

TASMANIA
LAW REFORM
INSTITUTE

Should Tasmania Introduce Notional Estate Laws?

FINAL REPORT NO. 27

SEPTEMBER 2019

CONTENTS

Information about the Tasmania Law Reform Institute.....	v
Background to this Final Report.....	v
Acknowledgments.....	vii
Terms of Reference.....	vii
List of Recommendations.....	viii
Glossary and Abbreviations.....	ix
Executive Summary.....	xi
Part 1: Introduction.....	1
1.1 The issue.....	1
1.2 Report structure.....	2
1.3 Freedom of testation and the development of family provision laws.....	2
1.4 The Testator’s Family Maintenance Act 1912 (Tas).....	4
Part 2: Property Falling Outside Family Provision Claims.....	9
2.1 Introduction.....	9
2.2 Pre-death gifts and transfers.....	9
2.3 Joint tenancy assets.....	10
2.4 Superannuation.....	11
2.5 Proceeds of a life insurance policy.....	12
2.6 Trust assets and property the subject of a power of appointment.....	13
2.7 Estate assets distributed from an estate.....	14
2.8 Conclusion.....	15
Part 3: Development of Notional Estate Laws.....	16
3.1 Introduction.....	16
3.2 England and Wales.....	16
3.3 Scotland.....	21
3.4 Canada.....	22
3.5 New Zealand.....	25
3.6 United States.....	27
3.7 Australia.....	27
Part 4: New South Wales Notional Estate Laws.....	33
4.1 Introduction.....	33
4.2 Background.....	33
4.3 Part 3.3 of the NSW <i>Succession Act</i>	35
4.4 When the court may make a notional estate order.....	35
4.5 Effect of notional estate order.....	40

4.6	Critique of New South Wales’ notional estate laws	40
4.7	Summary	40
Part 5: Should Tasmania Introduce Notional Estate Laws?		41
5.1	Introduction.....	41
5.2	Is there a problem?.....	41
5.3	Potential issues with notional estate provisions.....	48
5.4	Should Tasmania introduce notional estate legislation?	49
5.5	Arguments against notional estate provisions.....	50
5.6	Arguments in support of notional estate provisions	69
5.7	The New South Wales provisions.....	78
5.8	Other matters.....	83
5.9	Conclusion and recommendation.....	84
Appendix 1: ‘Notional estate’ style provisions – New South Wales and England and Wales		91
Appendix 2: ‘Notional estate’ style provisions in Canada.....		92
Appendix 3: Reported Tasmanian Family Provision Decisions, April 2009 to April 2019		98
Appendix 4: Reported New South Wales decisions involving potential notional estate April 2018 to April 2019.....		101

Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the government, the community, the University and the Institute itself.

The work of the Institute involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other States and the Commonwealth.

The Institute's Director is Associate Professor Terese Henning. The members of the Board of the Institute are Associate Professor Terese Henning (Chair), Professor Tim McCormack (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (appointed by the Attorney-General), Associate Professor Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (appointed at the invitation of the Institute Board), Mr Rohan Foon (appointed by the Law Society of Tasmania), Ms Kim Baumeler (appointed at the invitation of the Institute Board) and Ms Rosie Smith (appointed at the invitation of the Institute Board as a member of the Tasmanian Aboriginal community).

The Board oversees the Institute's research, considering each reference before it is accepted, and approving publications before their release.

The Institute can be contacted by email at Law.Reform@utas.edu.au, or by mail at:

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Background to this Final Report

In December 2016, the then Attorney-General, the Honourable Dr Vanessa Goodwin MLC, wrote to the Institute following an approach by the Treasurer, the Honourable Peter Gutwein MP, about the issue of whether Tasmania should implement the concept of 'notional estate' within existing family provision legislation. The Institute subsequently received a formal reference on this matter

and funding from the Solicitors' Guarantee Fund to undertake the reference. The Institute released an Issues Paper in March 2019, *Should Tasmania Introduce Notional Estate Laws* (Issues Paper No 28), with a call for submissions by 24 May 2019. It produced and published a short video, factsheet and Easy Read summary of the Issues Paper to enhance the availability of accessible information about the review. The Issues Paper and video were published on the Institute's website and announced via social media. The Institute's researcher was interviewed on ABC Radio Hobart and an opinion piece about the review was published in *The Mercury* newspaper on 13 March 2019. Articles also appeared in *The Examiner* newspaper.

Advice of the review was announced to Tasmanian legal practitioners and members on the Law Society of Tasmania's weekly bulletin. The Institute was invited to attend meetings of the Law Society Elder and Succession Law Committee and Family Law Committee. The Institute also obtained approval to write to accountants and financial advisors to inform them of the review and provide them with a flyer that they were invited to distribute amongst their clients and other contacts.

The Institute received 28 written responses and four verbal submissions to the questions asked in the Issues Paper, comprising the views of 67 individuals¹ and two organisations.² The Institute received public submissions from the following respondents:

- The Treasurer, the Honourable Peter Gutwein MP
- Elder & Succession Law Committee of the Law Society
- Litigation Committee of the Law Society
- Family Law Committee of the Law Society
- Mr Robert Young
- Ms Susan Baldock
- Joint submission of Mrs Dorothy Lowe, Mrs Evelyn Jones, Mr Kevin Claridge, Mr Nigel Claridge, Mr Dennis Claridge, Mr Graeme Claridge, Ms Teresa Edwards, Mr Brian Claridge, and Mr Philip Claridge³
- Mr Tony Gray
- Mr Essen Bradbury
- Ms Heather Dunn
- Mr Barry Claridge
- Ms Ann Hamilton
- Ms Phillipa Alexander
- Mr Justin McMullen

¹ These numbers include eight members of the Elder and Succession Law Committee, eight members of the Litigation Committee, nine members of the Family Law Committee, the joint submission lodged by Dorothy Lowe on behalf of her eight siblings, and the joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

² Submissions #1I and #2I.

³ Without intending any disrespect, the Institute refers to this joint submission throughout this report as 'Dorothy Lowe and siblings'.

- Ms Alice Grubb
- Mr Geoffrey Nash
- Mr Steven Bishop
- Ms Nina Hendy
- Joint submission of Ms Christine Schokman, Mr Dexter Marcenko and Mr Michael Flanagan
- Mr Sam McCullough
- Mr James Walker

The Institute thanks all those who responded to the Issues Paper or met with the Institute.

Acknowledgments

This report was prepared for the Board by Mrs Kate Hanslow. The Issues Paper that preceded this Final Report was prepared by Mr Ken Mackie, Dr Elise Histed, Mr Dylan Richards and Mrs Kate Hanslow. Both were edited by Mr Bruce Newey.

The Institute thanks Mrs Nina Hendy, Ms Kimberley Martin and Mr Frank Kennedy who participated in the filming of the Institute's short video about the review. The Institute also thanks Mr Richard Williams of CineStill for producing the video, and Speak Out Tasmania for their preparation of the Easy Read versions of the Issues Paper and this report. The Institute also wishes to acknowledge the assistance and guidance provided by Distinguished Professor Don Chalmers, Professor Gino Dal Pont, Dr David Plater and Professor John Williams.

Terms of Reference

Whether notional estate legislation should be introduced in Tasmania.

List of Recommendations

1. That notional estate laws not be introduced in Tasmania in the absence of nationally uniform family provision laws.
2. That, if notional estate laws are introduced:
 - 2.1 There be a comprehensive public education campaign advising stakeholders of the effect of legislative reform.
 - 2.2 Reforms not operate retrospectively.
 - 2.3 Legislative reform broadly align with Part 3.3 of the *Succession Act 2006* (NSW), subject to any variations made necessary to ensure consistency with existing terminology used in the *Testator's Family Maintenance Act 1912* (Tas) and Recommendation 2.4.
 - 2.4 The term 'relevant property transaction' be limited to acts rather than failures to act.
 - 2.5 The legislative framework incorporates a section consistent with s 95 of the *Succession Act 2006* (NSW) enabling the Supreme Court to approve agreements between eligible claimants about the transfer of assets and relinquishment of claims.
3. That the State Government advance the national debate surrounding nationally uniform family provision legislation via the Council of Attorneys-General or by referring the matter to the Institute to advance through coordination of a national project amongst law reform bodies.
4. That, if nationally uniform estate dispute laws are progressed, this matter be revisited, and, following a full evaluation of the operation of the New South Wales notional estate scheme, the utility of incorporating notional estate provisions within national uniform laws be considered as well as the form that those provisions might take.

Glossary and Abbreviations

Administrator	Someone who obtains a Grant of Letters of Administration from the Supreme Court of Tasmania
BCLI	British Columbia Law Institute
BDBN	Binding death benefit nomination
<i>Donatio mortis causa</i>	Also known as a ‘death bed gift’ ⁴
Elder Law Committee	Elder & Succession Law Committee of the Law Society of Tasmania
Estate	Assets held by the deceased at their death or that are paid to the person’s legal personal representative
EUC	European Union Committee
Executor	Someone appointed under a will to administer the will-maker’s estate
Family provision claim	A claim by an eligible applicant for additional provision from a deceased’s estate under the <i>Testator’s Family Maintenance Act 1912</i> (Tas) (or equivalent laws in other jurisdictions)
<i>FLA</i>	<i>Family Law Act 1975</i> (Cth)
Family Law Committee	Family Law Committee of the Law Society of Tasmania
Grant of Administration	‘A legal document issued under the Seal of the Court which enables the person(s) named as Executor(s) or Administrator(s) to deal with the assets held by the deceased in Tasmania.’ ⁵
Grant of Probate	‘Probate is the process of officially proving the validity of a Will as being the last Will of the deceased. A Grant of Probate is issued when the deceased’s last Will and testament is proved by one or more Executors named in the Will.’ ⁶
Grant of Letters of Administration	A Grant made if a person dies without a will

⁴ There are three elements that must exist for a valid *donatio mortis causa*: ‘(1) the gift must be made in contemplation of the donor’s death, although not necessarily in expectation of death; (2) there must be delivery of the subject matter of the gift to the donee or a transfer of the means or part of the means of getting at the property, or, as has been said, the essential indicia of title; and (3) the gift must be conditional upon it taking effect on the death of the donor, being revocable until that event occurs’: *Public Trustee v Bussell* (1993) 30 NSWLR 111, 115 (Cohen J) quoted in *Hobbes v NSW Trustee & Guardian* [2014] NSWSC 570, [22] (White J). Its effect is to render effective an otherwise imperfect gift: *Hobbes v NSW Trustee & Guardian* [2014] NSWSC 570, [1].

⁵ Supreme Court of Tasmania – Probate and Administration
<https://www.supremecourt.tas.gov.au/probate_and_administration>.

⁶ Ibid.

Intestacy	Where a person dies without a will that gifts the whole of their estate
Legal personal representative	An executor or administrator who obtains a Grant of Administration
Litigation Committee	Litigation Committee of the Law Society of Tasmania
NSWLRC	New South Wales Law Reform Commission
<i>NSW Succession Act</i>	<i>Succession Act 2006</i> (NSW)
NZLC	New Zealand Law Commission
QLRC	Queensland Law Reform Commission
SALRI	South Australian Law Reform Institute
Testator	See ‘Will-maker’
<i>TFM Act</i>	<i>Testator’s Family Maintenance Act 1912</i> (Tas)
The National Committee	National Committee for Uniform Succession Laws
VLRC	Victorian Law Reform Commission
WALRC	Law Reform Commission of Western Australia
Will-maker	A person who makes a will.

Executive Summary

In 1977, the New South Wales Law Reform Commission ('NSWLRC') recommended that New South Wales' estate dispute legislation be reformed to broaden the classes of assets that may be affected by a family provision claim. In response, the New South Wales Government enacted the *Family Provision Act 1982* (NSW) which enables the court to deem certain non-estate assets as 'notional estate' for the purpose of funding successful family provision claims.

Despite the National Committee on Uniform Succession Laws endorsing the New South Wales approach to notional estate laws, it remains the only Australian jurisdiction to have laws that enable the court to utilise non-estate assets to fund provision for successful claimants. The merits of legislation of this type have been considered by the Victorian Law Reform Commission ('VLRC') and South Australian Law Reform Institute ('SALRI'), with SALRI recommending that such laws not be introduced and the VLRC making no recommendation concerning their introduction. In 2016, the former Attorney-General, the Honourable Dr Vanessa Goodwin MLC, requested that the Institute review potential reforms to the *Testator's Family Maintenance Act 1912* (Tas) ('TFM Act') to incorporate notional estate provisions in Tasmania.

The Issues Paper that preceded this report asked a range of questions to gauge the degree of community support or opposition to the introduction of notional estate laws in Tasmania. The Issues Paper stimulated significant community interest, with a range of competing views expressed in the 32 formal submissions received. After conducting its review of the current law, considering the feedback received to questions asked in the Issues Paper and examining the research and developments in other jurisdictions, the Institute concludes that notional estate legislation should not be introduced in Tasmania at this time. The Institute does, however, make several recommendations about what such a scheme should look like if introduced and how future reforms might fit with the broader objective of nationally uniform succession laws.

What are family provision claims?

In Australia, all capable adults are able to make a document (called a will) that outlines what is to happen to their assets (called their 'estate') after their death. There are no fixed amounts that must be left to family members and the person is free to choose how they want their estate dealt with.

Part 1 of this report explains that there is, however, legislation that enables limited classes of people to claim a share (or a larger share) of a person's estate. These are often called 'family provision claims.' In Tasmania, these laws are contained in the *TFM Act*. Those able to make a claim are limited to spouses and children of the deceased (including step-children), or the deceased's parents where they did not have a spouse or child. A person may bring a claim because they were not left anything under a will, or they may consider that what they were provided is not adequate or proper in the circumstances. It is equally possible for someone to challenge their entitlement under intestacy, where statute outlines who is to receive a person's estate where they die without a valid will that distributes the whole of their estate.

A family provision claim is commenced by application to the Supreme Court of Tasmania, which determines a claim if the matter cannot be resolved amongst the parties. The applicant must satisfy

the Court that they have been left without adequate provision for their proper maintenance and support. The Court will consider a range of factors in its discretion, which may include matters like the applicant's need, the size of the estate available, the nature and quality of the relationship between the applicant and the deceased, the competing claims of beneficiaries and any reasons ascertained why the deceased wished to gift their estate as they did. The Court can decline to award provision for an applicant where it determines that they have disintitiled themselves due to their conduct. This might occur, for example, where the applicant has been violent or abusive towards the deceased.

If the Court is satisfied that an applicant satisfies the test outlined in the *TFM Act*, it may order that the applicant receive an amount (or additional amount) from the deceased's estate. The key elements of the *TFM Act* are explained in Part 1.

What assets are able to be claimed?

In all Australian jurisdictions other than New South Wales, a court may only make provision for a successful family provision applicant from the deceased's estate. It is possible for a person who might be considered wealthy to die with very little (if anything) in their estate. This might occur where the person owns property with others as a joint tenant, or where assets are held in trusts. Assets may pass to beneficiaries outside of a person's estate, for example, where superannuation or life insurance proceeds are paid directly to beneficiaries rather than to the person's legal personal representative. A person may also gift assets before their death, with any assets gifted then ceasing to be part of their estate. Those assets that may fall outside a person's estate are outlined in Part 2.

The way people hold their assets may exist for a range of reasons — for example, for asset protection or taxation purposes. Pre-death gifts may be made to reward or compensate individuals who have provided someone with care or assistance. On the other hand, structuring arrangements may be deliberate strategies to reduce or eliminate the risk of challenge to assets after death via a family provision claim. In either case, the effect is to significantly reduce, and sometimes eliminate, the possibility of an applicant receiving further provision from an estate, because there is no estate to claim.

In Tasmania, an applicant must file a family provision claim within three months of a Grant of Administration having been made in the estate, although the Court has discretion to extend this period. If the claim period passes and a legal personal representative has not had notice of any claims, the legal personal representative may commence distributing the estate amongst beneficiaries. The *TFM Act* confirms that assets distributed in these circumstances cease to be part of an estate. These assets are then also unavailable to fund provision for a successful applicant where the Court allows them to make a family provision claim out of time.

Designating non-estate assets as 'notional estate'

Part 3 explains that legislation in New South Wales, and some overseas jurisdictions, is intended to address these circumstances. For example, provisions within the *Succession Act 2006* (NSW) ('NSW *Succession Act*') enable the court to designate assets outside of a person's estate as 'notional estate'. The court can then utilise this notional estate when awarding provision for a successful applicant. These provisions are not dissimilar to laws that apply to bankruptcy, where assets may

be ‘clawed-back’ when they are disposed of within certain timeframes prior to the commencement of a person’s bankruptcy. Similarly, in the family law context, superannuation is considered property of the parties, with the Family Court able to make orders splitting superannuation between partners. In some circumstances, trust assets may also be considered a financial resource of a party for the purposes of family law property orders despite those assets being held in a trust and not owned personally.

Part 4 details the notional estate provisions operating in New South Wales. In broad terms, the New South Wales Supreme Court may only make a notional estate order if an applicant is successful in their claim, and only if there are insufficient assets in the estate to fund the award ordered, or to pay legal costs. Only transactions occurring within three years of death (or that occur upon or after a person’s death) are relevant. The provisions apply equally to acts and omissions. So, if a person fails to do an act — like sever a joint tenancy, or make or change a binding death benefit nomination, or make a distribution from a trust — then those ‘transactions’ may also be captured. Before designating property as notional estate, the Court must consider the importance of not interfering with reasonable expectations in relation to property, the substantial justice and the merits involved, and any other matter it considers relevant.

The New South Wales’ notional estate provisions align with the National Committee for Uniform Succession Laws’ (‘National Committee’) recommendations made in 1997, and subsequent recommendations in 2004. Despite this, New South Wales is the only jurisdiction to have introduced notional estate laws. Some overseas jurisdictions have similar, although not identical, provisions, including parts of the United Kingdom, Canada and the US. The New Zealand Law Commission (‘NZLC’) has endorsed legislative provisions aimed at addressing family provision avoidance although their recommendations have not been enacted in statute.

Notional estate laws enable the court to award provision for successful family provision claimants from a much broader pool of assets than are presently available in Tasmania. On one hand, extending the reach of family provision laws to assets not currently impacted imposes a further restriction on a person’s ability to choose how they want their estate distributed after their death. On the other hand, there is scope for people to structure their affairs in ways that limit the utility of family provision laws which are intended to ensure that a person makes adequate provision for their spouse and children. The recommendations contained in this report aim to reach an appropriate balance between these competing issues.

Conclusions reached in this report

Part 5 of this report outlines and analyses the submissions that the Institute received to its Issues Paper. It concludes by answering the question whether Tasmania should introduce notional estate laws at this time in the negative. Primarily, the Institute’s reasons for reaching that conclusion are:

- that the extent to which meritorious claims are being defeated through assets passing outside a person’s estate has not been clearly demonstrated;
- that, without nationally uniform legislation, a person may structure their affairs to avoid the operation of notional estate laws — meaning that their effectiveness in addressing the issue identified is limited;

- that the effectiveness of the New South Wales notional estate provisions has not been established;
- that most respondents to the Issues Paper supported narrowing the scope of the *TFM Act* rather than expanding its jurisdiction to include non-estate assets;
- that notional estate laws have the potential to have an adverse impact on a large percentage of the population, for example by prolonging the administration of estates and increasing legal costs for legal personal representatives, beneficiaries and parties to family provision litigation; and
- that aggrieved beneficiaries who are unable to pursue assets through a family provision claim may have remedies available to them under other legal doctrines, notably equitable causes of action.

These considerations are canvassed in detail in Part 5. The Institute recommends that discussion around nationally uniform family provision legislation be advanced. The Institute further recommends that decisions about the merit and form of notional estate provisions within model legislation be supported by an evaluation of the effectiveness of the existing New South Wales scheme and research on the need for reform.

As noted in the Issues Paper, the Institute's terms of reference are confined to the question of whether Tasmania should have notional estate laws. It is outside the scope of this report to consider the need for, or desirability of, other changes to the *TFM Act*, other than to consider any changes that may become necessary or desirable if notional estate legislation were introduced.

Part 1

Introduction

1.1 The issue

1.1.1 Australia adopts a ‘freedom of testation’ model, where a person with the necessary capacity to make a will (a ‘will-maker’) is free to make a will that leaves their estate to whomever they wish upon their death. There is no legal obligation to leave any particular amount or share of an estate to a spouse, children or other dependant. Where a person dies without a valid will, legislation sets out how their estate is to be divided amongst family members.⁷

1.1.2 All states and territories, however, have legislation that allows a court to make provision (or additional provision) for an eligible applicant where the court determines that a will, or the effect of intestacy laws, does not make adequate provision for that applicant’s proper maintenance and support.⁸ In Tasmania, these laws are contained in the *Testator’s Family Maintenance Act 1912* (Tas) (*TFM Act*). Claims are commonly known as ‘family provision’ or ‘TFM’ claims.

1.1.3 Only those assets that are part of the deceased’s ‘estate’ can be used to fund a successful claim.⁹ Broadly speaking, this includes assets that the deceased possessed or was entitled to at their death.¹⁰ There are many instances where assets that might be viewed as the deceased’s are not, in fact, part of their estate. This includes assets owned with others as a joint tenant, assets held in trusts and, in some instances, superannuation or the proceeds of a life insurance policy. A person may also validly gift assets prior to death with the effect that they then cease to form part of their estate. It is immaterial whether or not those gifts or arrangements are made prior to death with the intention of defeating a potential family provision claim.

1.1.4 Legislation in New South Wales enables the court to deem assets outside of an estate as ‘notional estate.’¹¹ The court may then use this notional estate to fund provision for a successful family provision applicant. Some other countries have similar legislation that enables the court to ‘clawback’ assets so that they may be used to fund awards for successful claimants. It is in this broad legislative context that the Institute conducted the reference provided by the government.

⁷ In Tasmania, these laws are contained within the *Intestacy Act 2010* (Tas) (*Intestacy Act*).

⁸ *Testator’s Family Maintenance Act 1912* (Tas) (*TFM Act*); *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW) Pt 3.2 (*NSW Succession Act*); *Family Provision Act 1970* (NT); *Succession Act 1981* (Qld) Pt 4; *Inheritance (Family Provision) Act 1972* (SA); *Administration and Probate Act 1958* (Vic) Pt IV; *Family Provision Act 1972* (WA).

⁹ *TFM Act* (n 8) s 3(1).

¹⁰ The *Probate Rules 2017* (Tas) require those applying to the Court for a Grant to file an inventory of the estate with their application: r 35(1). That inventory must contain details of ‘the real and personal estate which the deceased possessed, or was entitled to, at the time of his or her death’: r 35(2)(a).

¹¹ *NSW Succession Act* (n 8) Pt 3.2.

1.2 Report structure

1.2.1 The purpose of this report is to evaluate whether Tasmania should amend the *TFM Act* to incorporate notional estate provisions.

1.2.2 The report comprises five parts. Part 1 summarises the history of succession laws and the introduction of family provision legislation. It outlines the family provision legislation operating in Tasmania under the *TFM Act* and explains those assets available for successful applicants. This part continues by highlighting the interrelationship and differences between claims under the *TFM Act* and other claims that may be pursued against estate and non-estate assets, particularly claims in equity.

1.2.3 Part 2 frames the issue by identifying those assets unable to be claimed as part of a family provision claim under the *TFM Act*. Part 3 then introduces the concept of a ‘notional estate’, and details the consideration and development of notional estate-style provisions in some jurisdictions overseas. This part also outlines the outcomes of other reviews that have evaluated the potential introduction or use of notional estate provisions in Australia.

1.2.4 Part 4 details the development and scope of notional estate provisions contained within Part 3.3 of the *Succession Act 2006* (NSW) (‘NSW *Succession Act*’). Part 5 then outlines and considers submissions that the Institute received in response to the questions asked in the Issues Paper about the merits of introducing notional estate provisions in Tasmania. It concludes by recommending against the introduction of a notional estate scheme in Tasmania at this time. However, it also outlines proposed approaches that could be implemented if legislative reform is progressed, including through nationally uniform legislation.

1.3 Freedom of testation and the development of family provision laws

1.3.1 The law of succession in Australia is based on liberal views of the rights of ownership and possession of private property developed in the 19th century.¹² The basic argument was that testamentary freedom was a consequence of individual property rights. It followed that there should be no automatic right for individuals to inherit. This approach contrasts with most civil law countries which feature partial forced succession laws, where immediate relatives of the deceased are entitled to certain shares of an estate of which they may not be deprived. Freedom of testation then rests only with that part of the estate not subject to the shares.

1.3.2 The ability of a will-maker to leave his or her property to whomever pleased him or her was the dominant doctrine in the common law world for about 200 years before the twentieth century.¹³ Due to increasing concerns that complete testamentary freedom meant that will-makers could entirely ignore the claims of dependants (typically wives and minor children), the early

¹² See for example John Stuart Mill, *Principles of Political Economy* (Longman, 1848) Ch 2.

¹³ Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 2014) 13–14. Emeritus Professor Rosalind Croucher AM is at the time of writing the President of the Australian Human Rights Commission and former President of the Australian Law Reform Commission.

twentieth century saw the introduction of legislative intervention to protect those dependants. The original suggestions for reform were for the adoption of a mixed system of testate and universal succession, with fixed shares devolving on a will-maker's wife and/or children.¹⁴ Eventually, however, that system was considered to be too inflexible and rigid and the solution adopted by all Australian jurisdictions was to vest the courts with a discretionary power to award provision where the circumstances were appropriate.

1.3.3 The first legislation of this type was enacted in New Zealand with the passing of the *Testator's Family Maintenance Act* in 1900. All Australian state and territory jurisdictions followed suit: Victoria in 1906, Tasmania in 1912, Queensland in 1914, New South Wales in 1916, South Australia in 1918, Western Australia in 1920 and both the Australian Capital Territory and the Northern Territory in 1929.¹⁵ Similar legislation was passed in England in 1938.¹⁶ The focus of the earlier law was upon the protection of widows, as exemplified by the parliamentary remarks of the Attorney-General of New South Wales preceding the introduction of the original New South Wales Act of 1916:

It is remarkable that in Australia, where the rights of women have developed as rapidly as the matter of property, we have wiped out whatever right a woman has in the estate of her husband. The dower which existed here for many years exists no longer. It was abolished in the year 1890 and today a man may leave the whole of his property both real and personal, to any stranger to whom he chooses to leave it. The wife may have been with him a partner for forty or fifty years. She may have assisted him in acquiring whatever wealth he possesses, yet he, dying, may will the property away and leave her dependent on the kindness of friends or the charity of the state. During his lifetime he cannot do that, for it is incumbent on him to maintain his wife. The object of the Bill is to secure that after her husband's death the right of the wife to get sufficient from his estate to maintain her shall continue, and the right of his children shall be equally preserved.¹⁷

1.3.4 As is evident in this statement, the original legislation was directed at the protection of women, along with the children of a marriage.¹⁸ Those individuals were likely to be financially

¹⁴ John De Groot and Bruce Nickel, *Family Provision in Australia* (Lexis Nexis Butterworth, 4th ed, 2012) 3–4.

¹⁵ *Widows and Young Children Maintenance Act 1906* (Vic); *TFM Act* (n 8); *Testator's Family Maintenance Act 1914* (Qld); *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW); *Testator's Family Maintenance Act 1918* (SA); *Guardianship of Infants Act 1920* (WA); *Administration and Probate Ordinance 1929* (ACT); *Testator's Family Maintenance Ordinance 1929* (NT).

¹⁶ *Inheritance (Family Provision) Act 1938* 1 & 2 Geo 6, c 45. For a brief history of family provision law see Gino Dal Pont and Ken Mackie, *Law of Succession* (Lexis Nexis Butterworth, 2nd ed, 2017) [15.5]–[15.8].

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 August 1916, 578 (D R Hall, Attorney General and Minister for Justice).

¹⁸ Lord Justice Simon, for example, has commented that the intention of family provision was 'to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance.': *Schaefer v Schuhmann* [1972] AC 572, 596, cited in *Barns v Barns* (2003) 214 CLR 169, 173, [2] (Gleeson CJ). Croucher has made similar comments: 'Family provision legislation is *not*, as its name suggests, family provision legislation. It was cast as family maintenance legislation within strict confines. And it was cast from the perspective of the testator. It did not impose a restriction upon testamentary freedom, except in a broad, minimally corrective sense.': Rosalind Croucher, 'Contracts to Leave Property by Will and Family Provision after *Barns v Barns* (2003) 196 ALR 65 — Orthodoxy or Aberration?' (2005) 27(2) *Sydney Law Review* 263, 282.

dependent on their husbands and have limited prospects to earn an income.¹⁹ Over time, however, the categories of eligible applicants have been expanded. Justice Callinan in *Barns v Barns*²⁰ commented upon the widening of family provision legislation since its inception, quoting the following passage from *White v Barron*:²¹

From time to time the enactments have been amended, almost always in the direction of wider access to the relief which the legislation affords. This has no doubt occurred in response to the pressures created by social change.²²

1.3.5 Any future reform to family provision legislation should consider its purpose and intent within contemporary society.²³ Former Queensland Supreme Court Judge, Justice Atkinson, has said the following about the policy behind family provision legislation and its relevance to future law reform:

The law of family provision has two broad objectives: to allow substantial testamentary freedom in the disposition of property and to ensure that those with a legitimate moral claim on the estate are adequately provided for. Law reform must seek to find an appropriate balance between these two often competing objectives, in light of changing societal circumstances. In addition, law reform should seek to reduce the number of opportunistic claims, while ensuring that those with legitimate claims are not improperly excluded and to reduce the complexity created by the different regimes in the various states and territories.²⁴

1.4 The *Testator's Family Maintenance Act 1912 (Tas)*

1.4.1 Legislative provisions enabling certain family members to claim further provision from an estate in Tasmania are contained within the *TFM Act*.²⁵ It is the Supreme Court of Tasmania that has jurisdiction to hear and determine claims under the *TFM Act*.

1.4.2 The following classes of people are eligible to make a claim:

- a spouse (defined to include a person in a significant relationship with the deceased at the date of their death within the meaning of the *Relationships Act 2003 (Tas)*);²⁶

¹⁹ Malcolm Voyce, 'Family Provision, the Family Farm and Rural Patriarchy: Three Actors in Search of a Play' (2014) 19 *Deakin Law Review* 347, 353.

²⁰ *Barns v Barns* (2003) 214 CLR 169.

²¹ *White v Barron* (1980) 144 CLR 431, 439[7] (Stephen J).

²² *Barns v Barns* (2003) 214 CLR 169, 212 [132] (Callinan J).

²³ Rosalind Croucher, 'Conflicting Narratives in Succession Law – A Review of Recent Cases' (2010) 14(2) *Australian Property Law Journal* 179, 189–190.

²⁴ Justice Roslyn Atkinson, 'Family Provision in Australia: Addressing Interstate Differences and Family Provision Law Reform' (Speech, Queensland Law Society Conference on Family Provision, 25 July 2014) 18.

²⁵ *TFM Act* (n 8).

²⁶ *Ibid* s 2(1) definition of 'spouse'.

- children, including an adopted child, step-child²⁷ and surrogate child;²⁸
- parents, where the person dies without a spouse or children; and
- a former spouse if they were receiving, or entitled to receive, maintenance from the deceased at their death.²⁹

1.4.3 In some jurisdictions, the classes of those eligible to apply for provision are more expansive and can include a person partly or wholly dependent on the deceased,³⁰ a person living in a close personal relationship³¹ with the deceased at their death,³² and grandchildren³³ and siblings³⁴ in limited circumstances.

1.4.4 An application must be filed with the Court within three months of the date of a grant of administration being made in the estate, although the Court may grant an extension of this time in its discretion.³⁵

1.4.5 Section 3 outlines the test that the Court must apply when determining the merits of a claim. The section provides a threshold jurisdictional question requiring the Court to be satisfied that a deceased's will or intestacy provisions have left an applicant 'without adequate provision for his proper maintenance and support'.³⁶ If, and only if, that condition is satisfied may the Court embark on the discretionary question as to whether provision should be made, and if so, to what extent.³⁷

1.4.6 Courts have made it clear that the words 'adequate' and 'proper' establish independent tests as to eligibility. 'Adequate' relates to the actual needs of the applicant, but 'proper' is a matter that can only be determined having regard to all the circumstances of the case.³⁸ The *TFM Act* provides that, when assessing the merits of a claim, a judge may have regard to:

- the net value of the estate;³⁹
- the financial resources of the applicant;⁴⁰ and

²⁷ Defined to mean a child of the parent's spouse, and a child whose natural parent was the spouse of that person at the time of the natural parent's death: *ibid*, s 2(1) definition of 'stepchild'.

²⁸ *Ibid* definition of 'child'.

²⁹ *Ibid* s 3A.

³⁰ *Succession Act 2006* (NSW) s 57(1)(e); *Administration and Probate Act 1958* (Vic) s 90, definition of 'eligible person', s 91(2)(b); *Succession Act 1981* (Qld) ss 41(1), 40 (definition of 'dependant').

³¹ Defined to mean 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: *Succession Act 2006* (NSW) s 3(3).

³² *Ibid* s 57(1)(f).

³³ *Administration and Probate Act 1958* (Vic) s 90, definition of 'eligible person'; *Family Provision Act 1969* (ACT) ss 7(1)(e), 7(3); *Family Provision Act 1972* (WA) s 7(1)(d); *Inheritance (Family Provision) Act 1972* (SA) s 6(h); *Family Provision Act 1970* (NT) ss 7(1)(e), 7(3).

³⁴ *Inheritance (Family Provision) Act 1972* (SA) s 6(j).

³⁵ *Ibid* s 11.

³⁶ *Ibid* s 3(1).

³⁷ This is the so-called 'twin tasks' approach. See *Singer v Berghouse* (1994) 181 CLR 201, 15 (Mason CJ, Deane and McHugh JJ).

³⁸ *Bosch v Perpetual Trustee Co Ltd* (1938) AC 463.

³⁹ *TFM Act* (n 8) s 7.

⁴⁰ *Ibid*.

- the deceased's reasons, so far as they are ascertainable, for making the dispositions in their will, or for not making any provision or further provision.⁴¹

1.4.7 The Court may refuse to make an order where the character or conduct of the applicant disentitles him or her to the benefits of an order.⁴²

1.4.8 Whilst the *TFM Act* does not list other factors, the following matters may be considered when assessing the merits of a claim:

- the financial responsibilities of the applicant;
- the applicant's age and health;
- the nature and quality of the relationship between the applicant and the deceased;
- services rendered to the applicant by the deceased;
- any benefits that the applicant or beneficiaries received from the deceased during his or her life; and
- the competing moral and financial claims of the beneficiaries, including the duty of the deceased to provide for other members of the family.

Property available to satisfy a family provision claim

1.4.9 Section 3(1) of the *TFM Act* provides that any order of the Court is restricted to the estate of the deceased. As Dal Pont and Mackie state: 'Provision can therefore be made only out of the property that the deceased beneficially owned at the time of death and that passes to the deceased's personal representative, less the liabilities of the estate'.⁴³ The High Court has defined the concept of an 'estate' as follows:

assets of which the testator might at his death dispose and which have come or could come to the hands of the personal representative by reason of the grant of probate or letters of administration.⁴⁴

1.4.10 Assets within a person's estate might include:

- real property or other assets owned solely or owned with others as a tenant in common;
- cash or investments held in sole accounts;
- chattels or personal items owned solely, for example jewellery, art or antiques;
- shares owned by the deceased personally;
- debts owed to the deceased personally;
- superannuation that is paid to the deceased member's legal personal representative;
- the proceeds of a life insurance policy paid to a legal personal representative; and
- any funds in a beneficiary loan account of the deceased's within a trust.

⁴¹ Ibid s 8A.

⁴² Ibid s 8.

⁴³ Dal Pont and Mackie (n 16) [20.3]. See also *Barns v Barns* (2003) 214 CLR 169, 174 [7].

⁴⁴ *Easterbrook v Young* (1977) 136 CLR 308, 318.

1.4.11 Part 2 explains the assets that fall, or may fall, outside a person's estate and are therefore not available to the Court when awarding provision for a successful applicant.

1.4.12 There are certain scenarios where assets gifted prior to death or at death may still be available in the context of family provision claims. These are explained in the following paragraphs.

Property subject to contract: testamentary promises

1.4.13 Sometimes will-makers may make contracts with third parties in which they agree to gift their property in certain ways under their will. A common example is agreements between spouses to make their wills in certain ways.

1.4.14 In *Barns v Barns*,⁴⁵ the High Court held that property the subject of a contract between parties for one to make their will in a certain way was available to satisfy an order under family provision legislation. The effect of the decision is that a will-maker is unable to quarantine assets from risk of a family provision claim by entering into an agreement with someone to make certain gifts in their will. Gifts made in a will in compliance with a mutual wills agreement may still be used to fund provision for successful family provision applicants, subject to the court retaining its discretion in relation to which assets should bear the burden of an order.⁴⁶

Transfers subject to unconscionability or undue influence

1.4.15 Assets that a person validly transfers or gifts before their death fall outside their estate and cannot be claimed via a family provision claim. There are, however, circumstances where a transaction may be set aside, with the result that the asset will revert to the deceased's estate. This might occur, for example, where:

- the deceased entered into an agreement without the necessary capacity to do so;
- the deceased entered into the transaction subject to undue influence⁴⁷ or fraud; or
- the transaction was subject to unconscionability.⁴⁸

⁴⁵ *Barns v Barns* (2003) 214 CLR 169.

⁴⁶ *TFM Act* (n 8) s 3(2).

⁴⁷ Undue influence is described as 'an ascendancy by the stronger party over the weaker party such that the relevant transaction is not the free, voluntary and independent act of the weaker party. In other words, it is the actual or presumed impairment of the judgment of the weaker party that is the critical element in the grant of relief on the ground of undue influence': Sir Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27 *Anglo-American Law Review* 1, 6–8, cited in *Bridgewater v Leahy* (1998) 194 CLR 457, 478 [75].

⁴⁸ Unconscionability, as distinct from undue influence, has been described as follows: 'Unconscionable conduct, as the term suggests, focuses more on the unconscientious conduct of the defendant. As a ground of relief in England unconscionable conduct has been confined largely to "catching bargains" with expectant heirs and others in particular categories of disadvantage eg those who are illiterate. ... In Australia, it has been recognized that unconscionable conduct is a ground of relief which will be available "whenever one party by reason of some condition or circumstance is placed at a special disadvantage *vis-à-vis* another and unfair or unconscientious advantage is taken of the opportunity thereby created": Mason, (n 47) 6–8, cited in *Bridgewater v Leahy* (1998) 194 CLR 457, 478 [75].

1.4.16 For example, in *Bridgewater v Leahy*,⁴⁹ an uncle sold a portion of his property to his nephew for its true value, but by deed forgave a substantial portion of the debt. The nephew also benefitted under his uncle's will by being given the option to purchase his rural property substantially under value. Following the uncle's death, his widow and daughters applied to have the transaction set aside. The majority of the court held that the deceased was in a disadvantaged position when the deed was signed, having an emotional attachment and dependency on the nephew. The nephew had taken advantage of this to secure the benefit. The transaction was therefore set aside.

1.4.17 As this case illustrates, transactions that a deceased entered into before their death either at a time when they did not have the ability to understand the transaction, or were unduly influenced, may already be addressed through existing remedies. Introduction of notional estate legislation would not affect this situation.

⁴⁹ (1998) 194 CLR 457.

Part 2

Property Falling Outside Family Provision Claims

2.1 Introduction

2.1.1 Part 1 explained the development and operation of the *TFM Act*. It was noted that certain assets fall outside a person's estate and therefore may not be used to fund provision for a successful applicant under the *TFM Act*. This part provides additional detail to explain those assets that are excluded from family provision claims and the circumstances in which they are excluded. It is these assets and circumstances that notional estate provisions are intended to address.

2.2 Pre-death gifts and transfers

2.2.1 The present law provides scope for potential family provision claims to be defeated through a person removing property from their estate, for example transferring or gifting away their assets prior to death. If a gift is effective,⁵⁰ the Court does not have jurisdiction in respect of that property (except in limited situations⁵¹) as it does not constitute the 'estate' of the deceased.

2.2.2 The Issues Paper provided the following example of such a scenario:

Example:

Mr Smith has three adult children. His only substantial asset is a dairy farm at Deloraine. His daughter helps with the farming operations as well as living with Mr Smith and assisting him with domestic tasks. Mr Smith does not have a close relationship with his two sons who live interstate.

Mr Smith wants his daughter to take over the farm on his death. He is adamant that he does not want the farm to be sold and is worried that this might happen if his sons were to claim a share of his estate after his death.

Mr Smith therefore decides to transfer (gift) the farm to his daughter during his life. The effect is that, on Mr Smith's death, the farm does not form part of his estate. It is unable to be claimed by his sons via a family provision claim.

2.2.3 It is irrelevant whether a gift was made with the purpose of defeating a potential claim.⁵²

⁵⁰ Refer to [1.4.15]-[1.4.17] in relation to when gifts may be ineffective.

⁵¹ See [5.6.11] for discussion of family law contexts and [5.5.59] for a summary of the application of equitable doctrines.

⁵² There are many authorities but see *Re Richardson* (1920) SALR 24, 40.

2.3 Joint tenancy assets

2.3.1 Property held jointly with another person may be held in a ‘joint tenancy’ form of ownership or a ‘tenancy in common’ form of ownership. Each are treated differently. Co-owned assets held as joint tenants do not form part of a person’s estate, whilst interests held jointly as tenants in common do form part of an estate.

2.3.2 The legal effect of joint tenancy ownership is to automatically vest a co-owner’s interest in the property in the surviving co-owner. This is called a right of survivorship. As a result, a co-owner’s interest in property held as a joint tenant is not an asset that can be gifted via their will or dealt with under intestacy. The effect is that a deceased’s interest in a joint tenancy asset falls outside of the pool of assets from which provision can be made for a successful applicant under the *TFM Act*.

2.3.3 This situation is in contrast to a tenancy in common form of ownership where one co-owner’s share does not automatically vest in a surviving co-owner upon death. Each co-owner holds a distinct share that then forms part of their estate upon their death.

2.3.4 The Issues Paper explained the effect of joint tenancy ownership upon family provision claims using the following example:

Example:

Lucinda and Gary commence a relationship in their sixties. Both have children from previous relationships. Lucinda owns a house at Smithton in her sole name which she received from her late husband’s estate.

Lucinda wants to make a will that leaves the property to Gary.

Lucinda learns that her children will be able to challenge a gift of the house to Gary in her will. She also learns that, if the property was held by them as joint tenants, Gary will automatically receive it and it will not form part of Lucinda’s estate and be able to be challenged. She therefore decides to transfer the house so that she and Gary own it as joint tenants.

On her death, Lucinda’s children are unable to claim any share of the house under the *TFM Act* as Gary automatically receives the property as the surviving joint tenant.

2.3.5 The High Court case of *Calvert v Badenach*⁵³ demonstrates this issue. In that case, the Court considered whether a lawyer preparing a will was negligent for failing to advise his client about options to structure his estate in order to reduce the risk or impact of a family provision claim. At first instance, Chief Justice Blow explained:

The testator could have arranged his affairs during his lifetime so that the assets of the estate available to satisfy a claim under the *TFM Act* were worth far less than \$200,000.⁵⁴ His principal assets were his interests in two properties on the Tasman Peninsula. He and

⁵³ See *Badenach v Calvert* (2016) 257 CLR 440.

⁵⁴ This was the amount that the deceased’s daughter was ultimately awarded following making a family provision claim: see *Doddridge v Badenach* [2011] TASSC 34.

the plaintiff owned each property as tenants in common in equal shares. If he had made arrangements for the plaintiff and himself to hold both properties as joint tenants then, when he predeceased the plaintiff, those properties would have ceased to form part of his estate. There are no 'notional estate' provisions in the TFM Act. Similarly, he could have given or transferred other assets to the plaintiff before he died, placing them out of reach for the purposes of the TFM Act. He was terminally ill when he gave the solicitor instructions for his last will, and the solicitor knew that.

The plaintiff contends that the solicitor and his firm were negligent in that they (a) failed to advise the testator of the risk of the daughter making a claim under the TFM Act, and (b) failed to advise him of the options available for him to arrange his affairs so as to reduce or extinguish his estate, so as to avoid or partly avoid any claim which could disturb his testamentary wishes.⁵⁵

2.3.6 In summary, had the deceased entered into arrangements to transfer ownership of properties to a joint tenancy ownership, they would have been unavailable to satisfy the ultimately successful claim for provision.⁵⁶

2.3.7 Joint bank accounts have the same effect as joint tenancy property.

2.4 Superannuation

2.4.1 Superannuation can be a substantial asset of an individual. The Australian Prudential Regulation Authority ('APRA') reports that there were \$2.7 trillion in superannuation assets in Australia at 30 June 2018.⁵⁷ The average account balance was \$69,807.⁵⁸ An individual may also hold life insurance within superannuation, with it being estimated that 13.5 million Australians have a life insurance policy within super,⁵⁹ comprising more than 70 per cent of the life insurance policies in Australia.⁶⁰

2.4.2 The treatment of a person's superannuation upon their death depends on several factors including the rules of the fund in which it is held and any binding nominations made by the member effective upon their death. Depending on these factors, a person's superannuation death benefits may or may not form part of their estate. It may not form part of a person's estate if, for example, they have made a valid and effective⁶¹ binding death benefit nomination that directs all of their death benefits to a beneficiary, for example to a spouse or other dependant.

⁵⁵ *Calvert v Badenach* [2014] TASSC 61, [3]–[4] (Blow CJ).

⁵⁶ See *Doddridge v Badenach* [2011] TASSC 34.

⁵⁷ APRA, *Statistics: Annual Superannuation Bulletin* (June 2018, Reissued 22 January 2019) 6.

⁵⁸ *Ibid* 8.

⁵⁹ Metlife Insurance Limited, *Insurance Inside Super: A detailed report into members' awareness, attitude and engagement with Insurance Inside Super* (2018).

⁶⁰ Michael Easson, 'Super changes could leave thousands without enough superannuation', *Sydney Morning Herald* (Sydney, 2 September 2018).

⁶¹ Where the nomination complies with the rules of the particular fund and superannuation legislation.

2.4.3 Death benefits that a fund pay directly to beneficiaries fall outside of the purview of a claim under the *TFM Act*. It is only death benefits that are paid to a deceased's legal personal representative that become available for use to fund successful claims.

2.4.4 The Issues Paper gave the following illustrative example:

Example:

Barry has superannuation with the ABC Superannuation Fund with \$450,000 in his member account. He wants his five children to receive his superannuation when he dies and does not want any of it to be claimed by his partner.

Barry completes a binding death benefit nomination that directs all of his superannuation to his five children equally. The nomination means that, on his death, Barry's super must be paid to his children, which is what the fund ultimately does. His partner is unable to claim provision from any of the superannuation when making a family provision claim under the *TFM Act*.

2.5 Proceeds of a life insurance policy

2.5.1 The way that the proceeds of a life insurance policy are treated is similar to the position in relation to superannuation. In summary, the proceeds of a life insurance policy are paid according to the details of the policy — who the account holder is and any beneficiaries nominated.

2.5.2 Proceeds of a life insurance policy paid to a person's legal personal representative form part of their estate and are available for challenge under the *TFM Act*. Proceeds of a life insurance policy that are paid directly to a nominated beneficiary fall outside of the person's estate and are not available to satisfy successful family provision claims.

2.5.3 The Issues Paper gave the following hypothetical scenario:

Example:

Jenny takes out a life insurance policy to ensure that there will be enough money for her daughter, Tamika, to complete her education if Jenny were to die young. Jenny does not want there to be any possibility that the proceeds of the policy could be paid to anyone else and wants them used solely for Tamika's benefit.

Jenny therefore nominates Tamika as the beneficiary of her life insurance policy. The effect is that the life insurance company must pay the proceeds to Tamika and they are unable to be affected by any claim that might be made under the *TFM Act*.

2.6 Trust assets and property the subject of a power of appointment

2.6.1 Assets held within a trust, for example a family trust, do not form part of a person's estate with the exception of any beneficiary loan account the deceased has within the trust.⁶²

2.6.2 A will-maker may have a controlling role in relation to a trust, for example as a trustee, appointor, protector or guardian. In many instances, the terms of a trust deed give the trustee broad discretion about the treatment of income and capital. A trustee may, for example, have power to distribute income and/or capital to themselves as a beneficiary. If they were to make such a distribution, then the amount received would become part of their estate.⁶³

2.6.3 Despite a person having had effective control of a trust during their life, including the ability to appoint income and capital to themselves as a beneficiary, the assets of that trust are not part of their estate. The trust's assets may not, therefore, be used to fund provision for a successful family provision applicant.

2.6.4 The terms of a trust deed may also give individuals the ability to appoint a successor controller of the trust by deed or by will. When a will-maker exercises their power of appointment in their will, the property appointed is not part of their estate.

2.6.5 The following example was given in the Issues Paper to demonstrate this type of scenario:

Example:

Mr Nguyen is the sole appointor and trustee of the Nguyen Family Trust. The trust has in excess of \$1 million net assets. Despite having terminal cancer and knowing of his imminent death, Mr Nguyen does not appoint any capital of the trust to himself as a beneficiary. The \$1 million of net assets therefore remain within the trust following his death.

The Trust Deed sets out how Mr Nguyen can pass control of the trust to successors in the event of his death. Before his death, Mr Nguyen exercised this power by including a clause in his will which nominated Mrs Nguyen.

Mr Nguyen's children are worried because they have no guarantee that they will receive any distributions from the trust. The terms of the trust give the trustee a broad discretion in relation to decisions about distributions of income and capital. Mr Nguyen's children are unable to claim any of the assets held in the Nguyen Family Trust if they decide to bring a family provision claim against Mr Nguyen's estate.

⁶² The case of *Estate Grundy; La Valette v Chambers-Grundy* [2018] NSWSC 104 provides an example of circumstances where trusts and companies owed debts to the deceased and which comprises assets of his estate and available for the family provision claimant to seek: see at [66].

⁶³ See discussion of Justice White in *Sam Wardy v Gordon Salier & Anor; William Wardy v Gordon Salier & Anor; Hassiba Wardy v Estate of late Edmond Wadih Wardy, developer and Ch 3 of the Succession Act 2006 & Anor* [2014] NSWSC 473 ('Wardy') where it was held that the deceased's omission to appoint the assets of a trust to himself during his life was covered by NSW notional estate provisions, enabling the assets of the trust to be considered as part of the deceased's 'notional estate'.

2.7 Estate assets distributed from an estate

2.7.1 Assets that were within an estate, but that a legal personal representative distributed prior to the making of a family provision claim, may also be excluded from a family provision claim.

2.7.2 The *TFM Act* requires a family provision claim to be filed with the Court within three months of the grant of administration.⁶⁴ Section 11(4) provides that any application seeking an extension of this time limit must be made before the estate has been fully distributed.⁶⁵ It states:

An application ... shall be made before the final distribution of the estate of the deceased person, and no distribution of any part of the estate made before the making of an application ... shall be disturbed by reason of that application or of any order made thereon or in consequence thereof.

2.7.3 This was the situation that arose in *Williams v Williams*.⁶⁶ This case involved an application by a surviving spouse which was made after the expiry of the three month claim period. In the meantime, the executors had distributed the main asset in the estate, property at St Helens worth about \$650,000, in accordance with the terms of Mr Williams' will.

2.7.4 Whilst the Court approved the applicant's claim being made out of time,⁶⁷ it was confirmed that, as a consequence of s 11(4) the *TFM Act*, the distribution of the St Helens property could not be disturbed for the purpose of making provision for the applicant.⁶⁸ This significantly reduced the pool of assets from which additional provision could be made for the spouse.

2.7.5 The courts have made clear, however, that where an executor or administrator distributes an estate prematurely or with notice of a claim, the court may make orders requiring a representative to restore assets to an estate. By way of illustration, in the case of *Soens v Rathborne*,⁶⁹ Justice Hallen quoted the following statement by Chief Justice Young:

I wish to make it quite clear that in my view that where there has been a premature distribution of the estate the Court is not obliged to consider questions of notional estate, but would make an order that the executors personally restore the money which they have taken into the estate with interest and then make an order out of the augmented actual estate.⁷⁰

2.7.6 There thus remains scope for the court to restore assets to an estate where they have been distributed improperly. In that instance, those assets would remain available to fund claims under the *TFM Act*.

⁶⁴ *TFM Act* (n 8) s 11(1).

⁶⁵ *Ibid* s 11(4). See also *Easterbrook v Young* (1977) 136 CLR 308.

⁶⁶ *Williams v Williams* [2018] TASSC 19. See also *Williams v Williams (No 2)* [2018] TASSC 61.

⁶⁷ *Williams v Williams* [2018] TASSC 19.

⁶⁸ See *Williams v Williams (No 2)* [2018] TASSC 61, [5].

⁶⁹ [2018] NSWSC 302 (14 March 2018).

⁷⁰ *Soens v Rathborne* [2018] NSWSC 302, [47] (Hallen J), citing *Ernst v Mowbray* [2004] NSWSC 1140, [65].

2.8 Conclusion

2.8.1 As the analysis in this part illustrates, potential family provision claims may be defeated, or at least the assets at risk reduced, based upon the way that a person structures and deals with their assets during their life.

2.8.2 In response to this circumstance, New South Wales and some overseas jurisdictions have enacted notional estate provisions (however called) within family provision legislation. These provisions enable assets to be treated as though they comprised part of a person's estate for the purpose of awarding provision to a successful family provision claimant. The development of these 'notional estate' laws are explained in Part 3. The New South Wales framework is explained in more detail in Part 4.

Part 3

Development of Notional Estate Laws

3.1 Introduction

3.1.1 Preceding parts of this report have summarised the development of family provision laws and explained those assets that may be claimed as part of a family provision claim in Tasmania. This part explains the development of notional estate laws in other jurisdictions which are broadly framed as ‘anti-avoidance’⁷¹ mechanisms to eliminate, or at least substantially reduce, the ability for individuals to defeat family provision claims by removing assets from challenge. New South Wales is the only jurisdiction in Australia to enact notional estate laws. However, consideration has been given to their introduction in relation to joint tenancy properties in Western Australia. Their enactment has been rejected in Victoria and South Australia. Internationally, they have been considered in New Zealand and Scotland, and implemented in a more limited form in parts of the United Kingdom, Canada, and the United States. This part details both the debate that has occurred and the approach subsequently taken in the United Kingdom, Scotland, Canada, New Zealand and the United States as well as the debate and approach in Victoria, South Australia and Western Australia. Because New South Wales is the only jurisdiction to enact notional estate laws in Australia, the legislation there is given separate and detailed consideration in Part 4 of this report.

3.2 England and Wales

3.2.1 The Law Commission (England & Wales) reviewed family provision laws in England during the 1970s, publishing its final report in 1974.⁷² The Commission’s review examined two types of transactions intended to defeat claims: the disposal of property during a person’s life and contracts to leave property by will.⁷³ It concluded that it was necessary to enact legislative provisions to prevent will-makers removing assets from risk of challenge in order to protect dependants and to discourage individuals from prejudicing dependants.⁷⁴ The Commission observed that similar provisions already existed under family law to deal with situations where individuals transfer or dispose of assets with the intention of defeating a claim.⁷⁵ Whilst it noted the potential interference with a person’s freedom to dispose of their assets as they please, and the

⁷¹ See description of the Queensland Law Reform Commission (‘QLRC’), *Report to the Standing Committee of Attorneys General on Family Provision* (Miscellaneous Paper 28, December 1997) ch 6.

⁷² Law Commission (England & Wales), *Family Law Second Report on Family Property: Family Provision on Death* (Law Com No 61, July 1974).

⁷³ *Ibid* Part V.

⁷⁴ *Ibid* [191].

⁷⁵ *Ibid* [192].

potential uncertainty created for third parties, it concluded that ‘it is a matter of overriding importance to ensure that family provision laws are effective.’⁷⁶

3.2.2 The Commission ultimately recommended that legislation provide the court with broad powers to deal with circumstances where a deceased has, within six years of their death,⁷⁷ entered into a transaction with the intention of defeating a potential family provision claim. It recommended that the court only be empowered to clawback assets where the recipient of the property (including money) has not given full valuable consideration in return. It proposed that the court be required to consider all of the circumstances before making an order, including the circumstances in which a disposition was made, any consideration given and the conduct and financial resources of the recipient and their relationship with the deceased.⁷⁸

3.2.3 The Commission separately considered the issue of joint tenancy assets, the proceeds of life insurance policies and pension fund benefits.

3.2.4 In relation to the question of whether joint tenancy assets should be available to satisfy family provision claims, the Commission recommended that a deceased’s severable share should be considered part of their net estate, if the court considers it just in the circumstances.⁷⁹ However, in order provide some degree of certainty to co-owners, it proposed that legislation only enable joint tenancy properties to be included in the pool of available assets where a family provision claim is made within six months of the date of the grant of representation and that there should be no ability for the court to extend that time period.⁸⁰

3.2.5 The Commission saw ‘considerable difficulties’ with including the proceeds of a life insurance policy as part of a ‘notional estate’ pool⁸¹ and concluded that they should not be available for family provision claimants. It recommended, however, that the court have power to require recipients of the proceeds of a policy to repay to an estate some or all of the insurance premiums paid as may be just in the circumstances. Its rationale was that it is this amount that has been lost to the estate.⁸²

3.2.6 In relation to pension funds, the Commission also concluded that there were difficulties with interfering with trustees’ discretion and did not recommend that legislative provisions include the ability for the court to capture those benefits within a ‘notional estate’ style regime.⁸³

3.2.7 The *Inheritance (Provision for Family and Dependants) Act 1975* (UK) was introduced following this review. It provides that the following assets may be considered as part of the ‘net estate’ for the purpose of family provision claims and used to fund successful claims:

⁷⁶ Ibid [191].

⁷⁷ Ibid [211].

⁷⁸ Ibid [198].

⁷⁹ Ibid [141].

⁸⁰ Ibid.

⁸¹ Ibid [205].

⁸² Ibid [206]. The Alberta Law Reform Institute (‘ALRI’) has made similar observations but reached the opposite conclusion: ALRI, *Division of Matrimonial Property on Death* (Final Report No 83, May 2000) [434]–[436].

⁸³ The Law Commission (England & Wales) (n 72) [213].

- property or money that a person receives as a consequence of a nomination made by a deceased that was in force at their death;⁸⁴
- property or money that a person receives as a *donatio mortis causa* (death-bed gift);⁸⁵
- the deceased's severable share in joint tenancy property;⁸⁶ and
- property disposed of within six years of death with the intention of defeating a family provision claim where the recipient of the property did not provide full valuable consideration.⁸⁷

3.2.8 Further detail of the model operating in the UK is provided in Appendix 1.

2010 European Union Committee Report

3.2.9 The European Union Committee ('EUC'), a Select Committee of the House of Lords, considered estate 'clawback'⁸⁸ laws as part of its review of cross-jurisdictional issues involving succession laws in the European Union in 2009–2010.⁸⁹ The purpose of the review was to consider conflict of law issues between jurisdictions, noting that substantial variations exist amongst EU countries, some of which adopt civil law systems whilst others adopt common law models. One issue considered was the operation of clawback laws in civil law jurisdictions where individuals seek to evade forced heirship laws by disposing of or gifting assets before their death.⁹⁰

3.2.10 The EUC's report expressed concerns about the proposed legislation that had been drafted, commenting that the outcome, which would result in the 'claw-back' legislation having broader application, was a 'serious defect' in the proposal advanced⁹¹ and that this was the 'single most contentious issue for the UK.'⁹²

3.2.11 It noted the following criticisms that had been made of the operation of clawback laws:

- 'Those receiving gifts, including charitable gifts and gifts made on marriage, would be uncertain whether the property would be subject to clawback. This would either inhibit the use of the gift or force them to seek forms of protection such as insurance.
- Anyone whose property might possibly have been acquired from a donee and subject to clawback, whether or not they were aware of this fact, may feel the need to take out protection against a clawback claim.

⁸⁴ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 8(1).

⁸⁵ *Ibid* s 8(2).

⁸⁶ *Ibid* s 9.

⁸⁷ *Ibid* s 10, with these provisions being broadly consistent with the recommendations of the Law Commission of England.

⁸⁸ Defined as follows: 'Clawback is intended to stop the possibility of individuals evading the forced inheritance rules by giving away their property during their lifetime': EUC, *The EU's Regulation on Succession: Report with Evidence* (House of Lords Paper No 75, Session 2009–10E) [86].

⁸⁹ *Ibid*.

⁹⁰ *Ibid* [86].

⁹¹ *Ibid* 5.

⁹² *Ibid* [86].

- It would be difficult to fix a price for assets subject to clawback.
- Trusts and the use of insurance or pension policies to effect estate planning would be undermined, even transfers to offshore trustees if the property remains in the UK.
- Increasing legal costs would be incurred in advising on property rights and the transfer of property.
- The various UK registers of property title would be undermined because they would not provide a guarantee as to the ownership of the property.⁹³

3.2.12 The Chancery Bar Association submission to the EUC noted:

Under our private international law, gifts and other lifetime transactions by deceased persons are not characterised as matters of succession and there is therefore no question of their being ‘clawed back’ on death.⁹⁴

3.2.13 The EUC concluded that clawback provisions present a problem for the UK,⁹⁵ stating that:

As a number of our witnesses pointed out, there is in the UK a legal culture of freedom for individuals to dispose of their property as they wish; and there is a strong UK cultural heritage of providing social support through gifts to charity. To this may be added the important role played by trusts in the UK.⁹⁶

3.2.14 The EUC contrasted the more limited clawback provisions under the *Inheritance (Provision for Family and Dependants) Act 1975* (UK), stating that they were ‘of relatively limited impact, and practitioners know how to advise their clients.’⁹⁷ The EUC’s report thus provides some evidence of community acceptance of the limited clawback provisions operating in the UK but strong opposition to expansion of their scope.

2011 Law Commission (England & Wales) Review

3.2.15 In 2011, the Law Commission (England & Wales) undertook a review of family provision claims in the United Kingdom.⁹⁸ The Commission noted existing provisions under the *Inheritance (Provision for Family and Dependants) Act 1975* (UK), particularly ss 8–10 which enable the following as part of the deceased’s net estate:

- death-bed gifts;⁹⁹
- statutory nominations;
- a deceased’s share in joint tenancy property; and

⁹³ Ibid [89].

⁹⁴ Ibid 60.

⁹⁵ Ibid [94].

⁹⁶ Ibid.

⁹⁷ Ibid [92].

⁹⁸ Law Commission (England & Wales), *Intestacy and Family Provision Claims on Death* (Law Com No 331, December 2011).

⁹⁹ Also known as ‘*donatio mortis causa*’.

- property transferred under-value during the six years before a deceased's death with the intention of defeating a family provision claim as part of the deceased's net estate.¹⁰⁰

3.2.16 The Commission did not comment on the need for or desirability of amending these provisions and did not make recommendations for reform with the exception of the following matters:

Joint tenancy properties

3.2.17 The Commission noted that the then existing legislation stipulated that an applicant may only seek provision from joint tenancy assets where their claim is commenced within time, with there being no power to affect that joint tenancy property if a claim is commenced out of time.¹⁰¹ That approach was consistent with its previous recommendations.¹⁰² The Commission asked whether the court should have the discretion to permit an order to include joint tenancy assets where a claim is permitted out of time. It reported that this proposal was well supported, primarily on the basis that it would give the court greater flexibility and 'avoid inequitable results.'¹⁰³ It noted that the Society of Trust and Estate Practitioners, for example, commented that 'it is not sensible to include arbitrary traps within our law.'¹⁰⁴ It therefore recommended that the section be revised to permit joint tenancy property to be used to fund provision where claims are permitted out of time.¹⁰⁵ It acknowledged that this reform could result in an increased number of orders affecting joint tenancy properties.¹⁰⁶

3.2.18 In summary, in relation to joint tenancy properties, the Commission endorsed retaining the inclusion of joint tenancy properties and recommended extension of those provisions to cover claims made out of time. This legislative reform was subsequently made.¹⁰⁷

Pensions

3.2.19 The Law Commission (England & Wales) observed the differences between family provision legislation and family law legislation as they relate to powers over pension funds.¹⁰⁸ It therefore asked whether there should be reform to permit recourse to pension funds as a last resort where the assets of the estate would otherwise be insufficient to fund a successful claim.

3.2.20 The Commission reported that, of those respondents addressing the question, over half favoured reform,¹⁰⁹ one quarter were opposed and others did not express an opinion.¹¹⁰ One argument put forward in opposing inclusion of pensions within the pool of available funds was that

¹⁰⁰ Law Commission (England & Wales) (n 98) [7.41].

¹⁰¹ Ibid [7.74].

¹⁰² See [3.2.4].

¹⁰³ Law Commission (England & Wales) (n 98) [7.77].

¹⁰⁴ Ibid.

¹⁰⁵ Ibid [7.83].

¹⁰⁶ Ibid [7.85].

¹⁰⁷ See *Inheritance and Trustees' Powers Act 2014* (UK) cl 6 sch 2, s 7(2).

¹⁰⁸ Law Commission (England & Wales) (n 98) [7.103].

¹⁰⁹ Including the Chancery Bar Association and the Family Law Bar Association, the Law Society and the Society of Trust and Estate Practitioners.

¹¹⁰ Law Commission (England & Wales) (n 98) [7.105].

pension trustees have a discretion about payment which they exercise carefully.¹¹¹ It was submitted that ‘little would be gained by subjecting the exercise of the trustees’ discretion to the supervision of the courts in family provision proceedings.’¹¹² Other criticisms made included that most pension funds are modest in size, therefore making claims not worthwhile,¹¹³ and that if they were included there would be increased complexity, leading to delay¹¹⁴ and expense.¹¹⁵

3.2.21 In considering the different contexts in which family provision laws apply compared to the operation of family law, the Commission stated:

The ancillary relief method of sharing a pension that has not (usually) entered payment (that is to say that the pensioner is not yet in receipt of a pension) is very different from altering the destination of a payment that has already been made by permitting the court to override the discretion vested in pension trustees.¹¹⁶

3.2.22 The Commission did not make any recommendations to include within family provision legislation pension funds falling outside an estate.¹¹⁷

3.3 Scotland

3.3.1 Whilst Scotland adopts a form of forced heirship, the issue of clawback is also relevant to the devolution of estates under this system and was thus considered by the Scottish Law Commission in its review of succession laws between 2007 and 2009.¹¹⁸ The Scottish Law Commission considered specifically the effect of pre-death gifts or under value transfers made prior to death which have the effect of reducing the size of a deceased’s estate. It evaluated whether there should be any clawback provisions within its succession law to protect the rights of family members in these circumstances. The Commission observed that anti-avoidance provisions already operated in Scotland under family law.¹¹⁹

3.3.2 The Scottish Law Commission found during public consultation that there was ‘almost unanimous opposition to this idea.’¹²⁰ Accordingly, it did not propose legislative reform to incorporate clawback style provisions within its succession laws, stating:

As many respondents pointed out, any anti-avoidance scheme would create numerous practical difficulties and would be likely to be complex. And, from a principled perspective, it would disrupt or frustrate otherwise legitimate and intentional acts on the part of the deceased before death. In addition, those who were well advised would be able

¹¹¹ Ibid [7.107].

¹¹² Ibid.

¹¹³ Ibid [7.108].

¹¹⁴ Ibid [7.109].

¹¹⁵ Ibid [7.112].

¹¹⁶ Ibid.

¹¹⁷ Ibid [7.120].

¹¹⁸ See Scottish Law Commission, *Discussion Paper on Succession* (Discussion Paper No 136, August 2007); Scottish Law Commission, *Report on Succession*, Scot Law Com No 215 (April 2009).

¹¹⁹ See *Family Law (Scotland) Act 1985* (Scotland) s 18.

¹²⁰ Scottish Law Commission (2009) (n 118) [1.20].

to take steps to organise their affairs in the light of whatever anti-avoidance measures may be in place, but those who were not in that position, which generally would be people with more modest estates, would be liable to be unduly and unjustifiably affected.¹²¹

3.3.3 The outcome was thus a rejection of notional estate-style provisions to fund inheritances.

3.4 Canada

3.4.1 During the 1970s, the Uniform Law Conference of Canada ('ULCC') proposed the enactment of uniform family provision laws for Canada.¹²² The proposed Uniform Act incorporates notional estate-style provisions dealing with circumstances where a person enters into a transaction with the intention of defeating a claim.¹²³ The Act deals with:

- 'unreasonably large' dispositions of property occurring within one year of a person's death where full valuable consideration is not given.¹²⁴ In those circumstances, the court must be satisfied that there are insufficient assets in the estate to make provision for a successful applicant,¹²⁵ with the amount to be paid determined in accordance with prescribed rules;¹²⁶
- *donatio mortis causa* (or death-bed gifts);
- money deposited in an account in the name of the deceased in trust for another, remaining on deposit at the date of the death;
- money deposited in an account in the name of the deceased and another person or persons and payable on death under the terms of the deposit or by operation of law to the survivor or survivors, remaining on deposit at the date of the death of the deceased;
- any disposition of property made by a deceased whereby property is held by the deceased and another as joint tenants;
- any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his or her death retained, either alone or with another person or persons, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal; and
- any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her.

3.4.2 There are no time limits imposed upon these transactions, other than the first scenario listed.

3.4.3 Despite the recommendation of the ULCC, only two provinces, Ontario and Yukon, have enacted legislation broadly consistent with the Uniform Act in this regard.¹²⁷ Only in Yukon may the court 'clawback' unreasonably large gifts occurring in the year before the will-maker's death with the intention of defeating a claim. Both Yukon and Ontario enable the other dispositions

¹²¹ Ibid.

¹²² *Uniform Dependents' Relief Act 1974* (Canada).

¹²³ Details included in Appendix 2.

¹²⁴ *Uniform Dependents' Relief Act 1974* (Canada) s 21(1)(a).

¹²⁵ Ibid s 21(1)(b).

¹²⁶ Ibid s 21(2).

¹²⁷ Some provinces, however, include similar provisions within family law legislation, as explained at [3.4.5].

outlined in the Uniform Act (listed above) to be treated as estate assets and used to fund provision for successful family provision claimants. Details of the varying models operating in Canada are provided in Appendix 2.

3.4.4 Whilst only a minority of provinces have enacted clawback provisions consistent with the Uniform Act, most have legislation providing that property disposed of pursuant to a contract to dispose of property by will (for example, a mutual wills contract) may be included within a family provision claim, to the extent that the recipient did not give full consideration.¹²⁸ These provisions are consistent with the approach in Australia as a consequence of the decision of *Barns v Barns*¹²⁹ where the High Court held that property disposed of pursuant to a mutual wills contract can be affected by a family provision claim.

3.4.5 Although not all Canadian provinces have incorporated anti-avoidance provisions within family provision legislation, some address the division of assets between spouses after death within family law legislation.¹³⁰ Even within these jurisdictions there is broad variation between the treatment of non-estate assets. For example, in Saskatchewan, substantial gifts of property without the consent of a spouse, or assets transferred for less than full consideration with the intention of defeating a claim where the recipient knew or ought to have known of that intention may be clawed back.¹³¹ Other non-estate assets, however, like joint tenancy properties or bank accounts, are not covered.¹³² On the other hand, Manitoba's family law legislation includes provisions similar to the Uniform Act that provide that non-estate assets, including *donatio mortis causa*, joint tenancy property, and the proceeds of life insurance policies, may in certain circumstances¹³³ be treated as part of an estate where the deceased spouse did not receive adequate consideration.¹³⁴ Ontario deals with these issues differently again, the effect of which is to include certain non-estate assets as part of the pool of family assets but with limited clawback ability.¹³⁵

3.4.6 These issues were considered by the Alberta Law Reform Institute ('ALRI') in 2000. It noted the absence of clawback provisions in Alberta, describing this circumstance as 'inadequate'¹³⁶

¹²⁸ This had been recommended for British Columbia but has not been enacted: British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (BCLI Report No 45, June 2006) 202.

¹²⁹ *Barns v Barns* (2003) 214 CLR 169. See discussion at [1.4.14].

¹³⁰ *The Family Property Act*, SS 1997, F-6.3, Part VI (Saskatchewan) ('*The Family Property Act* (Sask)'); *Family Property Act*, CCSM, c F25, Part IV (Manitoba) ('*Family Property Act* (Man)'); *Family Law Act*, RSO 1990, c F.3 (Ontario) ('*Family Law Act* (Ont)'); and to a lesser degree, the *Matrimonial Property Act*, RSA 2000, c M-8 (Alberta) – see ss 5(1), 11(2) ('*Matrimonial Property Act* (Alta)').

¹³¹ *The Family Property Act* (Sask) (n 130) s 28. See also *Family Property Act* (Man) (n 130) ss 6(9)–(11); *Matrimonial Property Act* (Alta) (n 130) s 10.

¹³² See *The Family Property Act* (Sask) (n 130) s 31.

¹³³ See *Family Property Act* (Man) (n 130) s 35(3). This approach has been broadly endorsed by the ALRI: see ALRI (n 82) [439].

¹³⁴ *The Family Property Act* (Man) (n 130) s 35(1).

¹³⁵ See for example *Family Law Act* (Ont) (n 130) s 4(1) definition of 'valuation date', s 26(1). Note however, that this jurisdiction includes provisions similar to the Uniform Act within the *Succession Law Reform Act 1990* (Ontario) Part V (see Appendix 2) and the Ontario Law Reform Commission has recommended that the two Acts be made consistent: Ontario Law Reform Commission, *Report on Family Property Law* (Report, 1993) 108–110.

¹³⁶ ALRI (n 82) [421].

and allowing for ‘easy circumvention’ of laws.¹³⁷ It proposed reform to its family law legislation to include certain non-estate assets as part of the parties’ pool of assets.¹³⁸ There was an almost equal split of views amongst respondents to the supplementary question of whether these assets should then be able to be recovered from third party recipients.¹³⁹ It was ultimately concluded that non-estate assets ought to be able to be utilised to fund awards for surviving spouses where the assets within an estate are insufficient.¹⁴⁰ Despite this recommendation, these reforms have not been enacted.¹⁴¹

3.4.7 In 2006, the British Columbia Law Institute (‘BCLI’) considered reform to its succession laws, including family provision legislation. It proposed a varied anti-avoidance model to that contained in the Uniform Act and operating in a modified form in Ontario, having concluded that those provisions were ‘too intrusive and draconian.’¹⁴² This view was expressed because the effect of the provision can ‘extend to innocent transactions and interrupt contractual relations entered into in good faith.’ This view was consistent with the BCLI’s earlier comments made in 1983.¹⁴³

3.4.8 The varied model that the BCLI proposed provided for transactions¹⁴⁴ entered into with the intention of defeating claims to be voidable for the purpose of funding claims.¹⁴⁵ The BCLI proposed, however, that transactions that third parties enter into for valuable consideration and in good faith where, at the time of the transaction, they had no notice or knowledge of the purpose of the transfer being to defeat a claim, ought to be excluded.¹⁴⁶ The BCLI advocated this approach on the basis that it would then ‘provide finality and protect settled expectations in completed dealings.’¹⁴⁷ It proposed that property only be used to the extent necessary to make sufficient assets available to fund provision. The model advocated limited the classes of eligible applicants able to make a claim and the BCLI stated that this supported its conclusion that ‘there ought to be a means of preventing the rights of deserving claimants from being deliberately defeated by transfers of property during the deceased’s lifetime.’¹⁴⁸

¹³⁷ Ibid [422].

¹³⁸ Ibid Rec 29, with the exemption of funds, such as life insurance proceeds, intended to be used to satisfy debts or liabilities or for business purposes: at Rec 30.

¹³⁹ With 10 expressing support, 10 expressing opposition and one commentator suggesting that assets only be able to be clawed-back where the third party was aware of the deceased’s purpose of defeating a claim: ibid [454].

¹⁴⁰ Ibid Recs 31–33.

¹⁴¹ See *Matrimonial Property Act* (Alta) (n 130).

¹⁴² BCLI (n 128) 205.

¹⁴³ Law Reform Commission of British Columbia (‘LRCBC’), *Report on Statutory Succession Rights* (LRC 70, 1983) 95–97.

¹⁴⁴ Including transfers of property to joint tenancy, deposits into joint bank accounts, transfers of property for nominal or no consideration, or designations or changes of beneficiaries of a life insurance policy or pension fund.

¹⁴⁵ BCLI (n 128) 202–203.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 203.

¹⁴⁸ Ibid 205.

3.4.9 Despite the recommendations of the BCLI, these reforms have not been enacted, although reforms enacted in 2009 via the *Wills, Estates and Succession Act* were otherwise broadly consistent with the recommendations contained in the BCLI's report.¹⁴⁹

3.4.10 To summarise the position in Canada, whilst notional estate-style provisions have been recommended by the Uniform Law Conference of Canada since the 1970s, these provisions have only been enacted to their full effect in one jurisdiction. Subsequent recommendations proposing narrower notional estate-style provisions to those contained in the Uniform Act have not been enacted in those jurisdictions where recommendations have been made.

3.5 New Zealand

3.5.1 New Zealand has also examined the utility of notional estate laws in a review completed by the New Zealand Law Commission ('NZLC').¹⁵⁰ It released its final report in the same year that the National Committee for Uniform Succession Laws proposed a roll out of notional estate provisions across Australia.¹⁵¹ It too endorsed introduction of similar provisions for New Zealand.

3.5.2 In its preliminary paper, the NZLC observed that art 17 of the *International Covenant on Civil and Political Rights* confirms the right to freedom from arbitrary interference with privacy, home and correspondence and stated that succession laws should protect this right.¹⁵² It also noted, however, that states also have other obligations under other international human rights laws including the *International Convention on the Elimination of All Forms of Discrimination against Women* and the *United Nations Convention on the Rights of the Child*.¹⁵³

3.5.3 Initially, the NZLC had proposed that an administrator have the ability to require non-probate assets to bear part of the burden of a family provision claim where they are of the opinion that 'so much of the estate of a deceased person as is disposed of by will or intestacy is significantly affected by a claim.'¹⁵⁴ It proposed that beneficiaries have the right to appeal an administrator's decision.¹⁵⁵

3.5.4 The NZLC further proposed that claimants have the right to apply to the court for non-probate assets to be called in. It suggested that this should include gifts and transactions made for less than full consideration, if made within three years of death, and transactions entered into with the fraudulent intention of removing property from challenge (without time limit).¹⁵⁶

¹⁴⁹ See Appendix 2.

¹⁵⁰ NZLC, *Succession Law: A Succession (Adjustment) Act* (Report 39, August 1997). See for example at 127–135, C176–C191.

¹⁵¹ *Ibid* [3.7.1]–[3.7.2].

¹⁵² NZLC, *Succession Law Testamentary Claims: A Discussion Paper* (Preliminary Paper 24, August 1996) [25].

¹⁵³ *Ibid* [26].

¹⁵⁴ *Ibid* Draft Testamentary Claims Act s 48, C156–160.

¹⁵⁵ *Ibid* s 49, C163.

¹⁵⁶ *Ibid* s 50, C166.

3.5.5 Following community consultation, the NZLC recommended that non-probate assets be available to satisfy claims, so long as the holder of that property is a party to the proceedings.¹⁵⁷ The Commission argued for this approach on the basis that,

This is required in fairness to claimants, since the will-maker's obligations apply irrespective of the technical arrangements used to dispose of property upon death. It is also required in fairness to the will or intestate beneficiaries, who may otherwise bear a disproportionate burden which cannot be passed on to the successors to the non-probate assets.¹⁵⁸

3.5.6 It drafted separate sections dealing with:

- assets disposed of otherwise than by will — for example trust assets and joint tenancy properties;¹⁵⁹
- transactions that a deceased entered into prior to death with the intention of prejudicing claimants;¹⁶⁰ and
- transfers made less than three years before death where full valuable consideration was not given.¹⁶¹

3.5.7 The draft provisions put the onus upon a person who acquired property to prove that they acquired it for valuable consideration and in good faith.¹⁶²

3.5.8 The NZLC's recommendations relating to the inclusion of notional estate are yet to be enacted,¹⁶³ while recommendations made in the NZLC's reports relating to other matters, including forfeiture,¹⁶⁴ financial agreements¹⁶⁵ and formal requirements for wills¹⁶⁶ have been adopted.¹⁶⁷

3.5.9 Whilst there has not been reform to the *Family Protection Act* to cover non-estate assets, spouses in New Zealand are able to apply for the division of property of a relationship after death, including certain non-estate assets, under family law legislation. Consistent with Australian family law,¹⁶⁸ the *Property (Relationships) Act 1976* (NZ)¹⁶⁹ enables the court to clawback assets disposed of with the intention of defeating claims under the Act.¹⁷⁰ This section applies to situations where recipients and subsequent recipients of property receive assets otherwise than in good faith and

¹⁵⁷ NZLC (n 150) Draft Succession (Adjustment) Act ss 52, 53.

¹⁵⁸ Ibid [C179].

¹⁵⁹ Ibid Draft Succession (Adjustment) Act s 52(2).

¹⁶⁰ Ibid s 54(1)(b).

¹⁶¹ Ibid s 54(1)(c).

¹⁶² Ibid s 55.

¹⁶³ See *Family Protection Act 1955* (NZ).

¹⁶⁴ See *Succession (Homicide) Act 2007* (NZ).

¹⁶⁵ See *Property (Relationships) Amendment Act 2001* (NZ).

¹⁶⁶ See *Wills Act 2007* (NZ).

¹⁶⁷ For a critique of this situation, see Nicola Peart, 'New Zealand's Succession Law: Subverting Reasonable Expectations' (2008) 37(4) *Common Law World Review* 356.

¹⁶⁸ Refer to discussion at [5.6.7].

¹⁶⁹ *Property (Relationships) Act 1976* (NZ) ss 1M(c), 4D, 10B(1), pt 8. Application for family provision still remains possible in addition to parties' rights under this Act: s 57.

¹⁷⁰ Ibid s 44(1).

without full or adequate consideration.¹⁷¹ The court has discretion to refuse to make an order for the recovery of the relevant asset(s) if the recipient received the property in good faith, and has altered his or her position in reliance such that the court considers it is inequitable to grant relief in whole or in part.¹⁷² The *Property (Relationships) Act* also contains provisions which enable superannuation and life insurance to be treated as assets of a relationship for the purpose of dividing property between spouses.¹⁷³

3.5.10 The availability of family law legislation to deal with the division of property between spouses after death may thus, at least in part, address the absence of notional estate provisions within family provision legislation in New Zealand insofar as spouses are concerned. This approach is similar to some provinces in Canada which also enable use of family law legislation to divide property amongst spouses after death rather than being the exclusive jurisdiction of family provision legislation.¹⁷⁴

3.6 United States

3.6.1 The United States' *Uniform Probate Code*¹⁷⁵ also adopts a form of notional estate law, enabling non-estate assets to be treated as part of an 'augmented estate' and used to calculate and, if necessary, fund,¹⁷⁶ surviving spouses' shares of an estate. These provisions capture property that the deceased held a power of appointment in respect of immediately prior to death, joint tenancy property and accounts and proceeds of insurance policies.¹⁷⁷

3.7 Australia

3.7.1 Previous paragraphs have explained international approaches. The following section explains Australia's consideration of notional estate laws.

Recommendations of the National Committee for Uniform Succession Laws

3.7.2 In 1991, the Standing Committee of Attorneys-General (the 'Standing Committee') agreed to progress nationally uniform succession laws. The Queensland Law Reform Commission ('QLRC') was engaged to coordinate the project, convening the National Committee for Uniform Succession Laws (the 'National Committee') to ensure national representation and input.

3.7.3 The National Committee's report presented to the Standing Committee examined the New South Wales approach to notional estate legislation and endorsed similar provisions being included

¹⁷¹ Ibid s 44(2).

¹⁷² Ibid s 44(4).

¹⁷³ Ibid ss 8(1)(g), (i).

¹⁷⁴ See [3.4.5].

¹⁷⁵ *Uniform Probate Code* (US) §§ 2-202–2-209. The Uniform Code has been adopted by 22 states: see Uniform Law Commission (Web Page) <<https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8>> (viewed 16 June 2019).

¹⁷⁶ See *ibid* §§ 2-209.

¹⁷⁷ *Ibid* §§ 2-205.

in the new national model legislation.¹⁷⁸ Part 4 explains in more detail the notional estate legislation operating in New South Wales and the recommendations of the New South Wales Law Reform Commission (‘NSWLRC’) upon which that model was based.

3.7.4 The National Committee’s acceptance of the New South Wales approach has been criticised for its lack of critical analysis:

What is curious — to me at least — is that there was apparently no discussion in the National Committee’s work of the model of the claw-back property provisions. The New South Wales provisions are used because they are there and have been in force for a while now to see if there is anything hugely wrong with them. It is a convenient — and pragmatic — approach to law reform, in sticking to the familiar.

But the model has always bothered me. For a start, it is based on the old New South Wales death duty provisions. There the formula was a complex one, the end result of which was just to determine — precisely — the dutiable value of assets on death. It was not about attaching property in any way and, hence, served a different purpose... A precisely formulated scheme like that of death duties placed the emphasis in the wrong place — for family provision purposes...

A second problematic aspect of the definition of notional estate was the mixing up of subjective and objective elements: again placing extra hurdles in the way of getting to the *real* issue under the legislation.¹⁷⁹

3.7.5 The National Committee revisited the issue of uniform succession laws in a Supplementary Report to the Standing Committee in 2004.¹⁸⁰ The purpose of the report was to outline draft model legislation for Australia giving effect to the National Committee’s earlier recommendations contained within its 1997 report.¹⁸¹ This model legislation included replicating, in broad terms, the notional estate provisions from New South Wales.

3.7.6 The NSWLRC subsequently published a report containing commentary in relation to the draft model legislation.¹⁸²

3.7.7 In 2007, the Northern Territory Law Reform Committee (‘NTLRC’) reviewed the draft model legislation at the request of the Northern Territory Attorney-General.¹⁸³ It approved in substance the provisions dealing with notional estate, except for use of notional estate to fund provisions for claims made out of time. This view was expressed on the basis that it would seem to create unfairness for third parties affected by a notional estate order.¹⁸⁴

¹⁷⁸ QLRC (n 71) 93.

¹⁷⁹ R Croucher, ‘Towards Uniform Succession in Australia’ (2009) 83 *Australian Law Journal* 728, 740.

¹⁸⁰ QLRC, *Family Provision Supplementary Report to the Standing Committee of Attorneys General* (Report No 58, July 2004).

¹⁸¹ *Ibid* Appendix 2.

¹⁸² NSWLRC, *Uniform Succession Laws: Family Provision* (Report No 110, 2005) 37.

¹⁸³ NTLRC, *Report on Uniform Succession Laws: A Review of the Recommendations of the National Committee for Uniform Succession Laws and draft Bills on Intestacy and Family Provision* (Report No 31, September 2007).

¹⁸⁴ *Ibid* 56.

3.7.8 Despite the recommendations of the National Committee, notional estate legislation has not been implemented in any other Australian jurisdiction. Senior Counsel, Lindsay Ellison SC, has commented in relation to this inaction:

It would be adventurous to say in this regard New South Wales ‘leads the way’ since in the 35 years since the *Family Provision Act*, 1982 came into force, no other State has followed.¹⁸⁵

The Law Commission of Western Australia

3.7.9 The Law Reform Commission of Western Australia (‘WALRC’) was engaged to conduct a review of Western Australian law applying to joint tenancy and tenancy in common properties, releasing its report and recommendations in 1994.¹⁸⁶

3.7.10 The review noted developments internationally and the notional estate provisions operating in New South Wales as they apply specifically to joint tenancy properties. The WALRC identified arguments both for and against reforms enabling the court to utilise joint tenancy properties to fund provision for successful family provision claimants. It tentatively favoured a more limited approach to the New South Wales *Succession Act*. It suggested that provisions should cover:

- acts (rather than omissions) — for example, where assets are transferred to joint tenancy rather than the failure to sever a joint tenancy prior to death;
- transactions occurring within a limited period of one year prior to death where full consideration is not given;
- transactions where there is an intention to defeat a family provision claim;
- claims progressed in a timely manner;¹⁸⁷
- protections for third parties, for example financial institutions; and
- situations where there are otherwise insufficient assets in the estate to fund an award.¹⁸⁸

3.7.11 The WALRC concluded, however, that it was inappropriate to propose legislative reform to deal solely with joint tenancy properties and so recommended against legislative reform.¹⁸⁹ It recommended that it was instead desirable for Western Australian family provision legislation to

¹⁸⁵ Lindsay Ellison SC, “‘Through a Glass, Darkly’”: The Long Arm of the Notional Estate Rules: Why Lawyers in All States Need to Understand them’ (Conference Paper, Wills and Estates Conference, 22 February 2019) [1].

¹⁸⁶ WALRC, *Joint Tenancy and Tenancy in Common* (Project No 78, Report, November 1994).

¹⁸⁷ The Commission endorsed provisions then operating in the United Kingdom preventing the use of joint tenancy property to fund claims where these claims were made out of time: *Ibid* [4.28]. A similar view has been expressed by the NTLRC when evaluating the draft Model Bill which would enable notional estate orders to be made where claims were made out of time ‘questions would arise as to the fairness of allowing notional estate orders to be made particularly where many years have already passed.’: NTLRC (n 183) 56.

¹⁸⁸ WALRC (n 186) [4.23]–[4.31].

¹⁸⁹ *Ibid* Rec 10.

be reviewed more broadly in relation to the potential use of non-estate assets to fund awards of provision.¹⁹⁰ This recommendation has not been progressed.¹⁹¹

Victorian Law Reform Commission Review

3.7.12 The Victorian Law Reform Commission ('VLRC') released a Consultation Paper in 2012 as part of its review of succession law in Victoria.¹⁹² Amongst other matters, it dealt with the possibility of introducing notional estate provisions in Victoria.¹⁹³

3.7.13 In its Final Report, the VLRC observed that several respondents' submissions were not in favour of introducing notional estate laws in Victoria on the basis that the law ought not detract from the general proposition that persons are able to deal with their property as they wish during their lifetime.¹⁹⁴

3.7.14 Some respondents expressed the view that, if notional estate provisions were introduced, they should only apply to transactions entered into with the specific intention of defeating a claim for family provision.¹⁹⁵ In relation to the relevance of intention, however, the VLRC concluded:

The Commission considers that a notional estate scheme that only applied to transactions entered into with the intention of avoiding family provision obligations could be easily circumvented. Further, intention is difficult to prove, as evidenced by the clear preference for the notional estate provisions in New South Wales which do not require proof of intention to defeat a possible family provision claim. The Commission also agrees that any notional estate scheme that does not require some intention on the part of the deceased person risks being too far-reaching and unduly limiting of a person's right to dispose of their property during their life...¹⁹⁶

3.7.15 Further, it commented:

The Commission also considers that any transaction entered into before death may have the effect of benefitting the same people who could later be family provision claimants. The gift during life may give effect to the person's responsibility to provide, but does this before death rather than after.¹⁹⁷

3.7.16 It concluded that the need for notional estate laws and the effectiveness of the New South Wales provisions in meeting that need (if any) had not been demonstrated. It noted that:¹⁹⁸

¹⁹⁰ Ibid.

¹⁹¹ WALRC, *Project 78 – Joint tenancy and tenancy in common* (Web Page, 31 January 2017) <https://www.lrc.justice.wa.gov.au/P/project_78.aspx>.

¹⁹² VLRC, *Succession Laws: Family Provision* (Consultation Paper No 12, 2012).

¹⁹³ Ibid [2.69]–[2.93]. For the National Committee's recommendations see [3.7.2] above.

¹⁹⁴ VLRC, *Succession Laws* (Final Report, 2013) [6.180].

¹⁹⁵ Ibid [6.181].

¹⁹⁶ Ibid [6.183].

¹⁹⁷ Ibid [6.185].

¹⁹⁸ Ibid [6.175].

The National Committee's recommendation to adopt the New South Wales provisions was not based on empirical research demonstrating the need for such provisions, but rather because the provisions existed and had been in operation for some time, and there was 'nothing hugely wrong with them'.¹⁹⁹

3.7.17 The VLRC did not recommend introduction of notional estate provisions in Victoria due to 'the absence of clear evidence demonstrating the need for such provisions in Victoria, or the effectiveness of such provisions in New South Wales.'²⁰⁰

3.7.18 In 2014, the Victorian Parliament considered reforms to their family provision legislation to, amongst other things, narrow the class of eligible applicants, and deal with costs provisions. The Second Reading speech when the Justice Legislation Amendment (Succession and Surrogacy) Bill 2014 was tabled stated: 'The starting point is that a deceased is entitled to dispose of their estate as they see fit, and this should only be departed from where they had a moral duty to provide for the needs of the claimant and yet failed to do so.'²⁰¹ Notional estate legislation has not been progressed in Victoria, consistent with the recommendations of the VLRC.

South Australian Law Reform Institute

3.7.19 SALRI released a report in 2017 that considered a range of issues related to family provision, including the possibility of introducing notional estate legislation in South Australia.²⁰²

3.7.20 The majority of respondents to SALRI's Background Paper²⁰³ expressed opposition to the introduction of notional estate legislation. Reasons given included that notional estate laws intrude upon testamentary freedom and that there may be a host of valid reasons for a will-maker entering into arrangements during his or her lifetime other than seeking to defeat a future family provision claim.

3.7.21 SALRI sought feedback about the operation of superannuation and trusts, but there was little support for notional estate provisions in these areas. There was some support, however, for using notional estate provisions to equalise benefits given where beneficiaries received pre-death gifts.²⁰⁴

3.7.22 SALRI's conclusion was as follows:

SALRI is not persuaded of the case for introducing NSW style notional estate and clawback laws in South Australia. The relevant laws are complicated. SALRI finds the reasoning of the VLRC convincing. It also accepts the views presented in consultation that NSW style notional estate or clawback laws are very problematic in terms of both

¹⁹⁹ Ibid [6.175] citing Croucher (n 179) 740.

²⁰⁰ VLRC (n 194) [6.186].

²⁰¹ Victoria, *Parliamentary Debates*, Legislative Council, 20 August 2014, 2617 (Edward John O'Donohue).

²⁰² SALRI, *Distinguishing Between the Deserving and the Undeserving: Family Provision Laws in South Australia* (Report No 9, December 2017) Part 8.

²⁰³ SALRI, *Looking After One Another: Family Provision Laws in South Australia* (Background Paper, February 2017). See also SALRI, *Review of the Inheritance (Family Provision) Act 1972 (SA)*, Factsheet 7 – Notional Estate and Clawback Provisions (2 February 2017).

²⁰⁴ SALRI (n 202) [8.3.16]–[8.3.17].

policy and practice and would especially undermine the concept of testamentary freedom. SALRI notes that when a strong theme of both its consultation and wider research is the importance of enhancing testamentary freedom and reducing a court's ability to intervene, it would be inconsistent to introduce NSW style notional estate or clawback laws in South Australia.²⁰⁵

3.7.23 It recommended that notional estate laws not be introduced in South Australia²⁰⁶ and to date no such laws have been implemented there.

²⁰⁵ Ibid [8.4.1].

²⁰⁶ Ibid [8.4.2] Recommendation 27.

Part 4

New South Wales Notional Estate Laws

4.1 Introduction

4.1.1 New South Wales is the only jurisdiction in Australia to have introduced notional estate legislation. For that reason, these provisions are considered in detail below.

4.2 Background

4.2.1 In 1977, the NSWLRC was the first Australian law reform commission to consider and recommend adoption of notional estate laws as part of its broad review of family provision legislation operating in New South Wales at the time.²⁰⁷

4.2.2 It summarised the competing issues arising in relation to the utility of inclusion of notional estate legislation within family provision legislation as follows:

The interests involved are fundamental: on the one hand, the interest of a person in arranging his affairs in his way and the interest of a transferee of property in securing his title and, on the other hand, the interest of a family in not being disinherited. In trying to answer these questions, any reformer faces a dilemma. If all dispositions of property made by a person in his lifetime are valid against the surviving members of his family, the new Act will give incomplete protection to the family. And if the surviving members can claim against property disposed of by, say, their deceased father, the new Act will be recognizing a potential interest in that property which must clog its alienability and adversely affect its utility and value.²⁰⁸

4.2.3 After weighing up these competing issues and submissions it received, the NSWLRC concluded that there was a need for notional estate laws, commenting that:

If the new Act can be evaded, its effectiveness will be limited. If it does not contain provisions directed at some common arrangements of property, it will not concern those with the means and the determination to attain and follow expert advice; only the poor or the inert will be affected by it. The Act can be evaded. Property can be put outside its application in a variety of ways and often without difficulty. In some circumstances, opening a joint bank account or taking out a policy of life assurance is sufficient. Indeed one volume of English precedents contains a form for a *Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Inheritance (Family Provision) Act 1938*.²⁰⁹

²⁰⁷ NSWLRC, *Testator's Family Maintenance and Guardianship of Infants Act 1916* (Report No 28, 1977).

²⁰⁸ *Ibid* [2.22.3].

²⁰⁹ *Ibid* [2.22.2]. Similar comments about the need for family provision laws to be effective had previously been made by the Law Commission (England & Wales), see (n 72) [191]. Croucher has criticised the NSWLRC's comments that there was little objection to introduction of notional estate legislation in NSW conveyed in

4.2.4 The NSWLRC recommended that the court be empowered to deal with certain gifts a deceased made during life and, secondly, to utilise property distributed via ‘will substitutes’.²¹⁰ It stated that, if the reforms proposed were enacted, they would ‘introduce new and far-reaching rules into the law of succession.’²¹¹

4.2.5 The NSWLRC proposed that NSW’s notional estate provisions cover:

- property gifted by the deceased within three years of death, if made with the intention of defeating an application for provision;
- gifts made within one year of death, regardless of intention;
- property subject to a power of disposal by the deceased;
- property comprised in certain settlements;
- property held on a joint tenancy;
- property held in certain life assurance schemes; and
- property in certain superannuation schemes.²¹²

4.2.6 The NSWLRC’s recommendations, not all in their original form, were put into effect by the *Family Provision Act 1982* (NSW). It has been noted that the passing of notional estate laws in New South Wales was not without controversy and there was significant debate about their inclusion:

Parliamentary Counsel and the Commissioner, Gressier, disagreed on several fundamental issues concerning the Bill, eventually narrowing down to two, but major, issues: the definition of ‘eligible person’ and the notional estate provisions, but it dragged the process of implementation out over several years. It was like a game of ‘ping pong’. The disagreement was eventually resolved by a compromise, the Commission giving way on notional estate and Parliamentary Counsel giving way on eligibility ...²¹³

4.2.7 Similar observations have made about the strong opposing views that experts expressed in response to the recommendations of the NSWLRC relating to notional estate.²¹⁴

submissions it received, commenting: ‘The Commission expressed surprise that the notional estate proposals “evoked little opposition” from the commentators, hence the conclusion in the Report that “...the proposals were widely accepted as being right in principle”. “Little opposition” is not, however, an accurate reflection of the opposition actually received before the production of the Report. Although the negative arguments were fewer in number, such arguments, when put, were expressed in strong terms: “little” in volume, perhaps; but not “little” in terms of degree.’: R Croucher, ‘Law Reform as Personalities, Politics and Pragmatics – *The Family Provision Act 1982* (NSW): A Case Study’ (2007) 11(1) *Legal History* 1, 21.

²¹⁰ NSWLRC (n 207) [1.7], [2.22.14].

²¹¹ Ibid [2.22.1].

²¹² Ibid [2.23.2], Draft Bill s 23.

²¹³ Croucher (n 209) 7.

²¹⁴ Including Professor Woodham of Sydney University and Justice Hutley of the New South Wales Supreme Court: *ibid* 6, 21–23.

4.2.8 The *Family Provision Act* was subsequently repealed, and family provision laws incorporated into the NSW *Succession Act* with the provisions relating to notional estate retained and included in ch 3, pt 3.3. The current provisions are explained in the following paragraphs.

4.3 Part 3.3 of the NSW *Succession Act*

4.3.1 Part 3.3 of the NSW *Succession Act* allows the court to make orders designating property not within a person's estate as comprising the 'notional estate' of the deceased. Any property designated as 'notional estate' becomes available to make provision for a successful family provision application as though it were part of the estate.²¹⁵ The New South Wales legislation explains the effect of the provisions as follows:

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 3.2 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).²¹⁶

4.3.2 Certain classes of transactions may be caught by the New South Wales notional estate provisions:

- property that has been distributed from an estate;²¹⁷
- property that has been the subject of a 'relevant property transaction';²¹⁸ and
- property falling within the preceding two scenarios and which has been the subject of a subsequent 'relevant property transaction'.²¹⁹

4.3.3 The notional estate provisions operating in New South Wales are given detailed analysis below.

4.4 When the court may make a notional estate order

4.4.1 This section explains when a notional estate order may be made under the NSW *Succession Act*.

A 'relevant property transaction'

4.4.2 To designate property as notional estate, the court must be satisfied that there has been a 'relevant property transaction'. A 'relevant property transaction' is defined as follows:

²¹⁵ *Succession Act 2006* (NSW) s 63(5).

²¹⁶ *Ibid* Part 3.3 – Notional estate orders, Notes.

²¹⁷ *Ibid* s 79.

²¹⁸ *Ibid* s 80.

²¹⁹ *Ibid* s 81.

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 time later) 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.²²⁰

4.4.3 The legislation specifies a number of examples of ‘relevant property transactions’.²²¹ These include:

- failure to exercise a power of appointment;
- failure to prevent property passing by survivorship by not severing a joint tenancy;
- failure to exercise a power to extinguish a trust or a property interest held by another person over property;
- failure to nominate a beneficiary under a life assurance policy;
- failure to nominate a beneficiary under a superannuation fund; or
- entering into a contract for the disposition of property out of the deceased’s estate,

in situations where valuable consideration was not given.

This list is not exhaustive.²²²

4.4.4 Providing full valuable consideration for a particular act or omission excludes that transaction from being a ‘relevant property transaction’. ‘Full valuable consideration’, broadly speaking, means that the person receiving an item has paid full value for the item. For example, if a property is worth \$300,000 and the person receiving the property pays \$300,000 for it, this is full valuable consideration.

4.4.5 The case of *Wardy* provides an example of where the court has designated trust assets as notional estate.²²³ In that case, a trust, known as the ‘Edward Wardy Trust’, was established in 1998. At the date of Mr Wardy’s death, the trust had assets of \$11.5m. Mr Wardy’s estate had assets of approximately \$9.6m. The trustee of the trust was a company which had two directors — one being the deceased, and the other his son, John. Mr Wardy had two other sons and a surviving spouse. They comprised the applicants in the case, seeking a declaration that assets of the trust should be designated as notional estate. Mr Wardy was the sole shareholder of the corporate trustee. He had been the appointor of the trust until 2008 when he was replaced by John. At trial there was an argument that the removal of Mr Wardy as appointor was a ‘relevant property transaction’,

²²⁰ Ibid s 75.

²²¹ Ibid s 76(2).

²²² Ibid s 76(3).

²²³ *Wardy* (n 63).

although this argument was unsuccessful as Justice White was unpersuaded that the transaction was entered into with the intention of denying or limiting a claim, as required by the legislation.²²⁴

4.4.6 The sons argued that the deceased's omission, in his capacity as a director of the corporate trustee, to appoint the assets of the trust to himself as a beneficiary was a 'relevant property transaction.' Alternatively, they argued that, as sole shareholder, he could have removed John as a director of the company and then resolved to distribute the assets of the trust to himself.²²⁵ They submitted that it was immaterial that the appointor could have removed the trustee company, because there was no evidence that John would have done that even if he had been removed as a director or the deceased took steps to distribute some or all of the assets of the trust to himself.²²⁶ His Honour commented, '[t]he placing of assets in a family discretionary trust with a corporate trustee controlled by the deceased is a paradigm case for the intended application of the notional estate provisions.'²²⁷

4.4.7 His Honour concluded that the assets of the trust were capable of being designated as notional estate. Specifically, his Honour considered the omission of Mr Wardy to appoint the assets of the trust to himself, disadvantaging his estate, to be a relevant property transaction.²²⁸ The three applicants (a spouse and two children of the deceased) were successful in their claims, with provision awarded for them out of the assets of the trust designated as notional estate.²²⁹

Timeframe covered

4.4.8 The NSW *Succession Act* provides that the court may make an order designating property as notional estate if it is satisfied that a person entered into a relevant property transaction before his or her death and that the transaction:

- if taking effect **within three years** before the deceased's death — was entered into with the intention of wholly or partly defeating or limiting a claim for family provision;
- if taking effect **within one year** before the deceased's death — was entered into at a time when the deceased had a moral obligation to make adequate provision that was substantially greater than any moral obligation to enter into the transaction. In these circumstances the deceased's intention is irrelevant; or
- took effect or is to take effect on or after the deceased's death.²³⁰

4.4.9 Section 79 explains when a relevant property transaction takes effect. It provides that 'a relevant property transaction is taken to have effect when the property concerned becomes held by

²²⁴ See *Succession Act 2006* (NSW) s 80(2)(a).

²²⁵ *Wardy* (n 63) [95].

²²⁶ *Ibid* [96].

²²⁷ *Ibid* [141].

²²⁸ *Ibid*.

²²⁹ *Ibid* [234].

²³⁰ *Succession Act 2006* (NSW) s 80.

another person or subject to a trust or as otherwise provided by this section.’ It confirms that a relevant property transaction can take effect upon the deceased’s death.

4.4.10 When a transferee enters into a subsequent relevant property transaction, the court continues to hold power to make an order designating property as notional estate if it finds there are special circumstances.²³¹ The NSW *Succession Act* also deals with circumstances where a transferee dies and the property becomes held by either their legal personal representative or is distributed from their estate.²³²

Test that is applied

4.4.11 For the court to make an order designating property as notional estate, it must find that there has been disadvantage, or lack of benefit, to the estate, or a person is entitled to apply for a family provision order.

4.4.12 Specifically, the court must be satisfied that a relevant property transaction:

- directly or indirectly disadvantaged the deceased, the estate or a person entitled to apply for a family provision order; or
- involved the exercise (or failure to exercise) by the principal party to the transaction or any other person²³³ of a right, a discretion or a power of appointment, disposition, nomination or direction that, if not exercised (or exercised), could have resulted in a benefit to the deceased, the estate or a person entitled to apply for a family provision order.²³⁴

Restrictions on power

4.4.13 There are a number of restrictions on the power of the court to designate property as notional estate.²³⁵

4.4.14 First, the court can only make a notional estate order if it is satisfied that:

- the deceased left no estate; or
- the deceased’s estate is insufficient for the making of the family provision order or costs orders that the court thinks should be made; or
- orders should not be made wholly out of the deceased’s estate because there are other persons who could apply for family provision orders, or there are special circumstances;²³⁶ or
- the deceased’s estate has been distributed and no estate remains, or the remainder is insufficient for the court making family provision orders or costs orders.²³⁷

²³¹ Ibid s 81.

²³² Ibid s 82.

²³³ Including alone, or jointly or severally.

²³⁴ *Succession Act 2006* (NSW) s 83(1).

²³⁵ Ibid div 3.

²³⁶ Ibid s 88.

²³⁷ Ibid s 79.

4.4.15 Secondly, the court may not exercise its power unless it has considered the importance of not interfering with reasonable expectations in relation to property, the substantial justice and the merits involved in making or refusing to make an order and any other matter it considers relevant.²³⁸

4.4.16 The assessment of ‘reasonable expectations’ has been explained as follows:

‘What amounts to “reasonable expectations in relation to property” was considered in *Petschelt v Petschelt* [2002] NSWSC 706, at [68], by McLaughlin M (as the Associate Justice then was), who said:

That phrase does not, however, indicate the person by whom those reasonable expectations are held. Clearly the Court must consider the reasonable expectations of the First Defendant in relation to property. By the same token, however, the Court should also consider the reasonable expectations of the Deceased herself in relation to property, and also, possibly, the reasonable expectations of the Plaintiff.

In *D’Albora v D’Albora* [1999] NSWSC 468, at [53], Macready M (as the Associate Justice then was) gave examples of the circumstances which might give rise to reasonable expectations for the purposes of this section:

Under s 27(1)(a) the Court has to consider the importance of not interfering with the reasonable expectations in relation to the property. Such reasonable expectations may well occur in a number of circumstances. For example, a beneficiary who receives a property may have spent money on the property or worked on the property ... Another common area where one often sees in this matter is where there is a promise in relation to the property and the acting by an intended beneficiary on the fact of that promise.

Similarly, in *Wentworth v Wentworth* [1992] NSWCA 268, Priestley JA, with whom Samuels AP and Handley JA agreed, referring to the “more general precautionary provisions” in ss 26 and 27 of the Family Provision Act, said:

Section 27(1) for example, says the Court shall not make an order designating property as notional estate unless it has considered, amongst other things, the importance of not interfering with reasonable expectations in relation to property. If someone is in possession of property, otherwise than by gift, after having given up something of equivalent value in order to obtain that property, it would be entirely reasonable for that person to expect to remain in possession of it.” (Emphasis omitted.)²³⁹

Factors considered when deciding what property is to be designated as notional estate

4.4.17 The court must consider the following matters when deciding what property should be designated as notional estate:

- the value and nature of any property the subject of a relevant property transaction, or subject to a subsequent transaction;
- any consideration given in a relevant property transaction;

²³⁸ Ibid s 87.

²³⁹ *Soens v Rathborne* [2018] NSWSC 302, [227] (Hallen J) citing *John v John* [2010] NSWSC 937 (Ward J) (as her Honour then was) [118]–[120].

- any changes in the value of property or the consideration since the relevant property transaction was entered into, distribution made, or consideration given;
- whether the property or consideration could have been used to obtain income; or
- any other matter it considers relevant in the circumstances.²⁴⁰

4.4.18 The court may only designate property as notional estate to the extent it considers necessary to make the provision that it determines should be made (or for costs to be paid).²⁴¹

4.4.19 The NSW *Succession Act* also clarifies that, where property becomes held by a person as a trustee, the court may not designate any property held by that person as notional estate apart from the property held by them as a trustee as a consequence of a relevant property transaction.²⁴²

4.4.20 It is possible to apply to the court to vary a notional estate order to change the property affected.²⁴³ This enables property affected to be substituted for alternative property.

4.5 Effect of notional estate order

4.5.1 An order designating property as notional estate extinguishes rights to that property to the extent of the order.²⁴⁴

4.6 Critique of New South Wales' notional estate laws

4.6.1 Some commentators and those practicing in succession law have raised issues with New South Wales' notional estate laws. These critiques are included within Part 5 of this report when considering the question whether Tasmania should adopt these provisions within the *TFM Act*.²⁴⁵

4.7 Summary

4.7.1 The terms of reference ask for the Institute's advice about whether Tasmania should enact notional estate provisions. One matter asked of respondents was, if Tasmania introduced notional estate laws, should it adopt the New South Wales provisions, or should certain aspects be different. Responses to this question, along with responses to the Issues Paper's other questions are outlined in Part 5.

²⁴⁰ *Succession Act 2006* (NSW) s 89(1).

²⁴¹ *Ibid* s 89(2).

²⁴² *Ibid* s 89(3).

²⁴³ *Ibid* s 92.

²⁴⁴ *Ibid* s 84.

²⁴⁵ See [5.5].

Part 5

Should Tasmania Introduce Notional Estate Laws?

5.1 Introduction

5.1.1 The Issues Paper asked a series of questions to ascertain the need, and degree of community support, for the introduction of notional estate laws in Tasmania. It asked respondents whether they considered that notional estate laws would create any adverse consequences. Respondents were also asked whether, in their view, the New South Wales provisions ought to be adopted unchanged or whether there were certain elements that should be amended.

5.1.2 The Issues Paper generated significant community interest, with 32 formal submissions received, representing the views of 67 individuals and two organisations. This part outlines responses received and concludes with an analysis of the merits of notional estate-style provisions. The Institute's view is that, at this time, notional estate legislation would have limited impact in resolving an unquantified problem.

5.2 Is there a problem?

5.2.1 The Issues Paper commented that, to decide whether to introduce notional estate legislation, the first question that should be asked is, 'is there a need?' One difficulty in answering this question is the lack of empirical evidence about the extent of disputes occurring in Tasmania including the number that are resolved informally, those that result in the commencement of court proceedings and the percentage that proceed to trial. Available data is outlined below.

Prevalence of claims

5.2.2 The number of reported Supreme Court decisions provides some evidence of the prevalence of family provision disputes in Tasmania.

5.2.3 Appendix 3 summarises the reported decisions between April 2009 and April 2019. The following observations are made:

- during this period, there were 13 reported decisions (1.3 per year average);
- taking into account the two cases involving multiple applicants,²⁴⁶ there were 17 individual claims determined (average 1.7 per year), with nine of those claims being successful (52.9%);

²⁴⁶ In both *Contencin v Tasmanian Perpetual Trustees Ltd* [2010] TASSC 3 ('*Contencin*') and *Nicholas v Tubb* [2016] TASSC 53 there were multiple applicants: *Contencin* with two applicants and *Nicholas v Tubb* with four.

- two matters involved claims by surviving spouses (11.8%), with the substantial majority commenced by adult children (88.2%); and
- both claims by spouses were successful (100%), whilst seven out of the 15 adult children claims were successful (46.7%) (total success rate 53%).

5.2.4 To gauge the prevalence of disputes, it is useful to review the number of deaths occurring during that period. Australian Bureau of Statistics data reveals that there were 49,889 deaths in Tasmania between 2009 and 2017 (statistics are unavailable for 2018 and 2019).²⁴⁷ Whilst it is not possible to draw accurate conclusions, it is apparent that the frequency with which family provision hearings occur as a percentage of all deaths in Tasmania is relatively rare.

5.2.5 The fact that there are few matters that proceed to trial does not, however, mean that there is not a problem. Many disputes may be resolved informally within families and between beneficiaries without court action becoming necessary. And the statistics do not reveal the percentage of claims that are commenced but are resolved or abandoned before trial. Australian research, for example, found that only 31% of the Public Trustees' files sampled that involved estate disputes resulted in a trial.²⁴⁸ The Supreme Court of Tasmania advised the Institute that approximately 60 to 65% of civil matters (including family provision claims) are settled at mediation and a large proportion settle after mediation.

5.2.6 The Supreme Court's Annual Reports contain data of the number of Grants finalised each year and number of family provision claims filed. These details are outlined in Table 1.

Table 1: Number of Grants made and family provision claims filed/determined per year²⁴⁹

Financial Year	No. Applications for a Grant* Finalised	No. Family Provision claims filed	Percentage of claims to Grants made	Number of reported decisions
2017/2018	2,266	34	1.50%	0
2016/2017	2,330	44	1.89%	1
2015/2016	2,342	42	1.79%	1
2014/2015	2,441	30	1.23%	1
2013/2014	2,405	33	1.37%	1
Total	11,784	183	1.55%	4

*'Grant' includes applications for Probate and applications for Letters of Administration. It excludes Reseals of Probate due to data not being available prior to 2016–2017.

5.2.7 These statistics illustrate the infrequency with which family provision disputes are litigated in Tasmania.

²⁴⁷ Australian Bureau of Statistics, *Deaths, Australia, 2017* (Catalogue Number 3302.0, 26 September 2018).

²⁴⁸ Cheryl Tilse et al, *Having the Last Word? Will Making and Contestation in Australia* (Report, University of Queensland, 2015) 17.

²⁴⁹ Data extracted from the Supreme Court of Tasmania Annual Reports, available at <<https://www.supremecourt.tas.gov.au/publications/annual-reports/>>.

Prevalence of family provision avoidance

5.2.8 The previous paragraph reviewed the number of matters that proceed to a court hearing, concluding that family provision disputes in Tasmania are relatively infrequent. The extent of the issue, however, can only be gleaned through data identifying the number of eligible applicants that have been unable to pursue their claims because assets passed outside an estate. To gauge the true extent of the issue, it would then be necessary to assess those claims against their merits to establish the extent to which meritorious claims are unable to be pursued because of the absence of notional estate provisions in Tasmania.

5.2.9 These are matters about which there is little, if any, empirical evidence. For this reason, the Institute sought information about whether individuals had experienced situations where a person had structured their affairs to remove them from risk of a family provision challenge:

Question 1

In your experience, do people deal with or structure their assets in order to reduce the property that is available to make provision for a successful applicant under the *Testator's Family Maintenance Act 1912* (Tas)? Please provide examples.²⁵⁰

5.2.10 There were 17²⁵¹ submissions addressing this question. Either explicitly or implicitly, 14²⁵² submissions (82%) indicated that, in their experience, there are occasions in which people structure their affairs to remove assets from their estate. Some respondents, however, qualified their response by indicating either:

- that the circumstances in which this is completed for the primary purpose of removing assets from a family provision challenge is, in their experience, relatively rare;²⁵³ and/or
- that the removal of assets from the estate environment is more commonly completed for a range of other reasons including taxation, asset protection purposes, or to avoid the need for a Grant of Administration after death.²⁵⁴

5.2.11 Three lawyers²⁵⁵ stated that, in their experience, clients who structure their affairs with the intention of removing assets from a foreseeable challenge are usually well informed and do so only after careful consideration. Lawyer Justin McMullen submitted that more commonly, where a client

²⁵⁰ This question was based upon a question originally formulated by the VLRC. See VLRC (n 192) 34 Question FP7.

²⁵¹ Susan Baldock, Dorothy Lowe and siblings, Tony Gray, Essen Bradbury, Heather Dunn, Barry Claridge, Ann Hamilton, Submission #2I, Phillipa Alexander, Submission #17, Justin McMullen, Alice Grubb, Geoffrey Nash, Steven Bishop, Nina Hendy, Elder Law Committee, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁵² Susan Baldock, Dorothy Lowe and siblings, Tony Gray, Essen Bradbury, Heather Dunn, Barry Claridge, Ann Hamilton, Submission #2I, Submission #17, Justin McMullen, Steven Bishop, Nina Hendy, Elder Law Committee, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁵³ Essen Bradbury, Submission #2I, Justin McMullen, view of the majority of the Elder Law Committee, noting that one member of that Committee abstained from participating in the submission and another Committee member expressed a dissenting opinion as explained in this report.

Justin McMullen suggested this may occur in approximately +/- 2% of clients, with a Hobart law firm (2I) indicating somewhere in the range of approximately 5%–10%.

²⁵⁴ Justin McMullen, Alice Grubb, Ann Hamilton, Elder Law Committee.

²⁵⁵ Justin McMullen, Essen Bradbury, Ann Hamilton.

has concerns about an adult child receiving an inheritance, clients put in place protective measures for their benefit, rather than removing that child as a beneficiary:

Typically, where a testator parent has concerns over the poor behaviour of a child, they are more likely to put in place appropriate measures to protect that child from their poor behaviour. That is to say, parents no longer ‘cut out’ the spendthrift, gambling or drug addicted child but rather use discretionary and protective trusts to ensure that they can safely make provision for those beneficiaries to ensure that they may get the highest benefit from the legacy that they will receive.

5.2.12 Retired lawyer Ann Hamilton stated:

In my experience people making a decision to cut a family member out of receiving a share of their estate find that decision difficult, and emotionally stressful. I would be constantly reminded of the complexity of family relationships and would see how much hurt is involved in estrangement. I never felt that people made the decision to cut someone off lightly or without re-living the pain of a difficult relationship.

5.2.13 Several respondents²⁵⁶ observed that usually people’s intentions behind minimising the assets in their estate were to ‘make things easier’, or to provide certainty for loved ones. In other words, minimising the assets in their estate was usually motivated by a desire to assist their chosen beneficiaries, rather than being completed for malicious purposes. One submission expressed this as follows: ‘I believe the motivation is usually always to protect their “true beneficiaries” as opposed to disinheriting a person.’²⁵⁷

5.2.14 Tony Gray, a financial planner with 25 years’ experience, commented upon the infrequency with which he had experienced clients or their families making malicious or unfair decisions about the division of assets after death:

In only one instance have I encountered a client situation where they were manifestly unfair in their estate plans — and that did not involve superannuation or insurance and the assets fell within the estate (and was not challenged). By contrast, we regularly find clients who wish to limit the risk of challenge when planning their estate position and do so in a fair and considered fashion.

5.2.15 Justin McMullen made similar observations about the infrequency with which deliberate asset stripping occurs:

I find it extremely rare that potential TFM claim avoidance strategies are undertaken in typical nuclear family groups. Such action is typically undertaken only where there is very significant relationship breakdown between, say, a testator parent and an adult child. Even within the class of those will makers who may depart for standard estate distributions, it is a much smaller sub class of people who then take material steps to diminish their estate to defeat any potential claim. To take the further step often means, say with real property, relinquishing a level of control over that asset during the testator’s lifetime. In many cases, that is a step too far.

²⁵⁶ Essen Bradbury, Submission #17, Alice Grubb, Tony Gray.

²⁵⁷ Alice Grubb.

5.2.16 Eight submissions²⁵⁸ informed the Institute of situations where eligible applicants had been unable to apply under the *TFM Act* because assets had passed to beneficiaries outside the estate environment. The substantial majority were adult children claimants, whilst a submission from three litigation lawyers at Hobart law firm, Ogilvie Jennings,²⁵⁹ provided examples of three different matters, one of which affected children who were minors. Further details of these examples are outlined later in this report to illustrate their support for notional estate legislation.²⁶⁰

5.2.17 Another respondent commented that they intend to structure their affairs to remove assets from risk of challenge.²⁶¹ Consistent with observations that many lawyers made (outlined above), it was stated their intentions for doing so were to protect certain beneficiaries whom they considered to be deserving. Two respondents²⁶² stated that they had worked hard to build up their assets and sacrificed a lot and that they should have the choice about who receives their assets after death. The perceived importance of individuals having freedom of testation is considered further at [5.5.2].

5.2.18 In summary, it is apparent that some Tasmanians do structure their affairs and make certain arrangements in order to protect assets from a family provision challenge. The extent to which this occurs, however, remains unquantified although responses suggest that the frequency is relatively low.

What does the public think about this circumstance?

5.2.19 The question that follows concerns the degree to which Tasmanians consider it appropriate for individuals to be able to take steps to protect assets. If there is broad community support for individuals having the ability to remove assets from their estate, then there is no ‘problem’ requiring redress. The Issues Paper therefore asked the following question:

Question 2

Should people be entitled to deal with their assets during their lifetime to reduce the property that is in their estate and available to claim under the *Testator’s Family Maintenance Act 1912* (Tas)? Please provide reasons for your opinion.²⁶³

5.2.20 There was a diverse range of answers to this question, ranging from those strongly opposed to avoidance schemes, to those strongly in support of people retaining the ability to structure their affairs to reduce the assets in their estate.

²⁵⁸ Submission #1, Susan Baldock, Dorothy Lowe and siblings, Barry Claridge, Steven Bishop, Heather Dunn, Nina Hendy, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁵⁹ Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁶⁰ See [5.5.19], [5.6.27], [5.6.31].

²⁶¹ Submission #3.

²⁶² Submission #3, Submission #11.

²⁶³ This question was originally formulated by the VLRC. See VLRC (n 192) 34 Question FP8.

5.2.21 Of the six submissions²⁶⁴ expressing concerns with the current scheme, reasons given in support of their views included that:

- the effectiveness of the *TFM Act* is severely limited whilst people are able to limit, and sometimes eliminate, family provision claims;
- most statutes dealing with financial impositions contain anti-avoidance provisions — for example, taxation, family law and bankruptcy;²⁶⁵
- they had experienced situations where they considered legitimate claims had been defeated through there being no assets able to be claimed;²⁶⁶ and
- it can result in eligible applicants in financial need becoming or remaining reliant upon government support.²⁶⁷

5.2.22 All of the respondents²⁶⁸ that stated that their claims had been defeated through assets being transferred prior to death raised concerns about the circumstances in which transfers or the making of a will had occurred.²⁶⁹ Issues about a parent's capacity at the time of a transfer(s) and allegations of undue influence, deception, coercion and fraud were mentioned with it being apparent that these concerns contributed to respondents' sense of anger and frustration that they felt their claims had been effectively defeated in these circumstances. There was a sense that respondents considered that choices about the transfer of assets were not a true reflection of their parents' wishes and intentions and were instigated by third parties (step-parents or siblings) with ill-motives. In other words, it appeared these respondents were of the view that their parents' ability to act as 'wise and just testators' was overborne by external factors and that this was one reason justifying a need for judicial intervention.

5.2.23 These submissions demonstrate the complexities and range of issues that can arise in estate disputes with sometimes interweaving or compounding issues exacerbating frustration and dissatisfaction with existing laws. However, as explained elsewhere in this report,²⁷⁰ concerns about the validity of a gift or transfer due to incapacity, undue influence or fraud and questions about the validity of a person's will are not necessary components for the making of a notional estate order and those matters can be addressed through existing causes of action.²⁷¹ In other words, enactment

²⁶⁴ Submission #1, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan, Steven Bishop, Heather Dunn, Nina Hendy, Barry Claridge. Whilst Dorothy Lowe and siblings expressed concerns about the current framework based upon their own experiences, in response to this question of the Issues Paper asking whether people should have the ability to structure their affairs to remove assets from challenge, the response was 'Yes if they are *compus mentus* [sic].'

²⁶⁵ Steven Bishop, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁶⁶ Submission #1, Susan Baldock, Dorothy Lowe and siblings, Barry Claridge, Steven Bishop, Heather Dunn, Nina Hendy, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁶⁷ Steven Bishop.

²⁶⁸ Dorothy Lowe and siblings, Barry Claridge, Heather Dunn, Nina Hendy, Submission #1, Submission #4.

²⁶⁹ Submission #1 also raised concerns about the purchase and transfer of assets to joint tenancy ownership where there is a second relationship or marriage, commenting 'I think second marriages are a opportunity for deceptive actions, a selfish financial gain... the concept of marriage is a green light to gain a financial advantage laced with selfish motives.'

²⁷⁰ See [1.4.15].

²⁷¹ This matter was raised by Phillipa Alexander in her submission. Submission #11 also commented that legislation relating to theft might address these types of concerns.

of notional estate legislation would not alter a person's existing right to seek redress where they assert that gifts and transfers have been completed without the transferor having capacity or whilst subject to undue influence or fraud. Further, in circumstances where a transaction results in a step-parent inheriting a biological parent's asset, children (the recipient's step-children) remain eligible to pursue a claim against that step-parent's estate following their death.²⁷²

5.2.24 Nevertheless, the examples that lawyers²⁷³ provided where clients had been unable to pursue family provision claims due to the lack of estate assets did not raise questions about the deceased's capacity or that they were overborne by undue influence. They indicated that, under existing laws, there were no available remedies for those clients without notional estate legislation.

5.2.25 Reasons given by those (n = 11²⁷⁴) who considered it valid or appropriate for individuals to be able to structure their affairs to reduce the assets at risk included:

- the importance of freedom of testamentary disposition, or the ability for a person to decide who receives their assets after death;²⁷⁵
- that people should be able to deal with their assets during their lifetime as they wish;²⁷⁶
- that it provides will-makers and their beneficiaries with certainty, and therefore peace of mind, that assets are free from challenge;²⁷⁷
- that will-makers are themselves best able to consider and weigh up the various competing claims to their assets and decide what is an appropriate division in the circumstances;²⁷⁸
- that it avoids delay in the administration of estates;²⁷⁹
- that the need for notional estate legislation has not been established through clear evidence;²⁸⁰ and
- that there is a lack of evidence of the effectiveness of the New South Wales notional estate provisions in addressing any perceived need.²⁸¹

5.2.26 In summary, of the respondents addressing this question, most were of the view that individuals should have the ability to structure their assets to reduce what is in their estate and therefore available for claimants under the *TFM Act*. Paragraph [5.5] outlines in more detail the arguments advanced in support of respondents' opinions.

²⁷² *TFM Act* s 3A, s 2 definition of 'child'.

²⁷³ Christine Schokman, Dexter Marcenko and Michael Flanagan, Steven Bishop.

²⁷⁴ Submission #4, Essen Bradbury, Ann Hamilton, Submission #2I, Phillipa Alexander, Justin McMullen, Alice Grubb, Geoffrey Nash, Submission #11, Submission #17, Elder Law Committee.

²⁷⁵ Submission #4, Ann Hamilton, Submission #2I, Submission #17, Geoffrey Nash, Elder Law Committee, Submission #11.

²⁷⁶ Sam McCullough, Essen Bradbury, Submission #2I, Phillipa Alexander.

²⁷⁷ Essen Bradbury, Tony Gray, Sam McCullough, Submission #11.

²⁷⁸ Submission #10, Alice Grubb, Justin McMullen, Sam McCullough.

²⁷⁹ Elder Law Committee.

²⁸⁰ Phillipa Alexander, Justin McMullen, Elder Law Committee, Submission #11.

²⁸¹ Phillipa Alexander, Submission #11. This view was also expressed by the VLRC: VLRC (n 194) [6.175].

5.3 Potential issues with notional estate provisions

5.3.1 A further factor to consider when assessing the merits of introducing notional estate legislation is whether it would create any unintended or undesirable consequences. The VLRC, for example, observed that people deal with their assets in particular ways for a variety of reasons, including to provide for their family during their lifetime, and that to introduce notional estate legislation would interfere with legitimate structuring arrangements.²⁸²

5.3.2 Appreciating the importance of not introducing a scheme that is intended to resolve one issue but by doing so creates others, the Institute requested respondents' views about whether they considered notional estate legislation would create any adverse consequences:

Question 4

Do you consider that introduction of notional estate provisions in Tasmania would create difficulties or issues? For example, in your experience or opinion how might notional estate legislation interfere with:

- (a) tax planning;
- (b) asset protection arrangements;
- (c) provisions made for individuals during a person's life;
- (d) farming or business succession arrangements; or
- (e) other aspects of estate planning?

5.3.3 There were 12 responses to this question.²⁸³ Potential adverse consequences raised included:

- the effect upon asset protection arrangements, for example where trusts are established for asset protection purposes;²⁸⁴
- the potential impact upon tax planning strategies²⁸⁵ including the potential for adverse taxation consequences if, for example, superannuation is paid to non-dependants;²⁸⁶
- the impact upon gifts made for individuals during a person's life;²⁸⁷ and
- that it undermines estate planning strategies, particularly where a person dies shortly after completing a restructuring of their affairs.²⁸⁸

²⁸² VLRC (n 192) 34 [2.89]. See also discussion in VLRC (n 194) [6.177]–[6.180], [6.185].

²⁸³ Submission #4, Tony Gray, Essen Bradbury, Heather Dunn, Ann Hamilton, Submission #21, Phillipa Alexander, Justin McMullen, Geoffrey Nash, Steven Bishop, Elder Law Committee, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁸⁴ Essen Bradbury, Phillipa Alexander.

²⁸⁵ Essen Bradbury, Ann Hamilton, Phillipa Alexander, Justin McMullen, Elder Law Committee.

²⁸⁶ Justin McMullen, Elder Law Committee, Ann Hamilton referring to discussion in *Re Estate Grant, deceased* [2018] NSWSC 1031 [199].

²⁸⁷ Essen Bradbury, Phillipa Alexander, Elder Law Committee.

²⁸⁸ Submission #21, Justin McMullen, Elder Law Committee.

5.3.4 In acknowledging that notional estate provisions could have adverse consequences, lawyer Steven Bishop expressed the view that upholding the objectives of the *TFM Act* is of greater importance:

It may interfere with the listed matters [included in Question 4]. In my view, that would only be to the extent that it is necessary to achieve compliance with the obligations under the *TFM Act*. Those matters are of a lesser priority than the need to comply with the *TFM Act*, and should therefore yield to that small extent. I note that they are all matters upon which parties would be receiving legal or other professional advice, and there is no reason to think that such advice cannot encompass suitable compromises. This is a lesser evil than allowing untrammelled freedom of testamentary disposition to set at nothing the proper social objectives of the *TFM Act*.

5.3.5 Lawyers, Christine Schokman, Dexter Marcenko and Michael Flanagan also noted that any adverse consequences in making a notional estate order would be a factor that the court would consider:

The courts under Part 3.3 of the *Succession Act 2006* (NSW) are required to consider the difficulties which may be caused if they are asked to exercise their jurisdiction to make provision from notional estate. Similar provisions in Tasmania would afford protection against undue interference with transactions which are effected pre-death.

There is also a large body of legislation and common law which considers the adverse consequences which may be given rise to as a result of other statutory provisions which prohibit attempts to defeat the due operation of statutory regimes. Parliamentary Counsel can no doubt draw upon the lessons of these statutory and common law principles.

5.3.6 In contrast, three respondents²⁸⁹ expressed an opposing view, stating that notional estate laws would disadvantage more individuals than they would benefit. One commented that ‘many more would suffer their ill effects than those for whom they might benefit.’²⁹⁰ Justin McMullen submitted:

[notional estate legislation would] introduce a substantial impost onto every testator who might wish to structure their affairs for tax minimalisation, asset protection, protection of beneficiaries, balancing between different categories of beneficiaries in melded relationships and many other valid forms of structuring — none of which is designed to deny provision to beneficiaries who are due adequate provision for their proper maintenance and support after the death of the testator.

5.4 Should Tasmania introduce notional estate legislation?

5.4.1 Answers to previous questions elicited that there is at least a percentage of potential claimants who have been unable to pursue claims under the *TFM Act* because assets were held or distributed outside of the estate environment. There were diverse and conflicting views amongst respondents about whether present arrangements are appropriate.

²⁸⁹ Submission #11, Phillipa Alexander, Justin McMullen.

²⁹⁰ Submission #11.

5.4.2 The Issues Paper asked respondents for their views about whether notional estate legislation should be introduced in Tasmania:

Question 3

Please indicate your level of support (if any) for the following proposition: ‘notional estate legislation should be introduced in Tasmania’:

1. strongly agree;
2. agree;
3. somewhat agree;
4. neutral/no view;
5. somewhat disagree;
6. disagree;
7. strongly disagree.

Please provide reasons explaining your view.

5.4.3 There were 25 responses to this question. Ten (40%) either agreed²⁹¹ or strongly agreed²⁹² that notional estate legislation should be introduced, whilst 15 (60%) either opposed²⁹³ or strongly opposed²⁹⁴ reform. Accounting for the fact that some submissions were made jointly, there were 19 individual respondents²⁹⁵ who either agreed or strongly agreed with the introduction of notional estate legislation, with 12 individuals and two organisations opposing reform.

5.4.4 The following section outlines the feedback received both for and against enactment of notional estate provisions in Tasmania.

5.5 Arguments against notional estate provisions

5.5.1 Sixteen submissions expressed objection to the introduction of notional estate legislation. Reasons given are summarised in this paragraph.

²⁹¹ Susan Baldock, Litigation Committee of the Law Society, endorsing the reasoning of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁹² Submission #1, Submission #4, Dorothy Lowe and siblings Barry Claridge, Heather Dunn, Steven Bishop, Nina Hendy, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

²⁹³ Robert Young, Submission #5, Submission #1I, Submission #11, Submission #2I.

²⁹⁴ Submission #3, Tony Gray, Essen Bradbury, Ann Hamilton, Phillipa Alexander, Submission #17, Justin McMullen, Alice Grubb, Geoffrey Nash, Elder Law Committee (with dissenting view expressed).

²⁹⁵ Ten from the one family.

Freedom of testation and freedom of disposition

5.5.2 The importance of individuals having freedom to decide who receives their assets on death was the most common reason conveyed in support of the view that notional estate legislation should not be introduced. The Elder Law Committee, for example, stated:

There are many reasons why a testator may wish to disinherit a child or children or leave them a smaller proportion of their estate. When a Will maker has worked their life building the assets in their estate they should be able to do what they want with them. It is the Will maker's property therefore they should be able to give it to whom they want. Children should not have an automatic entitlement to a share of their parents' estate.

5.5.3 The Committee went on to state:

There are many countries around the world that operate under a system of forced heirship where a proportion of a person's estate has to pass to certain classes of beneficiaries. In Australia we are free to give our assets to whomever we want under testamentary freedom. The introduction of notional estates would severely curtail this freedom.

5.5.4 The Committee's submission noted that one of its members, a litigation lawyer, held a dissenting view. This dissenting opinion was conveyed in the submission of member Christine Schokman, made jointly with Dexter Marcenko and Michael Flanagan. They expressed a view that opposition to notional estate legislation based upon testamentary freedom is misguided:

Any extension of the jurisdiction of the courts under the TFM Act to allow for consideration of a notional estate does not unduly restrict testamentary freedom or stop people dealing with their assets during their lifetime as they wish. The judges exercising this jurisdiction are very cognisant of their obligations to take into consideration the wishes of a testator when faced with an application under the TFM Act. ...

Acts by a testator which attempt to thwart the objects of the Act would be accounted for as evidence of a deceased's testamentary intentions. Indeed s 8A of the Act expressly provides that evidence as to the deceased's reasons for their dispositions are a relevant consideration. Few other considerations are expressly enshrined in the Act.

5.5.5 They went on to state:

Citing the principle of testamentary freedom as a basis for opposing the introduction of notional estates carries limited force. The Supreme Court's respect for the principle of testamentary freedom in the course of determining proceedings under the Act is regularly expressed.²⁹⁶

5.5.6 Freedom for a person to leave their assets as they wish is often raised when discussing family provision legislation.²⁹⁷ Its importance was highlighted in the 1870 decision of *Banks v Goodfellow*:

²⁹⁶ Citing *Contencin* (n 246).

²⁹⁷ See for example *McDonald v O'Connor* [2019] NSWSC 261, [279] (Hallen J), quoting his Honour in *Goodsell v Wellington* [2011] NSWSC 1232, [108]. The Elder Law Committee referred to the following passages from High Court cases by way of illustration: 'all authorities agree that it was never meant that the Court should re-

the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it.²⁹⁸

5.5.7 Despite the passing of time since *Banks v Goodfellow* was decided, Justice Lindsay²⁹⁹ has said of this statement that, '[t]he genius of this passage is that it is timeless in its understanding of the human condition. It is instructive even in modern times.'³⁰⁰ Several legislative reforms have extended the concept of testamentary freedom over the years,³⁰¹ including providing the courts with 'dispensing powers' to overcome deficiencies with wills,³⁰² and powers to rectify wills.³⁰³

5.5.8 Steven Bishop expressed the view that testamentary freedom has been given 'undue precedence.' His submission included the following quotation from a journal article to illustrate the need for limits upon absolute testamentary freedom:

'The notion of Testamentary freedom was a construct of the 19th century, an offshoot of the style of English laissez-faire liberalism that was fashionable at the time. However it was recognised late in the 19th century that testamentary freedom of this type allowed some testators to ignore their responsibilities...'³⁰⁴

5.5.9 Christine Schokman, Dexter Marcenko and Michael Flanagan made similar comments about the limited relevance of testamentary freedom, stating: 'We have recognised for over a century that testamentary freedom should not permit testators to fail to provide for those who are financially dependent upon them or who have a "moral" claim for provision.'

5.5.10 Whilst interference with testamentary freedom is a common concern, notional estate orders in New South Wales are in fact relatively rare. Appendix 4 contains a summary of reported decisions between April 2018 and April 2019 where the issue of notional estate was raised. Seven

write the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court. An observer of the course of development in the administration in Australia of such statutory provisions might be tempted to think that, unchecked, that is likely to become the practical result.': *Pontifical Society for the Propagation of the Faith v Scales* (1962)107 CLR 9 Dixon CJ. The Committee also referred to *Vigolo v Bostin* (2005) 221 CLR 191(Gleeson CJ) who stated that: 'The discretionary power of the Court is limited in interfering with the exercise of freedom of testamentary disposition.'

²⁹⁸ *Banks v Goodfellow* (1870) LR 5 QB 549, 564.

²⁹⁹ New South Wales Supreme Court judge. Justice Lindsay manages the Probate list.

³⁰⁰ Justice Geoff Lindsay, *A Province of Modern Equity: Management of Life, Death and Estate Administration* (Estate Administration: A Course of Seminars – The Protective, Probate and Family Provision Jurisdictions of the Supreme Court of New South Wales, The New South Wales Bar Association and The Law Society of New South Wales, 26 May 2015) [36].

³⁰¹ Croucher (n 23) 180.

³⁰² See for example *Wills Act 2008* (Tas) ss 10, 13.

³⁰³ See for example *ibid* s 42.

³⁰⁴ Submission of Steven Bishop quoting James MacIntosh, 'Limitations on Free Testamentary Disposition and the British Empire' (1930) 12(1) *Journal of Comparative Legislation and International Law* 13.

of the 29 decisions³⁰⁵ handed down during that period raised the question of potential notional estates, with only one matter³⁰⁶ resulting in a notional estate order being made.

Freedom to deal with one's assets during life

5.5.11 Several respondents noted that, it is not only testamentary freedom that is affected by notional estate legislation, but also the freedom for a person to deal with their assets during their life. Of the fundamental distinction between these rights, the Hon Mr Justice David Hayton has commented that it was vital to 'protect well-established fundamental property principles that make a clear distinction between *inter vivos* property rights and testamentary property rights.'³⁰⁷ The Institute of Chartered Accountants in England and Wales expressed a similar view in its submission to the EUC, commenting that: 'Clawback will destroy the fundamental right of an individual to alienate himself from his property in lifetime and on death.'³⁰⁸ The Scottish Law Commission has made similar observations, referring to the following statement of the British Columbia Law Reform Commission about the function of succession laws as being 'to distribute what remains of the testator's estate after his death, not to remedy any injustices which may have occurred during his lifetime.'³⁰⁹

5.5.12 These sentiments were shared by several respondents to the VLRC's review, including the Law Institute of Victoria, Carolyn Sparke SC and barrister Andrew Verspaandonk.³¹⁰ SALRI also commented upon the importance of individuals having the ability to deal with assets during

³⁰⁵ *Olsen v Olsen* [2019] NSWSC 217 (15 March 2019); *McDonald v O'Connor* [2019] NSWSC 261 (14 March 2019); *Gail Patricia Stone v Michael John Stone* [2019] NSWSC 233 (8 March 2019); *Detheridge v Detheridge* [2019] NSWSC 183 (7 March 2019); *Neal v Neal* [2018] NSWSC 1669 (1 March 2019); *Meissner v Lindsay* [2019] NSWSC 82 (12 February 2019); *Rogers v Rogers* [2018] NSWSC 1982 (18 December 2018); *Maynard v Maynard* [2018] NSWSC 1961 (14 December 2018); *Re Estate Di Meglio; Di Meglio v Carle* [2018] NSWSC 1690 (4 December 2018); *Wise v Barry; The Estate of Robyn Margaret Wise* [2018] NSWSC 1726 (14 November 2018); *Re Estate McNamara* [2018] NSWSC 1661 (2 November 2018); *Sreckovic v Sreckovic* [2018] NSWSC 1597 (23 October 2018); *Cringle v Cringle* [2018] NSWSC 1558 (19 October 2018); *Mekhail v Hana; Mekail v Hana; In the Estate of Nadia Mekhail* (No 3) [2018] NSWSC 1452 (5 October 2018); *Rogic v Samaan* [2018] NSWSC 1464 (28 September 2018); *Papas v Co* [2018] NSWSC 1404 (12 September 2018); *Amos v Hogg* [2018] NSWSC 1226 (15 August 2018); *Sergent v Glass* (No 2) [2018] NSWSC 1100 (18 July 2018); *Steinmetz v Shannon* [2018] NSWSC 1090 (16 July 2018); *Re Estate Grant, deceased* [2018] NSWSC 1031 (5 July 2018); *Gargano v Coves* [2018] NSWSC 985 (3 July 2018); *Katramados v Hasapis* [2018] NSWSC 948 (22 June 2018); *Cooper v Cooper* [2018] NSWSC 851 (14 June 2018); *Philpott v Pantos* [2018] NSWSC 852 (14 June 2018); *Justin Barker v Gordon Albert Salier* [2018] NSWSC 798 (24 May 2018); *Sariban v Pocock; Pocock v Peipman* [2018] NSWSC 724 (24 May 2018); *Wright v Burg* [2018] NSWSC 595 (7 May 2018); *Beech v Squire* [2018] NSWSC 594 (4 May 2018); *Harris v Harris* [2018] NSWSC 552 (1 May 2018); *Webster v Strang; Steiner v Strang* [2018] NSWSC 495 (23 April 2018); *Sloboda v Crawford* [2018] NSWSC 483 (17 April 2018).

³⁰⁶ *Re Estate Grant, deceased* [2018] NSWSC 1031 (5 July 2018).

³⁰⁷ Cited in EUC (n 88) 71.

³⁰⁸ *Ibid* 73.

³⁰⁹ LRCBC, (n 143) 39, cited in Scottish Law Commission (2007) (n 118) [4.15]. The Scottish Law Commission did not propose that pre-death gifts be able to be disturbed due to the uncertainties this would create, endorsing the NSWLRC's description of this as the 'social evil of insecure titles': Scottish Law Commission (2007) (n 118) [4.20].

³¹⁰ VLRC (n 194) [6.178]–[6.179].

lifetime, including making gifts to family, particularly in the context of an ageing population and economic changes:

With the greater general longevity of the population, older family members often wish to benefit their descendants during their lifetime — an opportunity not available when people typically died at a much younger age. Making provision for family and dependants when they most need it, and when a testator has the desire and the enhanced ability to do so with the enjoyment of greater wealth and security, (eg: superannuation), is something many people do.³¹¹

5.5.13 In summary, several commentators and bodies have noted that notional estate legislation affects a person's right to deal with their assets during their lifetime, including their right to make gifts in accordance with their wishes.

Lack of demonstrated need

5.5.14 Six submissions³¹² expressed the view that the need for notional estate legislation has not been demonstrated.³¹³ It was stated that there is 'no wave of avoidance that needs to be cured',³¹⁴ and that there is an absence of 'empirical evidence of the "mischief" that is to be corrected.'³¹⁵ These views align with observations made at [5.5.10] that the instance of notional estate orders in New South Wales is relatively infrequent. This fact raises questions about first, whether there is a sufficient problem with the law that requires redress and, secondly, whether New South Wales' notional estate laws address the perceived need.

5.5.15 Justin McMullen stated that instances where one party to a relationship owns all assets of the couple solely is declining, meaning that cases where a surviving spouse is left without adequate provision is declining, and will continue to decline:

It is rare in my experience to find one spouse of a couple who is ignorant as to the assets of the relationship. Anecdotally, people are more knowledgeable about the ownership arrangements of their personal and real property and their corporate and trust structures. To that end, it is less likely that one spouse of a couple will own the property of the relationship in their sole name. It is for that reason that the incidence of lack of provision to surviving spouses has diminished and will continue to diminish over time.

5.5.16 Lawyer Essen Bradbury commented that further evidence is required to demonstrate a need for legislative reform:

this quick survey is inadequate if we are going to undertake such structural reform to the TFM legislation that has been brought about by one instance of what may appear on its surface to be an unfair outcome. Accordingly, more research to investigate the costs of

³¹¹ SALRI (n 202) [8.2.3].

³¹² Alice Grubb, Phillipa Alexander, Justin McMullen, Elder Law Committee, Submission #11, Essen Bradbury.

³¹³ This view was also expressed by the VLRC: VLRC (n 194) [6.175].

³¹⁴ Justin McMullen.

³¹⁵ Essen Bradbury.

estate legislation, and a review of matters that are dealt with out of court needs to be undertaken before making such dramatic erosions of testamentary freedom.

5.5.17 Two respondents similarly submitted that there would need to be a compelling argument to justify the intrusion upon a person's rights to deal with their assets as they please.³¹⁶

Will-makers are best equipped to assess the competing claims to their assets

5.5.18 An Australian study of will-making trends found that over one quarter of the people surveyed who had made wills making unequal provision between their children stated that their reasons for doing so were in recognition of financial contributions or work.³¹⁷ Consistent with these findings, some respondents observed that individuals may, during their lifetime, make gifts to someone in recognition of, or to compensate them for their assistance or support. It was submitted that individuals should have the freedom to make gifts to thank or reward effort and that it is inappropriate for those transactions to be later subject to challenge under a family provision claim.³¹⁸ The Elder Law Committee also provided the example of a parent who, during their lifetime, transfers a shack to one of their children as they pay all the maintenance and other expenses and are the only child who uses it. The Committee commented that notional estate laws could disadvantage the recipient of the shack in those circumstances.

5.5.19 When reviewing its succession laws, the New Zealand Law Commission expressed the view that, '[i]n many cases the best person to judge who is family and what duties are owed to family is the will-maker.'³¹⁹ On the other hand, Christine Schokman, Dexter Marcenko and Michael Flanagan commented that will-makers do not always act as a 'wise and just testator.' They provided the following illustrative example:

A testator had four children who unfortunately became embroiled in a bitter feud which resulted in the testator siding with one of his children. Not long before his death the testator wrote his other three children out of his will and he gifted a substantial real estate holding to the favoured child with the evident intent of defeating any future claim under the Act.

The reason the favoured child benefitted so greatly was because she and the testator each vehemently denied that another relative sexually molested the testator's grandchildren (the issue of the children whose TFM application was intentionally defeated). They maintained this denial of guilt notwithstanding that a jury unanimously made findings of guilt against the relative. Had the Act been allowed to operate as intended the Court would have surely found that the testator had a strong moral obligation to provide for each of his children.

This recent example illustrates that not all testators are wise and just and that the principle of testamentary freedom should always be subject to the provisions of the Act.

³¹⁶ Submission #21, Sam McCullough.

³¹⁷ Tilse et al (n 248) 13.

³¹⁸ Alice Grubb, Justin McMullen, Essen Bradbury.

³¹⁹ NZLC (n 152) [25].

5.5.20 Robert Young noted that the courts consider what assets beneficiaries receive outside an estate when assessing the merits of a family provision claim.³²⁰ Mr Young suggested that a useful reform to the *TFM Act* would be to include an express provision allowing these gifts to be considered when a judge is assessing a claim.

Loss of control and lack of certainty

5.5.21 Five submissions stated that notional estate legislation would create uncertainty for individuals and their intended beneficiaries because a broader range of assets could be affected by a family provision claim.³²¹ Presently, for example, individuals who hold assets as joint tenants, or who complete binding death benefit nominations, have certainty that those assets will not be affected by a potential family provision claim after death. Similarly, the recipients of assets gifted during life have certainty that those gifts will not later be the subject of a family provision claim.³²² There is a risk that creating uncertainty might deter individuals from maintaining, developing or improving properties.³²³

5.5.22 It was said that uncertainty would erode the peace of mind that is achieved when individuals have confidence that assets will pass to their chosen beneficiaries free from challenge. Financial advisor Tony Gray explained the comfort that family members often feel upon being informed that decisions that the deceased had put in place during their life were free from risk of challenge, irrespective of whether a specific claim was foreseen.

5.5.23 Several respondents observed the challenges that individuals face when planning for their death and deciding upon the distribution of assets amongst family members, particularly in blended families. Some lawyers commented that these decisions can be stressful and emotional and that clients take comfort in knowing that the choices that they ultimately make can be implemented in a form that, after death, is immune from a family provision challenge. One respondent commented that notional estate laws ‘would disrupt the lives of many families and create chronic/acute anxiety.’³²⁴

5.5.24 By way of contrast, it has been observed that family provision disputes have a substantial degree of uncertainty:

The jurisdiction is riddled with uncertainty and any advice given to testators and their survivors is therefore no more reliable than taking a bet on the horses ... nobody can be certain that testamentary wishes will indeed withstand challenge. That is one of the

³²⁰ This point has also been made by the LRCBC (n 143) 20; and SALRI: SALRI (n 202) [8.2.3].

³²¹ Essen Bradbury, Geoffrey Nash, Tony Gray, Submission #11, Sam McCullough. This issue was also raised by some commentators when the Alberta Law Reform Institute considered reform to its *Matrimonial Property Act*: ALRI (n 82) [423]. It has also been considered elsewhere: Scottish Law Commission (2007) (n 118) [4.20]; EUC (n 88) [89].

³²² The Chancery Bar Association expressed concerns about the effect of ‘claw-back’ provisions upon inter vivos transactions in its submission to the EUC: EUC (n 88) 60.

³²³ WALRC (n 186) [4.27].

³²⁴ Submission #11.

reasons for the increase in trusts. They give the settlor more control over the destination of assets they have accumulated.³²⁵

Delay and complexity in the administration of estates

5.5.25 Four submissions commented that introduction of notional estate provisions would mean that the typical time taken to administer estates would be extended.³²⁶ Concerns about delay were also raised when the NSWLRC conducted its initial review of notional estate legislation.³²⁷

5.5.26 It was noted that, if Tasmania had notional estate laws, then, prior to applying for a grant of administration, legal personal representatives would need to take additional steps to identify all assets that may be characterised as notional estate — including an investigation of all transactions that the deceased entered into in the three years prior to death.³²⁸ Justice Lindsay of the New South Wales Supreme Court has commented that this investigative process can be a complicated task where a deceased had an attorney acting on their behalf as they are not usually subject to regular reporting requirements.³²⁹ In Tasmania, for example, absent a direction of the donor or order of the Board, there are no reporting requirements upon attorneys.³³⁰ This may affect the quality of record-keeping³³¹ which may not have been subject to external audit.

5.5.27 One respondent³³² raised a concern that beneficiaries may not have access to financial resources, for example, a bank account, whilst an estate remains un-administered.

5.5.28 It was submitted that the complexities of notional estate provisions would result in longer court disputes and therefore greater delays for beneficiaries. Judicial comment from New South Wales supports the view that notional estate laws add complexity, with Justice Einstein describing notional estate laws as ‘a complex concept’.³³³ Justice Hallen has made similar observations, commenting that the path that the court is required to take before making an order designating property as notional estate and awarding provision for a successful applicant from that notional

³²⁵ Nicola Peart, ‘New Zealand Report on New Developments in Succession Law’ (2010) 14(2) *Electronic Journal of Comparative Law* 1, 22. See also Sylvia Villios and Natalie Williams, ‘Family Provision Law, Adult Children and the Age of Entitlement’ (2018) 39 *Adelaide Law Review* 249, 258.

³²⁶ Justin McMullen, Elder Law Committee, Submission #11, Tony Gray.

³²⁷ See comments of Justice Hutley cited in Croucher (n 209) 23. This issue was also considered by the ALRI which concluded that the need for due diligence enquiries was not an ‘unsurmountable problem’: ALRI (n 82) [426]. The issue of complexity and delay has also been noted by the Scottish Law Commission: Scottish Law Commission (2007) (n 118) [4.16].

³²⁸ Justin McMullen.

³²⁹ Justice Lindsay (n 300) [80].

³³⁰ See *Powers of Attorney Act 2000* (Tas).

³³¹ Although they have obligations to keep accurate records: *ibid* s 32AD.

³³² Submission #11.

³³³ *Galt v Compagnon* (NSWSC, Einstein J, 24 February 1998) 21, cited in *Kelly v Deluchi* [2012] NSWSC 841, [138] (Hallen J).

estate is ‘a tortuous one’.³³⁴ The National Committee itself acknowledged that the New South Wales notional estate provisions are ‘complicated and not easy to understand’.³³⁵

5.5.29 Three submissions³³⁶ stated that there would be additional complexity and administrative work for trustees of superannuation funds if they were required to consider succession and estate planning matters if notional estate legislation were introduced. On behalf of the Government, the Treasurer submitted that defined benefit schemes should be excluded from the operation of any proposed notional estate law as it would ‘add significant complexity and administrative work’ and be ‘contrary to the original intent and design of the schemes.’ Whilst this comment was directed specifically at defined benefit schemes, similar issues arise in relation to application of notional estate legislation to superannuation funds more broadly.

Increased costs of litigation and estate administration

5.5.30 One respondent stated that, in their opinion, parties’ legal costs would increase if notional estate legislation were introduced.³³⁷ Phillipa Alexander commented:

As a legal costs consultant operating in the NSW jurisdiction, I estimate that costs in excess of \$50,000 are incurred for even the smallest case, with costs in the hundreds of thousands incurred for those which run for more than one or two days’ hearing. This has the potential to cause hardship to a substantial number of persons.

5.5.31 Lawyer, James Walker commented that legal costs of estate disputes are often paid for by an estate and an increase in litigation would adversely affect the size of estates.

5.5.32 It is possible for legal costs to be affected in two ways:

- as discussed at [5.5.26], legal personal representatives and potential claimants may need to make extensive enquiries to ascertain those assets that may be captured by the notional estate provisions;³³⁸ and
- the number of parties to a dispute may increase as the recipients of assets — for example, those inheriting a property by survivorship or beneficiaries of superannuation — would need to have the opportunity to be joined as parties to any court action.³³⁹

³³⁴ *Re Estate Grant, deceased* [2018] NSWSC 1031, [201]. It was noted that the following sections of the NSW *Succession Act* required consideration: ss 63(5), 73(2), 74, 75(1), 76(1), 76(2)(e), 77(1), 78, 80(1), 80(2)(c), 80(3)(a), 83, 84, 86, 87, 88(c) and 89.

³³⁵ QLRC (n 71) 80. Of this observation, SALRI has stated that it ‘considers this to be something of an understatement’: SALRI (n 202) fn 502.

³³⁶ Treasurer, Tony Gray, Sam McCullough.

³³⁷ Phillipa Alexander.

³³⁸ See for example the case of *Estate Grundy; La Valette v Chambers-Grundy* [2018] NSWSC 104 where extensive legal costs have been incurred (in unresolved litigation) by the plaintiff in seeking to identify all of the assets that may fall within her family provision claim.

³³⁹ On this point, it has been commented that: ‘The most radical complications [in the law of succession by the extension of claims against the estate] 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”.’: Francis Hutley,

5.5.33 The potential for a notional estates order may not, however, enlarge the number of parties to a dispute in all cases. An example is where a spouse is the executor and sole beneficiary of an estate whilst also the recipient of non-estate property, for example a joint tenancy property or the proceeds of a life insurance policy. In those circumstances, there may not be any other parties potentially affected.

5.5.34 Notional estate legislation could streamline some claims by consolidating into single court proceeding matters that would otherwise require separate court actions. Presently, a disgruntled beneficiary may pursue court action to recover assets to an estate prior to making a family provision claim by asserting undue influence or unconscionability to void a pre-death transfer of property.³⁴⁰ Alternatively, an individual may claim an equitable interest in non-estate property, whilst simultaneously commencing proceedings under the *TFM Act*.³⁴¹ Whilst these causes of action and remedies are distinct, there may be instances where, if notional estate legislation existed, individuals may proceed solely with a family provision claim as the court would have the ability to utilise non-estate assets to award provision for a successful applicant.

5.5.35 Additional legal costs may be mitigated where parties to a dispute agree upon those assets that may be included within a potential notional estate order. In New South Wales, reported decisions suggest that it is not uncommon for parties to agree upon the assets that may be the subject of a notional estate order. Where early concessions or agreements are made, protracted legal argument and discovery of documents may be unnecessary, thus minimising costs.

Greater prevalence of family provision claims

5.5.36 Four submissions suggested that notional estate laws would increase the prevalence of family provision disputes in Tasmania.³⁴² This was partly because claims that are presently unable to be pursued because of the lack of estate could then be pursued against notional estates. Further, the enlarged pool of assets available might make family members more inclined to pursue claims. One respondent expressed concern about this adding to the existing backlogs experienced in the courts.³⁴³ Another respondent commented:

It is in the public interest for otherwise preventable litigation to remain something which is capable of being prevented.³⁴⁴

5.5.37 It is difficult to reach conclusions about the extent to which notional estate legislation could increase the prevalence of claims. It is useful to look at the experience in New South Wales. A 2015 study of family provision claims across Australia found that New South Wales had 60% of all family provision hearings — three times the number in Victoria.³⁴⁵ The researchers hypothesised

Hutley, Woodham and Wood Cases and Materials on Succession (Lawbook Co, 3rd ed, 1984) v, cited in Croucher (n 23) 190.

³⁴⁰ See [1.4.15] for an explanation of claims based on undue influence or unconscionability.

³⁴¹ See [5.5.59] for an explanation of claims in equity.

³⁴² Tony Gray, Submission #17, Elder Law Committee, Submission #11.

³⁴³ Submission #11.

³⁴⁴ Submission #17.

³⁴⁵ Ben White et al, 'Estate Contestation in Australia: An Empirical Study of a Year of Case Law' (2015) 38 *University of New South Wales Law Journal* 880.

that notional estate laws increase the money available for challenge and that this may be a factor leading to an increased prevalence of claims in New South Wales. They found, however, that this was not the case as disputes in both Victoria and Queensland involved larger estates and yet those jurisdictions had fewer contests:

Notional estate was mentioned in relation to 15 of 59 estates, but in 5 of those estates, it was clear it was not driving the contest, for example, because the potential increase in the estate's value was very small. However, in the remaining 10 estates, we concluded that in 8, the availability of notional estate was very likely to have played a role in bringing a family provision claim ...

Eight estates is a relatively modest number and notional estate goes only a little way to explaining the position in New South Wales. If those eight estates were excluded, New South Wales would still have well over double the number of contested estates through family provision than Victoria (the next highest state), so there are other more important influences at play.³⁴⁶

5.5.38 These statistics only reveal the number of New South Wales claims proceeding to trial. As discussed elsewhere in this report,³⁴⁷ it is difficult to gauge the number of claims that are commenced but settled without a court determination. The New South Wales Supreme Court's Annual Reports reveal that, on average, in the three years between 2015 and 2017, there were 988 family provision claims filed each year in New South Wales.³⁴⁸ This demonstrates that there are a significant number of claims settled before a hearing. Essen Bradbury's submission advised that the number of claims settled out of court does not assist in the gaining of a clear picture of the impact of notional estate laws in New South Wales.

5.5.39 Reported family provision cases from New South Wales between April 2018 and April 2019 are summarised at Appendix 4. Of the 29 decisions handed down,³⁴⁹ seven (24%) raised the issue of potential notional estate. Most cases were therefore unaffected by the existence of notional estate laws in that jurisdiction. In at least some cases, however, whether there are assets able to be designated as notional estate may have had a significant impact upon whether a claim was filed. For instance, in the matter of *Harris v Harris*,³⁵⁰ the deceased's estate was only about \$8,000, whilst the value of possible notional estate was about \$600,000. It is likely that the availability of this potential notional estate was a key factor in the claim being pursued.

³⁴⁶ Ibid 903–904.

³⁴⁷ See [5.2.5].

³⁴⁸ Supreme Court of New South Wales, *2017 Annual Review* 50.

³⁴⁹ See n 305.

³⁵⁰ [2018] NSWSC 552.

Increase in unmeritorious claims

5.5.40 Three submissions suggested there could be an increase in unmeritorious or vexatious claims being made or threatened.³⁵¹ Two respondents noted that parties may feel pressured to settle unmeritorious claims to avoid the legal costs, delay and stress of litigation.³⁵² One commented:

Life is short, and the average person just wants to live a happy and peaceful life, free from the conflict, severe stress and the cost that litigation brings. In many cases, litigation severely impacts on the health and overall wellbeing of litigants over a long and protracted period. None of which is a positive for the society in which we live.³⁵³

5.5.41 It is acknowledged that participation in litigation of any sort can have a significant impact on the person and their family. This is argued to be particularly so in the context of estate litigation where disputes occur during a period of grief.³⁵⁴ Its implications have been described as follows:

Contests over estates have economic, social and psychological costs to families and individuals. The distribution of assets after death is not a purely financial or legal exercise and dispositions in a will can represent a very public realignment of relationships and hierarchies within a family.³⁵⁵

5.5.42 It is difficult to draw conclusions about whether there would be an increase in unmeritorious claims if notional estate laws were introduced. This is a discretionary jurisdiction so, by its very nature, it is not possible to determine conclusively the merits of a claim in the absence of a hearing where all the evidence is presented. Ultimately the question of merit is a matter for judges in their discretion.

Adult children claimants

5.5.43 As explained in Part 1, the *TFM Act* enables spouses and children to bring family provision claims.³⁵⁶ This Act does not distinguish between the respective claims of adult children and children who are minors and each are eligible to apply and succeed if they satisfy the court of the merits of their claims.³⁵⁷ Some respondents³⁵⁸ expressed concerns about further extension of family provision legislation in regards to adult, financially independent claimants with minimal financial need.

³⁵¹ Submission #11, Elder Law Committee, Sam McCullough.

³⁵² Submission #17, Sam McCullough.

³⁵³ Submission #17.

³⁵⁴ White et al (n 345) 881.

³⁵⁵ Cheryl Tilse et al, 'Will-making prevalence and patterns in Australia: keeping it in the family' (2015) 50(3) *Australian Journal of Social Issues* 319, 322, references omitted. See also the comments of Justice Hallen in *Bolger v McDermott* [2013] NSWSC 919 where his Honour stated at [1]: 'No dispute can be bloodier than when the blood, thicker than water, is spilled copiously in uncompromising and uncompromised litigation between [siblings] in a fight over their inheritance', also referred to in *Sariban v Pocock; Pocock v Peipman* [2018] NSWSC 724 (24 May 2018) [1] (Hallen J).

³⁵⁶ *TFM Act* s 3A.

³⁵⁷ For a useful summary of principles that the courts adopt when assessing claims by adult children, see *McDonald v O'Connor* [2019] NSWSC 261, [283] (Hallen J). See also *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275, [111].

³⁵⁸ Submission 2I, Elder Law Committee, Justin McMullen.

5.5.44 A recent Australian study of family provision cases found that by far the largest cohort of claimants were adult children.³⁵⁹ The researchers found that more than half of claims were brought by competent adult children and that about one third of claimants ‘could be regarded as “financially comfortable” adults just wanting more’.³⁶⁰ Another study in South Australia also found that the greatest proportion of claimants in South Australia between 2000 and 2018 were adult children.³⁶¹ A review of reported Tasmanian family provision cases provides consistent results, with most cases proceeding to hearing involving adult children applicants.³⁶²

5.5.45 Several academics have expressed concerns about the prevalence of adult financially independent children bringing and succeeding in family provision claims.³⁶³ White et al comment that one option for legislative reform would be to remove the automatic eligibility for adult children to bring a family provision claim and imposing a requirement to demonstrate that the deceased had a responsibility to provide for them.³⁶⁴ The National Committee’s Report and Supplementary Report, which endorsed notional estate provisions, contained recommendations limiting the eligibility of adult children so that they would not automatically be entitled to provision — proposing that they need to establish that ‘the deceased owed a responsibility to provide maintenance, education or advancement in life.’³⁶⁵ In 1997, the NZLC also recommended that new legislation ‘give children no greater rights than they had during their parents’ lifetime.’³⁶⁶ Many Acts in Canada limit the eligibility of adult children to those with special needs, for example due to disability.³⁶⁷ These reforms have been consistent with recommendations of their law reform commissions.³⁶⁸ Some Canadian jurisdictions³⁶⁹ have also transferred or provided dual jurisdiction for the family court to deal with the division of property between spouses after death. The effect is that, in Manitoba for example, notional estate-style provisions are available to spouses under family law legislation but not to the broader range of claimants under its family provision legislation.³⁷⁰

³⁵⁹ White et al (n 345).

³⁶⁰ Ibid 902.

³⁶¹ Villios and Williams (n 325).

³⁶² See [5.5.43].

³⁶³ See for example Peart (n 325); Croucher (n 179). Croucher has stated that: ‘Family provision is, in my view, right out of hand. It is on a slippery slope where adults are concerned. I would clearly distinguish the position of partners/spouses from that of children. Marriages, or marriage-like relationships, are based on different logic than simply being a child (or analogous relationship) of someone. A good look at family provision legislation in its real context is needed — namely, what role does, and should, property play in families. Unless we seriously look at such questions then we will continue to tinker with the legislation, a bit this way, a bit that, and end up writing a blueprint for bludging.’: Croucher (n 23) 200. For further critique of family provision legislation and the trend of ‘questionable’ cases being successful, see Anthony Gray, ‘Family Provision Applications: A Critique’ (2017) 91 *Australian Law Journal* 750; Villios and Williams (n 325) 249.

³⁶⁴ White et al (n 345) 906.

³⁶⁵ See draft Family Provision Bill 2004 cl 7.

³⁶⁶ Peart (n 325) 21.

³⁶⁷ See Appendix 2.

³⁶⁸ See for example BCLI (n 128) 186. The report comments, ‘[i]nterference with testamentary freedom based on a subjective assessment of moral obligation to leave a child a share of an estate, regardless of the child’s age or circumstances, has been rejected in this Project as a matter of policy’: at 187.

³⁶⁹ Refer to [3.4.5].

³⁷⁰ See [3.4.5].

5.5.46 This discussion suggests a need for the *TFM Act* to be reviewed more broadly so that it reflects current community expectations. Chief Justice Gleeson noted in *Vigolo v Bostin* that community standards ‘change and develop over time.’³⁷¹ The relevance of prevailing community standards with regards to claims by adult children was referred to in a recent Tasmanian decision, where Associate Justice Holt commented:

I do not think that prevailing community standards, even in the case of large estates, contain a requirement that a testator should completely remove the welfare burden of the State for his adult children.³⁷²

5.5.47 It is outside of the Institute’s terms of reference to consider or make recommendations about the provisions of the *TFM Act* generally, including who is eligible to bring a claim. The reference is limited to the question of whether notional estate legislation should be introduced. The matters are distinct with the question of whether notional estate legislation ought to be introduced being quite separate to the question of who ought to be able to make a claim.³⁷³

5.5.48 Notional estate legislation equally benefits children who are minors, financially dependent children or children with special needs. It also benefits financially dependent or interdependent spouses. One submission³⁷⁴ provided an example where notional estate legislation could have benefited minor children. Limiting discussion to adult children claimants fails to consider the broad range of applicants to whom notional estate provisions would extend.

Undermining the intention of joint tenancy ownerships, binding death benefit nominations and trusts

5.5.49 One of the fundamental features of joint tenancy is the doctrine of survivorship — that a surviving co-owner automatically receives a joint tenancy property on the death of their co-owner. This provides certainty for co-owners that the survivor will inherit a property, irrespective of the terms of each other’s wills, and free from the risk of a family provision challenge. One submission³⁷⁵ noted that introduction of notional estate legislation has the potential to defeat this arrangement:

The benefit of a joint tenancy is that a property owner need not be concerned about ownership of a property when they pass away. If these provisions were to be introduced, it is unclear what purpose joint tenancies would serve if they would be treated like a tenancy in common after death.³⁷⁶

³⁷¹ *Vigolo v Bostin* (2005) 221 CLR 191, [25] (Gleeson CJ).

³⁷² *Booth v Brooks* [2018] TASSC 35 (24 July 2018) [52]–[56] (Holt AsJ).

³⁷³ Of the limited scope of this review, the Elder Law Committee commented: ‘The introduction of notional estates in isolation (i.e. without reviewing all succession laws and in particular the TFM Act) is not a well-rounded way of reviewing succession law.’

³⁷⁴ Christine Schokman, Dexter Marcenko and Michael Flanagan. See [5.6.31] for extract of the example provided.

³⁷⁵ Submission #11.

³⁷⁶ Submission #11.

5.5.50 This issue has also been considered by the WALRC which commented upon the potential issues that could occur if joint tenancy property were able to be clawed back via notional estate legislation:

in many cases the other joint tenants will have acted in good faith in reliance upon the expectation that they could acquire the property by survivorship and that it may cause hardship to them if their vested rights are upset in order to make provision for the family of the deceased.³⁷⁷

5.5.51 A similar argument may also be made about the application of notional estate law to superannuation. Superannuation legislation enables members of super funds to execute a binding death benefit nomination ('BDBN') which directs the payment of their superannuation after death.³⁷⁸ If the rules of the fund permit use of a BDBN, and the nomination is completed in accordance with legislation and any particular rules of the fund, then the BDBN overrides any default discretion that the trustee might otherwise have to decide who receives a member's benefits after their death. The trustees are unable to override a valid BDBN and it may not be challenged by family members. Notional estate legislation has the potential to alter this arrangement by effectively providing eligible claimants with the opportunity to challenge a person's BDBN in order to seek provision from those funds. Ann Hamilton commented upon the interaction between state and federal laws in her submission:

I am unclear how the legislation interacts with the provisions of the SIS Act and regulations concerning binding death benefit nominations ... It seems a significant inroad into the decision making of a fund member for the death benefit (contrary to the nomination) to become part of a notional estate and so available to claimants the member did not wish to benefit.

5.5.52 Ms Hamilton expressed similar concerns about the potential impact upon trusts. She commented that notional estate provisions would pose 'an unacceptable intrusion into a trust that was likely established for the benefit of a wide range of beneficiaries' and an 'unacceptable intrusion into ... the rights of beneficiaries.' Four other submissions³⁷⁹ also raised concerns about the application of notional estate provisions to trusts. The Elder Law Committee illustrated their concern with the following example:

A client has multiple family trusts. The family business is run through the trusts. One son operates the business so the parents transfer control of all of the trusts to the son. If notional estates existed then the court could change the control of the trusts and then other siblings who know nothing about the business could have a say in its operation.³⁸⁰

Questions about the effectiveness of notional estate laws

5.5.53 Several respondents³⁸¹ commented upon a perceived lack of effectiveness of notional estate legislation. It was noted that, in the same way that estate planning strategies can presently be

³⁷⁷ WALRC (n 186) [4.5].

³⁷⁸ *Superannuation Industry (Supervision) Regulations 1994* (Cth) Reg 6.17A.

³⁷⁹ Submission #2I, Elder Law Committee, Sam McCullough, James Walker.

³⁸⁰ Elder Law Committee.

³⁸¹ Alice Grubb, Elder Law Committee, Submission #2I, Justin McMullen, Essen Bradbury, Sam McCullough.

employed to remove assets from risk, strategies would equally be used to avoid the operation of notional estate provisions. Lawyer, Alice Grubb commented:

Those who insist on avoiding any obligation they may have under the TFM Act will not be stopped by this legislation.

5.5.54 Similar observations were made when the Law Commission (England & Wales) reviewed this issue, with respondents stating that ‘attempts to prevent evasion would lead to great complication.’³⁸² The Elder Law Committee stated that introduction of notional estate provisions would increase the costs of estate planning advice due to the need to provide more complex advice.

5.5.55 One strategy referred to was the transfer of assets early so that any ‘relevant property transaction’ occurs outside the three-year period covered in New South Wales.³⁸³ This could involve parents transferring ownership of assets (for example, the family home) to one or more of their children whilst they are well, in the hope that they remain alive past three years so that the asset is then outside the notional estate clawback provisions. Unless appropriate arrangements are put in place to secure the parents’ rights, there is a risk that if relationships breakdown, they may lose their right to use and enjoy that asset. Particularly where that asset is a family home, this loss of control can create dependency and thus vulnerability. One respondent³⁸⁴ raised concerns about the potential for notional estate provisions to lead to an increased risk of elder abuse.

Removal of assets from the jurisdiction

5.5.56 Four submissions³⁸⁵ referred to the potential for introduction of notional estate legislation to have a negative impact investment in Tasmania. It was observed that individuals may choose to own assets in a jurisdiction that does not have notional estate laws in order to remove that asset from risk. One lawyer³⁸⁶ noted that one strategy advocated in continuing legal education forums where there is a risk of a family provision challenge to a client’s estate is the removal of assets from New South Wales (as the only jurisdiction with notional estates). In a similar vein, if Tasmania were to introduce notional estate legislation then it was submitted that it was likely that lawyers and other professional advisors would advise clients to consider holding their assets outside Tasmania.³⁸⁷ James Walker observed that, when Queensland abolished death duties, there was anecdotal evidence that a significant number of individuals moved their investment assets to Queensland to avoid death duties.³⁸⁸ Accordingly, it is foreseeable that similar conduct could follow the introduction of notional estates laws.

³⁸² Law Commission (England & Wales) (n 72) 50. The issue of avoidance was also considered by the Scottish Law Commission: Scottish Law Commission (n 118) [1.20].

³⁸³ Submission #21, Sam McCullough.

³⁸⁴ Submission #11.

³⁸⁵ Sam McCullough, James Walker, Essen Bradbury, Elder Law Committee.

³⁸⁶ Submission #10.

³⁸⁷ Sam McCullough referring to the example of *Hitchcock v Pratt* [2010] NSWSC 1508.

³⁸⁸ This observation has also been made by the NTLRC: NTLRC (n 183) 6.

5.5.57 Three respondents noted that only one Australian jurisdiction has notional estate legislation and that we should adopt an approach consistent with the majority.³⁸⁹

5.5.58 As noted elsewhere in this report,³⁹⁰ one of the key drivers for the enactment of notional estate legislation in New South Wales was the desire to further the objectives of family provision legislation. The absence of nationally uniform family provision legislation operates as a significant barrier to notional estate legislation achieving this purpose. This matter is discussed further at [5.9.10] to support the Institute's conclusion that notional estate legislation should not be introduced in Tasmania in the absence of national uniformity.

Existing alternative claims to estate and non-estate assets: Equitable claims³⁹¹

5.5.59 A relevant factor to consider is the extent to which individuals can pursue a claim to non-estate assets without notional estate legislation. One submission raised this issue.³⁹²

5.5.60 In certain circumstances, individuals may have claims to non-estate assets without resort to family provision legislation. In Part 1,³⁹³ it was explained that where assets are transferred at a time when the person did not have the necessary capacity to understand the transaction, or were subject to undue influence or fraud, the transaction may be set aside. Similarly, transfers that an attorney or administrator undertook without authority may also be rendered void. The effect is to restore the assets to the deceased's estate.

5.5.61 Separately, individuals may pursue a claim in equity to property that a deceased person owned. This includes assets falling outside a person's estate. The doctrine of equitable estoppel, for example, enables applicants to claim relief where a deceased has, during their lifetime, made representations or promises to them that they have then relied upon to their detriment such that it would be unconscionable for the deceased to depart from the expectation they had created.³⁹⁴

5.5.62 An example is *Ryan v Ryan*.³⁹⁵ In that case, a deceased's son applied to the court, claiming that his father had made certain promises to the effect that a property the father built at Berridale was 'going to be his and his sisters one day.'³⁹⁶ The son asserted that, as a result of his father's representations, he had assisted him with the construction of the home, including providing advice,

³⁸⁹ Submission #3, Essen Bradbury, Elder Law Committee.

³⁹⁰ See [4.2.3].

³⁹¹ The difference between equity and the common law has been described as follows: 'Equity supplements the common law, providing a separate and distinct body of principle that mitigates its rigours. The common law creates rights; equity relieves against strict insistence upon them, when such insistence is against conscience. The concern of equity with conscience — and particularly with unconscionable insistence on strict legal right — is manifest in many of its doctrines and remedies. So, in the field of unconscionable dealings, equity comes to the relief of those who, labouring under a special disadvantage, are unconscientiously exploited by another ... In the law of trusts, equity binds the conscience of a legal owner, who holds property impressed with a trust, to perform the trusts.': Hon Justice Brereton, 'Equitable Estoppel in Australia: The Court of Conscience in the Antipodes' (Speech, Australian Law Journal Conference: Celebrating 80 Years, 16 March 2007) 1.

³⁹² Submission #21.

³⁹³ See [1.4.15].

³⁹⁴ See for example *Sidhu v Van Dyke* (2014) 251 CLR 505.

³⁹⁵ [2016] TASSC 4.

³⁹⁶ *Ibid* [9].

assisting with the purchase of materials and supplying labour free of charge, to his detriment. The land was purchased in the deceased's sole name, however was later transferred to a joint tenancy with his partner for 'natural love and affection'. The effect was that, upon the father's death, the property vested in his surviving partner and did not form part of his estate. As a result, it could not be claimed via a family provision claim.

5.5.63 Justice Estcourt held that the elements of an equitable estoppel had been established. His Honour did not, however, consider that the facts supported the declaration of a constructive trust over the property. Instead, his Honour ordered that the deceased's partner pay equitable compensation for the amount the son lost in not having charged his father for materials and labour.³⁹⁷

5.5.64 In *Evans v Public Trustee*,³⁹⁸ Chief Justice Cox considered a surviving spouse's equitable claim to the assets of her late partner's estate, including their family home, a property at Bothwell, a car and trailer. She sought a declaration that she and the deceased held the assets as joint tenants in equity, or in default that they were owned by them as tenants in common pursuant to an express, implied or constructive trust. Under intestacy, his estate was to be divided between the partner (the applicant), their daughter and the deceased's three children from a prior relationship.

5.5.65 His Honour was satisfied that the applicant had contributed both financially and non-financially (through the performance of household duties) to the family home. His Honour declared that the family home and its contents were impressed with a constructive trust in favour of the deceased and the applicant as tenants in common in equal shares. The effect was to remove one half of the value of the family home and its contents from the partner's estate, with the applicant entitled to those assets.

5.5.66 *Leaman v Public Trustee*³⁹⁹ provides a further example. In that case, a surviving partner applied to the court seeking a declaration that property registered in his late partner's name was held pursuant to a resulting trust in his favour. Whilst the property had been purchased using the applicant's funds, it was registered in his partner's sole name. The Court was satisfied that the reasons for this were partly asset protection purposes, and partly due to the applicant's poor English and his embarrassment at the difficult spelling of his surname. The applicant predominantly paid the loan repayments and also completed maintenance on and improvements to the property. The

³⁹⁷ See also the decision of *Dennis v Dennis* [2016] TASSC 62 where Justice Estcourt heard a claim by one of the sons of a deceased, firstly based on a breach of contract, but in the alternative, a claim based on equitable estoppel. In relation to this second ground, the son argued that he had entered into a Succession Deed with his father and mother dealing with transfer of the ownership of a farming property in reliance upon a representation by his father that he would forgive loans that a company and trust owed to him in his will. There was some evidence from the son that one of the reasons that the Succession Deed had been entered into was to avoid a claim against the parents' estates if the farming property was instead gifted via their wills. In that case, his Honour was not satisfied that the evidence established on the balance of probabilities that there was an unequivocal or unconditional promise by the deceased to forgive debts owed to him in his will so the claim failed. The case, however, provides a further example of a family member's claim to an interest in estate assets pursuant to a constructive trust.

³⁹⁸ *Evans, Sally Lee v Public Trustee (as Administrator of the Estate of the late Bruno Sirgunas)* [1998] TASSC 159.

³⁹⁹ [1990] TASSC 67.

applicant gave evidence that, despite the property being registered in the deceased's sole name, it was intended that 'naturally whoever died first, the other would take over'.⁴⁰⁰

5.5.67 Justice Cox was satisfied that it was the mutual intention of the parties that the property be held for their joint use and benefit during their lifetimes and would then pass to the survivor on the death of the first of them. His Honour therefore made orders declaring that the applicant was the beneficial owner of the property, with the effect that it did not form part of his late partner's estate.

5.5.68 As these cases demonstrate, equitable doctrines already enable family members⁴⁰¹ to seek the Court's intervention where, for example, they have contributed to estate assets, or have acted to their detriment in reliance upon a deceased's promise that they would inherit certain assets. These claims can be resolved outside the family provision environment and do not require enactment of notional estate legislation to clawback assets. On the other hand, examples that some respondents shared with the Institute confirm that existing remedies may not resolve all instances that notional estate provisions could.

5.5.69 Equitable doctrines focus upon preventing unjust or inequitable outcomes where a person has suffered detriment, for example by not being compensated for their contributions to a deceased's assets. Their availability thus addresses criticisms that some respondents and commentators have made⁴⁰² about the application of family provision legislation to financially independent children without financial need because the focus is upon recognising their equitable interests in property.

Other matters

5.5.70 The Elder Law Committee's submission raised two other issues in support of their objection to notional estate legislation. First, it raised concerns about the potential impact that notional estate provisions would have upon charitable giving and bequests:

Some wealthy clients wish to leave their estates to charities rather than their children. In some cases their children are all financially independent and do not need their wealth. The majority of charities include in their annual budget an item for 'bequests'. Although they do not know how many bequests they will receive in any given year they have a fair idea based on previous years. The introduction of notional estates could significantly reduce bequests to charities due to claims by children which could impact on the work that the charities are able to undertake. If clients are aware of notional estates then this may also impact on how much they leave to charities and overall it may reduce people being benevolent.⁴⁰³

⁴⁰⁰ Ibid [5].

⁴⁰¹ Equitable claims are not, however, limited to family members unlike family provision claims under the *TFM Act*.

⁴⁰² See [5.5.43].

⁴⁰³ This point was also made by the Institute of Chartered Accountants in England and Wales, The Law Society of England and Wales, the Society of Trust and Estate Practitioners and The Notaries Society of England and Wales in its submissions to the EUC: EUC (n 88) 74, 81.

5.5.71 The Committee also expressed concerns about the impact that notional estate provisions would have for professionals advising clients about their estate planning:

We have already seen an increase in the number of clients who say ‘What’s the point of making a Will? The court can just decide who gets what anyway’. Notional estates may actually reduce the number of people who come to solicitors to get their wills drawn. It may also encourage people to complete more will kits instead of spending money to see lawyers to get a will drafted because in their mind what is the point in spending all that money when their wishes are not going to be listened to anyway.

5.6 Arguments in support of notional estate provisions

5.6.1 Ten submissions⁴⁰⁴ endorsed inclusion of notional estate provisions within the *TFM Act*. Reasons given in support are outlined below.

That notional estate legislation promotes the purpose and effectiveness of the TFM Act

5.6.2 Most respondents who supported notional estate legislation commented that the *TFM Act* is ineffective whilst there exists relatively simple mechanisms for individuals to avoid its operation. Notional estate provisions were therefore described as furthering the objectives of the *TFM Act*:

To extend the Court’s reach to assets notionally held by an estate would be to the advancement of the objects of the Act. The objects are to ensure that the obligations of a person to provide for a dependent spouse or child are met. These objects are noble as they correct capricious and unjustified testamentary dispositions.⁴⁰⁵

5.6.3 These observations align with comments made by Chief Justice Gleeson in *Barns v Barns* where his Honour stated: ‘a legally effective disposition of property prior to death placed such property beyond the reach of the legislation.’ His Honour went on to refer to this as an ‘inherent limitation in the legislative scheme’.⁴⁰⁶

5.6.4 Steven Bishop commented that, without anti-avoidance provisions, compliance with the *TFM Act* is effectively voluntary:

Quite simply, as is the case in most other areas of law where there is financial imposition from the state, given the chance people will avoid their obligations ... Without anti avoidance provisions, those unwilling to comply with the obligations can simply do so.

5.6.5 The submission of Christine Schokman, Dexter Marcenko and Michael Flanagan also commented upon the existence of anti-avoidance provisions under other statutes, stating ‘[l]egislation is littered with statutory prohibitions against transactions which are intended to defeat

⁴⁰⁴ Susan Baldock, Submission #1, Submission #4, Dorothy Lowe and siblings, Barry Claridge, Heather Dunn, Steven Bishop, Nina Hendy, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan, Litigation Committee (endorsing the reasoning in Ms Schokman, Mr Marcenko and Mr Flanagan’s submission).

⁴⁰⁵ Christine Schokman, Dexter Marcenko and Michael Flanagan. The WALRC has expressed a similar view: WALRC (n 186) [4.30].

⁴⁰⁶ *Barns v Barns* (2003) 214 CLR 169, 174 [4].

valid claims.⁴⁰⁷ Steven Bishop commented upon the utility of anti-avoidance provisions, submitting that ‘without compulsion, a significant minority of people will not comply with the law when it conflicts with their own desires.’

5.6.6 A desire to promote the effectiveness of family provision legislation was the driving force behind the NSWLRC’s recommendations for the enactment of notional estate legislation in New South Wales and has also been considered by other law reform agencies.⁴⁰⁸

Different outcomes under the Family Law Act

5.6.7 The *Family Law Act 1975* (Cth) (*FLA*) provides one example of legislated anti-avoidance provisions. Under s 106B, the Family Court can set aside transactions that are either entered into with the intention of defeating a claim or anticipated order, or that, irrespective of intention, have the effect of defeating an order.⁴⁰⁹

5.6.8 An example of this section in operation is the decision in *Tabussi*.⁴¹⁰ In that case, a husband had transferred a family home, then worth \$925,000,⁴¹¹ to his children in the months prior to his death from a terminal illness. Prior to his death, his wife of 35 years had filed proceedings with the Family Court of Western Australia. She argued that the transfer of the home to the deceased’s children should be set aside and that family court property orders be made. In the alternative, she argued that the transfer should be set aside — she would then pursue a family provision claim against her husband’s estate, including the family home.⁴¹² Without the transfer being set aside, the residue of his estate was only approximately \$50,000.⁴¹³

5.6.9 Justice Duncanson upheld the application, stating:

Having regard to the value of the Suburb N property which is by far the most significant asset of the marriage, it is readily apparent that it is appropriate that I exercise my discretion to set aside the transfer. If I did not do so, this most significant asset of the parties would be excluded from the property of the parties to be the subject of orders. In exercising my discretion I take into account that the second and third respondents received the property by way of a gift from the husband as opposed to a bona fide purchaser.⁴¹⁴

5.6.10 His Honour made orders for the property to be sold with 55% of the sale proceeds to be paid to the wife.⁴¹⁵

⁴⁰⁷ Referring to the *Family Law Act* s 106B (*FLA*) s 106B; *Bankruptcy Act 1966* (Cth) s 121.

⁴⁰⁸ See [4.2.3]; The Law Commission (England & Wales) (n 72) 49; ALRI (n 82) [422]; QLRC (n 71).

⁴⁰⁹ *FLA* s 106B.

⁴¹⁰ *Tabussi and Tabussi (As Executor of the Estate of the late Mr Tabussi Senior (deceased)) & Ors* [2015] FCWA 108 [151] (*Tabussi*).

⁴¹¹ It was valued at over \$1m at trial.

⁴¹² *Tabussi* (n 410) [5]–[7].

⁴¹³ *Ibid* [8].

⁴¹⁴ *Ibid* [151].

⁴¹⁵ *Ibid* [152].

5.6.11 Under the *TFM Act*, the Supreme Court does not have power to set aside a transaction that is intended to, or has the effect of, defeating a claim. Had the wife in *Tabussi* not commenced Family Court proceedings prior to her husband's death,⁴¹⁶ she would have been unable to claim any of the family home via a family provision claim as, like Tasmania, Western Australia does not have notional estate legislation. The wife would have had to rely upon equitable doctrines to pursue any interest in the property.⁴¹⁷ Notional estate provisions are therefore similar to s 106B of the *FLA* in that they give the court power to clawback assets in certain circumstances. The case of *Tabussi* also illustrates, however, that in certain circumstances use of the *FLA* can avoid the need for notional estate provisions within family provision legislation.

5.6.12 Whilst both the *FLA* and *TFM Act* deal with the division of property upon the ending of a relationship, different outcomes can occur between jurisdictions. The following has been said of this circumstance:

Just what a remarkable dichotomy exists therefore between the position of a spouse who has, prior to the death of his/her partner, separated from that party and instituted an application for property settlement pursuant to s 79 and that of a spouse who has separated from his/her partner but not instituted a s 79 application prior to the death of the partner. Similarly disadvantaged too is a spouse who has lived in connubial bliss with his/her marital partner only to discover upon the partner's death that no or little provision has been made for him/her in the testator's Will. He/she is omitted [from] most or all of the property which they enjoyed, or at least acquired during the marriage registered in the deceased's partner's name.⁴¹⁸

5.6.13 This quotation refers to the fact that the *TFM Act* applies to surviving spouses who may have remained in long and happy relationships with their partners. There is an argument that this quality justifies favourable outcomes for those surviving widows and widowers.⁴¹⁹ In response to this proposition, Justice Brereton has commented that:

In my view, the proper measure nowadays of the community's expectation as the basic minimum which testators should provide for their spouses, even in an unhappy marriage, is that provision which the surviving spouse would have received pursuant to Part VIII of the *Family Law Act* had the parties separated and instituted such proceedings. In a happy marriage, the standard might well exceed this ... The dutiful spouse who finds upon her husband's death that no or inadequate provision has been made for her is then in no worse

⁴¹⁶ If a relationship has ended but one of the parties to the relationship dies before an application is filed with the Family Court, then the Family Court does not have jurisdiction. If, on the other hand, one day prior to death, family court proceedings were filed, then the Family Court retains jurisdiction to make orders in relation to the division of property irrespective of the later death of one of the parties to proceedings: *FLA* ss 79(8), 90SM(8).

⁴¹⁷ See [5.5.61].

⁴¹⁸ D R Horton, 'Proceedings after Death – the Plight of the Widow' (4th National Family Law Conference Handbook (1990) cited in Justice Paul LG Brereton, 'Where Death and Divorce Meet: The Intersection of Family Provision and Family Law' (Speech, National Family Law Conference, October 2006) 19.

⁴¹⁹ See for example *Brewster, Re Application for Judicial Review (Northern Ireland)* [2017] UKSC 8, [13] citing Law Commission (England & Wales), *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, July 2007) [6.13].

position than a spouse who has separated before death and commenced property proceedings.⁴²⁰

5.6.14 His Honour concludes by stating that:

There is neither social sense nor legal logic in a surviving spouse who has not instituted proceedings before the other dies being in a position worse than would have been the case had such proceedings been instituted. Even more so where the surviving spouse was not separated but remained happily married until the death of the other, should such spouses not be in a worse position vis-a-vis the estate of the other than had the marriage failed ...⁴²¹

If the outcome did in fact depend upon the chance of whether property proceedings had or had not been instituted before death, or resulted in a ‘dutiful’ spouse who remained happily married to the deceased being worse off than if he or she had separated from the other, there would be justifiable cause for complaint.⁴²²

5.6.15 The Family Law Committee of the Law Society observed that introduction of notional estate legislation would provide the Supreme Court with broader powers more akin to those in the Family Court. It also noted that it would ‘remove an uncertainty for spouses in respect of which forum to file proceedings where a party is approaching the end of their life.’⁴²³ Others have endorsed alignment of family provision legislation with federal reforms under the *FLA*.⁴²⁴

5.6.16 Conversely, a Hobart law firm⁴²⁵ commented in its submission that the different contexts in which the *FLA* and *TFM Act* operate justify differences in approach and that comparing the two jurisdictions is unhelpful. One distinction includes application of the *TFM Act* to adult children, with the *FLA* limited to the division of property between separating couples.⁴²⁶

Treatment of superannuation under the *FLA*

5.6.17 Whilst no submissions raised this issue, there is a second difference between the operation of the *FLA* and the *TFM Act*. This arises in relation to the court’s powers over superannuation.

5.6.18 Since 2001, the Family Court has been able to make orders splitting superannuation between parties to a relationship.⁴²⁷ These reforms are consistent with recommendations of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act*. In 1992, the Joint Select Committee commented that:

With the value of superannuation increasing in significance as an individual’s personal savings and the proportion of the household income now being devoted to superannuation

⁴²⁰ Justice Brereton (n 418) 23.

⁴²¹ Ibid 24.

⁴²² Ibid 37.

⁴²³ Citing the case of *Stanford v Stanford* (2012) 247 CLR 108.

⁴²⁴ Croucher (n 209) 25.

⁴²⁵ Submission #21.

⁴²⁶ This point has also been made by the Scottish Law Commission: Scottish Law Commission (2007) (n 118) [4.11].

⁴²⁷ *FLA* Part VIII B, s 90MS; ALRC, *Review of the Family Law System* (Discussion Paper No 86, 2018) [3.132], Recs 75, 77.

payments, the Committee feels that a just property assessment must include consideration of superannuation entitlements.⁴²⁸

5.6.19 Whilst the Family Court now has access to superannuation, under the *TFM Act*, the Supreme Court is unable to utilise superannuation to fund provision for a successful applicant unless that superannuation is paid into an estate. To illustrate the different outcomes, if a husband has a super account with \$500,000, those funds may be included in the Family Court's orders dealing with the division of property upon the ending of his relationship. If, however, the relationship ends not upon separation but due to his death, then whether that \$500,000 is available for his wife depends upon the arrangements that the husband made in relation to his member account. If he had completed an effective BDBN directing his superannuation to, say, his daughter, then the wife is unable to seek any of his superannuation in a family provision claim. The differences in outcome can thus be significant.

5.6.20 The Australian Law Reform Commission ('ALRC') recently undertook a comprehensive review of the family law system.⁴²⁹ It commented in its discussion paper that:

in many cases, a fair property split cannot be achieved without a superannuation split, such as where there are minimal non-superannuation assets, and a significant disparity in superannuation balances. Failure to provide the economically weaker party with access to superannuation may also contribute to poor living standards in retirement.⁴³⁰

5.6.21 Similar comments were made in the ALRC's final report where it stated:

Given that caring responsibilities are typically, but not always, borne by women, and can have a lifelong impact on earnings, property division on or following separation can be an important mechanism for addressing deficiencies in the accumulation of superannuation.⁴³¹

5.6.22 These extracts highlight the significance of superannuation as an asset, a matter also discussed at [2.4.1]. The Supreme Court's inability to utilise superannuation paid directly to beneficiaries can therefore lead to significant differences between couples who separate and seek orders under the *FLA* and those where one dies and the *TFM Act* applies. On the other hand, whilst Ann Hamilton's submission referred to the importance of superannuation as an asset for many Tasmanians, she submitted that this factor supports her position that notional estate legislation ought not apply to superannuation:

Superannuation benefits are important assets for estate planning of people whose personal unencumbered assets are relatively few and it does not seem appropriate for the power to direct what occurs to those assets to be reviewed under notional estate legislation.

⁴²⁸ Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *Inquiry into certain aspects of the operation and interpretation of the Family Law Act 1975* (Report, November 1992) [9.2].

⁴²⁹ ALRC, *Family Law for the Future – An Inquiry into the Family Law System* (Final Report, ALRC Report 135, March 2019).

⁴³⁰ *Ibid* [3.138].

⁴³¹ *Ibid* [6.39].

Concluding remarks about operation of the *FLA*

5.6.23 As noted at [5.5.43], one criticism that is sometimes made of family provision legislation is its application to financially independent adult children. Some individuals object to the enactment of notional estate legislation on the basis that it would further extend the rights of financially independent children to claim assets of their parents that they do not have a right to claim during their parents' life.

5.6.24 As explained in Part 3,⁴³² New Zealand and some provinces in Canada⁴³³ have transferred or provided dual jurisdiction to the family court to make orders about the division of property between spouses after death. The effect is to create consistency between laws applying to spouses following separation and those applying after death. It thus resolves criticisms outlined earlier in this part about the different outcomes that can occur between the *FLA* and the *TFM Act* and reduces or eliminates the need for notional estate laws to achieve consistency for spouses. A further consequence of transferring jurisdiction to the Family Court is that it addresses concerns that some respondents raised about the availability of non-estate assets to financially independent claimants.

5.6.25 For these reasons, there would seem to be merit in further evaluating the potential role that the *FLA* could play in resolving the division of assets between spouses after death where family court proceedings have not been commenced prior to a spouse's death. Whilst the ALRC recently undertook an extensive review of the family law system in Australia, its final report did not discuss a potential extended role for the *FLA* to deal with the division of assets after death where proceedings are not already on foot.⁴³⁴ It is outside the scope of this review to consider this issue further, noting in particular the fact that the *FLA* is federal legislation and not a matter falling within the ambit of the Institute's role. The Institute highlights these matters, however, to demonstrate that some jurisdictions adopt different policy responses to resolve the issues raised in this Report.

Inequitable access and utilisation of estate planning strategies

5.6.26 The joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan stated that some individuals have unequal access to obtain and utilise estate planning advice and that this can lead to inequitable outcomes. This can arise:

- for will-makers, as those unable to afford legal advice may not be able to obtain advice, or then implement recommendations to structure their affairs to minimise assets at risk; or
- for potential claimants, where those in similar circumstances can experience different outcomes depending upon whether their parent or spouse sought advice and then structured their affairs to reduce the assets within their estate.

5.6.27 It appears from the Institute's consultation that many community members are unaware of strategies that may be used to protect assets from challenge. For those aware, obtaining advice can be financially prohibitive particularly for low-income earners. In some circumstances there may be other expenses incurred in structuring affairs to protect assets from challenge, notably capital gains

⁴³² See [3.4.5] in relation to Canada and [3.5.9] in relation to New Zealand.

⁴³³ Saskatchewan, Manitoba and Ontario.

⁴³⁴ ALRC (n 429).

tax or duty implications.⁴³⁵ The result can be that wealthy individuals have greater access to obtain and rely upon estate planning advice than individuals in lower socio-economic groups.⁴³⁶ Christine Schokman, Dexter Marcenko and Michael Flanagan demonstrated this problem using the following example they had encountered:

Another recent example involved a testator who, just one year prior to his death, held an estate which would have been conservatively valued in excess of \$12 million. He had one estranged son who, unlike the other children, was of illegitimate birth. The illegitimate son was raised with his half-siblings who were each the issue of a marriage. Our client instructed that he had been abused since infancy because of his bastardry and his father's shame.

The testator almost completely divested himself of his assets in the twelve months prior to his death. Our searches revealed that even in the 48 hours prior to his death the testator and his other children engaged in major share transfers.

There was no mystery as to his motivations for the inter vivos transactions. However, given that our client could not challenge the validity of those transactions, we conducted TFM proceedings on the basis that the estate was valued at approximately \$150,000. He settled his TFM claim for a sum of approximately 1% of the value of his siblings' collective inter vivos inheritances. Our client was living on a disability support pension and had five dependent children. Notwithstanding his estrangement, he had a strong moral claim against the depleted estate.

The lesson of this second example is that, quite often, it is the wealthiest of testators who have the means and the motive to engage commercial solicitors to protect their estates from applications under the Act.

5.6.28 As this scenario demonstrates, potential claimants may have almost identical circumstances but experience different outcomes depending upon whether their family member structured their affairs to remove assets from challenge. To provide an example, two daughters may not receive anything from their respective mother's estate whilst being in significant financial need, reliant upon government pensions and unlikely to be able to work in the future. In one case, the mother obtains advice and transfers ownership of her house to joint tenancy and transfers her term deposits to joint accounts. The other mother does not, so that at her death her estate includes her home and term deposits. The first daughter is prevented from pursuing a family provision claim because there is no estate to claim. The second daughter is able to pursue a claim as there are assets available in her mother's estate. It might be that the second daughter's claim is ultimately unsuccessful. It illustrates, however, the fact that one daughter may pursue an ultimately successful claim for further provision whilst the other daughter, in almost identical circumstances, is unable to do so. This results in a breach of the fundamental human rights principle that all people should be equal before the law. On the other hand, the *TFM Act* already treats individuals differently by limiting the classes of applicants able to apply for provision. Similarly, individuals in financial need can encounter different outcomes because, for example, one might have a parent who is wealthy whilst another's

⁴³⁵ This issue was raised by the Elder Law Committee and Ann Hamilton.

⁴³⁶ On this point, SALRI stated: 'This effectively means that well advised testators, typically those with resources and access to specialist professional advice, enjoy testamentary freedom and can avoid the application of family provision laws.': SALRI (n 202) [8.1.1].

parent does not have any assets of substance able to be claimed irrespective of the availability of notional estate legislation. It is thus more an example of people coming to the law from unequal positions rather than the law creating unequal outcomes.

5.6.29 Balanced with individuals' rights to be treated equally before the law is the competing common law right to the use and enjoyment of property.⁴³⁷ This right applies not only to will-makers who may wish to make gifts of their assets during their lifetime, but also recipients of assets who may be deprived of the right to enjoy their property.⁴³⁸ This factor was discussed further at [5.5.11].

5.6.30 Christine Schokman, Dexter Marcenko and Michael Flanagan made the point that sometimes unequal outcomes can occur without it being the deceased's intention. Individuals purchasing properties jointly may not appreciate the different consequences between joint tenancy or tenancy in common ownership.⁴³⁹ Or individuals may have purchased property some years before and fail to recall the form of ownership or its legal consequences. These matters were noted by the Law Commission (England & Wales) as part of its justification for recommending that joint tenancy property be included within its family provision scheme.⁴⁴⁰

5.6.31 Another example is where individuals may not intentionally structure their affairs so that their superannuation falls within or outside their estate. This occurred in the case of *Re Grant*⁴⁴¹ where the deceased had not made a binding or non-binding nomination although this was permissible under the rules of the fund.⁴⁴² In some circumstances a trustee's exercise of discretion about the payment of a member's death benefits may be reviewable, enabling individuals to pursue a claim under superannuation legislation.⁴⁴³ Nevertheless, Christine Schokman, Dexter Marcenko and Michael Flanagan's submission provided an example where this was not possible:

We represented three children, two of whom were under the age of 18. The deceased had separated from their mother some two to three years before his death. His estate was modest but he held significant funds in his superannuation/death benefit scheme.

The trustees of the scheme were left with no discretion other than to pay the funds to his current spouse (his de facto of just over two years). The Superannuation Complaints Tribunal had no jurisdiction to alter that distribution and the children were left with no support from him and no remedy. A discretion to consider notional estate would provide an avenue for addressing this dilemma.

This illustrates the injustices to potential applicants which are unintended by a deceased but could be remedied by the availability of notional estate. Proceedings under the

⁴³⁷ See also *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 17(2).

⁴³⁸ This point was made by the Institute of Chartered Accountants in England and Wales in its submission to the EUC: EUC (n 88) 73. See also WALRC (n 186) [4.22].

⁴³⁹ WALRC (n 186) [4.4].

⁴⁴⁰ Law Commission (England & Wales) (n 72) 36.

⁴⁴¹ *Re Estate Grant, deceased* [2018] NSWSC 1031 (Lindsay J).

⁴⁴² *Ibid* [193].

⁴⁴³ Robert Young made this point in his submission.

Testator's Family Maintenance Act are not always inconsistent with the desirability to give effect to one's testamentary intentions.

5.6.32 A potential benefit of notional estate legislation is that it can rectify such 'irregularities' that arise by chance or circumstance rather than by design.

'Fairness' for estate beneficiaries

5.6.33 Whilst no submissions raised it, linked to the previous discussion is the consideration that notional estate legislation can enable the burden of successful family provision claims to be shared equally between the beneficiaries of an estate and the 'non-probate' beneficiaries. A recent New South Wales case illustrates this notion.⁴⁴⁴ In that case, a step-son filed a family provision claim against his step-father's estate, asserting that his step-father's superannuation (valued at approximately \$858,000) be designated as notional estate. The beneficiaries named in the deceased's will supported their step-brother's claim for their father's superannuation to be designated as notional estate.⁴⁴⁵ Justice Lindsay made the observation that that argument had an 'added attraction' for the beneficiaries as it would reduce the impact of any order upon their gifts under the will.⁴⁴⁶ The applicant was ultimately successful, with Justice Lindsay ordering the superannuation as notional estate to fund provision for the successful claimant.

Burden on the state

5.6.34 Steven Bishop's submission referred to the fact that, without notional estate legislation, eligible applicants in significant financial need can become or remain reliant upon government support. In this way, the absence of notional estate legislation has an adverse impact upon not only the individual who is unable to bring a claim, but also the broader community.

5.6.35 Mr Bishop provided the following example where he acted for a client in receipt of government assistance who was unable to pursue a claim:

In a matter upon which I gave advice, a Testator was reputed to have had, prior to disposing of it, property to the value of about \$15,000,000.00. In accordance with advice received from a solicitor, he systematically disposed of the assets in his individual ownership so that upon death he was virtually penniless. He had left two children, one of whom was aged approximately 40 and who had been involved with drugs since the age of 15, and a burden on the tax payer since about the age of 18 ... Most importantly, the child with a drug problem will in all probability continue to be a burden on the tax payer in receipt of social security and in need of treatment and assistance from the various over strained services ... a cost the tax payer should reasonably expect to have been met by his deceased father.

5.6.36 Justin McMullen expressed a contrary view, submitting that the potential impact upon taxpayer resources does not justify enactment of notional estate provisions:

⁴⁴⁴ *Re Estate Grant, deceased* [2018] NSWSC 1031.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid* [69].

it is not a reasonable argument that protection of the public purse is an appropriate public policy reason to justify the removal of the long held right of a person to utilise their assets in any manner they choose. There is no law today requiring a testator to make provision for their spouse or adult child during the testator's lifetime — why should it be so upon their death.

Conclusion

5.6.37 In summary, submissions were split reasonably equally between those who supported notional estate legislation and those who opposed reform. There was no absolute majority in support of either option. The Law Society noted that its Committees had expressed a range of views, even within committee memberships, reflecting the ‘differing views in the community’. It expressed the view that ‘[e]xamples of injustice have been provided that support both sides of the debate.’ The Public Trustee similarly declined to make a submission, observing the conflicting positions between its role in acting for will-makers, potential claimants and legal personal representatives of an estate. This demonstrates that public opinion about the utility of notional estate legislation often depends upon an individual's perspective based upon their own experiences with the law.

5.7 The New South Wales provisions⁴⁴⁷

5.7.1 To consider fully the question whether Tasmania should introduce notional estate legislation, it is necessary to articulate what those provisions might look like. The Issues Paper noted that one option would be simply to introduce identical provisions to those in New South Wales. These provisions are consistent with the National Committee's recommendations about the approach that national uniform succession laws should take.⁴⁴⁸ There has, however, been some criticism made about how these provisions were developed and drafted based upon the former death duty provisions.⁴⁴⁹

5.7.2 The Issues Paper asked whether stakeholders considered the NSW *Succession Act* was an appropriate precedent or whether there are any perceived difficulties with the Act.

Question 5

If notional estate provisions were introduced in Tasmania, should the New South Wales legislation be used as a precedent? If so, are there any parts of these provisions that you think should be changed? For example, do you consider that there is a need to make any change to:

⁴⁴⁷ Part 4 outlines in detail the provisions of the NSW *Succession Act*.

⁴⁴⁸ Refer to [3.7.2].

⁴⁴⁹ Croucher (n 179) 740. Croucher has separately made the following observation about the passing of the New South Wales Bill: ‘Parliamentary Counsel and the Commissioner, Gressier, disagreed on several fundamental issues concerning the Bill, eventually narrowing down to two, but major, issues: the definition of “eligible person” and the notional estate provisions, but it dragged the process of implementation out over several years. It was like a game of “ping pong”. The disagreement was eventually resolved by a compromise, the Commission giving way on notional estate and Parliamentary Counsel giving way on eligibility ...’: Croucher (n 209) 7.

- (a) the types of property that may be affected;
- (b) the acts (or failures to act) captured;
- (c) the relevance of a person's intentions;
- (d) the period of time in which a relevant property transaction occurs that is covered;
- (e) the circumstances in which a notional estate order may be made; or
- (f) any other provisions.

5.7.3 Fifteen submissions addressed this question.⁴⁵⁰ Whilst not all respondents agreed that Tasmania should enact notional estate provisions, eight⁴⁵¹ considered that, if notional estate laws were introduced, the NSW *Succession Act* should be used as a base for legislative reform. Steven Bishop made the following comments about the utility of doing so:

It is ridiculous that in this day and age in a modern nation such as Australia there should be State differences in important laws. I cannot conceive of any changes that are of such monumental significance that they require different provisions for different Australians.

Adopting the New South Wales Provisions will enable access to a considerable body of pre-existing jurisprudence for the guidance of the profession. Of course, this includes judicial decisions, but also the text books and learned papers that we already have anyway.⁴⁵²

5.7.4 The Elder Law Committee also expressed the view that it would 'seem sensible' to have consistent legislation. The benefits of nationally consistent succession laws have also been advocated previously.⁴⁵³

5.7.5 Nine submissions⁴⁵⁴ expressed a view that, if notional estate legislation were introduced, there should be variations made to the New South Wales legislation. One respondent⁴⁵⁵ disagreed that the New South Wales approach should be adopted.

5.7.6 The following concerns about the New South Wales notional estate provisions were raised:

⁴⁵⁰ Submission #4, Dorothy Lowe and siblings, Essen Bradbury, Heather Dunn, Ann Hamilton, Phillipa Alexander, Justin McMullen, Geoffrey Nash, Steven Bishop, Elder Law Committee, Alice Grubb, Submission 2I, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan, Sam McCullough, James Walker.

⁴⁵¹ Submission #4, Dorothy Lowe and siblings, Essen Bradbury, Heather Dunn, Justin McMullen, Steven Bishop, Elder Law Committee, joint submission of Christine Schokman, Dexter Marcenko and Michael Flanagan.

⁴⁵² Sam McCullough made similar observations about the existence of a body of available jurisprudence from New South Wales.

⁴⁵³ Justice Atkinson (n 24) 18.

⁴⁵⁴ Ann Hamilton, Alice Grubb, Essen Bradbury, Justin McMullen, Submission #2I, Phillipa Alexander, Dorothy Lowe and siblings, Sam McCullough, James Walker.

⁴⁵⁵ Geoffrey Nash.

The types of property that may be affected

5.7.7 Five respondents commented upon the property covered by New South Wales notional estate orders.⁴⁵⁶ Two expressed a view that the types of property should be more specifically listed.⁴⁵⁷

5.7.8 Three submissions stated that notional estate legislation should not apply to superannuation.⁴⁵⁸ This issue was discussed at [5.5.51]. Four stated that notional estate provisions should not apply to trusts.⁴⁵⁹ This matter was also considered elsewhere in this report.⁴⁶⁰

The acts (or failures to act) captured

5.7.9 Three submissions⁴⁶¹ advocated that, unlike the *NSW Succession Act*,⁴⁶² notional estate laws should not apply to failures to act — for example, failure to sever a joint tenancy or make a distribution from a trust. Sam McCullough advocated this approach on the basis that it would focus the scheme upon positive asset-stripping undertaken with the intention of defeating claims. The effect would be to exclude family trusts, superannuation, life insurance policies and joint tenancy properties unless positive acts were undertaken within the prescribed period like a deposit of funds into a superannuation fund or trust or the creation of a joint tenancy. It was said that extending notional estate legislation to failures to act — for example the failure to sever joint tenancies or make or change a binding death benefit nomination or make a distribution from a trust — is a step too far.

5.7.10 These views are consistent with observations the WALRC has made of the New South Wales notional estate provisions which capture severances of joint tenancy. It expressed these considerations as follows:

The policy of the Act seems to be that once it becomes clear that one joint tenant runs a significantly greater risk of dying first, he is morally obliged to sever the tenancy so that he can leave his share in the property by will. If not, the property becomes part of the notional estate. This is unfair. The fellow joint tenant, who has borne the risk of losing all property in the event of dying first, is to be deprived of the benefit of survivorship in the interests of providing for the first joint tenant's family. In these cases, the right of a transferee of property to security of title should prevail over the interest of the deceased's family or dependants not to be disinherited.⁴⁶³

5.7.11 The Institute discusses the application of the New South Wales notional estate provisions to failures to act further at [5.7.9].

⁴⁵⁶ See [4.4] for detail of the property that may be affected by a notional estate order.

⁴⁵⁷ Phillipa Alexander, Geoffrey Nash.

⁴⁵⁸ Ann Hamilton, Robert Young, Sam McCullough.

⁴⁵⁹ Ann Hamilton, Submission #21, Sam McCullough, James Walker.

⁴⁶⁰ See [5.5.52].

⁴⁶¹ Essen Bradbury, Ann Hamilton, Sam McCullough.

⁴⁶² See [4.4.3] for explanation.

⁴⁶³ WALRC (n 186) [4.25].

The relevance of a person's intentions

5.7.12 Whilst the relevance of a person's intentions when entering into a property transaction was a matter raised by several respondents when the VLRC considered the question of notional estate legislation,⁴⁶⁴ it was a factor that only one respondent⁴⁶⁵ raised with the Institute. Whilst expressing the view that notional estate legislation should not be introduced, Geoffrey Nash stated that, if Tasmania had notional estate laws, then a person's intentions should be given stronger weight. On the question of intention, however, the VLRC concluded:

a notional estate scheme that only applied to transactions entered into with the intention of avoiding family provision obligations could be easily circumvented. Further, intention is difficult to prove, as evidenced by the clear preference for the notional estate provisions in New South Wales which do not require proof of intention to defeat a possible family provision claim. The Commission also agrees that any notional estate scheme that does not require some intention on the part of the deceased person risks being too far-reaching and unduly limiting of a person's right to dispose of their property during their life.⁴⁶⁶

The period of time that is covered

5.7.13 The NSW *Succession Act* provides that 'relevant property transactions' occurring within three years of death may be designated notional estate.⁴⁶⁷ By comparison, the UK's legislation covers transactions occurring within six years of death, consistent with the recommendations of their Law Commission.⁴⁶⁸ There is a need for balance between competing issues when considering the timeframe to which notional estate provisions apply:

Too long a period exposes donees to potential liability for many years and may prevent them dealing with their property as they would wish to do. A long period increases the investigations that the executors would have to carry out in order to discover whether relevant lifetime gifts had been made. On the other hand too short a period makes the anti-avoidance scheme easy to circumvent.⁴⁶⁹

5.7.14 Nine submissions⁴⁷⁰ expressed concerns about the period of time designated under the New South Wales provisions. Varying views were, however, expressed about the period of time that

⁴⁶⁴ VLRC (n 194) [6.181]. It was also considered by ALRI which noted that it was 'very difficult' to determine a person's intentions when entering into what it referred to as a 'will-substitute': ALRI (n 82) [429]. ALRI stated 'it is often very difficult to prove that the deceased intended to defeat the claim of the surviving spouse. For example, if a wife ensures that everything passes outside her estate and vests in her children from an earlier marriage, is she showing her love for her children or her intention to defeat her husband's claim? Even if her intention is to defeat the claim of her husband, will her children know of this intention or will they just assume she was showing her great love for them?': at [456]. Difficulties of establishing the relevant intention have also been highlighted by the WALRC: WALRC (n 186) [4.9], [4.24].

⁴⁶⁵ Geoffrey Nash.

⁴⁶⁶ VLRC (n 194) [6.183].

⁴⁶⁷ NSW *Succession Act* s 80(2).

⁴⁶⁸ Law Commission (England & Wales) (n 72) 53.

⁴⁶⁹ Scottish Law Commission (2007) (n 118) [4.21].

⁴⁷⁰ Dorothy Lowe and siblings, Essen Bradbury, Phillipa Alexander, Geoffrey Nash, Ann Hamilton, Justin McMullen, Submission #21, Alice Grubb, James Walker.

should be covered ranging from an unlimited timeframe⁴⁷¹ to shortening the timeframe to 12 months prior to death.⁴⁷²

5.7.15 Three submissions⁴⁷³ stated that the timeframes imposed within legislation are arbitrary.⁴⁷⁴ Each stated that the three-year timeframe can create opportunities for avoidance — for example, through transferring assets early. Justin McMullen queried why different outcomes should occur for those who transfer assets within three years of their death, and those who transfer assets three years and one day before their death:

I submit that the policy behind TFM and, as a result notional estate provisions, fails when a time limit is imposed on the recovery of assets under notional estate provisions insofar far as any transaction that occurs prior to the time limit [is concerned]. It is difficult to reconcile how the legislation could arbitrarily determine that a time limit applies for the operation of the notional estate provisions.

5.7.16 Emeritus Professor Rosalind Croucher has also raised issues with the period covered by New South Wales' notional estate provisions. She too observes that laws can be avoided by transferring assets outside of the three-year period prior to death, but comments that this itself can create problems:

This may get away from a notional estate argument, provided the testator survives for the three years, but may involve pension issues, and won't avoid a family dispute that may be brewing in any event.⁴⁷⁵

Other provisions

5.7.17 One respondent referred to the test imposed in the NSW *Succession Act* for the making of a notional estate order. It was submitted that:

S 80(2)(b) refers to a moral obligation to provide which seems a very broad concept. I am unclear how that moral obligation is established, what the guidelines are or how a finding of such an obligation fits with the obligation under testators family maintenance legislation.⁴⁷⁶

5.7.18 A Hobart law firm⁴⁷⁷ clarified that, if Tasmania were to introduce New South Wales' notional estate provisions, it should not adopt its legislative framework more broadly. Specifically, it highlighted that New South Wales has a broader range of eligible family provision applicants, and that Tasmania should not adopt its eligibility requirements as part of any legislative reform.

⁴⁷¹ Dorothy Lowe and siblings.

⁴⁷² Essen Bradbury, Phillipa Alexander. Geoffrey Nash also submitted that the period of time should be shortened, without specifying a time limit.

⁴⁷³ Justin McMullen, Alice Grubb, Submission #2I, Ann Hamilton.

⁴⁷⁴ The WALRC has expressed similar views: WALRC (n 186) [4.27].

⁴⁷⁵ Rosalind F Croucher, 'Succession Law Reform in NSW – 2011 Update' (Speech, Succession Law Conference, 17 September 2011).

⁴⁷⁶ Ann Hamilton.

⁴⁷⁷ Submission #2I.

5.8 Other matters

5.8.1 The Institute invited respondents to advance any other matters that they felt ought to be considered when determining whether notional estate legislation should be introduced in Tasmania:

Question 6

Are there any other matters in relation to introducing notional estate legislation in Tasmania that you would like to comment on?

5.8.2 A range of comments were made which have been included in previous discussions articulating the arguments advanced both for and against the implementation of notional estate legislation. Two matters not dealt with previously are considered in the following paragraphs.

The need for public education

5.8.3 One matter commented upon was that, if notional estate legislation were introduced, there would need to be a comprehensive public education campaign supporting the reforms.⁴⁷⁸ It was noted that notional estate laws have the potential to affect a large percentage of the population and that there would need to be broad understanding amongst members of the community about the potential effect of reforms upon their estate. One law firm⁴⁷⁹ commented that its lawyers observed that members of the public generally have limited knowledge of estate and succession laws. It stated that, given that notional estate legislation has been expressed as a relatively complex concept,⁴⁸⁰ it would be difficult to educate the public properly about the nature and effect of notional estate laws. Difficulties may be exacerbated by the fact that each jurisdiction has different laws, leading to community confusion.⁴⁸¹

New South Wales ‘contracting out’ provisions

5.8.4 Sam McCullough submitted that, in any event, a useful reform to the *TFM Act* would be the inclusion of a similar section to the NSW *Succession Act* that enables family members to agree upon the division of assets in advance of death and forgo rights to apply for further provision from an estate.⁴⁸² In summary, these provisions enable parties to apply to the court for its approval of family arrangements about the transfer or division of assets and their agreement not to bring a family provision claim. Obtaining the court’s sanction of an agreement enables individuals to then transfer assets without fear or uncertainty of a potential future challenge. Mr McCullough submitted that this would be useful where a person has legitimate reasons for wanting to transfer assets in advance of death, such as to provide for the succession of a family farm. He endorsed enactment of a similar provision in Tasmania to minimise disputes and offset the effect of notional estate legislation by continuing to enable parties to plan in advance of death. The VLRC also

⁴⁷⁸ Submission #11.

⁴⁷⁹ Submission #21.

⁴⁸⁰ See [5.5.28].

⁴⁸¹ The EUC also noted this challenge, remarking that it requires will-makers to realise the difference in applicable laws when they move to a jurisdiction with clawback provisions: EUC (n 88) [96].

⁴⁸² NSW *Succession Act* s 95.

recommended inclusion of an equivalent provision within Victorian legislation when it reviewed family provision laws in 2012.⁴⁸³

5.9 Conclusion and recommendation

5.9.1 This final section outlines conclusions reached about the enactment of notional estate laws in Tasmania.

5.9.2 The Institute's consultation and research identifies a significant degree of difference in opinion and approach to the question of notional estate legislation. There are compelling arguments both in support of and in opposition to notional estate laws. Whilst discussed in some detail earlier in this part, for convenience, and to assist to summarise key issues, the main arguments advanced on both sides are outlined in Table 2:

Table 2: Key arguments for and against notional estate laws

Arguments for	Arguments against
It advances the objectives of the <i>TFM Act</i> and ensures the law is effective. ⁴⁸⁴	The need for notional estate law has not been demonstrated. ⁴⁸⁵
There is evidence of claimants being unable to pursue claims due to the existence of non-estate assets. ⁴⁸⁶	The instance of intentional family provision avoidance is rare. ⁴⁸⁷
Will-makers do not always act as a 'wise and just testator'. ⁴⁸⁸	It interferes with the notion of testamentary freedom. ⁴⁸⁹
It is consistent to 'anti-avoidance' provisions included in other statutes. ⁴⁹⁰	It infringes upon the rights of people to deal with their assets as they wish during life. ⁴⁹¹
Meritorious claimants may become or remain a burden on the state. ⁴⁹²	It creates a lack of certainty. ⁴⁹³
A substantial number of submissions (38%) endorsed notional estate laws. ⁴⁹⁴	Testators are best placed to assess the competing claims to their estate. ⁴⁹⁵

⁴⁸³ VLRC (n 194) Rec 48.

⁴⁸⁴ See [5.6.2].

⁴⁸⁵ See [5.5.14].

⁴⁸⁶ See [5.2.16].

⁴⁸⁷ See [5.2.10].

⁴⁸⁸ See [5.5.19].

⁴⁸⁹ See [5.5.2].

⁴⁹⁰ See [5.6.4].

⁴⁹¹ See [5.5.11].

⁴⁹² See [5.6.34].

⁴⁹³ See [5.5.21].

⁴⁹⁴ See [5.4.3].

⁴⁹⁵ See [5.5.18].

Arguments for	Arguments against
Different outcomes can occur between the <i>FLA</i> and <i>TFM Act</i> . ⁴⁹⁶	The courts already consider pre-death gifts when assessing claims. ⁴⁹⁷
It can mean claimants have access to joint tenancy properties and superannuation which are often substantial assets held by a deceased.	Potential adverse consequences would impact a greater proportion of the population than those who would potentially benefit. ⁴⁹⁸
Any complexities are not insurmountable. ⁴⁹⁹	Notional estate laws are too complex. ⁵⁰⁰
It can sometimes remedy unintended consequences of legal ownership. ⁵⁰¹	It may increase the time and cost of estate administration and litigation. ⁵⁰²
There is competing evidence about whether the prevalence of claims may increase. ⁵⁰³	It may increase the prevalence of litigation placing a burden on the court and having a negative impact upon the community. ⁵⁰⁴
The burden of claims can be shared equally between estate and non-estate beneficiaries. ⁵⁰⁵	There may be an increase in unmeritorious claims. ⁵⁰⁶
Some situations are unable to be resolved without notional estate laws. ⁵⁰⁷	Other legal remedies exist to resolve some of the matters that notional estate laws are directed at. ⁵⁰⁸
It can mean individuals in very similar circumstances have unequal access to remedies under the <i>TFM Act</i> .	It may result in adverse taxation consequences. ⁵⁰⁹
Individuals have unequal access to legal advice due to social and economic factors. ⁵¹⁰	It undermines estate planning arrangements. ⁵¹¹
There is a need to protect dependants. ⁵¹²	It may impact asset protection arrangements. ⁵¹³
It serves as a discouragement to prevent intentional transfers intended to defeat claims. ⁵¹⁴	It undermines fundamental legal concepts such as joint tenancy, trust law and property rights. ⁵¹⁵

⁴⁹⁶ See [5.6.7].

⁴⁹⁷ See [5.5.20].

⁴⁹⁸ See [5.3.6].

⁴⁹⁹ ALRI (n 82) [426].

⁵⁰⁰ See [5.5.28].

⁵⁰¹ See [5.6.30].

⁵⁰² See [5.5.25], [5.5.30].

⁵⁰³ See [5.5.37].

⁵⁰⁴ See [5.5.36].

⁵⁰⁵ See [5.6.33].

⁵⁰⁶ See [5.5.40].

⁵⁰⁷ See [5.2.24].

⁵⁰⁸ Including equitable remedies and claims under the *FLA* where proceedings are commenced before death: See [5.5.59], [5.6.11].

⁵⁰⁹ See [5.3.3].

⁵¹⁰ See [5.6.26].

⁵¹¹ See [5.5.71], [5.3.3].

⁵¹² See [1.3.4].

⁵¹³ See [5.3.3].

⁵¹⁴ See [3.2.1].

⁵¹⁵ See [5.5.49].

Arguments for	Arguments against
	The effectiveness of the New South Wales scheme has not been evaluated. ⁵¹⁶
	Strategies exist to avoid operation of notional estate laws. ⁵¹⁷
	Individuals may move investment assets outside of the state. ⁵¹⁸
	A substantial number of submissions (61%) opposed notional estate legislation. ⁵¹⁹
	It may reduce charitable giving or adversely impact charitable bequests. ⁵²⁰
	The NSW provisions are too broad in their application to omissions. ⁵²¹

5.9.3 Whilst it appears from Table 2 that the arguments for notional estate laws are fewer in number, this should not itself lead to a conclusion that notional estate laws not be introduced. The Institute acknowledges experiences some respondents shared highlighting the detrimental impact the absence of notional estate legislation has had for them or their clients. Arguments for notional estate based upon advancing the effectiveness of family provision legislation are persuasive, especially when viewed in the context of anti-avoidance provisions existing within other statutes.

5.9.4 The division amongst respondents, commentators and law reform commissions and the varied approaches internationally and within Australia demonstrates that there is no clear or definite answer to the question of whether family provision laws should contain notional estate-style provisions and, if so, the scope of those laws.

5.9.5 The first consideration is the degree to which there is a need for reform. Submissions demonstrate that there is at least a certain proportion of the population who have been unable to pursue claims under the *TFM Act* because assets passed outside of the estate environment or were transferred prior to death. As noted earlier in this part, the extent to which this occurs remains unquantified and has not been demonstrated through empirical evidence. This means that it is not possible for the Institute to reach a conclusion about the extent of the problem that notional estate laws are intended to address.

5.9.6 Accepting that there is at least a certain number of individuals adversely impacted by the absence of notional estate laws and that such laws further the objectives and effectiveness of the *TFM Act*, the question that follows is what are the potential costs or problems with notional estate laws? Risks that respondents identified include a potential increase in legal costs and the length of estate administration. A lack of certainty for individuals and the prospect of an increase in litigation

⁵¹⁶ See [5.5.53].

⁵¹⁷ Ibid.

⁵¹⁸ See [5.5.56].

⁵¹⁹ See [5.4.3].

⁵²⁰ See [5.5.70].

⁵²¹ See [5.7.9].

and unmeritorious claims were also raised as problems. These issues would likely affect a large proportion of the population as will-makers, beneficiaries or family members of a deceased. Many of those potentially affected would be described as ‘innocent’ given respondents’ advice that most will-makers do not depart from what many may view as adequate provision for family and that even fewer still take active steps to structure their affairs to intentionally avoid claims.

5.9.7 The impact of notional estate laws from a rights perspective also does not produce straightforward results. On the one hand, individuals must have equal access to the law. It could be said that the absence of notional estate laws precludes equal access for people to pursue claims under the *TFM Act* and that notional estate laws thus advance equal access to the law. But as noted previously in this report, the situation is perhaps more accurately described as resulting from individuals coming to the law from an unequal position rather than the law itself creating unequal outcomes.

5.9.8 Balanced with these considerations were views advanced that individuals have the right to deal with their assets as they wish during life and that notional estate laws restrict a person’s right to do so. Similarly expressed was the notion of individuals having the right to testamentary freedom and the ability to dispose of their assets as they please. This latter argument however, has limited weight as the *TFM Act* itself is evidence of a long-standing qualification upon a person’s absolute freedom of testamentary disposition.

5.9.9 Several respondents and commentators have expressed the view that notional estate laws are too complex. This has the potential consequence of rendering the law inaccessible to many. Concerns were also raised that notional estate laws would create great uncertainty, particularly for individuals receiving gifts of assets during a person’s life. There is thus a need for caution before the enactment of notional estate laws with the risk of them rendering the law in this area less accessible and thereby breaching the fundamental human rights principle that the law should be certain and accessible.⁵²²

5.9.10 Considering potential issues with the introduction of notional estate law, a critical question is whether they adequately resolve the problem identified. One difficulty is that the effectiveness of the New South Wales scheme has not been fully evaluated. Many respondents and commentators, however, submit that there are strategies available to avoid the operation of notional estate legislation. One strategy identified is through taking legitimate advantage of the fact that most jurisdictions (presently all except New South Wales) do not have notional estate laws, meaning that individuals hold investment assets in those jurisdictions to avoid the operation of the law. This creates a significant barrier to the effectiveness of the law. There is a risk that enactment of notional estate laws might create the impression that they provide protections when they too can be avoided. When balanced with the fact that notional estate laws may adversely impact a

⁵²² *Van Alphen v The Netherlands* (UNHCR, Communication No 305/1988, UN Doc CCPE/C/39/D/305/1988, 1990); *R v Governor HMP Brockhill; Ex Parte Evans (No 2)* [2001] 2 AC 19, 38 (Lord Hope of Craighead). That the law is clear and accessible is also a core element of the rule of law: see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638 (Lord Diplock); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279.

substantial proportion of the population, their lack of effectiveness also supports the need for caution before enacting such a scheme.

5.9.11 A final consideration is the extent to which the issue identified can be resolved through other means. The availability of equitable doctrines, for example, enable individuals to pursue claims to non-estate assets where they have contributed to a deceased's assets or been promised certain property after a family member's death.⁵²³ Similarly, concerns that respondents raised about the validity of pre-death transfers of assets based on undue influence, fraud or lack of capacity can already be addressed via existing causes of action. The effect is that remedies already exist which in part address some of the matters respondents raised in support of notional estate legislation.

5.9.12 Given that the law must be effective and that the lack of nationally uniform legislation creates a significant barrier to the effectiveness of notional estate laws, viewed together with questions about the extent of need for reform and the potential problems it may create, the Institute has formed the view that notional estate provisions should not be enacted in Tasmania in the absence of nationally uniform family provision laws and further evaluation.

5.9.13 Given that the absence of national uniformity has been identified as a barrier to the effectiveness of notional estate laws, the Institute recommends that the debate surrounding nationally uniform family provision legislation be re-energised. This should include opportunity for national input and consultation into the question of whether, and if so to what degree, model legislation ought to include notional estate provisions. It is a matter that the State Government may pursue via the Attorney-General's position on the Council of Attorneys-General ('CAG'). Alternatively, the State Government may refer coordination of a national project between law reform agencies to the Institute. This project should consider the outcomes of reviews in Victoria and South Australia and feedback that the Institute received that, to introduce a substantial change like notional estate legislation, there should be empirical evidence of the need for reform, along with a robust evaluation of the effectiveness of the New South Wales legislation if this is to be adopted as the preferred approach.

5.9.14 Noting the strong arguments for notional estate legislation, the State Government may legitimately conclude that there is a need for legislative reform to incorporate notional estate provisions within the *TFM Act*. If notional estate laws were to be enacted, then reflecting the Institute's view that there is a need for caution, introduction of a more limited scheme would be appropriate.

5.9.15 One of the concerns that respondents expressed with the New South Wales approach to notional estate is its breadth.⁵²⁴ There were concerns raised about its application to trusts, superannuation, joint tenancy properties and more broadly, its application to omissions, or a person's failure to act, rather than solely to a person's positive acts. When compared to notional estate-style provisions operating in family provision legislation in the UK and two provinces of Canada,⁵²⁵ the NSW *Succession Act* is arguably the most far-reaching scheme of which the Institute

⁵²³ See discussion at [5.5.59].

⁵²⁴ See [5.5.52] in relation to discussion about its application to trusts, [5.5.51] about its application to superannuation, [5.5.49] about its application to joint tenancy properties and [5.7.9] on the fact that it incorporates omissions as well as acts.

⁵²⁵ See [3.2], [3.4].

is aware. This may be one of the underlying reasons why legislation consistent with the model legislation (based upon the New South Wales legislation) has not been enacted elsewhere in Australia.

5.9.16 The Institute notes that several respondents identified the utility of broadly framing provisions based upon the NSW *Succession Act* given the availability of existing educational materials and jurisprudence to assist the court and lawyers in interpreting the scheme. The Institute therefore suggests that a framework be broadly drafted based upon the NSW *Succession Act*. One variation is, however, proposed to narrow its scope.

5.9.17 The Institute proposes that the scheme be limited only to acts (for example transfers of assets) rather than omissions (for example, a failure to sever a joint tenancy or BDBN). This can be achieved by limiting the definition of ‘relevant property transaction’ in the *Succession Act*. The effect would be to remove its application to failures to sever a joint tenancy or make or change a nomination for a superannuation fund or life insurance policy. It would also exclude trusts, except in situations where, prior to death, an individual gifted an asset to a trust within the prescribed period. This approach provides greater consistency with models operating in Yukon⁵²⁶ and Ontario⁵²⁷ in Canada which deal with acts rather than omissions. It also limits criticisms of notional estate laws based upon a view that they undermine the legal foundations of fundamental laws including trust law and joint tenancy.⁵²⁸ It is broadly consistent with the 2006 recommendations of the BCLI⁵²⁹ and accords with the thrust of the WALRC’s preliminary views conveyed about the potential application of notional estate law to joint tenancy.⁵³⁰

5.9.18 The Institute further recommends that, if notional estate laws are enacted, the following strategies should be deployed to mitigate any adverse effect they may have:

- providing that the reforms do not operate retrospectively;
- ensuring that the legislative reforms are complemented by a comprehensive public education campaign to inform members of the public of the effect of laws; and
- consistent with the NSW *Succession Act*,⁵³¹ a section be included enabling families to enter into agreements to effectively ‘contract out’ of family provision claims. This strategy goes some way to providing certainty for family members who mutually agree upon the desirability of transferring or gifting assets before death.

5.9.19 The Institute acknowledges that a more limited framework to that operating in New South Wales may be criticised on the basis that it does not adequately cover the range of issues that the NSW *Succession Act* addresses. This is one of the risks of introducing a more limited scheme, however, the Institute considers it a more moderate approach that responds to concerns identified.

⁵²⁶ *Dependants Relief Act 2002*.

⁵²⁷ *Succession Law Reform Act 1990* (Ont) Part V.

⁵²⁸ See [5.5.49].

⁵²⁹ Including transfers of property to joint tenancy, deposits into joint bank accounts, transfers of property for nominal or no consideration, or designations or changes of beneficiaries of a life insurance policy or pension fund.

⁵³⁰ WALRC (n 186).

⁵³¹ See NSW *Succession Act* s 95.

Recommendations

1. That notional estate laws not be introduced in Tasmania in the absence of nationally uniform family provision laws.
2. That, if notional estate laws are introduced:
 - 2.1 There be a comprehensive public education campaign advising stakeholders of the effect of legislative reform.
 - 2.2 Reforms not operate retrospectively.
 - 2.3 Legislative reform broadly align with Part 3.3 of the *Succession Act 2006* (NSW), subject to any variations made necessary to ensure consistency with existing terminology used in the *Testator's Family Maintenance Act 1912* (Tas) and Recommendation 2.4.
 - 2.4 The term 'relevant property transaction' be limited to acts rather than failures to act.
 - 2.5 The legislative framework incorporates a section consistent with s 95 of the *Succession Act 2006* (NSW) enabling the Supreme Court to approve agreements between eligible claimants about the transfer of assets and relinquishment of claims.
3. That the State Government advance the national debate surrounding nationally uniform family provision legislation via the Council of Attorneys-General or by referring the matter to the Institute to advance through coordination of a national project amongst law reform bodies.
4. That, if nationally uniform estate dispute laws are progressed, this matter be revisited, and, following a full evaluation of the operation of the New South Wales notional estate scheme, the utility of incorporating notional estate provisions within national uniform laws be considered as well as the form that those provisions might take.

Appendix 1: ‘Notional estate’ style provisions – New South Wales and England and Wales

	New South Wales	England and Wales
Eligible claimants		
Spouse ⁵³²	✓	✓
Former Spouse ⁵³³	✓	✓ (if not re-partnered)
Child ⁵³⁴	✓	✓
Dependant ⁵³⁵	✓ (if member of household or grandchild)	✓
Other ⁵³⁶	✓	×
Non-estate assets that may be treated as ‘notional estate’:		
Joint tenancy assets ⁵³⁷	✓	✓
Superannuation ⁵³⁸	✓	×
Trusts ⁵³⁹	✓	× (unless fitting within s 10 (gifts) or s 11 (mutual wills contracts))
Life insurance ⁵⁴⁰	✓	×
<i>Donatio mortis causa</i> ⁵⁴¹		✓
Assets gifted pre-death ⁵⁴²	✓	✓ (dispositions made within 6 years of death with the intention of defeating a claim)
Property distributed pursuant to mutual wills contracts ⁵⁴³	✓	✓ (where full valuable consideration not given and deceased entered into contract with the intention of defeating a claim)
Omissions (failures to act) ⁵⁴⁴	✓	×

⁵³² *Inheritance (Provision for Family and Dependents) Act 1975* (UK) ss 1(1)(a), (1B); *NSW Succession Act* ss 57(1)(a), 57(1)(b).

⁵³³ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 1(1)(b); *NSW Succession Act* s 57(1)(d).

⁵³⁴ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) ss 1(1)(c), (d); *NSW Succession Act* s 57(1)(c).

⁵³⁵ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 1(1)(e); *NSW Succession Act* s 57(1)(e).

⁵³⁶ *NSW Succession Act* s 57(1)(f).

⁵³⁷ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 9(1); *NSW Succession Act* s 76(2)(b).

⁵³⁸ *NSW Succession Act* s 76(2)(e).

⁵³⁹ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 13; *NSW Succession Act* s 76(2)(c).

⁵⁴⁰ *NSW Succession Act* s 76(2)(d).

⁵⁴¹ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 8(2); *NSW Succession Act* s 75(1).

⁵⁴² *Inheritance (Provision for Family and Dependents) Act 1975* (UK) ss 10, 12; *NSW Succession Act* s 75(1).

⁵⁴³ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) ss 11, 12; *NSW Succession Act* s 76(2)(f).

⁵⁴⁴ *NSW Succession Act* s 75(1).

Appendix 2: ‘Notional estate’ style provisions in Canada

	Uniform Act	Saskatchewan ⁵⁴⁵	Ontario ⁵⁴⁶	BC ⁵⁴⁷	Nova Scotia ⁵⁴⁸	Alberta ⁵⁴⁹	Manitoba ⁵⁵⁰	NB ⁵⁵¹	Yukon ⁵⁵²	Newfoundland ⁵⁵³
Eligible claimants										
Spouse ⁵⁵⁴	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Former Spouse ⁵⁵⁵	✓ (if dependent upon deceased for at least 3 years before death)	×	×	×	×	×	✓	×	✓ (if dependent upon deceased for at least 3 years before death)	×
Child ⁵⁵⁶	✓	✓ (if under 18, or if an adult,	✓	✓	✓	✓ (if under 18, or if an adult,	✓ (if under 18, or if an adult,	✓	✓ (if under 16, or if older, they	✓

⁵⁴⁵ *Dependants’ Relief Act*, SS 1996, c D-25.01 (*‘Dependants’ Relief Act (Sask)’*).

⁵⁴⁶ *Succession Law Reform Act*, RSO 1990, c S.26, Part V (*‘Succession Law Reform Act (Ont)’*).

⁵⁴⁷ *Wills, Estates and Succession Act*, SBC 2009, c 13, Pt 4, Div 6 (*‘Wills, Estates and Succession Act (BC)’*).

⁵⁴⁸ *Testators’ Family Maintenance Act*, RSNS 1989, c 465, s 1 (*‘Testators’ Family Maintenance Act (NS)’*).

⁵⁴⁹ *Wills and Succession Act*, SA 2010, c.W 12.2, Part 5 (*‘Wills and Succession Act (Alta)’*).

⁵⁵⁰ *The Dependants Relief Act*, CCSM 1990, c D37 (*‘The Dependants Relief Act (Man)’*).

⁵⁵¹ *Provision for Dependants Act*, RSNB 2012, c 111 (*‘Provision for Dependants Act (NB)’*).

⁵⁵² *Dependants Relief Act*, RSY 2002, c 56 (*‘Dependants Relief Act (YT)’*).

⁵⁵³ *Family Relief Act*, RSNL1990 c F-3 (*‘Family Relief Act (Nfld)’*).

⁵⁵⁴ *Inheritance (Provision for Family and Dependants) Act 1975 (UK)* s 1(1)(a), (1B); *Uniform Dependants’ Relief Act (1974) (Canada)* ss 1(d)(i), (iv); *Dependants’ Relief Act (Sask)* (n 545) s 2(1) definition of ‘dependant’; *Succession Law Reform Act (Ont)* (n 546) s 57(1) definition of ‘dependant’; *Wills, Estates and Succession Act (BC)* (n 547) s 60; *Testators’ Family Maintenance Act (NS)* (n 548) s 2(1)(b) definition of ‘dependant’; *Wills and Succession Act (Alta)* (n 549) s 72(b)(i); *The Dependants Relief Act (Man)* (n 550) s 1 definition of ‘dependant’; *Provision for Dependants Act (NB)* (n 551) s 1 definition of ‘dependant’; *Dependants Relief Act (YT)* (n 552) s 1 definition of ‘dependant’; *Family Relief Act (Nfld)* (n 553) s 2(c) definition of ‘dependant’.

⁵⁵⁵ *Inheritance (Provision for Family and Dependants) Act 1975 (UK)* s 1(1)(b); *Uniform Dependants’ Relief Act (1974) (Canada)* s 1(d)(v); *The Dependants Relief Act (Man)* (n 550) s 1 definition of ‘dependant’; *Dependants Relief Act (YT)* (n 552) s 1 definition of ‘dependant’.

⁵⁵⁶ *Inheritance (Provision for Family and Dependants) Act 1975 (UK)* ss 1(1)(c), (d); *Uniform Dependants’ Relief Act (1974) (Canada)* ss 1(d)(ii), (iii); *Dependants’ Relief Act (Sask)* (n 545) s 2(1) definition of ‘dependant’; *Succession Law Reform Act (Ont)* (n 546) s 57(1) definition of ‘dependant’; *Wills, Estates and Succession Act (BC)* (n 547)

	Uniform Act	Saskatchewan ⁵⁴⁵	Ontario ⁵⁴⁶	BC ⁵⁴⁷	Nova Scotia ⁵⁴⁸	Alberta ⁵⁴⁹	Manitoba ⁵⁵⁰	NB ⁵⁵¹	Yukon ⁵⁵²	Newfoundland ⁵⁵³
		they must demonstrate inability to earn a living due to disability or that they ought to receive a greater share due to need or other circumstance)				they must demonstrate inability to earn a living due to disability, or be a student between 18-21 years)	they must demonstrate inability to earn a living due to disability or that they were substantially dependent upon the deceased at their death		must demonstrate inability to earn a living due to disability)	
Dependant ⁵⁵⁷	✓ (if grandparent, parent, descendant and dependent for at least 3 years before death)	×	✓	×	×	✓ (grandchildren under 18 where deceased acted as parent at time of death)	✓ (where deceased stood in the shoes of a parent, or substantially dependant grandchildren, parents, grandparents, siblings)	✓	✓ (if grandparent, parent, descendant and dependent for at least 3 years before death)	×
Other ⁵⁵⁸	×	×	✓	×	×	×	×	×	×	×

s 60; *Testators' Family Maintenance Act* (NS) (n 548) s 2(1)(b) definition of 'dependant'; *Wills and Succession Act* (Alta) (n 549) ss 72(b)(iii), (iv), (v); *The Dependants Relief Act* (Man) (n 550) s 1 definition of 'dependant'; *Provision for Dependants Act* (NB) (n 551) s 1 definition of 'dependant'; *Dependants Relief Act* (YT) (n 552) s 1 definition of 'dependant'; *Family Relief Act* (Nfld) (n 553) s 2(c) definition of 'dependant'.

⁵⁵⁷ *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s 1(1)(e); *Succession Law Reform Act* (Ont) (n 546) s 57(1) definition of 'dependant'; *Wills and Succession Act* (Alta) (n 549) s 72(b)(vi); *The Dependants Relief Act* (Man) (n 550) s 1 definition of 'dependant'; *Provision for Dependants Act* (NB) (n 551) s 1 definition of 'dependant'; *Dependants Relief Act* (YT) (n 552) s 1 definition of 'dependant'.

⁵⁵⁸ *Succession Law Reform Act* (Ont) (n 546) s 57(1) includes financially dependent parents and siblings within definition of 'dependant'.

	Uniform Act	Saskatchewan ⁵⁴⁵	Ontario ⁵⁴⁶	BC ⁵⁴⁷	Nova Scotia ⁵⁴⁸	Alberta ⁵⁴⁹	Manitoba ⁵⁵⁰	NB ⁵⁵¹	Yukon ⁵⁵²	Newfoundland ⁵⁵³
Non-estate assets that may be treated as ‘notional estate’:										
Joint tenancy assets ⁵⁵⁹	✓ (to the extent the deceased made a disposition of property to joint tenancy or a joint account)	×	✓ (to the extent the deceased made a disposition of property to joint tenancy or a joint account)	×	×	×	×	×	✓ (to the extent the deceased made a disposition of property to joint tenancy or a joint account)	×
Superannuation ⁵⁶⁰	×	×	✓	×	×	×	×	×	×	×
Trusts ⁵⁶¹	✓ (to the extent the deceased deposited funds in an account in their name in trust for another or to a trust to the extent that the deceased retained, either alone with another person or persons by the express provisions of the	×	✓ (consistent with the <i>Uniform Act</i>)	×	×	×	×	×	✓ (consistent with the <i>Uniform Act</i>)	×

⁵⁵⁹ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 9(1); *Succession Law Reform Act* (Ont) (n 546) s 72(1)(b); *Dependants Relief Act* (YT) (n 552) s 20(1)(d).

⁵⁶⁰ *Succession Law Reform Act* (Ont) (n 546) s 72(1)(g).

⁵⁶¹ *Inheritance (Provision for Family and Dependents) Act 1975* (UK) s 13; *Uniform Dependents’ Relief Act* (1974) (Canada) s 20(1); *Succession Law Reform Act* (Ont) (n 546) s 72(1)(e); *Dependants Relief Act* (YT) (n 552) s 20(1)(e).

	Uniform Act	Saskatchewan ⁵⁴⁵	Ontario ⁵⁴⁶	BC ⁵⁴⁷	Nova Scotia ⁵⁴⁸	Alberta ⁵⁴⁹	Manitoba ⁵⁵⁰	NB ⁵⁵¹	Yukon ⁵⁵²	Newfoundland ⁵⁵³
	disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal)									
Life insurance ⁵⁶²	✓	×	✓	×	×	×	×	×	✓	×
<i>Donatio mortis causa</i> ⁵⁶³	✓	×	✓	×	×	×	×	×	✓	×
Assets gifted pre-death ⁵⁶⁴	✓ (unreasonably large dispositions within 1 year of death as an immediate gift or where full valuable consideration not given)	×	×	×	×	×	×	×	✓ (unreasonably large dispositions within 1 year of death as an immediate gift or where full valuable consideration not given)	×
Property distributed pursuant to	✓ (where full valuable consideration not given)	✓ (where full valuable consideration not given)	✓ (where full valuable consideration not given)	×	✓ (where full valuable consideration not given)	✓ (where full valuable consideration not given)	×	×	✓ (where full valuable consideration not given)	✓ (where full valuable consideration not given)

⁵⁶² *Uniform Dependants' Relief Act* (1974) (Canada) s 20(1); *Succession Law Reform Act* (Ont) (n 546) s 72(1)(f); *Dependants Relief Act* (YT) (n 552) s 20(1)(f).

⁵⁶³ *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s 8(2); *Uniform Dependants' Relief Act* (1974) (Canada) s 20(1); *Succession Law Reform Act* (Ont) s (n 546) 72(1)(a); *Dependants Relief Act* (YT) (n 552) s 20(1)(a).

⁵⁶⁴ *Inheritance (Provision for Family and Dependants) Act 1975* (UK) ss 10, 12; *Uniform Dependants' Relief Act* (1974) (Canada) s 21(1); *Dependants Relief Act* (YT) (n 552) s 21.

⁵⁶⁶ Note that the BCLI had proposed inclusion of a clause consistent with those operating in the majority of other jurisdictions, although this has not been included in subsequent legislative reforms: BCLI (n 128) 202.

	Uniform Act	Saskatchewan ⁵⁴⁵	Ontario ⁵⁴⁶	BC ⁵⁴⁷	Nova Scotia ⁵⁴⁸	Alberta ⁵⁴⁹	Manitoba ⁵⁵⁰	NB ⁵⁵¹	Yukon ⁵⁵²	Newfoundland ⁵⁵³
mutual wills contracts ⁵⁶⁵										
Omissions (failures to act)	×	×	×	×	×	×	×	×	×	×
Test to award provision	such provision as it considers adequate for the applicant's proper maintenance and support ⁵⁶⁷	If the deceased has disposed of real or personal property in a manner that reasonable provision has not been made for the maintenance of the dependant, the court may order provision for maintenance in an amount that the court considers reasonable ⁵⁶⁸	Where the deceased has not made adequate provision for the proper support of his/her dependants ⁵⁶⁹	Where a will does not make adequate provision for the proper maintenance and support of the spouse or child, the court may order provision that it thinks adequate, just and equitable in the circumstances ⁵⁷⁰	Where deceased did not make adequate provision for the proper maintenance and support of a dependant, the judge may order whatever provision the judge deems adequate in the circumstances ⁵⁷¹	Where adequate provision for the proper maintenance and support of a person is not made, the court may order any provision it considers adequate for their proper maintenance and support ⁵⁷²	If it appears to the court that a dependant is in financial need, the court may order reasonable provision for their maintenance and support ⁵⁷³	Where a dependant's resources, taking into consideration everything they are entitled to under a will, intestacy or otherwise on the deceased's death, are not sufficient to provide adequately for them, the court may order what it considers	If a deceased has not made adequate provision for the proper maintenance and support of the dependant, the court may order provision it considers adequate for their proper maintenance and support ⁵⁷⁵	Where adequate provision for the proper maintenance and support has not been made, the court may order that adequate provision be made for their proper maintenance and support ⁵⁷⁶

⁵⁶⁵ *Inheritance (Provision for Family and Dependants) Act 1975* (UK) ss 11, 12; *Uniform Dependants' Relief Act* (1974) (Canada) s 15; *Succession Law Reform Act* (Ont) (n 546) s 71; *Testators' Family Maintenance Act* (NS) (n 548) s 16; *Dependants' Relief Act* (Sask) (n 545) s 10; *Wills and Succession Act* (Alta) (n 549) s 102; *Dependants Relief Act* (YT) (n 552) s 15; *Family Relief Act* (Nfld) (n 553) s 16.

⁵⁶⁷ *Uniform Dependants' Relief Act* (1974) (Canada) s 2.

⁵⁶⁸ *Dependants' Relief Act* (Sask) (n 545) s 6(1).

⁵⁶⁹ *Succession Law Reform Act* (Ont) (n 546) s 58(1).

⁵⁷⁰ *Wills, Estates and Succession Act* (BC) (n 547) s 60.

⁵⁷¹ *Testators' Family Maintenance Act* (NS) (n 548) s 3(1).

⁵⁷² *Wills and Succession Act* (Alta) (n 549) s 88(1).

⁵⁷³ *The Dependants Relief Act* (Man) (n 550) s 2(1).

⁵⁷⁵ *Dependants Relief Act* (YT) (n 552) s 2.

⁵⁷⁶ *Family Relief Act* (Nfld) (n 553) s 3(1).

	Uniform Act	Saskatchewan ⁵⁴⁵	Ontario ⁵⁴⁶	BC ⁵⁴⁷	Nova Scotia ⁵⁴⁸	Alberta ⁵⁴⁹	Manitoba ⁵⁵⁰	NB ⁵⁵¹	Yukon ⁵⁵²	Newfoundland ⁵⁵³
								adequate for their maintenance and support ⁵⁷⁴		
Statutory factors to be considered ⁵⁷⁷		✓	✓	×	✓	✓	✓	×	×	✓

⁵⁷⁴ *Provision for Dependants Act* (NB) (n 551) s 2(1).

⁵⁷⁷ *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s 3; *Succession Law Reform Act* (Ont) (n 546) s 62; *Dependants' Relief Act* (Sask) (n 545) s 8; *Wills and Succession Act* (Alta) (n 549) s 93; *The Dependants Relief Act* (Man) (n 550) s 8; *Family Relief Act* (Nfld) (n 553) s 5; *Testators' Family Maintenance Act* (NS) (n 548) s 5(1).

Appendix 3: Reported Tasmanian Family Provision Decisions, April 2009 to April 2019

	Case Name	Date	Judge	Applicant	Size of Estate	'Notional estate'	Provision awarded
1	<i>Williams v Williams (No 2)</i> [2018] TASSC 61	5 December 2018	Holt As J	Widow	\$1.08m	'As a result of the testator's death the applicant also became entitled to receive a Department of Veterans' Affairs ('DVA') pension of about \$450 per week and a DVA gold health card.' ⁵⁷⁸ the major estate asset, being an apartment complex at St Helens, worth about \$650,000, had been distributed in accordance with the terms of the will for the benefit of the daughter and her three children and for the benefit of the son ... by reason of the Act, s 11(4), the distribution which occurred prior to the time of the filing of the application cannot now be disturbed.' ⁵⁷⁹	YES – 'Provision by way of a flexible life interest in the couple's home in substitution for the mere right of occupancy and the bequest of a one-third interest in the investment property will be ordered.' ⁵⁸⁰
2	<i>Booth v Brooks</i> [2018] TASSC 35	24 July 2018	Holt AsJ	Adult daughter	\$6m	'At the time of his death the testator held 9 of 10 issued shares in the company Triffett Holdings Pty Ltd, which was registered in June 1984. The other share was held by the first respondent. The company acquired 220 hectares of land at Ouse in May 1997, which had a government value as at 1 July 2014 of \$1.25 million. The company acquired about 2,000 hectares of farming land in the Central Highlands in March 2008 which had a government valuation as at 1 July 2014 of \$2.7 million. Shortly after the death of the testator the company acquired 246 hectares of land at Ouse which had a government valuation as at 1 July 2014 of \$1.15 million. In the estate inventory no mention is made of the testator's shares in Triffett Holdings Pty Ltd and accordingly I infer that the company's assets were held in trust, rather than beneficially for the shareholders.' ⁵⁸¹	YES – \$800,000

⁵⁷⁸ *Williams v Williams (No 2)* [2018] TASSC 61 [2].

⁵⁷⁹ *Ibid* [4]–[5].

⁵⁸⁰ *Ibid* [57].

⁵⁸¹ *Booth v Brooks* [2018] TASSC 35 [36].

	Case Name	Date	Judge	Applicant	Size of Estate	'Notional estate'	Provision awarded
3	<i>Nicholas v Tubb</i> [2016] TASSC 53	13 October 2016	Holt AsJ	4 adult children	\$266,000	'In May 2015 the eldest child, Susan Jones, who was an executor, had been sent by the solicitor for the estate a transfer form to be signed by her to facilitate the transfer of the farm to Brodi Nicholas. After a number of questions under cross-examination she eventually conceded that she had received the transfer form in May 2015. By the time of the hearing in September 2016 she had still not signed and returned the form. If she had signed and returned the form promptly the farm would have been transferred to Brodi Nicholas well before her three siblings had brought their claims and so there would have been no prospect of disturbing the bequest of the farm.' ⁵⁸²	NO – Claim made out of time and extension not granted.
4	<i>Thorne v The Public Trustee</i> [2015] TASSC 56	25 November 2015	Holt AsJ	Adult daughter	Mid \$300,000s		NO
5	<i>How v How</i> [2015] TASSC 4	17 February 2015	Pearce J	Adult son	\$260,000		NO
6	<i>Rodgers v Tasmanian Perpetual Trustees Limited</i> [2013] TASSC 73	6 December 2013	Holt AsJ	Adult daughter	\$316,000		YES – \$50,000
7	<i>Koukias v Koukias</i> [2012] TASSC 85	12 December 2012	Holt AsJ	Adult daughter	\$140,000		NO
8	<i>Trumbull-Ward v Mitchell and Haley</i> [2012] TASSC 67	16 October 2012	Holt AsJ	Adult daughter	\$360,000		YES – 20% of estate less \$25,000
9	<i>Doddridge v Badenach</i> [2011] TASSC 34	8 July 2011	Evans J	Adult daughter	\$612,000		YES – \$200,000
10	<i>Coulston v Tasmanian Perpetual Trustees</i> [2010] TASSC 22	7 May 2010	Tennent J	Adult son	\$220,000		YES – \$25,000
11	<i>Contencin v Tasmanian Perpetual</i>	24 February 2010	Holt AsJ	Two adult children	Undisclosed		YES – son \$120,000, daughter \$240,000

⁵⁸² *Nicholas v Tubb* [2016] TASSC 53 [14].

	Case Name	Date	Judge	Applicant	Size of Estate	'Notional estate'	Provision awarded
	<i>Trustees Ltd</i> [2010] TASSC 3						
12	<i>Dodge v Blissenden</i> [2009] TASSC 116	18 December 2009	Blow J	Adult son	An unencumbered house in Moonah, its contents, a 1997 motor vehicle, and a bank account with \$8,379.91 in it		NO
13	<i>Tapp v The Public Trustee</i> [2009] TASSC 54	31 July 2009	Tennent J	Widower	\$99,000	<p>'A few days prior to her death, her son, Laife Thurstans, withdrew \$36,500 from those funds, thus removing those funds from the control of the deceased's will. Mr Thurstans told the Court he removed those funds at his mother's request, and that he gave \$10,000 to each of his siblings, Donna and Craig, kept \$10,000 for himself and used the balance to buy things and pay for things for his nephew Ben.'⁵⁸³</p> <p>'The deceased made her will late in 2004. At or around the same time, she arranged for the joint tenancy in respect of the Claremont home title to be severed.'⁵⁸⁴</p>	YES – Three quarters of estate property

⁵⁸³ *Tapp v The Public Trustee* [2009] TASSC 54 [21].

⁵⁸⁴ *Ibid* [22].

Appendix 4: Reported New South Wales decisions involving potential notional estate April 2018 to April 2019

	Case Name	Applicant type	Successful/not successful
1	<i>McDonald v O'Connor</i> [2019] NSWSC 261 (14 March 2019)	Adult daughter	Successful in receiving \$45,000 payment but not successful in establishing that there was 'notional estate'
2	<i>Re Estate McNamara</i> [2018] NSWSC 1661 (2 November 2018)	Adult son	Unsuccessful in establishing notional estate, ordered to receive a legacy of \$75,000
3	<i>Sreckovic v Sreckovic</i> [2018] NSWSC 1597 (23 October 2018)	Adult daughter	Unsuccessful
4	<i>Mekhail v Hana; Mekail v Hana; In the Estate of Nadia Mekhail (No 3)</i> [2018] NSWSC 1452 (5 October 2018)	Nephews	Unsuccessful
5	<i>Re Estate Grant, deceased</i> [2018] NSWSC 1031 (5 July 2018)	Step-son	Property designated as notional estate and received \$750,000
6	<i>Beech v Squire</i> [2018] NSWSC 594 (4 May 2018)	Two adult children	Unsuccessful
7	<i>Harris v Harris</i> [2018] NSWSC 552 (1 May 2018)	Adult son	Unsuccessful