claimant</td>
<td>Charity/ies involved</td>
<td>Outcome</td>
</tr>
<tr>
<td>-----------</td>
<td>------</td>
<td>-------</td>
<td>-------</td>
<td>----------</td>
<td>----------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Green v Perpetual Trustee Co Limited</td>
<td>1985</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Two sons, one a heroin addict, left nothing in will, claiming as against 4 charities</td>
<td>Four charities named in will as beneficiaries of three-quarters of estate</td>
<td>Charities reduced to one-quarter of estate. Sons given one-quarter each. Heroin addicted son awarded $3000 after six months off drugs, and a further $3000 after twelve months off drugs. A sum of $65,000 was set aside in trust to buy a house or to be invested in a house by the trustee. This sum was to revert to the charities in equal shares if the son could not stay off drugs for 10 clear years.</td>
</tr>
<tr>
<td>Maybury v Public Trustee</td>
<td>1986</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Step daughter of testator</td>
<td>Seven charities left 2/3 of a $1 million estate</td>
<td>Will varied to leave step daughter a home unit worth $110,000 and $40,000 cash.</td>
</tr>
<tr>
<td>Hoadley v Hoadley</td>
<td>1988</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Son of testator left no provision; daughter claiming increased provision</td>
<td>Heart Foundation of Australia; Sydney Hospital Foundation for Research (named as residuary beneficiaries)</td>
<td>Daughter awarded increased provision to $80,000; son awarded $65,000 to be held on trust with the proviso that if he had not ten clear years out of prison by 28 February 2007, the $65,000 was to go to the charities equally.</td>
</tr>
<tr>
<td>Anasson v Phillips; Pompeous v Phillips</td>
<td>1988</td>
<td>NSWSC</td>
<td>NSW</td>
<td>The only daughter and grandchildren of testatrix</td>
<td>Microsearch Foundation left about $2.5 million of a $3 million estate</td>
<td>Legacy to the Foundation reduced to $750,000.</td>
</tr>
<tr>
<td>Quek v Bulllock; Quek v Beggs</td>
<td>1990</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Two children of testatrix left without provision; claim to notional estate</td>
<td>South Granville Baptist Church</td>
<td>Notional estate found. Two real estate properties and the proceeds of another donated inter vivos declared to be the estate, totalling about $450,000, to be divided equally.</td>
</tr>
<tr>
<td>Re Gardner</td>
<td>1994</td>
<td>QSC</td>
<td>QLD</td>
<td>Only adult daughter of testatrix</td>
<td>Testatrix left entire estate to Amnesty International (Gld) and the Sisters of Charity</td>
<td>Daughter awarded $100,000 out of a net estate of about $220,000.</td>
</tr>
<tr>
<td>Public Trustee v Rosa Alvaro</td>
<td>1995</td>
<td>SASC</td>
<td>SA</td>
<td>Widow and children of testator</td>
<td>Anti-Cancer Foundation of the Universities of South Australia; the Asthma Foundation of South Australia Inc.</td>
<td>The will making the bequests to the charities involved was set aside as invalid because of the deceased’s mental state at the time of the making of the will. An earlier will leaving the deceased’s estate to his wife and children was to be reinstated.</td>
</tr>
<tr>
<td>Byrne v Galland</td>
<td>1995</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adult daughter of testator</td>
<td>Testator left whole estate of $690,000 left to charity</td>
<td>Adult daughter awarded $90,000 from a total estate of about $990,000.</td>
</tr>
<tr>
<td>Grant v Public Trustee</td>
<td>1996</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adult daughter and son</td>
<td>Whole estate of $690,000 left to charity</td>
<td>Daughter awarded $50,000 and son awarded $75,000.</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
<td>Court</td>
<td>State</td>
<td>Claimant</td>
<td>Charity/ies involved</td>
<td>Outcome</td>
</tr>
<tr>
<td>-----------</td>
<td>------</td>
<td>-------</td>
<td>-------</td>
<td>----------</td>
<td>----------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Shearer v Public Trustee; Hawke v Public Trustee</td>
<td>1998</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Two daughters and one son (all adults) left no provision at all in their mother’s will</td>
<td>National Heart Foundation of Australia and the Australian Kidney Foundation in equal shares</td>
<td>The will was not varied.</td>
</tr>
<tr>
<td>Brokenshire v The Equity Trustees Executors Agency Company Ltd</td>
<td>1998</td>
<td>VSC</td>
<td>VIC</td>
<td>Nephew omitted from will which he challenged as made under undue influence</td>
<td>Eaglehawk Uniting Church</td>
<td>Nephew unsuccessful.</td>
</tr>
<tr>
<td>Kent-Biggs v ANZ Executors Trustee Company Ltd</td>
<td>1999</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adopted daughter claiming from step-mother’s estate</td>
<td>University of Sydney</td>
<td>Will varied to award $100,000 for adopted daughter, leaving about $1.1 million (after costs and commission) for the University of Sydney.</td>
</tr>
<tr>
<td>Re Wright</td>
<td>1999</td>
<td>QSC</td>
<td>QLD</td>
<td>Only adult daughter of deceased left $50,000.</td>
<td>Remainder of total estate of $675,000 left to one single charity.</td>
<td>Will varied to provide $225,000 for the adult daughter. Remainder to charity.</td>
</tr>
<tr>
<td>Mitrovic v Perpetual Trustee Co Ltd</td>
<td>1999</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adult niece of testatrix left $5000</td>
<td>Remainder of estate left to charity</td>
<td>Will varied to award adult niece $125,000.</td>
</tr>
<tr>
<td>Richard v AXA Trustees Ltd</td>
<td>2000</td>
<td>VSC</td>
<td>VIC</td>
<td>Adult daughter with a psychiatric illness left in the hands of the trustees with discretion as to the disbursement of both income and capital</td>
<td>Entire residual estate left to a charitable trust for the benefit of the Brotherhood of St Laurence, the Royal Victorian Institute for the Blind and the Salvation Army.</td>
<td>Will varied to award daughter $650,000 of which not more than $550,000 was to be used to purchase a house, and the remainder to be invested.</td>
</tr>
<tr>
<td>Schultz v Goldsmith</td>
<td>2000</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adopted son left 20% of the estate</td>
<td>Salvation Army, Eastern Territory (25%), the Lutheran Concordia College of Adelaide (25%), and the Smith Family organisation of Griffith (25%)</td>
<td>Adopted son awarded 50% of the estate, with the remaining 50% to be divided equally among the three charities.</td>
</tr>
<tr>
<td>Wolnizer v Public Trustee</td>
<td>2001</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Only surviving son (an undischarged bankrupt) who received one third of the estate in the will, but requested a larger share</td>
<td>WIRES (NSW) (1/12) and the Bobby Goldsmith Foundation (3/12)</td>
<td>The will was varied in the son’s favour to reduce the legacy to the Bobby Goldsmith Foundation by 1/12. All other bequests were unvaried.</td>
</tr>
<tr>
<td>Marshall v Redford</td>
<td>2001</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Children of testator whose whole estate was left to charity</td>
<td>RSPCA (NSW)</td>
<td>One son compromised for $91,500, leaving a net estate of $255,453. The will was then varied to award $40,000 to the daughter, and $75,000 to the other son. The remainder went to the RSPCA.</td>
</tr>
<tr>
<td>Hogan v Clarke</td>
<td>2002</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Estranged daughter</td>
<td>Children’s Hospital Westmead (by succession)</td>
<td>Plaintiff’s claim denied; bequests to charity contained in will retained</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
<td>Court</td>
<td>State</td>
<td>Claimant</td>
<td>Charity/ies involved</td>
<td>Outcome</td>
</tr>
<tr>
<td>---------------------------</td>
<td>------</td>
<td>--------</td>
<td>-------</td>
<td>---------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Lee v Hearn</td>
<td>2002</td>
<td>VSC</td>
<td>VIC</td>
<td>Non-relative, sometime carer, claiming a moral duty owed to him</td>
<td>The whole estate (except for some specific legacies) was bequeathed to a charitable trust</td>
<td>The claimant’s right to provision was refused.</td>
</tr>
<tr>
<td>Blundell v Curvers</td>
<td>2002</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Husband claiming an interest in substantial artworks collection left solely to charity</td>
<td>Various charities (unnamed)</td>
<td>Artworks ordered to be sold and husband granted half-interest in proceeds of sale of artworks.</td>
</tr>
<tr>
<td>Pata v Vumbuca</td>
<td>2002</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Nephew</td>
<td>Challenge Foundation, the Deaf &amp; Dumb Society of New South Wales and the New South Wales Institution for Deaf &amp; Blind Children (in equal shares)</td>
<td>Legacy to the nephew of $70,000, a life estate in a home worth $450,000 and a capital sum of $240,000 for repairs to the property. The charities to retain the residual rights to the property after the nephew’s death (i.e. their legacy to be reduced from approx $350,000 each, and the remainder deferred).</td>
</tr>
<tr>
<td>Edwards v Terry</td>
<td>2002</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Only son claiming an increase in the 15% of his mother’s estate left to him</td>
<td>Royal Blind Society and the Salvation Army originally left 40% each of the estate (the executor was left 5% which was not disputed)</td>
<td>Son successful in claiming almost 71% of the remaining estate, the executrix retaining 5%. The remaining estate (24%) was split equally between the charities.</td>
</tr>
<tr>
<td>Novak-Niemola v Perpetual Trustee Co Ltd</td>
<td>2002</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Widow and adult son</td>
<td>Apart from small bequests to the widow and son, the entire estate was tied up in a trust until 2080 which could pay at its discretion the widow, son, grandchildren, and the Salvation Army Property Trust. After 2080 the trust assets were to be paid 60% to the Salvation Army and 40% to the testator’s grandchildren, or (as substitute) great-grandchildren.</td>
<td>The widow was awarded the testator’s interest in a home unit, and $100,000 and the son was awarded a bequest of $408,000 out of the total estate of about $1.5 million (after costs).</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
<td>Court</td>
<td>State</td>
<td>Claimant</td>
<td>Charity/ies involved</td>
<td>Outcome</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>------</td>
<td>-------</td>
<td>-------</td>
<td>-----------------------------------</td>
<td>-----------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>The Auckland City Mission v Brown</td>
<td>2002</td>
<td>NZCA</td>
<td>NZ</td>
<td>Adult daughter claiming increased provision</td>
<td>Auckland City Mission and the Salvation Army (both these charities were left the residue), and the Cancer Society (left a specific bequest of $500,000). The deceased’s will left some $3 million to charity,</td>
<td>This was an appeal from the High Court of New Zealand which had increased the adult daughter’s provision to $1.6 million. This appeal reduced that to just over $850,000 (about 20% of the estate) to be paid from the residue of the estate. This case has now been distinguished decisively as turning very particularly on its facts in both Henry v Henry [2007] NZCA 42 and Montgomery v Public Trust [2007] NZHC 804. These latter cases restore the status quo as regards applications by adult children in New Zealand.</td>
</tr>
<tr>
<td>Mahon v The Perpetual Trustee</td>
<td>2004</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adult daughter claiming home unit and lump sum from father’s estate</td>
<td>Mackillop Family Services Ltd as trustee for the St Vincent de Paul Boys Orphanage, Melbourne</td>
<td>Adult daughter awarded home unit and lump sum of $40,000 effectively halving the legacy to the orphanage.</td>
</tr>
<tr>
<td>Perry v Olliffe</td>
<td>2004</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adult daughter (other sibling made no claim) left income on half the estate for 20 years (which had expired) with 80% of the residual estate to go to charities</td>
<td>New South Wales Cancer Council and Salvation Army NSW Property Trust</td>
<td>Each daughter granted 37.5% of the capitalised estate, and the two charities 9.5% each (two grandchildren of the deceased received 3% each).</td>
</tr>
<tr>
<td>Carstrom v Boesen</td>
<td>2004</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Claimant in position of daughter (though possibly not biological daughter) left $75,000 of $300,000 total estate; each charity received $47,000</td>
<td>Salvation Army, the St Vincent de Paul Society, the Uniting Church In Australia Property Trust, the Smith Family</td>
<td>Claimant awarded $150,000 of the $300,000 estate, the amount to be taken from each charity’s provision.</td>
</tr>
<tr>
<td>Phillips v Hunt</td>
<td>2005</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Widow left only a life interest in the matrimonial home, but application for family provision made out of time</td>
<td>Trustees of the Sisters of Mercy (North Sydney) for the purposes of Our Lady’s Home at Waitara; St Gabriel’s School for Deaf Boys at Castle Hill conducted by the Christian Brothers; Trustees of the Sisters of Charity for the purposes of the Sacred Heart Hospice at Darlinghurst.</td>
<td>The time for application being extended, the court ordered that the will be varied so that the home could be sold and the proceeds paid to the widow to the extent of 70%; 30% to be paid to the three named charities.</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
<td>Court</td>
<td>State</td>
<td>Claimant</td>
<td>Charity/ies involved</td>
<td>Outcome</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------</td>
<td>--------</td>
<td>-------</td>
<td>---------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Hunt v Delaney</td>
<td>2005</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Two of three siblings abandoned by their deceased mother as children, and left no provision in her will</td>
<td>St Vincent de Paul Society and the Royal Blind Society in equal shares</td>
<td>$150 000 to the son and $200 000 to the daughter out of a total estate of around $430 000.</td>
</tr>
<tr>
<td>Morton v Little; Price v Little</td>
<td>2005</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Adult daughters left legacies of $20 000 each</td>
<td>Foundation for the National Parks and Wildlife due to receive over $1 million</td>
<td>One adult daughter awarded $350 000 and the other $100 000, reducing the charitable bequest to around $590 000.</td>
</tr>
<tr>
<td>Powell v Monteath</td>
<td>2006</td>
<td>QSC</td>
<td>QLD</td>
<td>Stepson with no provision in stepmother’s will</td>
<td>Queensland Cancer Fund and National Heart Foundation of Australia (Qtld)</td>
<td>Stepson awarded a lump son of $45 000 out of a total estate of approximately $235 000.</td>
</tr>
<tr>
<td>Groser v Equity Trustees</td>
<td>2007</td>
<td>VSC</td>
<td>VIC</td>
<td>Widow left a life interest in home</td>
<td>The estate (except for specific legacies to children and grandchildren) was bequeathed to various charitable trusts.</td>
<td>The court ordered that the home be sold to provide for the continuing care of the widow in a nursing home or hostel (similar to Phillips v Hunt). However, Mrs Groser subsequently died before this order could be finalised – see Groser v Equity Trustees Ltd [2008] VSC 163.</td>
</tr>
<tr>
<td>Nelligan v Crouch</td>
<td>2007</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Same sex partner, though the relationship had ceased before the death of the testator</td>
<td>Whole estate left to Royal Flying Doctor Service (RFDS), after gift to Crouch as executor failed</td>
<td>Partner awarded a legacy of $100 000, effectively reducing the legacy to the RFDS by about two-thirds.</td>
</tr>
<tr>
<td>Trustees for the Salvation Army Property Trust v Becker</td>
<td>2007</td>
<td>NSWCA</td>
<td>NSW</td>
<td>Friend of testatrix left almost the entire estate by second will in contention, with small legacies to the charities.</td>
<td>Testatrix left entire estate to the Salvation Army and the Royal Flying Doctor Service in equal shares under first will in contention</td>
<td>Second will declared valid; charities deprived of all but small legacies and had to bear the burden of costs. An application for leave to appeal to the High Court of Australia was rejected by that Court with costs against the charities.</td>
</tr>
<tr>
<td>Ansett v Moss</td>
<td>2007</td>
<td>VSCA</td>
<td>VIC</td>
<td>Second son of testator denied relief at first instance.</td>
<td>Testator, after providing for wife and children, left the bulk of his estate (valued at the time of his death in 1982 at $8.27 million) to a charitable trust</td>
<td>On appeal, the court said that ‘arguable that a wise, just and wealthy testator had a duty to make better provision for vicissitudes facing a son currently without financial means.’ Therefore, appellant’s prospects of success ‘not necessarily negligible’ if he made a further application. The second son, and his sister (who had earlier won the right to pursue further provision from the estate), will now both pursue further provision. The unusual aspect of this case is that the testator died in 1982, and any further provision must come from the charities’ share.</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
<td>Court</td>
<td>State</td>
<td>Claimant</td>
<td>Charity/ies involved</td>
<td>Outcome</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>------</td>
<td>---------</td>
<td>-------</td>
<td>---------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Abrego v Simpson</td>
<td>2008</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Husband of a marriage of short duration left only the contents of his wife’s home, provided he collect them within three months of her death. In her will, she accused him of physical and emotional abuse.</td>
<td>After pecuniary legacies, she gave the residue of her estate as follows: 1/17th to the Foundation Fighting Blindness, 1/17th to Diabetes Australia (NSW), 1/17th to the Cancer Council of New South Wales, 7/17ths to St Gabriel’s Church at Bexley for the charitable purposes of that church and the remaining 7/17ths to St Patrick’s Catholic Church in Sydney for the charitable purposes of that church.</td>
<td>The husband was awarded a life interest in the matrimonial home and a pecuniary legacy of $50,000. The other pecuniary legacies were not interfered with. Therefore the substantial costs were borne by the residue, reducing the amount to be distributed to the charities by more than $120,000.</td>
</tr>
<tr>
<td>Jacques v Public Trustee of Queensland</td>
<td>2008</td>
<td>OSC</td>
<td>Qld</td>
<td>Daughter left a house and $30,000 plus the income of a trust of the residue set up by the deceased for her daughter’s maintenance and support during her lifetime. The remainder of the trust after the daughter’s death left on trust to the two named charities</td>
<td>Queensland Cancer Fund and the Australian Neurological Foundation (Queensland Bequest Fund)</td>
<td>The daughter made application for a change in the trust arrangements so that the bulk of the capital should be paid into her superannuation fund. This would have deprived the charities of the bulk of the capital in the remainder. The judge declined to interfere with the trustee’s investment arrangements, thus preserving the position of the charities. The charities were not represented in the action.</td>
</tr>
</tbody>
</table>
# Appendix A

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Year</th>
<th>Court</th>
<th>State</th>
<th>Claimant</th>
<th>Charity/ies involved</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Groser v Equity Trustees Ltd</td>
<td>2008</td>
<td>VSC</td>
<td>VIC</td>
<td>Trustees, seeking to determine whether prior order concerning Mrs Groser could be carried out given her death (see Groser v Equity Trustees Ltd [2007] above, and Attorney – General (Vic) seeking to protect the interests of the charities under the trust established by Mr Groser</td>
<td>Charitable trust set up under Mr Groser’s will</td>
<td>Order concerning Mrs Groser could not be carried out, given her intervening death. Charitable interests protected. All costs borne by estate.</td>
</tr>
<tr>
<td>Townsend v Nichols</td>
<td>2008</td>
<td>NSWSC</td>
<td>NSW</td>
<td>Sister of deceased claiming to be a dependant</td>
<td>A one sixth part of the estate was left to each of The Australian Cancer Foundation for Medical Research; The Australian Quadriplegic Association Limited; The Salvation Army; and The Paraplegic and Quadriplegic Association of New South Wales</td>
<td>The sister was successful in her claim, and was awarded $200,000 taken from the charities’ shares of the estate. Costs were also payable from the estate. The charities did not appear or give evidence at the hearing.</td>
</tr>
</tbody>
</table>
QUESTION FRAMEWORK FOR CPNS PROJECT:
FAMILY PROVISION AND PHILANTHROPY

INTRODUCTION:
- Thank you for participation
- Purpose of research
- Brief background of ACPNS and its role
- Assurances of confidentiality
- Double-checking of permission to take notes
- Explanation of how unattributed quotes may be used in the final report
- Feedback of summary of research findings

QUESTIONS – LAWYERS:

DEMOGRAPHIC
How many years have you been in practice?
What is your current position in the firm?
Are you an accredited specialist in succession law?
Describe the succession practice of this firm – general/specialist?
Which other lawyers should we speak to about this topic?

BEQUESTS
Do clients ask for advice on bequests?
Are they influenced by your opinion?
How many times have you assisted in determining the charity for a clients’ bequest?
What influenced you to suggest that charity?
Specifically, did you rely on advertising in legal journals?
Did you use a charity handbook? For what purpose?
What other sources of information did you rely on to find a charity to recommend?
Are clients influenced by charity advertising or other promotional methods?
Did clients rely on the internet only?
Do they prefer to leave their bequest to a specific charity?
Do they leave specific legacies and bequests, or do they leave residual estates?
Do you inform them about the Queensland Community Fund?
What do you consider were the main influences on clients who did include a bequest in their wills?
What do you consider were the main objections by clients to leaving a charitable bequest?
Do you have any charities as clients?
FAMILY PROVISION
How many family provision disputes do you deal with?
What drives such disputes?
Have you noticed any increases in these applications?
Do these disputes usually involve specific bequests or residuals?
How many disputes are mediated?
How does mediation operate?
How many go to court?
What costs issues arise?
How are costs awarded in general?
What strategies can be implemented to avoid family provision applications?
Are these best implemented in the will?
Or are they best implemented via inter vivos planning through trusts, companies etc?
What other strategies can a will-maker employ? Discussion with children? Having children present for will making? Having independent financial advice?

QUESTIONS – CHARITIES:

DEMographics
Number of bequests over 5 years? 10 years?
Value of these bequests? Percent of income represented?
Do you have bequest fundraising staff?

ADVERTISING AND OTHER PROMOTIONAL ACTIVITIES
Do you advertise in legal journals?
Do you list in charity handbooks?
What are your most successful forms of promotion for bequests?
How much do you spend on advertising for bequests? Is this amount worth spending?
Have you researched the effectiveness of your bequest fundraising efforts?
Do you have a recommended bequest clause for wills?
Do you have a recommended bequest clause for wills?
How are requests for will-making assistance dealt with?
Do you have your own specialist staff? Recommend a law firm?
Have you had any difficulties with home made wills? Those made with will kits?
Have you experienced difficultly with bequest clauses which were unclear?
Have you had to make any applications cy-pres?
Does your governing body have ethical guidelines for attracting bequests?
FAMILY PROVISION CLAIMS

If faced with a family provision application which will affect a bequest to you, how do you usually respond?

Do you regard this as a serious issue?

Does mediation result in good outcomes for you?

Have you had to go to court over such claims?

Are legal costs a consideration?

Does your governing body have a policy for dealing with family provision applications?

Do you have any recommended preventative strategies to avoid family provision claims?
REFERENCES

Australia Post, Australian Lifestyle Survey.
References


Dal Pont, G. Charity Law in Australia and New Zealand; Oxford University, 2000.


Madden, K. and Scaife, W. Good Times and Philanthropy, The Australian Centre for Philanthropy and Non-Profit Studies, Queensland University of Technology, March 2008.


Marks, D.W., ‘The Relative as Kleptomaniac’ unpublished address to the Bar Association of Queensland, 19 February 2006.


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

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


New South Wales, Parliamentary Debates (Hansard), Legislative Assembly, 30 August 1916.


Rowlingson, K., ‘“Living Poor to Die Rich?” Or “Spending the Kids’ Inheritance”? Attitudes to Assets and Inheritance in Later Life’ (2006) 35(2) *Journal of Social Policy* 175


