



NSW LAW REFORM COMMISSION

REPORT 110

Uniform succession laws:
family provision

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MP
Attorney General for New South Wales

Dear Attorney

Uniform succession laws: family provision

We make this Report pursuant to the reference to this Commission received 5 May 1995.



The Hon Justice Michael Adams
Chairperson

Master Joanne Harrison

The Hon Justice David Hodgson

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

May 2005

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Terms of Reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MP, referred the following matter to the Law Reform Commission by letter dated 16 May 1995:

- To inquire into and report on the existing law and procedure relating to succession and to recommend and draft a model State and Territories law on succession.
- In undertaking this inquiry the Commission is to consult with the Queensland Law Reform Commission which has accepted responsibility for the coordination of a uniform succession laws project.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Master Joanne Harrison

The Hon Justice David Hodgson (Commissioner-in-charge)

The Hon Gordon Samuels AC CVO QC

Professor Michael Tilbury

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PREFACE

0.1 Family provision legislation aims to ensure that the family and other dependants of a deceased person are adequately provided for. This is achieved, where a Court decides that provision ought to be made, by allowing it to override the terms of the deceased person's will or the distribution of the deceased person's estate upon intestacy.

0.2 The legislation relating to family provision in each Australian State and Territory has been reviewed by the National Committee on Uniform Succession Laws. The National Committee was established by the Standing Committee of Attorneys General to review the existing state laws relating to succession and to propose model national uniform laws. The New South Wales Law Reform Commission has participated in the deliberations of the National Committee following terms of reference issued by the New South Wales Attorney General. The Queensland Law Reform Commission is the coordinating agency.

0.3 The National Committee submitted a report on family provision to the Standing Committee of Attorneys General in December 1997.¹ This was followed, in July 2004, by a supplementary report on family provision together with draft model provisions to implement the two reports.² This Report is a commentary on the draft model provisions as presented to the Standing Committee in July 2004.

0.4 The National Committee decided to make the *Family Provision Act 1982* (NSW) the basis for its deliberations since the New South Wales Act was "the most comprehensive and recent legislation" in the area.³ The New South Wales legislation was enacted in 1982 following recommendations framed by the New South Wales Law Reform Commission in 1977.⁴

0.5 In making its decisions on the draft model provisions, the National Committee took into account the following considerations:

- that all people with a strong moral claim to a share of the deceased person's estate should be entitled to apply for provision; and

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1. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997) ("**MP 28**").
 2. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) ("**R 58**").
 3. MP 28 at 2.
 4. New South Wales Law Reform Commission, *Testator's Family Maintenance and Guardianship of Infants Act 1916* (Report 28, 1977).

- the ability of the Courts to exercise their discretion to make appropriate decisions regarding an applicant's entitlement to provision,⁵

and based the proposed scheme “on the belief that the scheme should facilitate, and the Court determine, what is “just” in all the circumstances”.⁶

0.6 The model provisions are simply arranged. After the preliminary provisions in Part 1, Part 2 deals with family provision orders, including:

- who may apply for family provision orders and when they may do so (Part 2 Division 1);
- what the Court must take into account in making a family provision order (Part 2 Division 2);
- what property may be the subject of a family provision order (Part 2 Division 3); and
- general and consequential matters relating to family provision orders (Part 2 Division 4).

0.7 The property that may be the subject of a family provision order identified in Part 2 Division 3 includes property that is designated by the Court as “notional estate”. Notional estate orders may be made in certain circumstances under Part 3 of the Bill in relation to property that is no longer part of the estate of the deceased person because it has already been distributed either before or after death. Part 3, therefore:

- identifies the relevant property transactions that have taken the property out of the estate (Part 3 Division 1);
- identifies the circumstances in which notional estate orders may be made in relation to property that is subject to one of these transactions (Part 3 Division 2); and
- sets out the restrictions and protections in relation to the making of notional estate orders (Part 3 Division 3).

0.8 Finally, Part 4 of the Bill sets out provisions that help to make the scheme more effective and flexible, for example:

- by offering protections to administrators who act in accordance with the Act (cl 44 and cl 45);
- by allowing parties to agree to release their rights under the Act (cl 46 and cl 47);

5. MP 28 at 2.

6. MP 28 at 2.

- by allowing beneficiaries to substitute other property for property that has been made subject to a family provision order (cl 43);
- by allowing the Court to grant probate or administration in relation to a deceased estate in order to allow a family provision order to be made (cl 42); to fix the date of death of the deceased where the date of death is uncertain (cl 48); and to make orders as to costs (cl 49); and
- by providing for the making of regulations and rules of court to assist in the operation of the Act (cl 50 and cl 51).

0.9 The commentary that follows identifies the antecedents of the provisions as recommended by the National Committee. The commentary also sets out the reasons for adopting or departing from some of these provisions.

**Family Provision Bill
2004**

A Bill for an Act to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of the deceased person; and for other purposes.

PART 1 PRELIMINARY

1 Name of Act

This Act is the Family Provision Act 2004.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

costs, in relation to proceedings under this Act relating to the estate or notional estate of a deceased person, means the costs, charges and expenses of or incidental to the proceedings.

1.1 This definition is relevant to the provisions relating to costs in cl 29 and cl 49.

Court means [insert name of appropriate court for jurisdiction].

1.2 This provision is based on the definition of “Court” in *Family Provision Act 1982* (NSW) s 6(1) but has been expressed in jurisdiction-neutral terms so that each jurisdiction can insert a provision that relates to its own applicable monetary or other jurisdictional limits.¹ For example, in New South Wales, “Court” currently means:

(a) the Supreme Court, in relation to any matter (including a matter referred to in paragraph (b)), or

1. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997) (“**MP 28**”) at 146

2 | NSW Law Reform Commission

- (b) the District Court, in relation to a matter for which it has jurisdiction under section 134 of the *District Court Act 1973*.²

deceased transferee means a deceased transferee referred to in section 32 or 33.

de facto partner means [insert appropriate definition for jurisdiction or define other appropriate term for jurisdiction] [This draft uses the NSW term “de facto partner”. Each jurisdiction may insert the appropriate term for the jurisdiction where references to de facto partner occur in the draft Bill.]

- 1.3 This provision should be read in conjunction with cl 6(1)(b), below.

1.4 There is considerable diversity in the Australian jurisdictions relating to the terms and definitions used to describe “de facto partners” and other similar terms. This provision is expressed in jurisdiction-neutral terms, allowing each jurisdiction to insert a term and definition that is consistent with its other provisions that relate to de facto relationships, including both heterosexual and same-sex partnerships.

1.5 The National Committee acknowledged that this approach will not achieve uniformity in detail between the various jurisdictions but considered that it was necessary to accommodate the existing differences in the various definitions of de facto partner.³

- 1.6 In New South Wales a “de facto relationship” is:

a relationship between two adult persons:

- (a) who live together as a couple, and
- (b) who are not married to one another or related by family.⁴

family provision order means an order made by the Court under Part 2 in relation to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of another person.

notional estate of a deceased person means property designated by a notional estate order as notional estate of the deceased person.

- 1.7 This definition of notional estate is based on the definition of “notional estate” in *Family Provision Act 1982* (NSW) s 6(1).

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- 2. *Family Provision Act 1982* (NSW) s 6(1).
 - 3. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) (“**R 58**”) at para 2.24.
 - 4. *Property (Relationships) Act 1984* (NSW) s 6(1).

notional estate order means an order made by the Court under Part 3 designating property specified in the order as notional estate of a deceased person.

person entitled to exercise a power means a person entitled to exercise a power, whether or not the power:

- (a) is absolute or conditional, or
- (b) arises under a trust or in some other manner, or
- (c) is to be exercised solely by the person or by the person together with one or more other persons (whether jointly or severally).

1.8 This definition is based on the definition of “person entitled to exercise a power” in *Family Provision Act 1982* (NSW) s 6(7).

property includes the following:

- (a) real and personal property,
- (b) any estate or interest (whether a present, future or contingent estate or interest) in real or personal property,
- (c) money,
- (d) any cause of action for damages (including damages for personal injury),
- (e) any other chose in action,
- (f) any right with respect to property,
- (g) any valuable benefit.

1.9 This provision is based on the definition of “property” in *Family Provision Act 1982* (NSW) s 6(1).

1.10 “Any valuable benefit” has been held to extend widely to “new concepts” of property, so that “the taking effect of a valuable benefit (and its) becoming held by a person can occur although there has been no change at all in the ownership of any real or personal property”.⁵ An example of a valuable benefit could be the increase in the value of shares held by others as a result of the conversion of the deceased’s shares to preference shares upon his or her death.

5. *Wentworth v Wentworth* (NSW SC, No 3748/89, Bryson J, 14 June 1991, unreported) at 107. Approved *Schaeffer v Schaeffer* (1994) 36 NSWLR 315 at 318 (Handley JA).

property held by a person includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

1.11 This definition is based on *Family Provision Act 1982* (NSW) s 6(6).

will includes a codicil and any other testamentary disposition.

1.12 This formulation differs from the equivalent New South Wales provision⁶ in that it includes “any other testamentary disposition”. It is in the same terms as the National Committee’s definition of “will” in cl 4(1) of the *Wills Bill 1997*.⁷ This was originally based on cl 3 of the draft *Wills Act 1994* (Vic).⁸

(2) Notes in the text of this Act do not form part of this Act.

4 Application of Act to deceased persons

(1) This Act applies in relation to the estate of a deceased person whether or not administration of the estate has been granted.

Note. Administration may be granted for the purposes of being able to apply for a family provision order (see section 42).

(2) For the purposes of this Act, **administration** is granted in respect of the estate of a deceased person if:

- (a) probate of the will of the deceased person is granted in *[insert name of jurisdiction]* or granted outside *[insert name of jurisdiction]* but sealed in accordance with *[insert name of appropriate provision of jurisdiction]*, or
- (b) letters of administration of the estate of the deceased person are granted in *[insert name of jurisdiction]* or granted outside *[insert name of jurisdiction]* but sealed in accordance with

[insert name of appropriate provision of jurisdiction], whether the letters were granted

6. *Family Provision Act 1982* (NSW) s 6(1).

7. New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) Appendix A. See also *Wills Act 2000* (NT) s 4.

8. NSWLRC, Report 85 at para 1.5. A slightly different formulation was ultimately adopted in Victoria: see *Wills Act 1997* (Vic) s 3(2) which states, “This Act applies to a codicil or other testamentary writing in the same manner as it applies to a will”.

- with or without a will annexed and whether for general, special or limited purposes, or
- (c) an order is made under [insert references to appropriate provisions of jurisdiction relating to transfer of administration to the public trustee, election by the Public Trustee to administer small estates, administration by Public Trustee of intestate estates].
- (3) For the purposes of this Act, the **administrator** of the estate of a deceased person is a person to whom administration of the estate has been granted or any of the following persons:
- (a) a person who holds the estate or any part of that estate on a trust that arises out of the will or on the intestacy of the deceased person,
 - (b) a person who is otherwise entitled or required to administer that estate or any part of that estate.

1.13 **Clause 4(1)** departs from the New South Wales scheme in so far as it covers situations where it is not necessary, in some circumstances, to seek a grant of administration in order to administer a deceased estate.⁹ This is especially the case in Queensland where real property may, in certain circumstances, be transferred from a deceased estate without the need to produce a grant.¹⁰ In New South Wales, the Court may only make an order “on an application in relation to a deceased person in respect of whom administration has been granted”.¹¹

1.14 The definition of administration in **cl 4(2)** is based, with minor variations, on the definition of administration in *Family Provision Act 1982* (NSW) s 6(1).

1.15 The definition of administrator in **cl 4(3)** is based, with some variations of no significance, on the definition of administrator in *Family Provision Act 1982* (NSW) s 6(1).

9. The National Committee for Uniform Succession Laws has acknowledged that a significant number of estates are administered informally across Australia: New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons* (DP 42, 1999) para 10.25.

10. See NSWLRC, DP 42 para 10.3. See also *Succession Act 1981* (Qld) s 54(1); NSWLRC, DP 42 para 10.1-10.15.

11. *Family Provision Act 1982* (NSW) s 7.

5 Act binds Crown

This Act binds the Crown, not only in right of *[insert name of jurisdiction]* but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

1.16 Only New South Wales, Queensland and the Australian Capital Territory currently have legislative provisions that effectively bind the Crown for the purposes of family provision.¹² In the other Australian jurisdictions, the Crown is bound if the relevant legislation manifests an intention to bind the Crown and this, in part, depends upon when the original provisions relating to family provision were enacted.¹³

1.17 The National Committee concluded that it was necessary to remove any doubt as to the ability of the model uniform legislation to bind the Crown.¹⁴ This was because the extension of the range of persons entitled to apply for family provision to include persons “to whom a deceased person owed a responsibility to provide maintenance, education or advancement in life”¹⁵ whether they are a member of the family of the deceased or not, means that family provision orders could potentially be made against the Crown as the recipient of the deceased estate in situations where the deceased died intestate with no eligible next of kin.¹⁶

12. *Family Provision Act 1982* (NSW) s 5; *Succession Act 1981* (Qld) s 4(2); and *Legislation Act 2001* (ACT) s 121(1).

13. See *Bropho v State of Western Australia* (1990) 171 CLR 1.

14. R 58 at para 5.10-5.14.

15. Clause 7, below.

16. See *Administration Act 1903* (WA) s 14(1) Item 11; *Wills, Probate and Administration Act 1898* (NSW) s 61B(7); *Succession Act 1981* (Qld) Sch 2 Part 2 Item 4; *Administration and Probate Act 1958* (Vic) s 55; *Administration and Probate Act 1919* (SA) s 72G(e); *Administration and Probate Act* (NT) Sch 6 Part 4 Item 4; *Administration and Probate Act 1929* (ACT) Sch 6 Part 6.2 Item 4; *Administration and Probate Act 1935* (Tas) s 45.

PART 2 FAMILY PROVISION ORDERS

Division 1 Applications for family provision orders

2.1 All Australian jurisdictions currently restrict the range of persons who are entitled to apply for provision. The categories of persons entitled to apply for family provision orders vary considerably around Australia. Some categories have been included because of the view that those whom the deceased was supporting when he or she died should continue to be supported; others have been included because of what is seen as a moral obligation on the part of the deceased to make provision for them.¹

2.2 Arbitrary lists of categories, such as those currently provided for across Australia,² run the risk of excluding meritorious claims and of making unmeritorious claims possible.³ The National Committee observed that “there will always be deserving applicants in any category”.⁴

2.3 This Bill divides the persons who may apply for a family provision order into two categories:

- those who are automatically entitled to apply, as of right (see cl 6); and
- those who may apply only if the Court determines that they are entitled to do so (see cl 7).

2.4 The division into two categories follows the models established in, for example, New South Wales, which requires that the Court must first, in relation to former spouses and dependent grandchildren of the deceased or dependent members of the deceased’s household, “determine whether, in its opinion, having regard to all the circumstances of the case (whether past or present), there are factors which warrant the making of the application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors.”⁵ This requirement does not apply to surviving spouses, de facto partners or children of the deceased who are, therefore, entitled to apply as of right.

2.5 The National Committee has proposed that the list of those who are automatically entitled to apply should be limited to those categories that are unlikely to be seriously

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1. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997) (“**MP 28**”) at 8.
 2. See the list of specific categories of person currently entitled to apply for a family provision order: MP 28 at 187-206.
 3. MP 28 at 8-9.
 4. MP 28 at 8.
 5. *Family Provision Act 1982* (NSW) s 9(1).

disputed, that is, husbands, wives and de facto partners and non-adult children. The remaining category of those who may apply only if the Court determines that they are entitled to do so must establish that the deceased owed them a “responsibility to provide maintenance, education or advancement in life”.

6 Family members who are entitled to make applications

(1) *The following members of the family of a deceased person may apply to the Court for a family provision order in respect of the estate of the deceased person:*

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

(2) *In this section:*

non-adult child *of a deceased person means a child of the deceased person who was a minor when the deceased person died or who was born after the deceased person died, but does not include a stepchild of the deceased person.*

Note. *Section 11 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order.*

2.7 The persons who fall within the category of people who are automatically entitled to apply for a family provision order are the deceased’s spouse or de facto partner, and non-adult children. These categories have been identified by the National Committee as being among those who would “generally have the strongest claim for support from the deceased person’s estate”.⁶ The National Committee observed:

*During the life of the deceased person, his or her spouse and children would usually have been in a relationship with the deceased person whereby the deceased person was, by virtue of the relationship alone, regularly under a duty to support the spouse and/or children. During the deceased person’s life that duty would often have been a legal as well as a moral duty.*⁷

2.8 The categories of husband or wife and child are also the easiest relationships to define and prove.⁸

6. MP 28 at 9. See also National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) (“R 58”) at para 2.17-2.19.

7. MP 28 at 9.

8. MP 28 at 9.

De facto partner of the deceased

2.9 Although there is a degree of consistency across the Australian jurisdictions with respect to the eligibility of de facto partners to apply for family provision, the various jurisdictions still use a range of different terms⁹ and criteria for establishing such relationships.¹⁰ In light of this diversity, the National Committee, while agreeing to include de facto partners among those who are automatically entitled to apply, decided to leave the definition of de facto partner to the relevant legislation of each jurisdiction.¹¹ The definition of “de facto partner” is discussed in the commentary to clause 3.

Non-adult child of the deceased person

2.10 In allowing children of the deceased the automatic right to apply for a family provision order, no Australian jurisdiction currently imposes an age limit on applicants. In New South Wales, for example, the relevant provision simply refers to a “child of the deceased person”.¹²

2.11 **Clause 6(1)(c)** therefore represents a restriction on one of the traditional categories of those entitled to apply as of right, in that only non-adult children are included. The Court must consider the position of adult children in accordance with clause 7.

2.12 Such a provision places the entitlement to apply as of right clearly within “a maintenance framework of parental responsibilities”.¹³ The National Committee saw this new provision as moving against the trend of the Courts in recent years to make provision for able-bodied adult children of the deceased.¹⁴ The National Committee concluded that

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9. Most jurisdictions refer to de facto partnerships or relationships: *Property (Relationships) Act 1984* (NSW) s 4; *Interpretation Act* (NT) s 19A(3); *De Facto Relationships Act* (NT) s 3(1) and s 3A; *Acts Interpretation Act 1954* (Qld) s 32DA; *Interpretation Act 1984* (WA) s 13A; but some refer to domestic partners or partnerships: *Legislation Act 2001* (ACT) s 169; *Property Law Act 1958* (Vic) s 275(1); and one refers to significant relationships: *Relationships Act 2003* (Tas) s 4.
10. See *Legislation Act 2001* (ACT) s 169(2); *Property (Relationships) Act 1984* (NSW) s 4(2); *De Facto Relationships Act* (NT) s 3A(2); *Acts Interpretation Act 1954* (Qld) s 32DA(2); *Relationships Act 2003* (Tas) s 4(3); *Property Law Act 1958* (Vic) s 275(2); *Interpretation Act 1984* (WA) s 13A(2). In Tasmania, relationships may now also be proved by registration: *Relationships Act 2003* (Tas) s 4(2).
11. R 58 at 9.
12. *Family Provision Act 1982* (NSW) s 6(1) definition of “eligible person”.
13. R F Atherton, *Family Provision* (Victorian Attorney-General’s Law Reform Advisory Council, Expert Report 1, 1997) at para 3.15
14. MP 28 at 10-13.

non-adult children would “generally have a far greater moral claim to the deceased person’s estate than adult children”.¹⁵

2.13 **Stepchildren.** The definition of “non-adult child” in **cl 6(2)** does not include stepchildren who have been included in the lists of those eligible to apply in some jurisdictions.¹⁶ The National Committee decided not to include stepchildren because of the “definitional difficulties which may arise which would lead to further uncertainty”.¹⁷ Such difficulties might include whether some level of dependency would need to be found and the question about what to do in situations where the parent and step-parent have divorced.¹⁸ Step-children, may, nevertheless may make application if they meet the requirements of cl 7.

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

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

Note. *Section 11 sets out the matters that the Court may consider when determining whether a person is entitled to make an application under this section.*

2.14 To an extent, this provision follows the Victorian legislation which no longer lists categories of persons entitled to apply for a family provision order but rather allows the Court to order that provision be made for “the proper maintenance and support of a person for whom the deceased had responsibility to make provision”.¹⁹ The Bill differs from the Victorian model in that cl 6 also provides a limited list of categories of people who are automatically eligible to apply for family provision orders.²⁰ The National Committee decided against including any further list of categories within the category of those for whom the deceased “had responsibility to make provision”.

2.15 Clause 11(1), below, lists the matters the Court must consider in determining whether a person is eligible to apply for a family provision order.

15. MP 28 at 13.

16. *Family Provision Act 1969* (ACT) s 7(1)(d) and s 7(2); *Family Provision Act 1970* (NT) s 7(1)(d) and s 7(2)(b); *Succession Act 1981* (Qld) s 40 (definition of “child”); *Inheritance (Family Provision) Act 1972* (SA) s 6(g); *Testator’s Family Maintenance Act 1912* (Tas) s 2(1).

17. MP 28 at 13.

18. MP 28 at 197.

19. *Administration and Probate Act 1958* (Vic) s 91(1).

20. See para 2.7-2.12 above.

2.16 The Victorian Court of Appeal has recently considered the meaning of “responsibility” in the context of the Victorian provisions. It was held that the deceased’s responsibility must be determined in accordance with the statutory criteria in *Administration and Probate Act 1958* (Vic) s 91(4)(e)-(p).²¹ It was further noted that, while “responsibility” connotes what is essentially a “moral” responsibility or duty, the deceased’s “moral” duty “cannot be a substitute for the criteria enumerated in the statute”.²²

2.17 This broad category can be compared with the current New South Wales provision that includes in the definition of an eligible person, a person “who was, at any particular time, wholly or partly dependent upon the deceased person; and ...was, at that particular time or at any other time, a member of the household of which the deceased person was a member”.²³ While, like the proposed section, this New South Wales provision moves away from the traditional approach of nominating categories of family members, it may prove inadequate in a number of ways identified by the National Committee:

*It is possible that a person who was not dependent upon the deceased person could have a strong moral claim to maintenance and support from the deceased person’s estate. Similarly, being a member of the deceased person’s household is not necessarily an indication that the deceased person owed the person a responsibility of maintenance and support upon the deceased person’s death.*²⁴

2.18 The National Committee considered that this new category would allow “deserving” persons to apply for a family provision order while at the same time providing the means whereby the Courts could bring proceedings to a timely end if an applicant was unable to establish that the deceased owed them a responsibility to provide for their maintenance and support.²⁵

2.19 The Victorian Supreme Court has determined that, on the facts of the individual cases, persons within the following categories have had an entitlement to family provision:

- brother of the deceased;²⁶
- adult son of the deceased;²⁷ and
- adult daughter of the deceased.²⁸

21. Equivalent, in broad terms, to the criteria enumerated in cl 11, below.

22. *Coombes v Ward* [2004] VSCA 51 at para 12, 13, 28.

23. *Family Provision Act 1982* (NSW) s 6(1), definition of “eligible person”.

24. MP 28 at 15.

25. MP 28 at 20.

26. *Marshall v Spillane* [2001] VSC 371.

27. *De Angelis v De Angelis* [2003] VSC 432; *Blair v Blair* [2004] VSCA 149.

28. *Penn v Richards* [2002] VSC 378.

2.20 In other cases, the Court has found that persons in the following categories have not been entitled to orders for family provision:

- sister of the deceased;²⁹
- long term friend of the deceased;³⁰
- grandchildren of the deceased;³¹
- adult natural child of the deceased, adopted out in infancy;³² and
- business partner of the deceased.³³

Each of the persons in these categories could conceivably have been eligible on different facts, depending on such factors listed in cl 11(1) as may be relevant.

2.21 The range of persons who may conceivably apply for family provision under this proposed provision may render necessary costs provisions of the sort that were introduced in Victoria at the same time as the equivalent provision was introduced in that State.³⁴ The breadth of this proposed provision has also influenced recommendations in relation to cl 5³⁵ and cl 11(2)(m), cl 44(1)(b) and cl 46.³⁶

8 Applications for persons lacking capacity

- (1) *This section applies to the following persons:*
 - (a) *the administrator of the estate of the deceased person,*
 - (b) *[insert appropriate reference to litigation guardian/guardian ad litem/guardian] of a person,*
 - (c) *[insert reference to appropriate equivalent to the public trustee in jurisdiction],*
 - (d) *[insert reference to appropriate officer of jurisdiction in relation to children in care],*
 - (e) *[insert reference to appropriate officer under mental health legislation of jurisdiction].*
- (2) *A person to whom this section applies may apply to the Court:*
 - (a) *for a family provision order on behalf of a person who is or may be entitled to apply for such an order but who lacks capacity to do so, or*
 - (b) *for advice or directions as to whether an application for a family provision order ought to be made by or on behalf of any such person.*

29. *Sanderson v Bradley* [2004] VSC 231.

30. *Lee v Hearn* [2002] 7 VR 595.

31. *Leahey v Trescowthick* [1999] VSC 409; *Sherlock v Guest* [1999] VSC 431.

32. *Coombes v Ward* [2004] VSCA 51.

33. *Schmidt v Watkins* [2002] VSC 273.

34. See Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 9 October 1997 at 436. See also the commentary on cl 49, below.

35. See para 1.17, above.

36. See para 2.61, para 4.6 and para 4.20, below.

2.22 This provision allows the persons identified in cl 8(1) to apply to the Court for a family provision order on behalf of a person who lacks the capacity to do so and also to apply for advice or directions. Together with cl 9(4), it is based on *Succession Act 1981* (Qld) s 41(7).³⁷

9 Time limit for applications

- (1) *An application for a family provision order must be made not later than 12 months after the death of the deceased person, unless the Court otherwise directs.*
- (2) *If an application for a family provision order has been made by any person, it is, for the purposes of determining whether any subsequent application is made within the required time, taken to have been made by all persons who are entitled to make an application for a family provision order in respect of the estate concerned.*
- (3) *An application is taken to be made on the day it is filed in the Court's registry.*
- (4) *For the purposes of this section, an application for advice or directions made under section 8 is taken to be an application for a family provision order.*

2.23 **Clause 9(1)**, which sets the time limit for making a family provision application at 12 months from the date of death of the deceased, balances the need for there not to be undue delay in the administration of an estate with the need to ensure that those with a genuine claim have sufficient time within which to make it.³⁸ The time limit in New South Wales is currently 18 months.³⁹

Commencement of time limit

2.24 In commencing the time period at the date of death of the deceased, the National Committee is following similar provisions in Queensland⁴⁰ and New South Wales.⁴¹ The alternative would have been to commence the period with the granting of probate or letters of administration.⁴² This option was rejected as unworkable since informally administered estates would then be subject to a family provision application at any time.⁴³

2.25 Clause 48, below, allows the Court to determine a date of death for the purposes of this section if the date of death of the deceased is uncertain.

37. Compare *Testator's Family Maintenance Act 1912* (Tas) s 3(5).

38. MP 28 at 29. See also A Dickey, *Family Provision after Death* (Law Book Company, Sydney, 1992) at 13.

39. *Family Provision Act 1982* (NSW) s 16(1)(b).

40. *Succession Act 1981* (Qld) s 41(8).

41. *Family Provision Act 1982* (NSW) s 16(1)(b).

42. See, eg, *Family Provision Act 1970* (NT) s 9(1); *Family Provision Act 1969* (ACT) s 9(1); *Testator's Family Maintenance Act 1912* (Tas) s 11(1); *Inheritance (Family Provision) Act 1972* (SA) s 8(1); *Administration and Probate Act 1958* (Vic) s 99; *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 7(2)(a).

43. MP 28 at 35.

Duration of time limit

2.26 The 12 month period is a compromise between the shorter period of nine months from death in Queensland⁴⁴ and the longer period of 18 months from death in New South Wales.⁴⁵ The National Committee considered the 12 month time limit appropriate “both in the context of the efficient administration of the estate and from the point of view of certainty on the part of those with an interest in the distribution of the estate”.⁴⁶

Discretion to extend time

2.27 The limitation is to apply “unless the Court otherwise directs”. All jurisdictions make provision allowing for the Court to extend time when the circumstances require it. This discretion is, for the most part, unfettered.⁴⁷ Some jurisdictions require that an application for extension must be made before “final” or “full” distribution.⁴⁸ However, the National Committee preferred to follow the jurisdictions which allow an extension to be applied for at any time.⁴⁹ This would obviate the need to determine whether the application had been made before the “final” or “full” distribution of the estate.⁵⁰

2.28 This part of the provision is based on *Succession Act 1981* (Qld) s 41(8) which states that the limitation applies “unless the court otherwise directs”.

2.29 It was decided not to include a provision specifically requiring that cause be shown before the Court could grant an extension⁵¹ on the grounds that, even where the Court is given an unfettered discretion, applicants will generally be required to satisfy the Court that the delay in making the applications ought to be excused.⁵²

2.30 **Clause 9(2)** is based on *Succession Act 1981* (Qld) s 41(6). Western Australia has a similar provision.⁵³ Both differ from the equivalent Tasmanian provision which extends the limitation period for the others only if the Court so orders.⁵⁴ The Queensland provision was also preferred over the equivalent provision in New South Wales which

44. *Succession Act 1981* (Qld) s 41(8).

45. *Family Provision Act 1982* (NSW) s 16(1)(b).

46. MP 28 at 35.

47. Except in Victoria: see *Administration and Probate Act 1958* (Vic) s 99.

48. *Administration and Probate Act 1958* (Vic) s 99; *Inheritance (Family Provision) Act 1972* (SA) s 8(4); *Testator’s Family Maintenance Act 1912* (Tas) s 11(4); *Family Provision Act 1970* (NT) s 9(4); *Family Provision Act 1969* (ACT) s 9(4).

49. See *Family Provision Act 1982* (NSW) s 16(4); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 7(2); *Succession Act 1981* (Qld) s 41(8).

50. MP 28 at 37.

51. See, eg, *Family Provision Act 1982* (NSW) s 16(3).

52. *Coffey v Bennett* [1961] VR 264; *Re Walker* [1967] VR 890 at 892. See R 58 at para 5.15-5.17; para 5.25-5.27.

53. *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 12(2).

54. *Testator’s Family Maintenance Act 1912* (Tas) s 3(4).

allows the Court, when it makes an order in favour of an eligible applicant, also to make an order in favour of any other eligible person.⁵⁵

2.31 **Clause 9(3)** states that an application is taken to be made on the day it is filed in the Court's registry. In most jurisdictions, an application is taken to have been made on the date that the originating process was filed in the registry.⁵⁶ The National Committee decided to follow the Northern Territory and Australian Capital Territory in making express provision for this position.⁵⁷ The South Australian approach that the application is taken to have been made when the summons was served on the administrator of the estate⁵⁸ was rejected because of difficulties that could arise in the service of process, especially in situations where substituted service might have to be applied for.⁵⁹

2.32 **Clause 9(4)** is based on the final part of *Succession Act 1981* (Qld) s 41(7). It ensures that, so long as the representative of someone who lacks capacity to apply for a family provision order applies to the Court for direction or advice within the time limit set out in cl 9(1), any subsequent application for an order will be taken to have been made within time.

Division 2 Determination of applications

10 When family provision order may be made

- (1) *The Court may, on application under Division 1, make a family provision order in respect of the estate of a deceased person, if the Court is satisfied that:*
 - (a) *the person in whose favour the order is to be made is a person who may make an application, or is a person on whose behalf such an application may be made, and*
 - (b) *at the time that the Court is determining whether or not to make the order, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made is not made by the provision made in the will of the deceased person, or the operation of the intestacy rules in relation to the estate of the deceased person, or both.*
- (2) *The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the person in whose favour the order is made, having regard to the facts known to the Court at the time the order is made.*

Note. *Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 24). Part 3 sets out property that may be designated as part of the notional estate of*

55. *Family Provision Act 1982* (NSW) s 10. See MP 28 at 44.

56. See A Dickey, *Family Provision after Death* (Law Book Company, Sydney, 1992) at 14.

57. *Family Provision Act 1970* (NT) s 9(5); *Family Provision Act 1969* (ACT) s 9(5).

58. *Inheritance (Family Provision) Act 1972* (SA) s 8(6).

59. MP 28 at 38.

a deceased person for the purpose of making a family provision order.

- (3) *The Court may make a family provision order in favour of a person in whose favour a family provision order has previously been made in relation to the same estate only if:*
- (a) *the Court is satisfied that there has been a substantial detrimental change in the person's circumstances since a family provision order was last made in favour of the person, or*
 - (b) *at the time that a family provision order was last made in favour of the person:*
 - (i) *the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (the **undisclosed property**), and*
 - (ii) *the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property.*

2.33 **Clause 10(1) and (2)** are based substantially on *Family Provision Act 1982* (NSW) s 7 and s 9(2). They are concerned with assessing whether the deceased has made “adequate provision for the proper maintenance, education or advancement in life” of persons for whom the deceased ought to have made provision and the making of such provision.

2.34 The wording in **cl 10(1)(b)** in relation to the adequacy of the provision made out of the estate of the deceased is different to that in *Family Provision Act 1982* (NSW) s 9(2)(a). However, there is no material difference between the provisions. The current New South Wales provision refers simply to provision “out of the person’s estate” whereas cl 10(1)(b) refers to provision “made in the will of the deceased person, or the operation of the intestacy rules in relation to the estate of the deceased person, or both”. The phrase “or both” has been included to cover situations of partial intestacy where the will of the deceased has some effect but fails effectively to dispose of all of the estate of the deceased.

2.35 The use of the term “adequate” in **cl 10(1)(b)** allows for reference to be made to the case law that has built up around the term “inadequate” in the New South Wales legislation.⁶⁰

Maintenance, education and advancement in life

2.36 The wording “maintenance, education and advancement in life” used in cl 10(1) and cl 10(2) has been adopted from the relevant New South Wales provision.⁶¹ The phrase “maintenance, education and (or) advancement in life” is also used in the

60. *Family Provision Act 1982* (NSW) s 9(2).

61. *Family Provision Act 1982* (NSW) s 7.

Australian Capital Territory,⁶² Northern Territory⁶³ and South Australia.⁶⁴ Queensland, Victoria and Tasmania use the phrase “maintenance and support”.⁶⁵ Western Australia refers to “maintenance, support, education or advancement in life”.⁶⁶ It has been suggested that “support”, “maintenance” and “education” are words traditionally associated with expenditure of income, whereas “advancement in life” has been associated with the expenditure of capital (for example, the setting up of someone in business or upon marriage).⁶⁷

Court’s discretion to order provision

2.37 **Clause 10(2)** provides that “the Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made...”. This confers a wide discretion, subject only to the consideration of the facts at the date the order is made. (See the list of matters to be considered by the Court in cl 11, below.) In granting a wide discretion, this provision follows the general effect of provisions in all Australian jurisdictions.⁶⁸ A phrase along the lines of “having regard to all the circumstances of the case”, which has been included in some jurisdictions,⁶⁹ has been omitted from the Bill on the grounds that the words were unlikely significantly to restrict the Court’s discretion.⁷⁰

Circumstances at the date of the order

2.38 The phrase “having regard to the facts known to the Court at the time the order is made” is to the same effect as the equivalent New South Wales provision.⁷¹ In most other jurisdictions at present, the question of whether adequate provision has been made and what provision ought to be made must be determined at the date of death of the deceased.⁷² The National Committee could see no reason why the decision should be

62. *Family Provision Act 1969* (ACT) s 8(2).

63. *Family Provision Act 1970* (NT) s 8(1).

64. *Inheritance (Family Provision) Act 1972* (SA) s 7(1)(b).

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

66. *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(1).

67. MP 28 at 50.

68. *Family Provision Act 1982* (NSW) s 7; *Family Provision Act 1970* (NT) s 8(1); *Family Provision Act 1969* (ACT) s 8(1); *Succession Act 1981* (Qld) s 41(1); *Inheritance (Family Provision) Act 1972* (SA) s 7(1); *Testator’s Family Maintenance Act 1912* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 91; *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(1).

69. See *Family Provision Act 1982* (NSW) s 7; *Family Provision Act 1970* (NT) s 8(1); *Testator’s Family Maintenance Act 1912* (Tas) s 3(1).

70. See MP 28 at 68.

71. *Family Provision Act 1982* (NSW) s 7. See also *Family Provision Act 1969* (ACT) s 8(2).

72. See *Family Provision Act 1970* (NT) s 8(1); *Succession Act 1981* (Qld) s 41(1); *Inheritance (Family Provision) Act 1972* (SA) s 7(1)(b); *Testator’s Family*

made, taking into account circumstances at the date of death, but to the exclusion of facts and circumstances subsequently known to the Court at the time of the order.⁷³

Additional provision

2.39 As a general rule, a family provision order, once made, is final. The National Committee favoured finality in relation to family provision orders once made. In particular, the National Committee was conscious of the fact that “in attempting to provide redress for applicants in exceptional cases, there is a risk of encouraging unmeritorious litigation, the effect of which can be to erode the assets of an estate”.⁷⁴ However, two limited exceptions to this finality have been set out in Clause 10(3) of the draft Bill. Reference should also be made to the variation and revocation provisions contained in cl 21 and the restrictions on out of time and additional applications in cl 41.

2.40 **Substantial detrimental change in circumstances.** Clause 10(3)(a) allows the Court to make a further order for family provision where there has been a substantial detrimental change in the circumstances of a person in whose favour a family provision order has already been made. This is based on *Family Provision Act 1982* (NSW) s 8. It is clearly limited to those who have already received the benefit of a prior family provision order or orders.⁷⁵ This is consistent with the recommendation of the New South Wales Law Reform Commission in 1977, which sought to deal with the problem that, once a family provision order was made in favour of a particular person, the Court could not, in absence of specific legislative provision, order further provision.⁷⁶

2.41 **Undisclosed property.** Clause 10(3)(b) allows the Court to make a further order for family provision where the existence of certain property in an estate (or notional estate) of the deceased was not known at the time of the earlier order and the undisclosed property would have increased the value of the estate substantially.⁷⁷ Such an additional order has been restricted to situations where the Court has already made an order for family provision that is favourable to the applicant. In recommending this provision, the National Committee did not seek to restrict an applicant’s right to apply by reference to the particular reason why the property’s existence was not disclosed. The awareness of the existence of any undisclosed property on the part of an applicant was

Maintenance Act 1912 (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 91(3); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(1).

73. See MP 28 at 50-51.

74. R 58 at para 5.45.

75. See *Wentworth v Wentworth* (1995) 37 NSWLR 703 at 724 (Powell JA).

76. See New South Wales Law Reform Commission, *Testator’s Family Maintenance and Guardianship of Infants Act 1916* (Report 28, 1977) at para 2.17.1-2.17.7. See also *Re Breen* [1933] VLR 455; *Re Porteus* [1949] VLR 383.

77. For a discussion of this proposal, and the proposals that the National Committee rejected, see R 58 at para 5.40-5.57. For earlier proposals in this area, see Victoria, Chief Justice’s Law Reform Committee, *Testator’s Family Maintenance-Variation of Orders* (1973) at 8-11.

considered a factor that the Court could take into account in making the additional order rather than a factor leading to automatic disqualification of the applicant.⁷⁸

11 Matters to be considered by Court

- (1) *The Court may have regard to the matters set out in subsection (2) for the purpose of determining:*
 - (a) *whether a person is entitled to make an application under section 7, and*
 - (b) *whether, in the case of any application under Division 1, to make a family provision order and the nature of any such order.*
- (2) *The following matters may be considered by the Court:*
 - (a) *any family or other relationship between the person in whose favour the order is sought to be made (the **proposed beneficiary**) and the deceased person, including the nature and duration of the relationship,*
 - (b) *the nature and extent of any obligations or responsibilities owed by the deceased person to the proposed beneficiary, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,*
 - (c) *the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,*
 - (d) *the financial resources (including earning capacity) and financial needs, both present and future, of the proposed beneficiary, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,*
 - (e) *any physical, intellectual or mental disability of the proposed beneficiary, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,*
 - (f) *the age of the proposed beneficiary when the application is being considered,*
 - (g) *any contribution, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the proposed beneficiary to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family,*
 - (h) *any provision made for the proposed beneficiary by the deceased person, either during the deceased person's lifetime or any provision made from the deceased person's estate,*
 - (i) *the date of the will (if any) of the deceased person and the circumstances in which the will was made,*
 - (j) *whether the proposed beneficiary was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased*

78. R 58 at para 5.49-5.50.

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

2.42 **Clause 11** provides a list of matters to be taken into account in two situations:

- when the Court must determine eligibility to apply to the Court for a family provision order under cl 7; and
- when the Court must determine whether a family provision order should be made under cl 10 and the quantum of that award.

The items in the list are mostly based on *Administration and Probate Act 1958* (Vic) s 91(4)(e)-(p), although there are some additions.

2.43 Clause 11, however, differs from the Victorian provision in that the Victorian provision states that the Court, in making its determination, “*must* have regard to” the matters in the list, whereas cl 11 states that the matters in the list “*may* be considered by the Court”. The National Committee preferred the approach in cl 11 on the following grounds:

*If the Court were required to take into account every matter in the list... a result may be that appeals will be sought on the basis that the Court failed to take a particular matter into account or failed to give equal consideration to each matter - irrespective of its relevance in the particular case.*⁷⁹

The matters outlined are to be taken into account in determining both whether an applicant was owed a responsibility by the deceased and whether any provision made by the deceased was adequate.⁸⁰

Family or other relationships - paragraph (a)

2.44 Clause 11(2)(a) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(e).

Obligations and responsibilities of the deceased - paragraph (b)

2.45 Clause 11(2)(b) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(f).

79. MP 28 at 19-20.

80. MP 28 at 65.

Nature and extent of the estate - paragraph (c)

2.46 Clause 11(2)(c) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(g). However, it also refers to the notional estate of the deceased, which is not provided for in the Victorian scheme.

Financial resources and needs of others - paragraph (d)

2.47 Clause 11(2)(d) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(h).

Physical, intellectual or mental disability - paragraph (e)

2.48 Clause 11(2)(e) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(i).

Age - paragraph (f)

2.49 Clause 11(2)(f) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(j).

Benefits received by the deceased - paragraph (g)

2.50 Clause 11(2)(g) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(k). However, unlike the Victorian provision, it expressly excludes pensions and other benefits from the concept of “adequate consideration”. The National Committee was of the view that a carer’s pension should not be considered valuable consideration for the applicant’s contribution to the deceased’s welfare since it is “more compensation for income than the carer might otherwise have earned than it is remuneration”.⁸¹

Any provision in favour of the applicant - paragraph (h)

2.51 In considering the Victorian provision contained in *Administration and Probate Act 1958* (Vic) s 91(4)(l), which refers to “any benefits *previously* given”, the National Committee preferred a provision based upon one in the *Family Provision Act 1982* (NSW) which refers to:

*the provision (if any) made in favour of the eligible person by the deceased person either during the person’s lifetime or out of the person’s estate.*⁸²

The will of the deceased - paragraph (i)

2.52 This is a provision without antecedent, which allows the Court to consider:

- the date of any will; and
- the circumstances in which it was made.

2.53 ***The date of any will.*** The date of any will of the deceased is relevant in order to take into account change of circumstances, especially if the will was made a long time ago.⁸³

81. MP 28 at 23.

82. *Family Provision Act 1982* (NSW) s 9(2)(a).

83. See MP 28 at 23.

2.54 **The circumstances in which the will was made.** While the National Committee noted that the circumstances of the making of a will are strictly irrelevant (except in so far as they may go to the validity of the document), it suggested that such matters may be of relevance to family provision proceedings:

*A will made in circumstances of great secrecy may be unassailable in probate law but those circumstances, if admissible in family provision proceedings, may illuminate an imbalance of fairness in the distribution of the estate or disclose a state of affairs in which the testator did not really have an opportunity to consider all the claims incumbent upon her or him.*⁸⁴

The National Committee decided to include both these factors in the list of matters to be considered by the Court in case the Court should, in absence of any provision, have to address an argument that it cannot consider such matters because they are not included in the list.⁸⁵

Maintenance of the applicant by the deceased - paragraph (j)

2.55 Clause 11(2)(j) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(m).

Liability of another person to support the applicant - paragraph (k)

2.56 Clause 11(2)(k) is based on *Administration and Probate Act 1958* (Vic) s 91(4)(n).

Character and conduct - paragraph (l)

2.57 This item is based on *Administration and Probate Act 1958* (Vic) s 91(4)(o) which allows the Court to consider “the character and conduct of the applicant or any other person”. This provision has been included in the list of matters the Court may consider in determining both that the deceased owed a responsibility to maintain the applicant and the sufficiency of that provision.⁸⁶ However, this provision goes further than the Victorian provision and any other similar provisions, in that the Court may consider conduct “before and after” the death of the deceased, and the Court may also consider the character and conduct, not only of the applicant, but also of any other person.⁸⁷ In New South Wales, the Court, in deciding what provision, if any, to make, may consider the character and conduct of an applicant both before and after the death of the deceased.⁸⁸

2.58 With this provision, which allows the Court to take character and conduct into account, there is no need for a separate provision, like those in many Australian

84. MP 28 at 23.

85. MP 28 at 23.

86. See MP 28, drafting instructions at 12.

87. MP 28 at 66.

88. *Family Provision Act 1982* (NSW) s 9(3)(b).

jurisdictions,⁸⁹ to enable the Court to refuse to make an order on the basis of the character and conduct of the applicant.⁹⁰

2.59 The conduct of “any other person” could, for example, refer to a relative of the proposed beneficiary who concealed the will in which the deceased cut the proposed beneficiary out, or refer to any other person who is liable to support the proposed beneficiary.⁹¹

2.60 The National Committee noted that some conduct may result in the Court reducing the amount of the award rather than simply refusing to make the order. The National Committee, however, decided that it was not necessary to spell out that conduct could lead to a reduction in the amount of an award since “the Court’s discretion would be wide enough to make the most appropriate award in all the circumstances”.⁹²

Customary law - paragraph (m)

2.61 This item is not included in the Victorian provision. In adding consideration of “any relevant Aboriginal or Torres Strait Islander customary law or other customary law”, the National Committee “considered it important to enable the Court to take into account the deceased person’s and the applicant’s membership of a particular community and the customary practices and customary laws which help define that community in determining whether the deceased person owed the applicant a [relevant] responsibility”.⁹³ However, the National Committee did not consider it appropriate to specify “what customary practices and customary laws should be taken into account by the Court when determining a person’s eligibility to apply for family provision from the estate of a deceased member of a particular community”, especially bearing in mind that customary practices and laws will vary within and between communities, and not every member of a community will feel bound by its customary practices and laws.⁹⁴

Any other matter - paragraph (n)

2.62 This first part of this paragraph is based on *Administration and Probate Act 1958* (Vic) s 91(4)(p), which merely refers to “any other matter the Court considers relevant”. The remainder of the paragraph allows the Court to consider matters that were not only in existence at the time of the death of the deceased, but also matters in existence at the time the application is being considered.

89. *Administration and Probate Act 1958* (Vic) s 96(1); *Succession Act 1981* (Qld) s 41(2)(c); *Inheritance (Family Provision) Act 1972* (SA) s 7(3); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(3); *Testator’s Family Maintenance Act 1912* (Tas) s 8(1); *Family Provision Act 1970* (NT) s 8(3); *Family Provision Act 1969* (ACT) s 8(3)(a).

90. See MP 28 at 59-61 and 66.

91. See cl 11(2)(k).

92. MP 28 at 67.

93. MP 28 at 22-23.

94. MP 28 at 22.

12 Other possible applicants

- (1) *In determining an application for a family provision order, the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (other than a beneficiary of the deceased person's estate) but who has not made an application.*
- (2) *However, the Court may disregard any such interests only if:*
 - (a) *notice of the application, and of the Court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations [insert reference to prescribing by rules of court, if appropriate for the jurisdiction], or*
 - (b) *the Court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case.*

2.63 This provision, which is based on *Family Provision Act 1982* (NSW) s 20, was originally introduced to deal with a decision of the New South Wales Supreme Court that the Court should take into account the deceased's duty to all eligible persons even if they had not made an application.⁹⁵ This potentially meant that applicants could be denied provision if applicants with stronger claims existed, even if the people with stronger claims had not made an application.⁹⁶

2.64 Clause 12 differs slightly from the current New South Wales provision in that it makes clear that the interests of existing beneficiaries (either under the will or on intestacy) must be taken into account, even if they have not made an application for family provision.⁹⁷

13 Interim family provision orders

- (1) *The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the person concerned in the final order.*
- (2) *After making an interim family provision order, the Court must proceed to finally determine the application for a family provision order by confirming, revoking or varying the interim order.*

95. See *Re Bourke* [1968] 2 NSW 453; New South Wales Law Reform Commission, *Testator's Family Maintenance and Guardianship of Infants Act 1916* (Report 28, 1977) at para 2.9.11, 2.9.12.

96. NSWLRC, Report 28 at para 2.9.11.

97. This follows the effect of the decision in *Luciano v Rosenblum* [1985] 2 NSWLR 65 at 69. See R 58 at para 5.65-5.69.

2.65 This provision, which allows the Court to make an interim order for family provision before it has made a final decision, is based on *Family Provision Act 1982* (NSW) s 9(5) and s 9(6).

2.66 An express power to make an interim order is necessary because of the doubt that the Court could make an interim order without such an express power.⁹⁸ The National Committee concluded that such a power would be desirable in some circumstances:

*In some cases, an applicant for family provision may have a pressing need for financial support pending the final determination of his or her application. Alternatively, although an applicant may not demonstrate such a need, it may be clear to the court that an applicant will be entitled to at least a certain amount by way of provision out of the deceased's estate. In those circumstances, the court may be of the view that the applicant should not be deprived of that amount pending the final determination of the application.*⁹⁹

Division 3 Property that may be used for family provision orders

14 Property that may be used for family provision orders

- (1) *A family provision order may be made in respect of the estate of a deceased person.*
- (2) *If the deceased person died leaving a will, the estate of the deceased person includes property that would, on a grant of probate of the will, vest in the executor of the will, or would on a grant of administration with the will annexed, vest in the administrator appointed under that grant.*
- (3) *A family provision order may not be made in relation to property of the estate that has been distributed, except as provided by subsection (5).*
- (4) *Where property in the estate of a deceased person is held by the administrator of that estate as trustee for a person or for a charitable or other purpose, the property is to be treated, for the purposes of this Act, as not having been distributed unless it is vested in interest in that person or for that purpose.*
- (5) *A family provision order may be made in relation to property that is not part of the estate of a deceased person, or that has been distributed, if it is designated as notional estate of the deceased person by an order under Part 3.*

2.67 This clause identifies the property that may be subject to an order for family provision. The property that is made available is usually the property in the deceased's estate. In some circumstances, property that has ceased to be part of the deceased's

98. See, eg, *Cotton v Owen* [1999] SASC 391. See also *Young v Salkeld* (1985) 4 NSWLR 375 at 377.

99. R 58 at para 5.63.

estate or has been distributed, either before or after death, may also be subject to an order for family provision. This is referred to as “notional estate”.

2.68 **Clause 14(2)** is based on the definition of “estate” in *Family Provision Act 1982* (NSW) s 6(1).

2.69 **Clause 14(3)** is based on *Family Provision Act 1982* (NSW) s 6(4).

Property held by administrator as trustee

2.70 **Clause 14(4)**, which is based on *Family Provision Act 1982* (NSW) s 6(5), was included by the National Committee on the grounds that it “provides certainty in determining whether property that is held on trust by a personal representative remains part of an estate or whether it has been distributed”.¹⁰⁰ (Note that property that has already been distributed from a deceased estate may be made subject of a notional estate order.)¹⁰¹

Notional estate

2.71 **Clause 14(5)** refers to property that has been designated “notional estate” by an order under Part 3.

15 Orders may affect property in or outside jurisdiction

A family provision order may be made in respect of property situated in or outside [insert name of jurisdiction] when, or at any time after, the order is made, whether or not the deceased person was, at the time of death, domiciled in [insert name of jurisdiction].

2.72 Clause 15 is based on *Family Provision Act 1982* (NSW) s 11(1)(b).¹⁰²

Division 4 General provisions relating to family provision orders

16 Nature of orders

- (1) *A family provision order must specify:*
 - (a) *the person or persons for whom provision is to be made, and*
 - (b) *the amount and nature of the provision, and*
 - (c) *the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided, and*
 - (d) *any conditions, restrictions or limitations imposed by the Court.*
- (2) *A family provision order may require the provision to be made in one or more of the following ways:*

100. R 58 at para 3.90; see also para 3.56-3.89. This recommendation reverses an earlier recommendation of the National Committee: see MP 28 at 147.

101. See cl 30, below.

102. MP 28 at 114.

- (a) *by payment of a lump sum of money,*
 - (b) *by periodic payments of money,*
 - (c) *by application of specified existing or future property,*
 - (d) *by way of an absolute interest, or a limited interest only, in property,*
 - (e) *by way of property set aside as a class fund for the benefit of 2 or more persons,*
 - (f) *in any other manner the Court thinks fit.*
- (3) *If provision is to be made by payment of an amount of money, the family provision order must specify whether interest is payable on the whole or any part of the amount payable for the period, and, if so, the period during which interest is payable and the rate of the interest.*

2.73 **Clause 16(1)** sets out the matters that the Court *must* specify in making a family provision order. The paragraphs are based chiefly on *Administration and Probate Act 1958* (Vic) s 97(1).¹⁰³

2.74 **Clause 16(2)**, which sets out the ways in which the Court *may* require the provision to be made, is based on *Family Provision Act 1982* (NSW) s 11(1)(a).

2.75 **Clause 16(3)**, which makes provision for interest on any sum ordered, is based on *Family Provision Act 1982* (NSW) s 11(1)(d). The National Committee considered that the inclusion of this provision renders a provision to the effect of *Family Provision Act 1982* (NSW) s 15(3), which deals with interest in relation to consequential and ancillary orders, unnecessary.¹⁰⁴

2.76 The National Committee concluded, in relation to cl 16, that:

*Such a provision should assist the Court and practitioners and will ensure that the Court addresses significant matters which it otherwise may have disregarded. For example, unless such a list is included, Courts may be reluctant to make periodic orders or orders on terms.*¹⁰⁵

17 Consequential and ancillary orders

The Court may, in addition to, or as part of, a family provision order, make orders for or with respect to all or any of the following matters for the purpose of giving effect to the family provision order:

- (a) *the transfer of property of the estate directly to the person in whose favour the order is made, or to any other person as trustee for that person,*
- (b) *the constitution of any person by whom property of the estate is held as a trustee of that property,*
- (c) *the appointment of a trustee of property of the estate,*

103. Although paragraph (a) has no precursor and a basis for paragraph (c) may also be found in *Family Provision Act 1982* (NSW) s 11(1)(c) and s 13.

104. MP 28 at 109.

105. MP 28 at 113.

- (d) *the powers and duties of a trustee of property of the estate, including any trustee constituted or appointed under this section,*
- (e) *the vesting in any person of property of the estate,*
- (f) *the exercise of a right or power to obtain property for the estate,*
- (g) *the sale of or dealing with property of the estate,*
- (h) *the disposal of the proceeds of any sale or other realising of property of the estate,*
- (i) *the securing, either wholly or partially, of the due performance of an order under this Part,*
- (j) *the management of the property of the estate,*
- (k) *the execution of any necessary conveyance, document or instrument, the production of documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of the order,*
- (l) *any other matter the Court thinks necessary.*

2.77 This clause, which allows the Court to make consequential or ancillary orders to give full effect to an order for family provision, is based on *Family Provision Act 1982* (NSW) s 15(1). Clause 20, below, applies particular provisions of the law relating to trustees to the vesting of any property under this clause.

18 Undertakings to restore property

- (1) *The Court may make a family provision order subject to a condition that the person in whose favour the order is made is to enter into an undertaking, or give security, that, if the order is revoked because the deceased person was not deceased when the order was made, the person will restore any property received under the order, or otherwise make restitution, in accordance with any order of the Court made on the revocation.*
- (2) *In this section:*
deceased person *means the person (whether or not deceased) from whose estate a family provision order is made.*

2.78 This clause allows conditions to be imposed on an order for family provision in circumstances where the death of the “deceased” is presumed. It is based on *Family Provision Act 1982* (NSW) s 18. The National Committee considered that “such a provision, though rarely used, may be particularly relevant in times of war or community dislocation”.¹⁰⁶

19 Payment for exoneration from liability for orders

- (1) *The Court may, as part of a family provision order, or at any time, on the application of a beneficiary of the estate of a deceased person, by order:*
 - (a) *fix a periodic payment or lump sum payable by a beneficiary of an estate affected by a family provision order to represent the proportion of the property in the estate affected by the family provision order that is borne by the beneficiary’s portion of*

106. MP 28 at 135. Presumption of death will be dealt with by the National Committee in its report on the Administration of Estates of Deceased Persons.

- the estate, and*
- (b) *exonerate the beneficiary's portion of the estate from any further liability under the family provision order, on condition that payment is made as directed by the Court.*
- (2) *Without limiting subsection (1), in making any order under this section, the Court may do any of the following:*
- (a) *specify the person to whom the payment or lump sum is to be paid,*
- (b) *specify how any periodic payment is to be secured,*
- (c) *specify how any lump sum is to be invested for the benefit of any proposed beneficiary.*

Note. *Section 43 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.*

2.79 **Clause 19** is based on *Succession Act 1981* (Qld) s 41(5). A provision of this kind will ensure minimal disruption to other parties' actual positions or expectations in relation to certain property, by allowing beneficiaries of an estate to apply to make periodic payments to an applicant, and thereby save some property from being subject to an order for family provision.¹⁰⁷

2.80 The National Committee decided that a provision along the lines of *Succession Act 1981* (Qld) s 41(5) be included in the model legislation together with a provision along the lines of *Family Provision Act 1982* (NSW) s 30.¹⁰⁸ Clause 43, below, which is based on *Family Provision Act 1982* (NSW) s 30, allows for other property to be offered in substitution for property that might otherwise be subject to a family provision order.

20 Effect of order vesting property in estate

[Each jurisdiction may determine whether to include a provision applying particular provisions of its trust law to an order under section 17.]

2.81 **Clause 20** envisages a provision in the nature of *Family Provision Act 1982* (NSW) s 15(2). Section 15(2) provides:

The provisions of section 78 (except subsection (1)) and 79 of the Trustee Act 1925 apply to and in relation to an order under subsection (1) for the vesting of the property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, in the case of section 78 (2) of that Act, as if the provisions of subsection (1) and the other provisions of this Act relating to the making of orders under this Act were contained in Part 3 of that Act.

107. See MP 28 at 151.

108. MP 28 at 151.

If adopted here, such a provision would apply the relevant provisions of the law relating to trustees to the vesting of property under cl 17. *Trustee Act 1925* (NSW) s 78 and s 79 deal with the effect of vesting orders relating to the conveyance or release of property.

21 Variation and revocation of family provision orders

- (1) *A family provision order may be varied or revoked by the Court only in accordance with this Act.*
- (2) *The Court may, by order, vary or revoke a family provision order so as to allow provision to be made in favour of another person wholly or partly from all or any property affected by the order.*
- (3) *The Court must not vary or revoke a family provision order so as to allow provision to be made in favour of another person unless that person shows sufficient cause for not having applied for a family provision order before the order sought to be varied or revoked was made.*
- (4) *A family provision order is revoked if the grant of administration in respect of the estate of the deceased person is revoked or rescinded, unless the Court otherwise provides when revoking or rescinding the grant.*

Note. *The Court may also vary a family provision order under sections 13 and 43.*

2.82 **Sub-clauses 21(1), (2) and (4)** are based on *Family Provision Act 1982* (NSW) s 19(1)-s 19(3).

2.83 The National Committee favoured a provision to the effect of *Family Provision Act 1982* (NSW) s 19 with respect to the variation of orders.¹⁰⁹

2.84 **Clause 21(3)** has its origins in *Family Provision Act 1982* (NSW) s 20(4) to which s 19(2) is stated to be subject.

109. MP 28 at 131.

22 Variation and revocation of other orders

If a family provision order is varied or revoked, the Court may:

- (a) *vary or revoke any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the variation or revocation, and*
- (b) *make such additional orders as may be so necessary.*

2.85 **Clause 22**, which allows for the variation and revocation of consequential and ancillary orders,¹¹⁰ is based on *Family Provision Act 1982* (NSW) s 19(4). The National Committee favoured a provision to the effect of s 19 with respect to the variation of orders.¹¹¹

23 Effect of family provision order

A family provision order takes effect, unless the Court otherwise directs, as if the provision was made:

- (a) *in a codicil to the will of the deceased person, if the deceased person made a will, or*
- (b) *in a will of the deceased person, if the deceased person died intestate.*

2.86 **Clause 23**, which sets out the effect of a family provision order, is based on *Family Provision Act 1982* (NSW) s 14(1). It is not significantly different to similar provisions in most other Australian jurisdictions.¹¹²

2.87 The National Committee, in deciding to adopt this provision, observed that it would be “particularly useful in relation to the order of the payment of debts”.¹¹³

110. See cl 17, above.

111. MP 28 at 131.

112. See *Family Provision Act 1969* (ACT) s 16; *Family Provision Act 1970* (NT) s 16; *Inheritance (Family Provision) Act 1972* (SA) s 10; *Administration and Probate Act 1958* (Vic) s 97(4); *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 10.

113. MP 28 at 123.

24 Application

- (1) *This Part applies to interim family provision orders in the same way as it applies to family provision orders.*
- (2) *This Part (other than section 14) applies to property designated as part of the notional estate of a deceased person in the same way as it applies to property that is part of the estate of a deceased person.*

2.88 Clause 24 has been included to clarify the application of Part 2 with respect to interim family provision orders (see cl 13) and property designated as part of the notional estate of a deceased person (see Part 3).

PART 3 NOTIONAL ESTATE ORDERS

Note.

This Part applies where, as a result of certain property transactions, property is not included in the estate of a deceased person or where property has been distributed from the estate of a deceased person. This Part enables the Court in limited circumstances to make an order designating property that is not included in the estate, or has been distributed from the estate, as “notional estate” of the deceased person for the purpose of making a family provision order under Part 2 in respect of the estate of the deceased person (or for the purpose of ordering that costs in the proceedings be paid from the notional estate).

Property may be designated as notional estate if it is property held by, or on trust for, a person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on trust:

- (a) as a result of a distribution from the estate of a deceased person (see section 30), whether or not the property was the subject of the distribution, or*
- (b) as a result of a relevant property transaction, whether or not the property was the subject of the transaction (see section 31), or*
- (c) as a result of a relevant property transaction entered into by a person by whom property became held, or for whom property became held on trust, as a result of a relevant property transaction or a distribution from the estate of a deceased person (see section 32), whether or not the property was the subject of the relevant property transaction.*

Property may also be designated as notional estate if it is property:

- (a) held by the administrator of the estate of a person by whom property became held as a result of a relevant property transaction or distribution referred to in paragraph (a)–(c) above and who has since died (known as the **deceased transferee**), or*
- (b) held by, or on trust for, a person by whom property became held, or for the object of a trust for which property became held on trust, as a result of a distribution from the estate of a deceased transferee, whether or not the property was the subject of the relevant property transaction or the distribution from the estate of the deceased person or the deceased transferee (see section 33).*

Section 43 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

3.1 Notional estate orders are orders issued by the Court which are intended to make available for family provision orders assets that are no longer part of the estate of a deceased person because they have been distributed either before or after the deceased's death (either with or without the intention of defeating applications for family provision). Without legislative provisions allowing for notional estate orders, the Courts are unable to make family provision orders with respect to property that is no longer part of the deceased estate.

3.2 In New South Wales, notional estate provisions were introduced in 1982 in an attempt to deter people from avoiding their family provision responsibilities.¹ The new provisions were the result of recommendations made by the New South Wales Law Reform Commission in 1977.² Similar provisions may be found in England³ and the United States.⁴

3.3 In recommending the adoption of notional estate provisions, the National Committee noted that the provisions appeared to be working well in New South Wales.⁵ In considering the New South Wales provisions, the National Committee observed that a balance must be struck between competing considerations:

On the one hand the anti-avoidance provisions must ensure that it will be very difficult even for a very determined person to prevent a family provision order being made in respect of her or his estate. On the other hand, the anti-avoidance provisions must not:

- *impede the normal lifetime activities of people;*
- *impede the normal administration of estates; or*
- *affect people who have received property from the person in respect of whose estate family provision is being sought except where the Court is satisfied that it is necessary and just to designate property affected by such a transaction available to satisfy a family provision application.*⁶

3.4 The National Committee summarised the New South Wales provisions as being “designed to prevent avoidance while having the minimum possible collateral effects, and being fair to all concerned”.⁷

3.5 The National Committee decided to adopt the current New South Wales provisions with little change to their substance, preferring the more comprehensive New

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1. *Family Provision Act 1982* (NSW) Part 2 Div 2.
 2. New South Wales Law Reform Commission, *Testator’s Family Maintenance and Guardianship of Infants Act, 1916* (Report 28, 1977).
 3. *Inheritance (Provision for Family and Dependants) Act 1975* (Eng) s 10-13.
 4. *Uniform Probate Code* (US) s 2-201 - s 2-207.
 5. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997) (“**MP 28**”) at 87, 93.
 6. MP 28 at 80.
 7. MP 28 at 81.

South Wales provisions to some simpler but less comprehensive proposals from New Zealand:⁸

*The anti-avoidance provisions are complicated and not easy to understand. However, they have been very carefully worked out, and they form an efficient and effective means of ensuring that certain objectives are met.*⁹

3.6 While little change has been made to the content of the provisions, there has been some change to their style and order to make them easier for practitioners and other users to follow.¹⁰

Division 1 Relevant property transactions

25 Definition

In this Part:

relevant property transaction means a transaction or circumstance affecting property and described in section 26 or 27.

3.7 This is a machinery provision. The term “relevant property transaction” is employed in cl 26-28, 31-34, 40 and 41.

26 Transactions that are relevant property transactions

- (1) *A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:

 - (a) held by another person (whether or not as trustee), or
 - (b) subject to a trust,
 and full valuable consideration is not given to the person for doing or not doing the act.*
- (2) *The fact that a person has entered into a relevant property transaction affecting property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.*
- (3) *The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to*

8. See New Zealand, Law Commission, *Succession Law: A Succession (Adjustment) Act* (Report 39, 1997) 132-133; and MP 28 at 87-89.

9. MP 28 at 80. See also 93-94.

10. See MP 28 at 94.

property that is not in the person's estate.

3.8 **Clause 26(1)** is intended to achieve the same effect as *Family Provision Act 1982* (NSW) s 22(1) which refers to the person doing, directly or indirectly, or omitting to do, any act, as a result of which the property becomes held by another person (whether or not as trustee), or subject to a trust.

3.9 **Clause 26(2)** is based on *Family Provision Act 1982* (NSW) s 22(3).

3.10 **Clause 26(3)** is based on *Family Provision Act 1982* (NSW) s 22(7). It provides that the making of a will is not a prescribed transaction. In any event, the Court has the power, in making a family provision order, to override any disposition made by a will.

27 Examples of relevant property transactions

- (1) *The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 26.*
- (2) *The circumstances are as follows:*
 - (a) *if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time) becomes, or continues to be, entitled to exercise the power,*
 - (b) *if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,*
 - (c) *if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,*
 - (d) *if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death, or if some other event occurs, to a person other than the administrator of the person's estate, to exercise a power:*
 - (i) *to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy, or*
 - (ii) *to surrender or otherwise deal with the policy,*

- and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,*
- (e) *if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,*
 - (f) *if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.*
- (3) *Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 26.*
 - (4) *For the purposes of this Act, in the circumstances described in subsection (2)(b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.*

3.11 **Clause 27(1)** and **cl 27(3)** are based on the introductory paragraph in *Family Provision Act 1982* (NSW) s 22(4).

3.12 The paragraphs in **cl 27(2)** are based on the paragraphs in *Family Provision Act 1982* (NSW) s 22(4).

3.13 **Clause 27(2)(b)** is based on *Family Provision Act 1982* (NSW) s 22(4)(b). The provision as it currently stands in New South Wales has been criticised for lack of clarity but cases have held that *Family Provision Act 1982* (NSW) s 22(4)(b) applies to the situation where the deceased held an interest in property as a joint tenant and omitted to sever it.¹¹ The National Committee considered that s 22(4)(b) needed to be "reworded and clarified" in light of existing case law.¹² Paragraph (b) has, therefore, been reworded to make express reference to the deceased's omission to sever an interest in property held as a joint tenant.¹³

3.14 Finally, in dealing with *Family Provision Act 1982* (NSW) s 22(4)(b), the National Committee considered the question of what constitutes full valuable consideration for a person's omission to sever an interest in property held as a joint tenant. In New South Wales, there is authority to suggest that the Court could conclude on the facts of the case

11. *Wade v Harding* (1987) 11 NSWLR 551; and *Cameron v Hills* (NSW SC, No 3442/1986, Needham J, 26 October 1989, unreported) at 5. See also *Barker v Magee* [2001] NSWSC 563 at para 45.

12. MP 28 at 85.

13. National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) ("**R 58**") at para 3.26.

that, in omitting to sever a joint tenancy, there flowed to the deceased (in the form of the right of survivorship) a fair equivalent for what the deceased would have received had he or she in fact severed the joint tenancy before death, and that, therefore, the deceased had received full valuable consideration for the omission.¹⁴ The National Committee decided that **cl 27(4)** should be inserted to overcome the effect of the New South Wales authority.¹⁵ The National Committee concluded that cl 27(4):

*will prevent the mere retention of the right of survivorship from constituting full or any valuable consideration for not severing an interest in property held under a joint tenancy. However, where something in addition to the retention of the right of survivorship flows to the joint tenant from not severing that interest, the proposed provision will not prevent that additional benefit from amounting to valuable consideration.*¹⁶

3.15 **Clause 27(2)(f)**, which is based on *Family Provision Act 1982* (NSW) s 22(4)(f), in its terms may be broad enough to cover some *donationes mortis causa*, that is, conditional gifts given in contemplation of the death of the deceased and that take effect on the deceased's death.¹⁷

28 When relevant property transactions take effect

- (1) *For the purposes of this Act, a relevant property transaction is taken to have effect when the property concerned becomes held by another person or subject to a trust or as otherwise provided by this section.*
- (2) *A relevant property transaction consisting of circumstances described in section 27(2)(a), (c) or (d) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event resulting in the person no longer being entitled to exercise the relevant power.*
- (3) *A relevant property transaction consisting of circumstances described in section 27(2)(b) or (e) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event referred to in those paragraphs.*
- (4) *A relevant property transaction that involves any kind of contract for which valuable consideration, though not full valuable consideration, is given for the person to enter into the transaction is taken to be entered into and take effect when the contract is*

14. *Wade v Harding* (1987) 11 NSWLR 551 at 556. But see *Cameron v Hills* (NSW SC, No 3442/1986, Needham J, 26 October 1989, unreported) at 9.

15. R 58 at para 3.27, footnote 96.

16. R 58 at para 3.31.

17. But see the National Committee's specific recommendation that the anti-avoidance provisions should cover *donationes mortis causa*: MP 28 at 94. See also the New Zealand Law Commission's proposals relating to "non-probate assets": New Zealand, Law Commission, *Succession Law: Testamentary Claims* (Preliminary Paper 24, 1996) at para 340.

entered into.

- 3.16 **Clause 28(1)** is based on *Family Provision Act 1982* (NSW) s 22(2).
- 3.17 **Clause 28(2)** is based on *Family Provision Act 1982* (NSW) s 22(5).
- 3.18 **Clause 28(3)** is based on *Family Provision Act 1982* (NSW) s 22(5).
- 3.19 **Clause 28(4)** is based on *Family Provision Act 1982* (NSW) s 22(6).

Division 2 When notional estate orders may be made

3.20 This division, which identifies the circumstances in which a notional estate order may be made, contains the main notional estate provisions in cl 30, 31, 32 and 33.

29 Notional estate order may be made only if family provision order or certain costs orders to be made

- (1) *The Court may make an order designating property as notional estate only:*
- (a) *for the purposes of a family provision order to be made under Part 2, or*
 - (b) *for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.*

Note. *Section 14(5) enables a family provision order to be made in relation to property designated as notional estate of a deceased person. Section 49 enables the Court to order that costs be paid out of the notional estate of a deceased person.*

- (2) *The Court must not make an order under subsection (1)(b) for the purposes of an order that the whole or part of an applicant's costs be paid from the notional estate of the deceased person unless the Court makes or has made a family provision order in favour of the applicant.*

3.21 This provision, which has no antecedent in the New South Wales Act, is intended to limit the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person. This is achieved by acknowledging, in **cl 29(1)**, the circumstances in which a notional estate order may be made¹⁸ and then, in **cl 29(2)**, limiting the circumstances in which a notional estate order may be made for the purpose of an order for costs of the proceedings. **Clause 29(2)** prevents the Court from ordering that the costs of an applicant

18. In this regard see cl 14(5) and cl 49 of the model provisions.

be paid from the notional estate of a deceased person unless the Court has made a family provision order in favour of the applicant.

3.22 **Clause 29(2)** is intended to overcome a situation that arose in a 1992 case where there was virtually no property in the estate, but a large sum potentially available in the notional estate of the deceased. The Court held that, because it was not satisfied that an order for provision should be made, it did not have the power to designate property as notional estate to meet the costs of the successful defendant in the matter.¹⁹ This left the successful defendant to bear her own costs, a situation the Court did not consider desirable:

*The merits of the situation would require that the costs of the defendant be paid out of the [notional estate], but I do not consider that I have the power to order that.*²⁰

3.23 The National Committee, in recommending that it should be possible for the costs of parties other than the applicant to be met from the notional estate of the deceased if an applicant is unsuccessful, concluded, in respect of the unsuccessful applicant, that “it should not be possible for the court to make a notional estate order to enable the unsuccessful applicant’s costs to be paid out of the deceased person’s notional estate”.²¹

3.24 Apart from the above provision, the National Committee has decided to leave an unfettered discretion to the Court in relation to the awarding of costs in family provision proceedings.²²

30 Notional estate order may be made where property of estate distributed

- (1) *The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that, as a result of a distribution of the deceased person’s estate, property became held by a person (whether or not as trustee) or subject to a trust.*
- (2) *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 not as trustee) as a result of a distribution referred to in subsection (1), or*

19. *Tobin v Hardy* (NSW SC, No 1548/1992, Cohen J, 14 October 1992, unreported). The plaintiff’s claim had not been so unreasonable as to require the plaintiff to bear the defendant’s costs.

20. *Tobin v Hardy* (NSW SC, No 1548/1992, Cohen J, 14 October 1992, unreported) at 13.

21. R 58 at 78. See also the commentary on cl 39(b) at para 3.43, below.

22. R 58 at para 5.89. See also commentary on cl 49 at para 4.23-4.26, below.

(b) *the object of a trust for which property became held on trust as the result of a distribution referred to in subsection (1), whether or not the property was the subject of the distribution.*

3.25 This clause allows the Court to designate as notional estate property of the deceased estate that has already been distributed. It is based on *Family Provision Act 1982* (NSW) s 24.

3.26 Note there is no requirement for “special circumstances” before the Court can make an order such as is required in cl 32.

31 Notional estate order may be made where estate affected by relevant property transaction

(1) *The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that the deceased person entered into a relevant property transaction before his or her death and that the transaction is a transaction to which this section applies.*

Note. *The kinds of transactions that constitute relevant property transactions are set out in sections 26 and 27.*

- (2) *This section applies to the following relevant property transactions:*
- (a) *a transaction that took effect within 3 years before 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 death of the deceased person and was entered into when the deceased person had a responsibility 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,*
 - (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 not 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.*

3.27 This clause is based on *Family Provision Act 1982* (NSW) s 23. It allows the Court to designate as notional estate property that has been transferred during the course of the lifetime of the deceased by means of a “relevant property transaction”. Relevant property transactions are described in cl 26 and cl 27, above.

3.28 Clause 31(2)(b) differs from the equivalent New South Wales provision,²³ in that it refers to the deceased person’s “responsibility to make adequate provision” rather than the deceased person’s “moral obligation to make adequate provision”. The wording in this provision better reflects the terminology adopted elsewhere in the model provisions, for example, in cl 7.

3.29 Note there is no requirement for “special circumstances” before the Court can make an order such as is required in cl 32.

32 Notional estate order may be made where estate affected by subsequent relevant property transaction

- (1) *The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:*
- (a) *it:*
- (i) *has power, under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, a person (the transferee) as notional estate of the deceased person, or*
 - (ii) *immediately before the death of a person (the deceased transferee), had power, under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and*
- (b) *since the relevant property transaction or distribution that gave rise to the power to make the order was entered into or made, the transferee, or the deceased transferee, entered into a relevant property transaction, and -*
- (c) *there are special circumstances that warrant the making of the order.*
- (2) *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 not as trustee) as the result of the relevant property transaction entered into by the transferee or the deceased transferee, or*
 - (b) *the object of a trust for which property became held on trust as the result of the relevant property transaction entered into by the transferee or the deceased transferee,*
whether or not the property was the subject of the relevant property transaction.
- (3) *A notional estate order may be made under this section instead of or in addition to an order under section 30, 31 or 33.*

23. *Family Provision Act 1982* (NSW) s 23(b)(ii).

3.30 This clause allows the Court to designate as notional estate property (in the hands of a “transferee”) that it could have designated as notional estate under other provisions of the Model Bill, but where that property has already been transferred by the transferee to another person. The impact upon this other person (a third party) is the reason why special circumstances are required to warrant the making of an order.²⁴

3.31 The clause is based on *Family Provision Act 1982* (NSW) s 25. However, cl 32(1)(a)(ii), and the references to the “deceased transferee” were inserted to overcome the effect of the decision in *Prince v Argue*.²⁵ In that case, it was held that the Court could not make a notional estate order affecting the property of a deceased transferee since no property could then be held on trust for them. The effect of this decision has been dealt with by the National Committee in relation to this clause and cl 33.

3.32 The decision in *Prince v Argue* potentially restricts the Court’s ability to make notional estate orders in respect of property that is held by a subsequent transferee, where the original transferee has died. The National Committee observed that the Court’s ability to make a notional estate order in relation to a subsequent transferee required it to be satisfied that it had the power to make a notional estate order in relation to the property held by the original transferee. The National Committee considered that, in cases where the original transferee has died, the Court’s power to do this was now doubtful in light of the decision in *Prince v Argue* and accordingly recommended changes to cl 32.²⁶

33 Notional estate order may be made where property of deceased transferee’s estate held by administrator or distributed

- (1) *The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:*
- (a) *immediately before the death of a person (the deceased transferee), it had power under this or any other section of this Act, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and*
 - (b) *the power did not arise because property became held by the deceased transferee as trustee only, and*
 - (c) *in the case of property referred to in subsection (2)(b), there are special circumstances that warrant the making of the order.*

24. See cl 32(1)(c).

25. *Prince v Argue* [2002] NSWSC 1217.

26. R 58 at para 3.38.

- (2) *The following property may be designated as notional estate by a notional estate order under this section, whether or not it was the property the subject of the relevant property transaction or distribution from which the Court's power to make such an order arose:*
- (a) *if administration has been granted in respect of the estate of the deceased transferee—property that is held by the administrator of the estate of the deceased transferee in his or her capacity as administrator of the estate of the deceased transferee, or*
- (b) *if all or part of the estate of the deceased transferee has been distributed—property that is held by, or on trust for:*
- (i) *a person by whom property became held (whether or not as trustee) as the result of the distribution of the deceased transferee's estate, or*
- (ii) *the object of a trust for which property became held on trust as the result of the distribution of the deceased transferee's estate.*
- (3) *A notional estate order may be made under this section instead of or in addition to an order under section 30, 31 or 32.*

Note. *Administration of the estate of a deceased transferee may be granted for the purposes of being able to designate property as notional estate under this section (see section 42).*

3.33 This clause allows the Court to designate as notional estate property that has been transferred into the hands of a person who has subsequently died and the property has come into the hands of that person's administrator or has been distributed from their estate.

3.34 This clause has been inserted to overcome the effect of the decision in *Prince v Argue*.²⁷

3.35 The National Committee considered that the interpretation in *Prince v Argue* significantly limited the utility of the notional estate provisions since the Court is thereby "effectively precluded from exercising a power that, but for the death of a person, it could have exercised in relation to that person's property".²⁸

3.36 Special circumstances are only required to apply to circumstances where the estate of the deceased transferee has been subsequently distributed (under cl 33(2)(b)). The National Committee concluded that special circumstances should not apply where the deceased transferee's property merely came to be held by their administrator (see cl 33(2)(a) because an order made in respect of property held by the administrator "is simply being made instead of the order that could have been made in respect of the property held by, or on trust for, the deceased transferee if the deceased transferee had still been alive".²⁹

27. *Prince v Argue* [2002] NSWSC 1217. See para 3.31, above.

28. R 58 at para 3.35.

29. R 58 at para 3.48.

3.37 For consequential changes to other parts of the Model Bill with regards to the estates of deceased transferees, see cl 40(1) and cl 41(2)(a)(i), below.

34 Disadvantage and other matters required before order can be made

- (1) *The Court must not, merely because a relevant property transaction has been entered into, make an order under section 31, 32 or 33 unless the Court is satisfied that the relevant property transaction or the holding of property resulting from the relevant property transaction:*
- (a) *directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or*
 - (b) *involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that, if not exercised, could have resulted in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or*
 - (c) *involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or*
 - (d) *involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).*
- (2) *In this section:*
- principal party to the transaction**, *in relation to a relevant property transaction, means the person who, under section 26 or 27, enters into the relevant property transaction.*

3.38 Clause 34, which provides that the Court may not make a notional estate order unless a relevant person or estate is disadvantaged, is based on *Family Provision Act*

1982 (NSW) s 26. It has been included here in Division 2 even though it could equally have been identified as a restriction on the making of a notional estate order and included in Division 3.³⁰

35 Effect of notional estate order

A person's rights are extinguished to the extent that they are affected by a notional estate order.

3.39 **Clause 35** is based on *Family Provision Act 1982* (NSW) s 29.

36 More than one notional estate order may be made

The Court may make one or more notional estate orders in connection with the same proceedings for a family provision order, or any subsequent proceedings relating to the estate.

3.40 **Clause 36** is based on *Family Provision Act 1982* (NSW) s 28(3).

37 Power subject to Division 3

The Court's power to make a notional estate order under this Division is subject to Division 3.

3.41 This machinery provision draws attention to the restrictions and protections relating to notional estate orders set out in Division 3.

30. MP 28 at 86.

Division 3 Restrictions and protections relating to notional estate orders

38 General matters that must be considered by Court

The Court must not make a notional estate order unless it has considered the following:

- (a) *the importance of not interfering with reasonable expectations in relation to property,*
- (b) *the substantial justice and merits involved in making or refusing to make the order,*
- (c) *any other matter it considers relevant in the circumstances.*

3.42 **Clause 38** is based on *Family Provision Act 1982* (NSW) s 27(1).

39 Estate must not be sufficient for provision or order as to costs

The Court must not make a notional estate order unless it is satisfied that:

- (a) *the deceased person left no estate, or*
- (b) *the deceased person's estate is insufficient for the making of the family provision order, or any order as to costs, that the Court is of the opinion should be made, or*
- (c) *provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances.*

3.43 Clause 39 is based on *Family Provision Act 1982* (NSW) s 28(1), except that cl 39(b) allows that a notional estate order may be made when the deceased person's estate is insufficient for any order as to costs that the Court may be of the opinion should be made. This is additional to the requirement taken from s 28(1)(a) that the deceased's estate must be insufficient to allow the Court to order the provision that should be made.

3.44 The reasons for this provision are outlined in the commentary to cl 29(1)(b), above.³¹

40 Determination of property to be subject to notional estate order

31. See para 3.21-3.24.

- (1) *In determining what property should be designated as notional estate of a deceased person, the Court must have regard to the following:*
- (a) *the value and nature of any property:*
 - (i) *the subject of a relevant property transaction, or*
 - (ii) *the subject of a distribution from the estate of the deceased person or from the estate of a deceased transferee, or*
 - (iii) *held by the administrator of the estate of any deceased transferee in his or her capacity as administrator of the estate of the deceased transferee,*
 - (b) *the value and nature of any consideration given in a relevant property transaction,*
 - (c) *any changes in the value of property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the administrator of the estate of the deceased transferee or the consideration was given,*
 - (d) *whether property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), could have been used to obtain income in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the administrator of the estate of the deceased transferee or the consideration was given,*
 - (e) *any other matter it considers relevant in the circumstances.*
- (2) *The Court must not designate as notional estate property that exceeds that necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate under section 49, to allow to costs to be paid as ordered, or both.*
- (3) *If, as a result of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, property becomes held by a person as a trustee only, the Court must not designate as notional estate any property held by the person other than the property held by the person as a trustee as a consequence of any such relevant property transaction or distribution.*

3.45 **Clause 40(1)** is based on *Family Provision Act 1982* (NSW) s 27(2), except that provisions have been added, in cl 40(1)(a)(ii) and cl 40(1)(a)(iii), to take deceased transferees into account where relevant.³²

3.46 **Clause 40(2)** is based on *Family Provision Act 1982* (NSW) s 28(2), except that provision has been made to take into account the Court's ability to order costs from the notional estate of the deceased.³³

32. See also para 3.30-3.37 above.

33. See the commentary to cl 29 at para 3.21-3.24 and cl 49 at para 4.23-4.26.

3.47 **Clause 40(3)** is based on *Family Provision Act 1982* (NSW) s 28(4), except that provision has been made to take into account estates of deceased transferees where relevant.³⁴

41 Restrictions on out of time or additional applications

- (1) *This section applies to proceedings where:*
- (a) *an application for a family provision order is made later than 12 months after the death of the deceased person, or*
 - (b) *an application for a family provision order is made in relation to an estate that has been previously the subject of a family provision order.*
- (2) *The Court must not make a notional estate order in the proceedings unless:*
- (a) *it is satisfied that:*
 - (i) *the property to be designated as notional estate is property that was the subject of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, and*
 - (ii) *the person who holds the property holds it as a result of the relevant property transaction or distribution as trustee only, and*
 - (iii) *the property is not vested in interest in any beneficiary under the trust, or*
 - (b) *it is satisfied that there are other special circumstances that justify the making of the notional estate order.*

3.48 **Clause 41** places restrictions on the Court's ability to make notional estate orders in the case of applications made out of time or in the case of applications for further provision. It is based on *Family Provision Act 1982* (NSW) s 28(5). Material changes include the 12 month limitation period identified in cl 41(1)(a), necessitated by the limitation period proposed in cl 9 and variations to cl 41(2)(a)(i) to take account of deceased transferees where relevant.³⁵

34. R 58 Recommendations 3-5. See also para 3.30-3.37, above.

35. See also para 3.33-3.37, above.

PART 4 MISCELLANEOUS

42 Grant of probate or administration

- (1) *The Court may grant administration in respect of the estate of a deceased person, in order to permit an application to be made for a family provision order, to a person who may make an application, or to a person who may make an application on behalf of another person, if it is satisfied that it is proper to make the grant, whether or not the deceased person left property in [insert name of jurisdiction].*
- (2) *The Court may grant administration in respect of the estate of a deceased transferee, in order to permit property to be designated as notional estate under section 33, to a person who may make an application, or to a person who may make an application on behalf of another person, if it is satisfied that it is proper to make the grant, whether or not the deceased transferee left property in [insert name of jurisdiction].*
- (3) *Any such grant is to be for the purposes only of applying for a family provision order or a notional estate order.*
- (4) *The granting of administration under this section or under the [insert name of appropriate Act of jurisdiction] does not:*
 - (a) *prevent the Court from granting administration under this section, or*
 - (b) *unless the Court otherwise orders, affect any previous grant of administration under this section.*
- (5) *The provisions of the [insert name of appropriate Act of jurisdiction] apply to a grant of administration under this section, and to the administrator of the estate, in the same way as they apply to a grant of administration under that Act and the administrator of any estate for which such a grant has been made.*

4.1 **Clause 42** is based on *Wills Probate and Administration Act 1898* (NSW) s 41A. The National Committee favoured the inclusion of a provision to this effect to enable a person to obtain a grant of probate for family provision purposes. The National Committee observed that:

There have been difficulties in jurisdictions requiring a grant of probate for family provision purposes where a person entitled to a grant of probate has refused to take it. If there is no grant of probate there is no one to sue.¹

4.2 The National Committee also observed that jurisdictions which allow for the informal administration of deceased estates, such as Queensland, do not require a grant of probate before a family provision application can be entertained by the Court.²

1. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997) (“**MP 28**”) at 126.

43 Substitution of property affected by orders or proposed orders

- (1) *If the Court has made, or proposes to make, a family provision order affecting certain property in the estate of a deceased person, the Court may, on application by a person who offers other property in substitution (the **replacement property**):*
- (a) *vary the family provision order by substituting the replacement property for the property affected by the order, or*
 - (b) *make a family provision order in respect of the replacement property instead of the property proposed to be affected by such an order, as appropriate.*
- (2) *If the Court has made, or proposes to make, a notional estate order designating certain property as notional estate, the Court may, on application by a person who offers other property in substitution (the **replacement property**):*
- (a) *vary the notional estate order by substituting the replacement property for the property designated as notional estate by the order, or*
 - (b) *make a notional estate order designating the replacement property as notional estate instead of the property proposed to be designated as notional estate by such an order, as appropriate.*
- (3) *The Court may vary or make an order under this section only if it is satisfied that the replacement property can properly be substituted for the property affected or proposed to be affected by the family provision order, or the property designated or proposed to be designated as notional estate, as appropriate.*
- (4) *An order varied or made under this section is taken to be an order in respect of property of the estate or notional estate of the deceased person for the purposes of this Act (except section 23 (Effect of family provision order)).*

4.3 **Clause 43** is based on *Family Provision Act 1982* (NSW) s 30. The National Committee, in recommending a provision to this effect, noted the view that such a provision in some cases could facilitate “a proper result so as *not* to affect some parties’ actual position or expectation”.³ It was also noted that it could encourage settlement of family provision disputes in appropriate cases.⁴

4.4 The reference to “proposed” family provision and notional estate orders in **cl 43(1)** and **cl 43(2)** allows for the substituted property to be offered prior to the making of the order as well as after an order has been made. This will avoid the need for additional proceedings once an order has been made.⁵

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2. MP 28 at 126.
 3. MP 28 at 150.
 4. MP 28 at 150.
 5. See also cl 19 and para 2.79-2.80, above.

44 Protection of administrator who distributes after giving notice

- (1) *The administrator of the estate of a deceased person may distribute the property in the estate if:*
- (a) *the property is distributed not earlier than 6 months after the deceased person's death, and*
 - (b) *the administrator has given notice in the form prescribed in Schedule 1 that the administrator intends to distribute the property in the estate after the expiration of a specified time, and*
 - (c) *the time specified in the notice is not less than 30 days after the notice is given, and*
 - (d) *the time specified in the notice has expired, and*
 - (e) *at the time of distribution, the administrator does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.*
- (2) *An administrator who distributes property in the estate of a deceased person is not liable in respect of that distribution to any person of whose application for a family provision order affecting the estate of the deceased person the administrator did not have notice at the time of the distribution if:*
- (a) *the distribution was made in accordance with this section, and*
 - (b) *the distribution was properly made by the administrator.*
- (3) *The notice given by the administrator must be given in accordance with the regulations.*
- (4) *For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's [insert appropriate reference for jurisdiction to a legal practitioner].*

4.5 **Clause 44(1), (2) and (3)** are based on *Family Provision Act 1982* (NSW) s 35(1) and relevant rules,⁶ with some matters imported from *Succession Act 1981* (Qld) s 44(3)(a). The provisions imported from *Succession Act 1981* (Qld) s 44(3)(a) are:

- **Clause 44(1)(a)** which adopts the Queensland position that the period of six months runs from the date of death rather than the date of the grant of probate or letters of administration, as is the case in other jurisdictions.⁷ The National Committee noted that the purpose of such a provision is “to impel potential applicants to commence proceedings, or to advise the personal representative of an intention to commence proceedings, within six months of the death”.⁸ It should be noted that, notwithstanding the six month period before distribution

6. *Supreme Court Rules 1970* (NSW) Part 77 r 62, Sch F Form 121, and Part 78 r 91.

7. MP 28 at 95.

8. MP 28 at 33.

can be made in this clause, applicants will still have 12 months from the date of death to make a family provision application within time.⁹

- **Clause 44(1)(e)** on the basis that requiring that the administrator not have notice of any application or intended application will give added protection to potential applicants.¹⁰

4.6 In recommending a provision to the effect of **cl 44(1)(b)**, the National Committee noted the importance of public notice to potential applicants, particularly given the National Committee's decision to recommend a wide eligibility provision in cl 7, in order to ensure that potential applicants were given sufficient opportunity to become aware of their entitlement to apply for provision prior to the distribution of the estate.¹¹

4.7 A form of notice of intended distribution is set out in Schedule 1 of this Bill.

4.8 **Clause 44(4)** is based on *Succession Act 1981* (Qld) s 44(4).

45 Protection of administrator in other circumstances

- (1) *An administrator of the estate of a deceased person who distributes property in the estate for the purpose of providing those things immediately necessary for the maintenance, education or advancement in life of a person who was wholly or substantially dependent on the deceased person immediately before his or her death is not liable for any such distribution that is properly made.*
- (2) *Subsection (1) applies whether or not the administrator had notice at the time of the distribution of any application or intended application for a family provision order affecting property in the estate.*
- (3) *No person who may have made or may be entitled to make an application under this Act is entitled to bring an action against the administrator of the estate of a deceased person because the administrator has distributed any part of the estate if the distribution was properly made by the administrator after the person (being of full legal capacity) has notified the administrator in writing that the person either:*
 - consents to the distribution, or*
 - does not intend to make any application under this Act that would affect the proposed distribution.*
- (4) *An administrator of the estate of a deceased person who receives notice of an intended application under this Act is not liable in respect of a distribution of any part of the estate if the distribution was properly made by the administrator not earlier than 12 months after the deceased person's death.*

9. Clause 9(1), above.

10. MP 28 at 102.

11. MP 28 at 101; National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (Queensland Law Reform Commission, Report 58, 2004) ("R 58") at para 4.2.

- (5) Subsection (4) does not apply if the administrator receives written notice that the application has been commenced in the Court or is served with a copy of the application before making the distribution.
- (6) For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's [insert appropriate reference for jurisdiction to a legal practitioner].

4.9 **Clause 45** is chiefly based on provisions in *Succession Act 1981* (Qld) s 44.

Distributions to deceased's dependants

4.10 **Clause 45(1) and (2)** are based on *Succession Act 1981* (Qld) s 44(1) which protects personal representatives who make an early distribution for the "maintenance or support" of dependants of the deceased. Similar provisions, using different terminology to describe "maintenance or support", may be found in legislation in other Australian jurisdictions.¹² The National Committee decided to adopt the expression "maintenance, education or advancement in life" for the sake of consistency with cl 10, which deals with the Court's power to order provision.¹³

4.11 The Queensland provisions currently refer to the maintenance of "any child of the deceased person totally or partially dependent on the deceased person immediately before the death of the deceased person". Clause 45(1) refers instead to "a person who was wholly or substantially dependent on the deceased person immediately before his or her death" in order to accommodate the new approach to eligibility set out in cl 6 and cl 7.¹⁴

4.12 The National Committee also decided that this provision should make it clear that "the protection from liability afforded to a personal representative is to apply only to the extent that the distribution made is for the purpose of providing those things immediately necessary for the specified purposes".¹⁵ The phrase "for the purpose of providing those things immediately necessary for..." has, therefore, been adopted from *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 11.

4.13 This provision can be compared with cl 53(1) of the National Committee's *Wills Bill 1997*¹⁶ which allows a personal representative to make maintenance distributions to a person who is a beneficiary and who is wholly or substantially dependent on the testator,

12. *Family Provision Act 1969* (ACT) s 20(2)(a); *Family Provision Act 1970* (NT) s 20(2); *Administration and Probate Act 1958* (Vic) s 99A(1); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 11. See R 58 at para 4.8-4.14.

13. R 58 at para 4.21. See also MP 28 at 65.

14. See MP 28 at 103.

15. R 58 at para 4.22.

16. New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Report 85, 1998) Appendix A. See also *Wills Act 2000* (NT) s 55(1).

but whose entitlement under the will does not become absolute until 30 days after the testator's death. Clause 45 of the *Family Provision Bill* is broader, in that it applies to persons who are wholly or substantially dependent, but who are not necessarily named in the will, including those who may be entitled on intestacy or partial intestacy.

Distributions to which an eligible person consents

4.14 **Clause 45(3)** is based on *Succession Act 1981* (Qld) s 44(2) which provides that the personal representative will not be liable to any person who may have been entitled to apply for provision but who has advised the personal representative that he or she consents to the distribution or does not intend to make any application. Similar provisions have been enacted in Victoria and Western Australia.¹⁷

4.15 The National Committee noted that this provision facilitates the early distribution of estates¹⁸ and concluded that this was a desirable outcome, so long as the interests of persons who might be entitled to apply were not prejudiced by the early distribution.¹⁹

Distributions made after notice is given that a person intends to apply for family provision

4.16 **Clause 45(4) and (5)** are based on *Succession Act 1981* (Qld) s 44(3) which protects a personal representative from liability to a person who gives notice of an intention to make an application, but who fails to do so within the prescribed time and then makes an application out of time.

4.17 The National Committee, in recommending the inclusion of such a provision, noted that the mere giving of notice of intention ought not to delay the administration of an estate beyond the 12 month period prescribed in the Model Bill:

*the personal representative should be able to distribute the estate in the knowledge that he or she will not be liable in respect of that distribution if the person subsequently makes an application out of time.*²⁰

4.18 **Clause 45(6)** is based on *Succession Act 1981* (Qld) s 44(4).

17. *Administration and Probate Act 1958* (Vic) s 99A(2); and *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 20(4).

18. R 58 at para 4.16.

19. R 58 at para 4.23.

20. R 58 at para 4.25.

46 Release of rights under Act

- (1) *A release by a person of the person's rights to apply for a family provision order has effect only if it has been approved by the Court and to the extent that the approval has not been revoked by the Court.*
- (2) *Proceedings for the approval by the Court of a release of a person's rights to apply for a family provision order may be commenced before or after the death of the person whose estate may be the subject of the order.*
- (3) *The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a person.*
- (4) *In determining an application for approval of a release, the Court is to take into account all the circumstances of the case, including whether:*
 - (a) *it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and*
 - (b) *it is or was, at that time, prudent for the releasing party to make the release, and*
 - (c) *the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and*
 - (d) *the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.*
- (5) *In this section:*

release *of rights to apply for a family provision order means a release of such rights, if any, as a person has to apply for a family provision order, and includes a reference to:*

- (a) *an instrument executed by the person that would be effective as a release of those rights if approved by the Court under this section, and*
- (b) *an agreement to execute such an instrument.*

4.19 **Clause 46** is based on *Family Provision Act 1982* (NSW) s 31(1)-(6). This provision allows potential applicants to contract out of any entitlement to family provision while the deceased is still alive. The contracting out is subject to court approval.

4.20 The National Committee noted that the provisions had worked well in New South Wales and had been helpful in resolving disputes between parties before death.²¹ In favouring the inclusion of such provisions, the National Committee made the following observations:

21. MP 28 at 106.

The National Committee was conscious of the possibility of undue pressure being placed upon some people to contract out of future entitlements under family provision legislation. However, the significant advantages of such a procedure [were] seen to outweigh the possibility, particularly in light of the wider group of eligible applicants envisaged by the National Committee's proposed scheme. In particular, the advantages to parties in settling family affairs were acknowledged. Furthermore, the procedure could be very straightforward and inexpensive - with most approvals being done on the papers.²²

47 Revocation of approval of release

- (1) *The Court may not revoke an approval of a release given by it under section 46, except as provided by this section.*
- (2) *The Court may revoke an approval if it is satisfied:*
 - (a) *that its approval was obtained by fraud, or*
 - (b) *that the release was obtained by fraud or undue influence.*
- (3) *The Court may revoke an approval, either wholly or partially in respect of specified property, if it is satisfied that all persons who would be, in the Court's opinion, sufficiently affected by the revocation consent to the revocation.*

4.21 **Clause 47** is based on *Family Provision Act 1982* (NSW) s 31(7)-(9) which are part of the provisions allowing parties to contract out of their entitlement to apply for family provision.²³ These provisions enable the Court to revoke its approval of such arrangements in given circumstances.

48 Court may determine date of death

The Court may, if the date or time of death of a person is uncertain, determine, for the purpose of giving effect to any provision of this Act, a date or time of death that the Court thinks is reasonable for the purposes of the provision.

4.22 **Clause 48** is based on *Family Provision Act 1982* (NSW) s 6(8). This provision is necessary because a date of death of the deceased is required for determining:

22. MP 28 at 107.

23. See MP 28 at 106-107.

- the time limit for making an application for a family provision order²⁴ or notional estate order;²⁵
- the date after which the administrator may distribute the property in the estate;²⁶ and
- the time limits on transactions in relation to property that may be made subject to a notional estate order.²⁷

49 Costs

The Court may order that the costs of proceedings under this Act in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

Note. Section 29 sets out the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person.

4.23 **Clause 49** is based on *Family Provision Act 1982* (NSW) s 33(1). It empowers the Court to order that costs be paid out of the estate or notional estate of the deceased. Clause 49, however, does not include the other provisions in *Family Provision Act 1982* (NSW) s 33 which constrain the Court's ability to award costs in certain circumstances. The National Committee was of the view that the model legislation should not include further specific reference to costs:

but that each jurisdiction should be strongly encouraged to consider the most appropriate method for reducing the costs to the estate and the costs to parties of applications for family provision.²⁸

4.24 The National Committee noted:

Courts currently have the ability to award costs against unworthy applicants even though this is not specified in the legislation. However, pre-trial procedures to reduce costs and to encourage settlements should be promoted to deter these matters from going to court. It might also be considered appropriate in some jurisdictions to have the Registrar of the Court handle minor matters or matters involving estates valued at less than

24. Clause 9(1).

25. Clause 41(1)(c).

26. Clause 44(1)(a).

27. Clause 31(2).

28. MP 28 at 139.

*a certain amount. Again this is a procedural matter which would not be appropriate to insert in the model legislation.*²⁹

4.25 The question of an application for costs in relation to an application for a notional estate order is dealt with in cl 29.³⁰

4.26 Given the range of persons who may conceivably apply for family provision under cl 7, the New South Wales Law Reform Commission is of the view that it may be appropriate to investigate further the issue of orders for costs, with a view to introducing provisions in legislation or rules or regulations relating to civil procedure and orders for costs. In coming to this view, the Commission notes that Victoria introduced new provisions relating to orders for costs at the same time as the provisions were introduced that allow the Court to order that provision be made for “the proper maintenance and support of a person for whom the deceased had responsibility to make provision”.³¹ The Victorian provision states:

*If the Court is satisfied that an application for an order under section 91 has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant.*³²

To an extent, this addresses concerns that have been raised that cl 7 could lead to an increase in “blackmailing applications” made by persons who, for the most part, would have had no standing to make an application under the current provisions that apply throughout Australia,³³ as well as more general concerns about “spoiling” applications that have the effect of depleting an estate to the detriment of both actual and potential beneficiaries.³⁴

50 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

29. MP 28 at 139.

30. See para 3.21-3.24

31. *Administration and Probate Act 1958* (Vic) s 91(1). See cl 7 and para 2.21 above.

32. *Administration and Probate Act 1958* (Vic) s 97(7). See *Coombes v Ward (No 2)* [2002] VSC 84 and *Coombes v Ward* [2004] VSCA 51 at para 30-33 for an application of the costs provisions under the Victorian Act.

33. See P W Young, “Uniform Family Provision Acts” (2004) 78 *Australian Law Journal* 763.

34. See *Carroll v Cowburn* [2003] NSWSC 248 at para 36; *Linnane v Bonham* [1999] NSWSC 906.

4.27 **Clause 50** confers a regulation making power in terms similar to those whereby *Family Provision Act 1982* (NSW) s 36(1) confers the power to make rules of court under the *Supreme Court Act 1970* (NSW). The power to make rules of court is conferred by cl 51.

51 Rules of Court

- (1) *For the purpose of regulating any proceedings under this Act in or before the Court, rules of court, not inconsistent with this Act, may be made under the [insert name of appropriate Act of jurisdiction] for or with respect to any matter that by this Act is required or permitted to be prescribed by rules of court or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*
- (2) *This section does not limit the rule-making powers conferred by the [insert name of appropriate Act of jurisdiction].*
- (3) *Without limiting subsection (1), a rule may be made conferring jurisdiction on Registrars of the Court to hear and determine specified proceedings under this Act. [This provision may be inserted by jurisdictions in which rules of court relating to proceedings are intended to be made.] [When the Bill is enacted additional provisions will need to be inserted relating to amendments, repeals and savings and transitional provisions.]*

4.28 **Clause 51(1) and (2)** are based on *Family Provision Act 1982* (NSW) s 36(1) and s 36(2).

4.29 **Clause 51(3)** allows a rule to be made conferring jurisdiction on Registrars to hear and determine certain proceedings. The National Committee has noted, in the context of containing costs of family provision applications, the desirability in some jurisdictions of having Registrars handle “minor matters or matters involving estates valued at less than a certain amount”.³⁵ The National Committee considered that, ultimately, the jurisdiction of Registrars was a procedural matter to be dealt with by individual jurisdictions.

35. MP 28 at 139.

SCHEDULE 1 NOTICE OF DISTRIBUTION

(Section 44)

Notice of intended distribution of estate

Any person having any claim on the estate of *(name in capitals)* late of *(place)* *(occupation)* who died on *(date)* must send particulars of his or her claim to the executor *(or as the case may be)* *(name)* at *(address of executor or administrator)* *(or care of name of solicitor, solicitor, address, and, if applicable, or their agents, name, address)* within 30 days *(or such longer period as may be necessary so that the time specified expires not earlier than 6 months after the deceased person's death)* from publication of this notice. After that time, if the executor *(or as the case may be)* has received no notice of any claims, he or she may distribute the assets of the estate. Probate was *(or Letters of Administration were)* granted in *(name of jurisdiction)* on *(date)*.

S.1 **Schedule 1** is based on *Supreme Court Rules 1970 (NSW) Sch F form 121*. The National Committee recommended that the form of notice required by cl 44 be along the lines of form 121.¹

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1. National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Queensland Law Reform Commission, Miscellaneous Paper 28, 1997) (“**MP 28**”) at 102, footnote 197.

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