

**MACQUARIE LAW SCHOOL**

**SUCCESSION**

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**THE FAMILY PROVISION JURISDICTION  
IN HISTORICAL PERSPECTIVE**

by

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**INTRODUCTION**

- 1 The aim of this paper is to provide a short historical account of the family provision jurisdiction of the Supreme Court of NSW (an integral part of the law of succession in New South Wales) with a view to contextualising: (a) its significance to management of the affairs of people living, and dying, within reach of the jurisdiction; and (b) practical problems encountered upon an exercise of the jurisdiction.
- 2 No attempt is made to provide an exhaustive treatment of the jurisdiction, the law of succession or their history. A more modest objective is to place the jurisdiction in its legal, historical and social setting so as to demonstrate that it is more than the bare words on the page of a statute, but best exercised by a disciplined application of statutory criteria.
- 3 An historical perspective of the jurisdiction opens the mind to a need to examine text and context in a world of constant social change.

- 4 The jurisdiction is and always has been conferred, and governed, by an Act of the NSW Parliament. In broad terms, that legislation currently empowers the Court, on the application of a person entitled by the legislation to apply to the Court, for an order that “provision” for the applicant be made out of the estate of a deceased person (or property designated by the Court as “notional estate” of the deceased person) “for the maintenance, education or advancement in life” of the applicant. Such an order can be made if and only if the Court is satisfied that “adequate provision for the proper maintenance, education or advancement in life” of the applicant has not been made by the will of the deceased or by the operation of intestacy rules, or both.
- 5 What is interesting about the jurisdiction is the context in which it must be exercised. It is an area of the law that cannot fully be appreciated without a sense of the spirit embodied in the letter of the law. It turns on terms such as “adequate”, “proper” and “ought” in their application to provision for a person’s “maintenance, education or advancement in life”. These terms must be applied, in their legislative setting, in cases that are notoriously fact-sensitive.
- 6 A large impediment to a due exercise of the jurisdiction, and potentially a threat to its ongoing existence, is the tendency of some parties and their lawyers to become enmeshed in prohibitively expensive, interminable factual contests (giving vent to long-held grievances) without working within the spirit of the governing legislation.
- 7 In the absence of family harmony, exposure to family provision litigation costs, as well as the uncertainty attending any litigation, imposes heavy transaction costs on administration of a deceased estate.
- 8 In estate planning, an attempt should be made to avoid, or minimise, such costs by anticipating the potential operation of the family provision legislation.
- 9 In the resolution of disputes about administration of a deceased estate, all persons interested in the estate, or pursuit of an application for family provision relief, need to weigh the costs to them personally, as well as perceived benefits,

of involvement in litigation. Not uncommonly, the costs incurred in the conduct of a contested family provision case exceed the value of what could reasonably be anticipated as an order for provision.

- 10 Nobody involved in family provision proceedings can, or should, assume that his or her costs of the proceedings will be ordered to be paid out of the deceased estate in contest.

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

- 11 In his classic text, *A Concise History of the Common Law* (5<sup>th</sup> ed, 1956), at pages 711, 743 and 746, Professor TFT Plucknett described “the law of succession” as “an attempt to express the family in terms of property”.
- 12 The law of succession is interwoven with the law of property and family law. It generally arises from: (a) a perceived need for formality in the transfer of property on, or in anticipation of, death; and (b) precedential reasoning upon determination of disputes about the inheritance of property.
- 13 The law of succession does not depend upon an exercise of jurisdiction by a court in the case of every person who dies. Some property can pass otherwise than by means of a court order. An illustration of this is the case of a person whose only property is personal property, physically held in possession, ownership of which can be transferred by delivery with intent to effect a transfer.
- 14 However, in a modern setting much property depends for its transfer (if not its existence) upon engagement with the record keeping and procedures of a bureaucracy (public or private), or formalities imposed by law. A grant of probate or administration of a deceased estate might be required because of the nature of property to be administered.
- 15 So too in relation to the family provision jurisdiction of the Court. In the case of a harmonious family there may be no impediment to beneficiaries, by agreement, distributing a deceased estate in a manner other than contemplated

by the operation of a will or the rules of intestacy. However, absent agreement of all affected persons, a departure from the scheme of a valid will or the intestacy rules requires an application to the court – generally in the form of an application for a family provision order.

- 16 Succession law, as administered by the Supreme Court, is an amalgam of procedural and substantive law for the management of property either side of death. In every generation it takes colour from the society it serves, and that society's understanding of what constitutes "family", "property" and "proper arrangements" for the devolution of property on, or in anticipation of, death.
- 17 The law of succession in NSW is predicated upon an assumption that, at its core, there is an autonomous individual, living (and dying) in community. Within the constraints of community, and so far as can be ascertained, the law endeavours to give effect to the intentions of a person who, by reason of incapacity or death, is unable to manage his or her own affairs.
- 18 In a modern setting, decisions about the devolution of property on death are often made by individuals who, in management of their affairs, plan for the possibility that they will suffer incapacity for self-management as a prelude to death. Routinely, such planning involves execution of an "enduring power of attorney" (governed principally by the *Powers of Attorney Act 2003* NSW), an appointment of an "enduring guardian" (governed by the *Guardianship Act 1987* NSW) and the execution of a will (governed by Chapter 2 of the *Succession Act 2006* NSW), the preparation of which requires contemplation of the possibility that a person dissatisfied with the person's testamentary arrangements might, after the person's death, apply (under Chapter 3 of the *Succession Act 2006*) for a family provision order displacing them in whole or part.
- 19 Viewed through the prism of succession law "death" is now, more than formerly, less an event and more a process that may commence before, and extend beyond, physical death. The process commonly commences when a person plans for incapacity or death by the execution of an enduring power of attorney, an enduring guardianship appointment and a will. It commonly ends only when

the prospect of an application being made for a family provision order becomes negligible.

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

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

- 21 The Report of the NSW Law Reform Commission (No. 28, 1977) that led to enactment of the *Family Provision Act 1982 NSW* recorded a lack of local interest in adoption of a system of inheritance based on fixed proportions of a deceased estate: paragraph 1.6.
- 22 In its 1987 Report No. 39, on *Matrimonial Property*, the Australian Law Reform Commission followed suit. It recommended against the introduction of a “community of property regime” in Australia, preferring to maintain (with statutory modifications, embracing discretionary powers, where required) the system of “separate property during marriage” characteristic of the English tradition, recognising that, under the separate property regime operative in modern Australia, each spouse may own and deal with property in exactly the same way as an unmarried person: see Recommendation 24 and paragraphs 53 and 508 *et seq.*
- 23 The civil law concept of community of ownership arising from marriage has no place in modern Anglo-Australian common law: *Hepworth v Hepworth* (1963) 110 CLR 309 at 317-318; *Bryson v Bryant* (1992) 29 NSWLR 188 at 195-196.

- 24 The Anglo-Australian law of wills, probate and the administration of deceased estates (a core part of the law of succession) owes an historical debt to the Roman law tradition, not least because probate law and practice reflect even today the work of the English ecclesiastical courts before their integration with secular courts in the 19<sup>th</sup> century.
- 25 However, Australian law has moved away from – if it ever embraced – the Roman (civil) law concept of “forced heirship”, the idea that a deceased estate should pass to the next generation, in whole or part, in fixed shares, constraining a person’s testamentary freedom.
- 26 The Australian model (reflected in the seminal authority on the meaning of “testamentary capacity”, *Banks v Goodfellow* (1870) LR 5 QB 549 at 563-566) recognises in the individual a right to dispose of property by will – a much vaunted “testamentary freedom” – subject to the availability of a discretionary power in a court to make an order that provision be made out of a deceased estate for a person found to have an unsatisfied claim on the deceased’s bounty. In this way, Australian law seeks to balance competing claims of “the individual” and “family” (personification of a “collective” interest) in the Australian community.

#### **TESTAMENTARY FREEDOM : FREEDOM FROM WHAT, TO DO WHAT?**

- 27 More than is perhaps generally realised, expressions such as “testamentary freedom” and “freedom of testation” must be understood in the context in which they are used. They invite the questions: Freedom from what? Freedom to do what? Arguably, they have no real meaning unless they are used as a contrast to a statement of affairs involving a limitation on conduct.
- 28 This is not the conventional view of the topic. Testamentary freedom is generally assumed to have free-standing content.
- 29 However, on closer examination, “testamentary freedom” appears generally to be a comparative, rather than an absolute, concept.

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

“[15.1] The general law gave pre-eminence to freedom of testation, which has been described in more recent times as a ‘basic human right’ [: *Fung v Ye* [2007] NSWCA 115 at [25]; *Grey v Harrison* [1997] 2 VR 359 at 363 and 366]. Accordingly, it recognised few qualifications to this freedom, highlighting the weight given to the concept of ‘property’, and its alienability according to the wishes of its owner...

[15.3] ...[The importance attached by the general law to testamentary freedom stands] in contrast to the civil law’s various forays into impinging on this freedom, chiefly via allocating the deceased’s widow and children set shares of the deceased’s estate. Not that the common law, going back to earlier times, never restricted it. The common law system of primogeniture provided that inheritance of land devolved to the first-born son; indeed, one of the reasons for development of the ‘use’ was as a vehicle to circumvent the restrictions inherent in primogeniture. The latter was, in any case, survived by the common law’s refusal to recognise married women’s legal capacity to hold title to property independent of their husbands, only rectified by statute in the late 19<sup>th</sup> century. This likewise operated as a de facto restriction on freedom of testation.

[15.4] The headway of statute into the realm of freedom of testation has been a more recent phenomenon. Now in all jurisdictions – the first initiatives emanating from the 1980s – statute empowers courts to rectify wills. Even so, these initiatives hardly undermine, but rather foster, freedom of testation, as the aim of rectifying a will is to give effect to the intention of the testator, which has been imperfectly expressed in its terms....

[15.5] The chief statutory incursion into freedom of testation, though, is family provision legislation, an exclusively 20<sup>th</sup>-century phenomenon. ...”

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

32 A case could be made out for attributing a modern concept of “freedom of testation” to enactment of the *Wills Act* 1837 (Eng), adopted in NSW in 1840. That is the good root of title for the law of wills currently enacted in the

*Succession Act* 2006 NSW. Even then, will making was attended by formalities.

- 33 Throughout the 19<sup>th</sup> century, vestiges of feudal thought were abandoned as society moved from “status” to “contract” (HS Maine, *Ancient Law* (1861), Chapter 5), becoming progressively more transactional and less constrained by the incidents of relationship categories. By the beginning of the 20<sup>th</sup> century, the *Married Women (Property) Acts* had removed legal constraints on women, divorce was becoming more readily available, and “dower” and “curtesy” had been abolished. Relationships within the family, and society at large, were the subject of profound change.
- 34 It was in that environment, with women and children at a social disadvantage *vis-a-vis* men, that there arose calls for what became family provision legislation.
- 35 It was not only a concern for the welfare of vulnerable members of a family that drove those calls. A factor taken into account in reform of the law was recognition that, if vulnerable members of family affected by death are not supported by resources available to the family, the economic burden of their support may fall on the public purse.
- 36 In that environment, and in the years since, expressions such as “testamentary freedom” and “freedom of testation” have meaning as a contrast to testamentary choices made free of interference by an exercise of jurisdiction to make a family provision order.
- 37 The family provision jurisdiction of the Supreme Court must be assessed in a context broader than itself.

## **LOOKING BEYOND JURISDICTIONAL BOUNDARIES**

- 38 Mastery of the law of succession requires an ability: (a) to look forward from the time planning decisions are made about incapacity and death to the possibility that administration of a deceased estate might be contested; (b) to understand

processes for the administration of an estate affected by incapacity or death; and (c) after a death, to look back to *inter vivos* transactions to assess whether property the subject of such transactions properly forms part of the deceased's estate.

- 39 In addition to an understanding of the family provision jurisdiction, that requires an appreciation, particularly, of those heads of the Supreme Court's jurisdiction described as "the protective jurisdiction" (based, historically, on the English Lord Chancellor's Lunacy jurisdiction, his Infancy or Wardship jurisdiction or, as they may be variously described, his *parens patriae* jurisdiction) and "the probate jurisdiction" (formerly described as "ecclesiastical jurisdiction", historically derived from England's Ecclesiastical Courts), as well as "the equity jurisdiction" (historically based upon the Lord Chancellor's Chancery jurisdiction).
- 40 The administration of justice in the present day owes much to the law and procedures administered in now defunct English courts associated with these jurisdictions. Recognition of what they did, and what they achieved, facilitates an understanding of the functional significance of work which, in every age, must be done by lawyers.
- 41 Leaving aside the family provision jurisdiction, the historical source of these heads of jurisdiction (and the common law developed in the English Courts of Common Law) is found in the "*New South Wales Act*" 1823 (Imp), the "*Third Charter of Justice*" promulgated pursuant to that Act, and the *Australian Courts Act* 1828 (Imp) as preserved by section 22 of the *Supreme Court Act* 1970 NSW, reinforced by section 23 of the *Supreme Court Act*.
- 42 Each head of jurisdiction is governed by the purpose for which it exists, and each has a different functional imperative which (as illustrated by *Smith v Smith* [2017] NSWSC 408) may need to be recognised in problem solving that crosses jurisdictional boundaries:
- (a) The protective jurisdiction exists for the explicit purpose of taking care of those who cannot take care of themselves: *Secretary*,

*Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 258-259. The Court focusses upon the welfare and interests of a person incapable of managing his or her affairs, testing everything against whether what is to be done or left undone is or is not in the interests, and for the benefit, of the person in need of protection, taking a broad view of what may benefit that person, but generally subordinating all other interests to his or hers.

- (b) The probate jurisdiction looks to the due and proper administration of a particular estate, having regard to any duly expressed testamentary intentions of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.
- (c) The family provision jurisdiction, as an adjunct to the probate jurisdiction, looks to the due and proper administration of a particular deceased estate, endeavouring, without undue cost or delay, to order that provision be made for eligible applicants (out of a deceased person's estate or notional estate) in whose favour, because they have been left without "adequate provision for their proper maintenance, education or advancement in life", an order for provision "ought" to be made.
- (d) The equity jurisdiction generally looks to grant, or withhold, discretionary relief (to restrain conduct or to compel the performance of a duty) for the purpose of preventing conduct which, according to its precepts, is unconscionable. The law of succession is a fertile ground for fiduciary relationships because property is routinely required to be held by one person (a

fiduciary) on behalf of another (a beneficiary, or principal). A primary contribution of equity jurisprudence to succession law is its articulation of principles, and its provision of remedies, designed to hold a fiduciary to account for a breach of standards of conduct required of a fiduciary.

- 43 Implicit in a listing of these heads of jurisdiction is the common law (historically associated with the old English Common Law Courts of Queen's Bench, Common Pleas and Exchequer), ever present as part of the general law (that is, the non-statutory) setting in which they must be exercised. Think, for example, of the contribution of the common law to the law of property, contract, tort, restitution and agency – each commonly assumed, or encountered, in administration of the law of succession in its various guises.
- 44 The family provision jurisdiction differs from the other heads of jurisdiction here identified because it is transparently recent in origin and explicitly sourced in (local) legislation whereas (although they came to the Supreme Court of NSW *via* Imperial legislation) they have a flavour of antiquity and (reflecting their association with “the general law”) a history of reasoned development through the accumulation of precedents which expose the functional significance of the jurisdiction exercised.
- 45 Three examples of the interconnectedness of the Court's various heads of jurisdiction are here offered.
- 46 The first relates to identification of the pool of assets available to satisfy a family provision order. An application for provision cannot be properly considered unless the estate (or notional estate) of the deceased person who is the object of the application is first identified. Where the deceased had appointed an enduring attorney, and the attorney appears to have acted in breach of his or her fiduciary obligations as an attorney by using the power of an attorney to transfer property of the deceased to himself or herself, an entitlement residing in the deceased's legal personal representative (an executor or administrator of

the estate of the deceased) to recover such property may be an asset of the estate which has to be taken into account in the family provision proceedings.

- 47 In analysing that possibility, the law governing deployment of an enduring power of attorney may require consideration of the Court's protective jurisdiction; the law governing representation of a deceased estate invokes the probate jurisdiction; and the equity jurisdiction is generally interwoven with both the protective and the probate jurisdictions, all of which must be considered in the context of the family provision jurisdiction.
- 48 The second example of interconnections occurs when an application is made to the Court for approval of a family settlement involving the protected estate of an incapacitated person, an application for a statutory will and an application for a release of rights to apply for a family provision order: eg, *W v H* (2014) NSWSC 1696; *Re RB, a protected estate family settlement* [2015] NSWSC 70.
- 49 The third example relates to the Court's exercise of discretionary powers under the *Forfeiture Act* 1995 NSW where the availability of an application for family relief, or analogous principles, may be taken into account on consideration whether an "offender" should, in whole or part, forfeit an interest in property ostensibly acquired as a result of his or her offence: *Re Settree Estates* (2018) 98 NSWLR 910.

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

- 50 The Court's family provision jurisdiction is presently found in, and governed by, Chapter 3 (sections 55-100) of the *Succession Act* 2006 NSW.
- 51 For the purpose of exposition of the jurisdiction, the key provisions of Chapter 3 are the following:
- (a) Section 57 defines the categories of persons (described as "eligible persons") who have standing to make an application for a family provision order.

- (b) Section 58 stipulates that, unless the Court otherwise orders on sufficient cause being shown, an application for a family provision order must be made within 12 months of the death of the deceased person in respect of whose estate the order is sought.
- (c) Section 59(1) provides that the Court may, on an application for a family provision order, make such an order in relation to the estate of a deceased person if the Court is satisfied that:
  - (i) the applicant is an eligible person: section 59(1)(a).
  - (ii) if the applicant is otherwise than a “spouse” or child of the deceased, there are factors which warrant the making of the application: section 59(1)(b).
  - (iii) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made by the will of the deceased, or by the operation of the intestacy rules in relation to the estate of the deceased, or both: section 59(1)(c).
- (d) Section 59(2) provides that the Court may make such order for provision out of the estate of a deceased person as it thinks ought to be made for the maintenance, education or advancement in life of the applicant, having regard to the facts known to the Court at the time the order is made.
- (e) Section 60(2) provides a checklist of matters (including matters bearing upon personal relationships, available resources, competing needs, provision earlier made, and character and conduct) that may be considered by the Court for the purpose of determining:

- (i) whether an applicant is an eligible person; and
  - (ii) whether to make a family provision order and the nature of any such order.
- (f) Section 61 provides that (provided that due notice of an application for a family provision order is served on a person interested in the application) in determining an application for a family provision order the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (other than a beneficiary of the deceased's estate) but who has not made an application.
- (g) Section 63 provides that a family provision order may be made in relation to the estate of a deceased person or property designated as notional estate of the deceased under Part 3.3 (sections 74-90) of the *Succession Act*.
- (h) Section 65 stipulates that a family provision order must specify the person or persons for whom provision is to be made; the amount and nature of the provision; the manner in which the provision is to be provided and the part or parts of the estate of the deceased out of which it is to be provided; and any conditions, restrictions or limitations imposed by the Court.
- (i) Section 72 provides that a family provision order takes effect, unless the Court otherwise orders, as if the provision was made:
  - (i) in a codicil to the will of the deceased person, if the deceased made a will; or
  - (ii) in a will of the deceased person, if the deceased died intestate.

- (j) Section 95 enables a person's rights to apply for a family provision order to be released if and only if the Court approves the release.

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

53 Section 80(2) provides different criteria for assessment of a relevant property transaction depending upon its timing. The Court may make a designation order if it is satisfied that the deceased entered into a relevant property transaction before his or her death and the transaction:

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

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

**“57. Eligible persons**

(1) The following are "**eligible persons**" who may apply to the **Court** for a **family provision order** in respect of the **estate** of a **deceased person**:

(a) a person who was the *spouse* of the **deceased person** at the time of the **deceased person's** death,

(b) a person with whom the **deceased person** was living in a *de facto relationship* at the time of the **deceased person's** death,

(c) a *child* of the **deceased person**,

(d) a *former spouse* of the **deceased person**,

(e) a person:

(i) who was, at any particular time, wholly or partly *dependent* on the **deceased person**, *and*

(ii) who is a *grandchild* of the **deceased person** or was, at that particular time or at any other time, a *member of the household* of which the **deceased person** was a member,

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

**Note** : **Section 60** sets out the matters that the **Court** may consider when determining whether to make a **family provision order**, and the nature of any such order. An application may be made by a tutor (within the meaning of the *Civil Procedure Act 2005* ) for an **eligible person** who is under legal incapacity.

**Note** : "*De facto relationship*" is defined in **section 21C** of the *Interpretation Act 1987* .

(2) In this section, a reference to a child of a **deceased person** includes, if the **deceased person** was in a *de facto relationship*, or a *domestic relationship* within the meaning of the *Property (Relationships) Act 1984* , at the time of death, a reference to the following:

(a) a child born as a result of sexual relations between the parties to the relationship,

(b) a child adopted by both parties,

(c) in the case of a *de facto relationship* between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the *Status of Children Act 1996* , to be the father (except where the presumption is rebutted),

(d) in the case of a *de facto relationship* between 2 women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act 1996* ,

(e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*)”.

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

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

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

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

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

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

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

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

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

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

(a) the duration of the relationship,

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

(c) whether a sexual relationship exists,

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

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

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

(g) the care and support of children,

(h) the performance of household duties,

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

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

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

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

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

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

(5) Subsection (4) applies--

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

(b) to adoptions under the law of any place (whether in or out of Australia) relating to the adoption of children.

(6) Subsection (4) applies in relation to a child whose parentage is transferred as a result of a parentage order, or an Interstate parentage order, within the meaning of the [Surrogacy Act 2010](#) in the same way as it applies in relation to an adopted child, even if the parentage order is discharged or otherwise ceases to have effect. For that purpose, a reference in that subsection to an adoptive parent is to be read as a reference to a person to whom the parentage of a child is transferred under such a parentage order".

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

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

- 58 Two features of Chapter 3 of the *Succession Act* which distinguish the family provision jurisdiction of the Supreme Court of NSW from similar jurisdiction vested in other state and territorial Supreme Courts are:
- (a) the broad range of people who, by virtue of the definition of “eligible person”, have standing to apply for a family provision order; and
  - (b) the “notional estate” provisions which empower the Court, for the purposes of making a family provision order, to claw back property which would otherwise be lost to the estate of a deceased person.
- 59 The history of the family provision jurisdiction in NSW is marked by the development of these two characteristic features of the legislation (namely, a widening of the concept of “family” eligible to apply for a family provision order, and a widening of the categories of “property” against which an order for provision can attach), coupled with an enhancement of the powers of the Court to regulate administration of an estate so as to give effect to a family provision order.

## **THE ONGOING MARCH OF HISTORY**

- 60 As broad as may be the definition of “eligible person” for the purpose of a family provision application under Chapter 3 of the *Succession Act*, it does not cover everybody comprehended by contemporary concepts of “family”.
- 61 A lawyer practising in the family provision jurisdiction needs to be alive to this. Whether in an advance party, or in the rear, the law of succession maintains a close connection with evolving social concepts of family.
- 62 The interconnectedness of different branches of “succession law” operating across traditional jurisdictional boundaries is illustrated by two examples of an avenue for the jurisdictional constraints of Chapter 3 to be circumvented by a person within a broader concept of “family” than section 57 of the *Succession*

*Act* contemplates. Both owe their existence to legislation enacted well after the family provision jurisdiction became an established feature of the law of succession in NSW. Both may require consideration of their interaction with the family provision jurisdiction. The first is an application for a “statutory will”. The second is an application for an indigenous intestate estate distribution order.

63 As regards an application for a statutory will, note the following:

- (a) In an era in which people in possession of property are living longer and, for many years, enduring mental incapacity, concepts of family continue to expand. Take, for example, a grandchild of a propertied, incapacitated person never dependent upon that person. Take, as another example, the case of an elderly, incapacitated person cared for by a neighbour or a friend unrelated by blood or marriage.
- (b) For better or worse, at least some people outside the parameters of the definition of “eligible person” these days look to the possibility that, in anticipation of an incapacitated person’s death, they might circumvent jurisdictional constraints of Chapter 3 of the *Succession Act* by making, or encouraging another person to make, an application to the Court (ostensibly on behalf of a person making testamentary capacity) for authorisation of a “statutory will” under Part 2.2 (sections 18-26) of the *Succession Act*.
- (c) One of the topics upon which section 19 of the *Succession Act* requires evidence, on an application for leave to apply for a statutory will, is “any evidence available to the applicant of the likelihood of an application being made under Chapter 3 of [the *Succession Act*] in respect of the property of the person [on whose behalf an application is ostensibly made]”: section 19(2)(i).

- 64 An application for an indigenous intestate estate distribution order (under Part 4.4, sections 133-135, of the *Succession Act*) reflects Parliament's acceptance that the customary concept of "family" within an indigenous community may differ from the concept of "family" in the general community. Broadly speaking, within an indigenous community emphasis is placed on collateral relationships whereas, within the general community, the emphasis is on linear relationships: *Re Estate Wilson, deceased* [2017] NSWSC 1, 93 NSWLR 119; *Estate of Mark Edward Tighe* [2018] NSWSC 163; *Re Estate Jerrard, deceased* [2018] NSWSC 781, 97 NSWLR 1106.
- 65 On the hearing of either an application for a statutory will or an application for an indigenous intestate estate distribution order, the Court may be required to take into account familial relationships beyond those contemplated by section 57 of the *Succession Act* and, at the same time, take into account the availability or otherwise of family provision relief.

## LEGISLATIVE HISTORY OF THE FAMILY PROVISION JURISDICTION

- 66 Conventionally, the family provision jurisdiction is said to have its historical origins in legislation first enacted in New Zealand as the *Testator's Family Maintenance Act* 1900 NZ: eg, GE Dal Pont & KF Mackie, *Law of Succession* (Lexis Nexis Butterworths, Australia, 2<sup>nd</sup> ed, 2017), paragraph [15.5].
- 67 Australia's several states and territories followed suit over the next 30 years: Victoria (1906), Tasmania (1912), Queensland (1914), NSW (1916), South Australia (1918), Western Australia (1920), The Australian Capital Territory (1929) and The Northern Territory (1929).
- 68 As initially enacted, this legislation confined the family provision jurisdiction to the making of orders in relation to the estate of a deceased person who had left a will. The jurisdiction has since been extended to intestate estates: JK de Groot and BW Nickel, *Family Provision in Australia* (Lexis Nexis Butterworths, Australia, 5<sup>th</sup> ed, 2017), paragraph 3.2. NSW extended the jurisdiction in this respect in 1938.

- 69 Although enacted in September 1916, NSW’s legislation of that year was given a retrospective date of application (7 October 1915) through a quirk of politics: Lindsay, “The TFM Act: Early days leading to a 99 year centenary” (Supreme Court website, Speeches, 14 October 2015).
- 70 After two earlier, unsuccessful attempts to enact legislation in 1903 and 1907, advocates of “family maintenance” legislation introduced a new Bill into the Legislative Council on 7 October 1915. It was not debated in either House of Parliament until August 1916, by which time the public had been prepared for reform by two notorious deaths.
- 71 A prominent bookmaker (Francis James O’Neill) died on 28 March 1916 and the proprietor of the populist “Truth” newspaper (John Norton) died on 9 April 1916. Each man had disinherited an estranged widow and favoured outsiders over family. These, and rumours of other cases, provided political momentum for legislative reform. A whiff of scandal invited political action to accommodate moral imperatives for the protection of widows and children. The wills of O’Neill and Norton exposed the dark side of “testamentary freedom”.
- 72 As a member of the Legislative Assembly, Norton had opposed the enactment of family provision legislation in 1907. After his death, his political enemies took their revenge by backdating the effective operation of the 1916 Act to the date upon which the Bill for that Act was introduced into Parliament. It was their “Gotcha” moment. His estate was subject to the new legislation, retrospectively applied.
- 73 In NSW, the family provision jurisdiction can generally be described by reference to the three Acts of Parliament which have, in turn, conferred and governed it:
- (a) the *Testator’s Family Maintenance and Guardianship of Infants Act* 1916 NSW.
  - (b) the *Family Provision Act* 1982 NSW.

(c) Chapter 3 of the *Succession Act 2006* NSW.

74 As enacted, the 1916 “TFM Act” applied only to testate estates and confined eligibility to make an application for relief to the widow and children of a deceased male. Major milestones in the operation of the Act were to the following effect:

(a) In 1938 the Act was extended to cases of intestacy, but only for the benefit of a widow (not a widower or children) left without adequate provision.

(b) In 1954 the right to make an application in a case of intestacy was extended to children of the deceased.

(c) In 1965 eligibility to apply for relief was extended to an adopted child of the deceased.

(a) In 1976 eligibility to apply for relief was extended to ex-nuptial children of the deceased.

75 The *Family Provision Act 1982* introduced the broad concept of “eligible person” now found in section 57 of the *Succession Act 2006*, and the jurisdiction for designation of notional property also now found in the *Succession Act*. The 1982 Act had its legislative foundations in the NSW Law Reform Commission’s Report No. 28 (1977) on the TFM Act. Confirmation of this can be found in the Second Reading Speech on the Family Provision Bill in *Hansard* (Legislative Assembly), 23 November 1982.

76 Conceptually, Chapter 3 of the *Succession Act 2006* is essentially the same as the *Family Provision Act 1982*. Its enactment was preceded by the NSW Law Reform Commission’s Report No. 110 (2005), entitled “Uniform Succession Laws: Family Provision”, ostensibly giving effect to deliberations of the National Committee for Uniform Succession Laws: *Explanatory Note* on the Succession Amendment (Family Provision) Bill 2008; Second Reading Speech, *Hansard*

(Legislative Council), 26 June 2008. It has been updated, recently, to accommodate the marriage of same sex couples.

- 77 Inclusion in the 2006 Act (as section 60(2)) of a list of factors to be consulted in the determination of a family provision claim is an innovation which tends to concentrate the minds of Bench and Bar alike (or, at least, it should have that tendency).

## **THE FAMILY PROVISION JURISDICTION IN OPERATION : THE COURSE OF DECISIONS**

- 78 An account of the legislative history of the family provision jurisdiction is an essential part of the history of the jurisdiction, but it is of itself insufficient for an understanding of how the jurisdiction has developed.
- 79 The High Court of Australia and (before enactment of the *Australia Acts* in 1986) the Privy Council have considered the jurisdiction in several cases which continue to have resonance. They include *Re Allardice*; *Allardice v Allardice* [1911] AC 730; *Bosch v Perpetual Trustee Co.* [1938] AC 463; *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9; *Hughes v National Trustees Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134; *White v Barron* (1980) 144 CLR 431; *Singer v Berghouse* (1994) 181 CLR 201; and *Vigolo v Bostin* (2005) 221 CLR 191. Nevertheless, family provision cases are entertained by the High Court only on comparatively rare occasions.
- 80 Appellate judgments are far more numerous at the level of the NSW Court of Appeal. Recent judgments of that court include *Andrew v Andrew* (2012) 81 NSWLR 656; *Burke v Burke (No. 2)* [2015] NSWCA 195, 13 ASTLR 313; *Underwood v Gaudron* [2015] NSWCA 269, 14 ASTLR 68; *Page v Page* [2017] NSWCA 141, 16 ASTLR 331; *Sgro v Thompson* [2017] NSWLR 326; *Sparta v Tumino* (2018) 95 NSWLR 706; *Steinmetz v Shannon* (2019) 99 NSWLR 687.
- 81 Research assistance can often be obtained by a review of judgments of the Succession List Judge (Hallen J), who manages the Court's Family Provision List. His Honour's judgments routinely include a summary of the statutory

scheme and of recent cases bearing upon different categories of claimants for family provision relief. Recent examples of that are *Bowers v Bowers* [2020] NSWSC 109 at [217] *et seq* and *Page v Hull-Moody* [2020] NSWSC 411 at [120] *et seq* where his Honour dealt with applications for relief by an adult child of the deceased. One applicant succeeded. The other did not.

82 Resort to the family provision jurisdiction has steadily grown, particularly since the class of persons eligible to apply for a family provision order was enlarged in the *Family Provision Act* 1982 in a manner still reflected in section 57 of the *Succession Act* 2006.

83 A colourful description of the *Family Provision Act* 1982 shortly after its enactment can be found in the Foreword of Justice FC Hutley to the third (1984) edition of Hutley, Woodman and Wood, *Cases and Materials on Succession* (Law Book Co, 1984):

“Since the first edition [published in 1967], the law of succession on death has been simplified by the abolition of death, estate and succession duties by the Commonwealth, and the States of Queensland, New South Wales and Victoria. It has been complicated by the extension of claims against the terms of the will or rights on intestacy to persons outside the traditionally accepted legal family, that is, spouses, nuptial children and some descendants and to property not part of the actual estate of the deceased. The most radical complications have been introduced in New South Wales. George Orwell’s Big Brother could not have done better than the reformers who entitled the Act which gave claims against the estate to mistresses and lovers, ‘The Family Provision Act 1982’ [.] The Act might have been more properly entitled ‘The Act to promote the Wasting of Estates by Litigation and Lawyers Provision Act 1982’. Technological developments, such as in vitro fertilisation are putting accepted ideas under strain. These are as yet the concern of law reformers rather than the courts. More significant still is the weakening of the family as an instrument for the support of the aged, the upbringing of the young and for productive work. The weakening of the family has meant that the will as an instrument for effectuating the care of dependents has declined in importance. ...”

84 One does not have to embrace these sentiments as one’s own in order to acknowledge that they have some descriptive force. The nature, scope and operation of the family provision jurisdiction has changed dramatically (as has the concept of “family” in society) over the century or so since its first appearance. For better or worse, a liberal law has been applied liberally.

- 85 In *Fung v Ye* [2007] NSWCA 115 at [23]-[24] Young CJ in Eq (with whom Tobias JA and Bell J agreed) made the following observations:

[23] ... I must confess that the decisions of courts have moved well away from the basic principles of 1916 when the first legislation of this type was introduced into NSW. The original [TFM] Act exercised provision for widows and minor children. Today, the courts have very few applications from such persons but are flooded with claims by adult children or adult companions or associates of the deceased. Even though the present Act is entitled the "Family Provision Act", most applicants are only notionally part of the deceased's family, if that, in that they are now heads of their own households with their own spouse and children. Some, indeed, have not even made contact with the deceased for many years.

[24] However the way in which the present Act is framed inevitably has led to this present result. The great widening of potential applicants in ... the definition of 'eligible person' ... in particular, has meant that a testator not only has to think of his or her moral responsibility in the traditional sense, but also has to consider all the 'hangers on' who might be thought by the community to deserve benefaction. Although I use the word 'deserve' rather than 'expect' one wonders when one reads some of the cases whether that distinction is appropriate ...".

- 86 Applications for family provision relief are now often made by mature aged adults who (for whatever reason) had a period of estrangement in their relationship with the deceased and who, in retirement or on the verge of retirement, seek provision to accommodate their old age. Parties involved in cases of this character commonly invite the Court to review long standing grievances.

## **PARADOX AND PRINCIPLE IN ADJUDICATION OF FAMILY PROVISION APPLICATIONS**

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

- 88 In other areas of the law, judicial consideration of a statute is likely to inform construction of the statute in subsequent cases. That happens in family provision cases as well, but only to an extent. Every so often, general observations about “family”, “relationships”, “need” and “moral duty” (which are difficult to avoid in addressing the criteria for which Chapter 3 of the *Succession Act* 2006 provides) tend to be disclaimed by an appellate court as a “gloss” on the statute as attention is re-focussed on the text of the statute. It is by this means that the jurisdiction is constantly refreshed and adapted to social change.
- 89 One commonly hears the gravamen of a family provision case debated almost exclusively in terms not found in the text of the statute. Practitioners will commonly debate whether an applicant for family provision relief has, or has not, a proven “need” for provision – or whether the deceased did, or did not, have a “moral duty” to make provision (or further provision) for the applicant.
- 90 A case can be made out for reference to both “need” and “moral duty”. Section 60(2)(d) of the *Succession Act* 2006 invites the Court to consider “the financial resources (including earning capacity) and financial *needs*, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person’s estate.” Section 80(2)(b) of the Act requires the Court, on consideration of an application for designation of property as notional estate, to consider competing *moral obligations* on the part of a deceased person at the time an *inter vivos* transaction took effect.
- 91 However, practitioners commonly use the expressions “need” and “moral duty” as a shorthand way of referring to the criteria for which section 59(1)(c) and 59(2) of the *Succession Act* provide. There is no harm in this, provided one remains conscious of a need to begin, and end, every analysis of a particular case by reference to the text of the Act.
- 92 To succeed on a claim for a family provision order a plaintiff must establish that, viewed from a current day perspective he (or she) has been left without

“adequate provision for his (or her) maintenance, education and advancement in life” from the deceased’s estate or notional estate and that further provision “ought” to be made for him (or her) from the estate or notional estate, as the case may be.

- 93 The concepts of “adequate” and “proper” embedded in the family provision legislation must be understood as relative to the facts of the particular case: *Pontifical Society for the Propagation of the Faith v Scales* (1962) 17 CLR 9 at 19. As generally understood, “adequate” is a word concerned with *quantum* whereas “proper” is a word directed to a *standard* of maintenance, education and advancement in life. Both words focus attention on the circumstances of the particular case viewed from the perspective of the deceased and contemporary community standards.
- 94 In the exercise of its statutory powers in the determination of an application for a family provision order (in particular, sections 59(1)(c) and 59(2) of the *Succession Act*), the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 17 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally consulting specific statutory criteria referred to in section 60(2) of the Act so far as they may be material.
- 95 Not uncommonly, judges remind parties (and themselves) that family provision legislation is not a charter for a court to re-write a will. Moreover, a counsel of caution is found in cases such as *Slack v Rogan; Palffy v Rogan* (2013) 85 NSWLR 253 at [127], approved in *Sgro v Thomson* [2017] NSWCA 326 at [1]-[2] and [83]-[87], which emphasise that a deliberate scheme of testamentary dispositions by a capable testator is entitled to respect. In the dialectic that characterises the jurisdiction, that may call into play a reminder that the

statutory jurisdiction of the Court is to be given full operation according to its terms, notwithstanding that it encroaches on testamentary freedom: *Steinmetz v Shannon* (2019) 99 NSWLR 687 at [97].

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

## THE CONDUCT OF A FAMILY PROVISION CASE

- 97 The conduct of a family provision case requires familiarity not only with Chapter 3 of the *Succession Act* 2006, and associated caselaw, but also with the Supreme Court's *Practice Note No. SC Eq 7 – Family Provision*.
- 98 Family provision claims are rarely pleaded. Proceedings are ordinarily commenced by a plaintiff's filing of a summons, reciting bare claims for relief, directed to a representative (usually an Executor or Administrator) of the deceased as defendant, unless a family provision claim is tacked on to a statement of claim filed in probate proceedings. Even then, a claim for family provision relief is ordinarily asserted rather than pleaded.
- 99 In the first instance, questions for determination in a family provision case generally emerge from the plaintiff's primary affidavit (a template for which can be found in Annexure 1, required by clause 6, of the Practice Note) and the "administrator's affidavit" required of a defendant by clause 9.1 of the Practice Note.

- 100 The Practice Note, and case management procedures based on it in the Family Provision List, are directed to encouraging parties to exchange information at the earliest practical time so that they can each make a realistic assessment of their respective cases, leading (if not to an early settlement) to a compulsory mediation before allocation of a date for a final hearing.
- 101 In the presentation of a family provision claim, parties may best assist the Court by early identification of: (a) the deceased; (b) the age and date of death of the deceased; (c) the operative, and any other known, wills of the deceased; (d) the dates and terms of any grant of probate or administration affecting the estate of the deceased; (e) a family tree depicting personal relationships, with dates of births, deaths and marriages where material; (f) the pool of assets available, or (if a claim is made for designation of notional estate) potentially available, for the making of a family provision order; (g) a list of “eligible persons”; and (h) evidence confirming that all eligible persons have been given due notice of the proceedings. Where an order is sought for designation of property as notional estate, confirmation is required as to the joinder of necessary parties other than an Executor of Administrator.
- 102 The written submissions which are invariably required for the final hearing of a family provision case should enable the Court to access this information without fuss.
- 103 It also helps if there is, ever so briefly, an identification of the principal elements required for proof of a claimed entitlement, treating (in a simple, standard case) the following list of sections as a checklist:
- (a) Confirmation that the plaintiff’s originating process was filed within the time limited by the *Succession Act*, section 58(2); failing which the plaintiff’s originating process must include an application for an extension of time, as to which see *Warren v McKnight* (1996) 40 NSWLR 390 at 394E; *Dare v Furness* (1998) 44 NSWLR 493 at 500C..

- (b) Identification of the ground, or grounds, upon which the plaintiff claims to be an eligible person: *Succession Act*, sections 57 and 59(1)(a).
- (c) Where the plaintiff is otherwise than a “spouse” or child of the deceased, a statement of the grounds upon which the plaintiff contends that there are “factors warranting” the making of his or her application for relief: *Succession Act*, section 59(1)(b); *Re Fulop* (1987) 8 NSWLR 679 at 681; *Churton v Christian* (1988) 13 NSWLR 241 at 254.
- (d) A summary statement of the grounds upon which the plaintiff contends that he or she has been left without provision for his or her maintenance, education or advancement in life: *Succession Act*, section 59(1)(c).
- (e) A statement of the nature and quantum of relief which the plaintiff contends “ought” to be granted: *Succession Act*, section 59(2).
- (f) A summary of the principal factors listed in section 60(2) of the *Succession Act* alleged to be material.

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

## **CONCLUSION**

105 The family provision jurisdiction requires study in order not to be misunderstood. There is a persistent, erroneous lay perception that it can be

used to “challenge a will” so as to ensure that all members of a family are treated “equally” or at least “fairly”.

106 Advocates, no less than judges, commonly encounter fierce controversies within a family predicated upon: (a) a mistaken assumption that the underlying principle of an exercise of family provision jurisdiction is that all family members must be treated “equally”; and (b) very different ideas about what is meant by “equality” in the particular case.

107 There is no substitute, in confronting these stubborn ideas, for close attention to the text of the governing legislation, coupled with an insistence upon a cost-benefit analysis of involvement in litigation.

GCL

2 June 2020

(Revised 3 June 2020)