

TASMANIA
LAW REFORM
INSTITUTE

Should Tasmania Introduce 'Notional Estate' Laws?

ISSUES PAPER No. 28

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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.

How to respond

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to address any or all of those questions in their submissions.** Respondents can also suggest alternative options for reform or raise other relevant matters in their responses.

There are a number of ways to respond:

- By filling in the Submission Template

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted to the Institute. The Submission Template can be accessed at the Institute's webpage: <http://www.utas.edu.au/law-reform/>

- By providing a more detailed response to the Issues Paper

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible.

The Institute uses all submissions received to inform its research. Submissions may be referred to or quoted from in a TLRI final report which will be printed, provided to the Tasmanian Government and also published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

1. Public submission – the Institute may refer to or quote directly from the submission and name you as the source of the submission in relevant publications.
2. Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications but will not identify you as the source of the submission.
3. Confidential submission – the Institute will not refer to or quote directly from the submission but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in their deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time up to the time it is sent for publication, by contacting Kira White on (03) 6226 2069 or email Law.Reform@utas.edu.au. You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions will be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

Electronic submissions should be emailed to: Law.Reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute

Private Bag 89

Hobart, TAS 7001

Inquiries about the study should be directed to Mrs Kate Hanslow at the above address, or by telephoning (03) 6226 2069, or by email to Law.Reform@utas.edu.au.

CLOSING DATE FOR RESPONSES: <24 May 2019>

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

Final Report to the Attorney-General

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations for reform, will be published.

Terms of Reference

Whether notional estate legislation should be introduced in Tasmania.

Acknowledgments

This reference was given to the Institute in December 2016 by the then Attorney-General, the Honourable Dr Vanessa Goodwin MLC, and later funded by the Tasmanian Government from the Solicitors' Guarantee Fund, with a grant of \$65,022. This Issues Paper was prepared for the Board of the Tasmania Law Reform Institute by Mr Ken Mackie, Dr Elise Histed, Mr Dylan Richards and Mrs Kate Hanslow. It addresses the question of whether Tasmania should introduce notional estate legislation.

Glossary and Abbreviations

Administrator	Someone who obtains a Grant of Letters of Administration from the Supreme Court of Tasmania
Estate	Assets held by the deceased at their death or that are paid to the person's legal personal representative
Executor	Someone appointed under a will to administer the person's estate
Family provision claim	See 'TFM claim'
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.' ¹
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.' ²
Grant of Letters of Administration	A Grant made if a person dies without a will
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
NSWLRC	New South Wales Law Reform Commission
QLRC	Queensland Law Reform Commission
SALRI	South Australian Law Reform Institute
Testator	A person who makes a will
TFM claim	A claim by an eligible applicant for provision, or additional provision, from a deceased's estate under the <i>Testator's Family Maintenance Act 1912</i> (Tas) (or equivalent provisions in other jurisdictions)
<i>TFM Act</i>	<i>Testator's Family Maintenance Act 1912</i> (Tas)
<i>NSW Succession Act</i>	<i>Succession Act 2006</i> (NSW)
VLRC	Victorian Law Reform Commission

¹ Supreme Court of Tasmania – Probate and Administration
<https://www.supremecourt.tas.gov.au/probate_and_administration>.

² Ibid.

Executive Summary

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. A person could, for example, leave all of their estate to charity or friends and not gift anything to their spouse or child.

There are, however, laws in each state and territory of Australia that enable limited classes of people to claim a share (or a larger share) of a person’s estate after their death. These are often referred to as ‘TFM claims’ or ‘family provision’ claims. In Tasmania, these laws are contained in the *Testator’s Family Maintenance Act 1912* (Tas) (‘*TFM Act*’). Those able to make a TFM claim are limited to the spouse and children of the deceased, or the deceased’s parents where they did not have a spouse or child. A person may wish to make 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 the amount they are entitled to receive under the law of intestacy, where legislation sets out who is to receive a person’s estate and in what shares when a person dies without a valid will dealing with the distribution of their estate.

A person (an ‘applicant’) commences a TFM claim by filing an application with the Supreme Court of Tasmania, which determines a claim if the matter cannot be resolved by agreement 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, but this usually includes consideration of the size of the estate available, the nature and quality of the relationship between the applicant and the deceased, the competing claims of the beneficiaries, the financial need of the applicant and any reasons ascertained for why the deceased wished to gift their estate as they did. The Court can decline to make provision for an applicant where it determines that the person has disentitled themselves due to their conduct. This might arise, for example, where there has been violence or abuse inflicted upon the deceased by the applicant or other relevant family history.

If the Court is satisfied that an applicant meets the test outlined in the legislation, it may order that the applicant receive an amount (or additional amount) from the deceased’s estate.

In all Australian jurisdictions other than New South Wales, a court may only make provision for a successful TFM 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 another person as a joint tenant, or where assets are held in superannuation funds or trusts. A person may make gifts before their death, with any assets gifted then ceasing to be part of their estate. Assets may also 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.

These arrangements may not be made to intentionally defeat potential TFM claims and might exist for other reasons — for example, for asset protection or taxation purposes, or to reward or compensate an individual who has provided someone with assistance (in the case of gifts). These arrangements might, on the other hand, be intentional in order to reduce what is available to challenge if someone were to make a TFM claim after a person’s death. In either case, the effect is

the same: the result is to significantly reduce, and sometimes eliminate, the possibility of the Court awarding an applicant further provision from an estate, because there is simply no estate to claim.

In Tasmania, an applicant must file a TFM claim within three months of a Grant of Administration having been made in the estate, although the Court has discretion to extend this time period. If the three month 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. Because they are then not part of the estate, these assets are also unable to be used to fund provision for a successful TFM applicant where the Court permits them to make a claim out of time.

Legislation in New South Wales is intended to address these issues. It enables the court to deem assets that are not within a person's estate as part of their estate — called their 'notional estate'. The court is then able to utilise assets deemed notional estate when awarding provision for a successful TFM applicant. These provisions are not dissimilar to laws that apply to bankruptcy, where assets may be 'clawed-back' where 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 an asset for the purpose of ascertaining the parties' 'asset pool', with the Family Court able to make property orders splitting superannuation between partners. In some circumstances, trust assets may also be considered a financial resource of a party to a relationship for the purposes of family law property orders despite those assets being held in a trust and not owned personally.

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 to pay the award ordered. Only transfers or other dealings occurring within three years of the deceased's death (or that occur upon or after the person's death) may be treated as notional estate. 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 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.

These provisions enable the New South Wales Supreme Court to award provision for successful TFM claimants from a much broader pool of assets than are presently available to the Court in Tasmania. On one hand, extending the reach of TFM 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, the law presently gives 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 Institute has been asked to provide advice to the State Government about whether Tasmania should introduce notional estate legislation. If introduced, notional estate laws would extend the reach of the Supreme Court to enable it to make orders affecting property that is presently unable to be dealt with in a TFM claim. This Issues Paper asks a range of questions intended to elicit feedback from the Tasmanian community which will then be used to evaluate the degree of support or opposition that exists to the introduction of notional estate laws.

It is outside of the scope of this review 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 in Tasmania.

List of Questions

The Institute welcomes your response to any individual question or to all questions contained within this Issues Paper. A full list of the consultation questions is provided below.

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. (Page 31)

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 explaining your view. (Page 32)

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. (Page 32)

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? (Page 33)

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:

- (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? (Page 34)

Question 6

Are there any other matters in relation to introducing notional estate legislation in Tasmania that you would like to comment on? (Page 34)

Part 1

Introduction

1.1 The issue

1.1.1 All Australian states and territories adopt a ‘freedom of testation’ model, where a person with the necessary capacity to make a will (a testator) is free to make a will that leaves their estate to whomever they wish upon their death. Subject to family provision legislation (explained below), there is no legal obligation upon a testator to make any particular provision for their spouse, children or other dependants in their will. Where a person dies without a valid will, legislation sets out how that person’s estate is to be divided and distributed amongst their family members.³

1.1.2 All states and territories have legislation, however, that allows a court to make provision (or additional provision) for an eligible applicant where the court determines that a testator’s will (or the effect of intestacy laws) does not make adequate provision for that applicant.⁴ In Tasmania, these matters fall under the *Testator’s Family Maintenance Act 1912* (Tas) (the ‘TFM Act’) and are commonly known as family provision or ‘TFM’ claims.

1.1.3 In all Australian jurisdictions apart from New South Wales, only those assets that are part of the deceased’s ‘estate’ can be used to fund a successful claim for provision.⁵ Broadly speaking, this includes assets owned by the person solely, or owned with another person as a tenant in common.⁶ There are many instances where assets that might be considered the testator’s are not, in fact, included within their estate. This includes assets owned with others as joint tenants, trust assets and, in some instances, superannuation. A person may also alter the way assets are owned prior to death, including by making gifts which reduce their estate. What is included within a person’s estate is explained in more detail in Part 2.

1.1.4 Legislation has been enacted in New South Wales that enables the court to deem assets that are not part of a person’s estate as being part of their ‘notional estate.’⁷ This enables the court to fund provision for a successful family provision applicant from assets that are not available in other jurisdictions.

³ In Tasmania, these laws are contained within the *Intestacy Act 2010* (Tas).

⁴ *Testator’s Family Maintenance Act 1912* (Tas) (‘TFM Act’); *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW) Pt 3.2; *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).

⁵ *TFM Act* (n 4) s 3(1).

⁶ The *Probate Rules 2017* (Tas) require those applying to the Court for a Grant to file an inventory of the estate with their application: s 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’: s 35(2)(a).

⁷ *Succession Act 2006* (NSW) Pt 3.2.

1.1.5 The purpose of this review is to evaluate whether Tasmania should introduce similar notional estate legislation to ‘claw-back’ assets and make them available to fund an award of provision for a successful TFM applicant.

1.2 Background to this Reference

1.2.1 In December 2016, the then Attorney-General, the Honourable Dr Vanessa Goodwin MLC, wrote to the Tasmania Law Reform 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. This arose because of concerns raised by a constituent about gifts and transfers made prior to a testator’s death which resulted in their estate, for TFM purposes, being significantly smaller than what might be considered their net worth. The effect was to substantially reduce the pool of assets from which to award provision to an applicant under the *TFM Act*.

1.2.2 The Institute subsequently received funding to make recommendations to the Tasmanian Government on whether Tasmania should introduce notional estate legislation.

1.3 Report structure

1.3.1 The purpose of this Issues Paper is to examine whether Tasmania should amend the *TFM Act* to incorporate notional estate provisions similar to those that exist in New South Wales.

1.3.2 The Issues Paper comprises five parts: Part 1 discusses the legal concept of family provision. Part 2 outlines some of the potential issues with the current law. Part 3 introduces the concept of a ‘notional estate’ for the purposes of family provision law. It examines the recommendations of the National Committee for Uniform Succession Laws, the Victorian Law Reform Commission (‘VLRC’) and the South Australian Law Reform Institute (‘SALRI’) on the matter. Part 4 reviews the New South Wales notional estate provisions contained in the *Succession Act 2006* (NSW), along with case examples from New South Wales. Part 5 then considers options for reform and invites responses to a series of questions about these options.

1.4 Family provision laws

1.4.1 This Part serves as an introduction to family provision legislation generally. It deals with the following issues:

- succession and property;
- the restriction on absolute testamentary freedom via family provision legislation; and
- an explanation of the *TFM Act*.

History of succession and property laws

1.4.2 The predominant view of the current law of succession is that it is based on the rights of ownership and possession of private property. Many of the advantages of gaining private property

would be lost if those private rights were not to extend to a right to transmit that property on death.⁸ This view was, and is, heavily based on the liberal views of John Stuart Mill (1806–1873).⁹

1.4.3 The basic argument, although simplistic, was that testamentary freedom was a consequence of an individual's creation of property rights. It followed that there should be no automatic right for any individuals (most likely members of the deceased's family) to inherit. Under this view, testamentary freedom was seen to be absolute. The ability of the testator 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.¹⁰

1.4.4 This is in stark contrast to most civil law countries, which feature partial forced succession laws, where there is a compromise between total freedom of testation on the one hand and the interests of the deceased's family on the other. The compromise has taken a number of forms, the essence of which is that the immediate relatives of the deceased have certain shares of which they may not be deprived. Freedom of testation rests only with that part of the estate not subject to the shares. Mackie comments that the advantages of such schemes include the obvious certainty created, the equality of treatment of relatives and the lack of need to resort to judicial proceedings to enforce the right.¹¹ Conversely, Atkinson comments:

One obtains property in his lifetime and may do with it as he pleases — why should he not be permitted to appoint his successors? Akin to this is the argument that a plan of forced inheritance might discourage individual initiative and thrift. Such a scheme would also tend to destroy parental control, and thus render family relations unwholesome. The testator would have no protection which would enable him to reward kindness or punish cruelty.¹²

Restrictions on absolute testamentary freedom: Family provision legislation

1.4.5 A difficulty with complete testamentary freedom is, of course, that testators have an absolute right to leave property as they wish and may ignore the claims of family and other dependants. The need for legislative intervention to protect those dependants was recognised in the early twentieth century. The original suggestions for reform were for the adoption of a mixed system of testate and universal succession, with fixed shares devolving on the wife and children, as with the European Civil Law system discussed above.¹³ 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.

1.4.6 The first legislation of this type was enacted in New Zealand with the passing of the *Testator's Family Maintenance Act* in 1900. All state and territory jurisdictions in Australia followed suit: Victoria in 1906, Tasmania in 1912, Queensland in 1914, New South Wales in 1916,

⁸ Ken Mackie, *Principles of Australian Succession Law* (LexisNexis Butterworths, 3rd ed, 2017) [1.10].

⁹ See John Stuart Mill, *Principles of Political Economy* (Longman, 1848).

¹⁰ Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 2014) 13–14.

¹¹ Mackie (n 8) [1.11].

¹² Thomas Atkinson, *Handbook of the Law of Wills and Other Principles of Succession: Including Intestacy and Administration of Decedents' Estates* (West Academic Publishing, 2nd ed, 1953) 36.

¹³ John De Groot and Bruce Nickel, *Family Provision in Australia* (Lexis Nexis Butterworth, 4th ed, 2012) 3–4.

South Australia in 1918, Western Australia in 1920 and both the Australian Capital Territory and the Northern Territory in 1929.¹⁴ Similar legislation was passed in England in 1938.¹⁵ 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.¹⁶

1.4.7 As is evident in this statement, the original legislation was directed at the protection of women, who were likely to be financially dependent on their husbands, along with the children of a marriage. Over time, however, it was recognised that similar problems existed in relation to other classes of individuals and so the categories of eligible applicants have been expanded.

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

1.5.1 This next section outlines key provisions of the *TFM Act*.¹⁷ It is the Supreme Court of Tasmania that has jurisdiction to hear and determine claims under the Act.

The test applied

1.5.2 Section 3 of the *TFM Act* 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'.¹⁸ 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.¹⁹

¹⁴ *Widows and Young Children Maintenance Act 1906 (Vic)*; *TFM Act* (n 4); *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)*.

¹⁵ *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].

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 August 1916, 578 (D R Hall, Attorney General and Minister for Justice).

¹⁷ The *TFM Act* is set out in full in Appendix A.

¹⁸ *Ibid* s 3(1).

¹⁹ This is the so-called 'twin tasks' approach. See *Singer v Berghouse* (1994) 181 CLR 201, 15 (Mason CJ, Deane and McHugh JJ).

1.5.3 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.²⁰ In other words, there is no fixed concept, with the Court using a ‘multi-faceted evaluation judgement’²¹ to evaluate the current and future needs of an applicant. In undertaking this consideration, the Court places itself in the position of the deceased and considers what he or she ought to have done in the circumstances, treating them as wise and just, rather than fond or foolish. This is often regarded as a moral duty test, which was most forcibly stated by Edmonds J in the New Zealand decision of *Allardice v Allardice*.²² In that case, his Honour stated that the duty of the court was to place itself in the position of the testator and to consider:

whether or not, having regard to all the existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving husband or father owes towards his wife or towards his children.

1.5.4 This so called ‘moral test’ has been reiterated in most modern decisions²³ and upheld by a majority of the High Court of Australia in *Vigolo v Bostin*.²⁴ However, there is also judicial authority that the ‘moral duty’ approach is not a static concept and involves consideration of contemporary community standards in assessment of the claim.²⁵

1.5.5 The *TFM Act* provides that, when assessing the merits of a claim, a judge may have regard to:

- the net value of the estate;²⁶
- the financial resources of the applicant;²⁷ and
- 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.²⁸

1.5.6 The *TFM Act* provides that the Court may to refuse to make an order (even if a ‘moral’ claim has been established) where the character or conduct of the applicant disentitles him or her to the benefits of an order.²⁹

1.5.7 Whilst the Act does not set out other factors, the following matters are often considered when assessing the merits of an applicant’s claim:

- the financial responsibilities of the applicant;
- the age and health of the applicant;

²⁰ *Bosch v Perpetual Trustee Co Ltd* (1938) AC 463.

²¹ See *Foley v Ellis* [2008] NSWCA 288, [3] (Basten JA).

²² [1910] 29 NZLR 959, 972–3.

²³ Although not in New South Wales, where it is regarded as a ‘gloss’ on the legislative provisions. See for example, *Permanent Trustee Co Ltd v Fraser* [1995] 36 NSWLR 24.

²⁴ (2005) 312 ALR 692.

²⁵ See for example, *Lee v Hearn* [2005] VSCA 127, [8] (Callaway JA).

²⁶ *TFM Act* (n 4) s 7.

²⁷ *Ibid*.

²⁸ *Ibid* s 8A.

²⁹ *Ibid* s 8.

- the nature and quality of the relationship between the applicant and the deceased;
- services rendered to the applicant by the deceased;
- promises made by the deceased about the provisions of the will, acted upon by the applicant;
- lifetime benefits received by the applicant from the deceased; and
- the competing moral and financial claims of the beneficiaries, including the duty of the deceased to provide for other members of the family.

Eligible applicants

1.5.8 The following classes of people are eligible to make a claim in Tasmania seeking provision, or further provision, from an estate:

- 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));³⁰
- children, including an adopted child, step-child³¹ and surrogate child;³²
- parents, where the deceased dies without any spouse or children; and
- a former spouse of the deceased if they were receiving, or entitled to receive, maintenance from the deceased at their death.³³

1.5.9 In some jurisdictions, the classes of those eligible to apply for provision is more expansive and may include a person partly or wholly dependent on the deceased,³⁴ a person living in a close personal relationship³⁵ with the deceased at their death,³⁶ and grandchildren³⁷ and siblings³⁸ in limited circumstances.

Other provisions of the TFM Act

1.5.10 Other parts of the *TFM Act* are summarised briefly as not being germane to the main inquiry about the possible inclusion of notional estate provisions in the Act:

³⁰ Ibid s 2(1) definition of ‘spouse’.

³¹ 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’.

³² *Ibid* definition of ‘child’.

³³ *Ibid* s 3A.

³⁴ *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’).

³⁵ 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).

³⁶ *Ibid* s 57(1)(f).

³⁷ *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).

³⁸ *Inheritance (Family Provision) Act 1972* (SA) s 6(j).

- section 11 deals with time limit for making an application. It provides that an application must be filed within three months of the date of a grant of administration being made in the estate. This section allows the Court to grant an extension of time, in its discretion;
- section 8A relates to the admissibility of evidence of the deceased's reasons for making a will, particularly for not benefitting the applicant in that will; and
- section 3(2) gives a wide discretion to the Court as to the method in which provision may be made for a successful applicant.

Part 2

Potential Issues with the Law

2.1 Introduction

2.1.1 Claims under the *TFM Act* can only deal with the estate of a deceased. Some assets might be considered to be an asset of a deceased, but at law fall outside of their estate. A common example is joint tenancy property. A number of other examples are outlined in this Part.

2.1.2 Depending upon how assets are held and structured, there is potential for a person who might otherwise be considered wealthy to die with very little, if anything, in their estate. This reduces (or eliminates) the pool of available assets from which to satisfy a successful claim under the *TFM Act*. This occurrence may frustrate the intention of the Act which is to make provision, or additional provision, for a worthy applicant.

2.1.3 This Part is concerned with two issues:

- what property is available to satisfy an order under s 3 of the *TFM Act*; and
- when is an estate ‘distributed’ for the purposes of the *TFM Act*?

2.2 Property available to satisfy a claim

2.2.1 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’.³⁹

2.2.2 A person’s estate comprises assets or interests held by⁴⁰ the person solely, jointly with others as tenants in common (not as joint tenants) and other assets paid to the person’s legal personal representative upon their death.

2.2.3 This section explains what is included in a person’s estate which can be claimed as part of a TFM claim.

Transfers subject to unconscionability or undue influence

2.2.4 Assets transferred or gifted before a person’s death typically fall outside of their estate for the purpose of a TFM claim.

³⁹ Dal Pont and Mackie (n 15) [20.3].

⁴⁰ A person’s estate can also include assets that they are entitled to, for example debts owed to them by third parties.

2.2.5 If, however, a transaction is made in circumstances of unconscionability or undue influence, it may be set aside in equity. In such a case, the asset would become available to satisfy a TFM claim. For example, in *Bridgewater v Leahy*,⁴¹ a testator had sold a portion of his property to his nephew for its true value, but by deed had forgiven a substantial portion of the debt. The nephew also benefitted under the testator's will by being gifted an option to purchase the testator's rural property substantially under value. An application to set aside by the widow and daughters of the testator, who were otherwise barely provided for in the will, was successful. The court held that the testator was in a disadvantaged position when the deed was executed, having an emotional attachment and dependency on the nephew. The nephew had taken advantage of this to secure the benefit.

2.2.6 Transactions that a deceased entered into before his or her death where there has been unconscionability or undue influence are therefore already able to be addressed and the property restored to a person's estate without the use of notional estate legislation.

Property subject to contract: testamentary promises

2.2.7 It is possible for testators to make contracts with third parties to leave them some property under their will. A common example is where spouses make an agreement with each other to make their wills in certain ways.

2.2.8 Prior to the decision of the High Court of Australia in *Barns v Barns*,⁴² the Privy Council had held that these types of contracts had to be performed before any claim for family provision could be entertained.⁴³ That is, the court had no power to throw any of the burden of a family provision order on property gifted by the testator in fulfilment of a promise to do the same.⁴⁴

2.2.9 In *Barns v Barns* the High Court refused to follow this authority, preferring to follow an earlier Privy Council decision⁴⁵ which held that property the subject of a contract between parties for one to make their will in a certain way was indeed available to satisfy an order under family provision legislation. In the Tasmanian case of *Calvert v Badenach*,⁴⁶ Porter J noted the comments of Gleeson CJ in *Barns v Barns*:

Because the [family provision legislation] imposed a restriction on freedom of testamentary disposition, a promise to make a testamentary disposition was subject to the potential operation of that legislative restriction. The effect of the legislation could have been avoided by a disposition inter vivos so that the deceased died with no estate; that is inherent in the scheme of the legislation. But the effect of the legislative restriction on freedom of testamentary disposition cannot be avoided by a promise to make a certain disposition.⁴⁷

⁴¹ (1998) 194 CLR 457.

⁴² (2003) 214 CLR 169.

⁴³ *Schaefer v Schumann* [1972] AC 294 ('Schaefer').

⁴⁴ The facts in *Schaefer*, *ibid*, involved specific real estate. The result may have been different if the contract had simply related to all the estate or the residue of the estate. In other words, residue after all claims have been made against the estate, including family provision claims.

⁴⁵ *Dillon v Public Trustee* [1941] AC 294.

⁴⁶ *Calvert v Badenach* [2015] TASFC 8.

⁴⁷ *Ibid* [74] (Porter J) quoting *Barns v Barns* (2003) 214 CLR 169, 184 [33] (Gleeson CJ).

2.3 Property unavailable to satisfy a claim

2.3.1 This next section outlines property that may not be available to satisfy a TFM claim, depending on the circumstances.

Pre-death gifts and transfers

2.3.2 The present law provides scope for potential TFM claims to be defeated through a person removing property from their estate, for example by making gifts prior to death. If a gift is effective,⁴⁸ the Court has no jurisdiction to touch that property (as it does not constitute the ‘estate’ of the deceased). It is irrelevant whether the gift was made with the purpose of defeating a potential claim.⁴⁹

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 TFM claim.

Joint tenancy property

2.3.3 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.

2.3.4 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. A co-owner’s interest in property held as a joint tenant is therefore 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*.

2.3.5 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.

⁴⁸ Refer to [2.2.4]–[2.2.7] in relation to when gifts may be ineffective.

⁴⁹ There are many authorities but see *Re Richardson* (1920) SALR 24, 40.

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 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 as Gary automatically receives the property as the surviving joint tenant.

2.3.6 The case of *Calvert v Badenach* (which proceeded to the High Court⁵⁰) 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 TFM claim. At first instance, Blow CJ 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 \$200,000.⁵¹ His principal assets were his interests in two properties on the Tasman Peninsula. He and 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.⁵²

2.3.7 This case demonstrates the applicability of potential notional estates legislation in the context of joint tenancies. Had the testator 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.

Joint Bank Accounts

2.3.8 Joint bank accounts have the same effect as joint tenancy property. That is, a deceased's interest in a joint bank account vests upon the surviving account holder. This was confirmed in the

⁵⁰ See *Badenach v Calvert* 257 CLR 440.

⁵¹ The amount that the deceased's daughter was ultimately awarded following making a TFM claim: see *Doddridge v Badenach* [2011] TASSC 34.

⁵² *Calvert v Badenach* [2014] TASSC 61, [3]–[4] (Blow CJ).

New Zealand case of *re Brownlee*,⁵³ where a testator died leaving her entire estate to her daughter, excluding her other three children. The estate, after administration, was valued at just under \$4,000. At the time of her death, however, there was approximately \$87,000 in a joint bank account in the name of the testator and her daughter. The High Court of New Zealand held that the funds in the joint bank account vested in the daughter on her mother's death and did not form part of her estate. Their decision was consistent with previous Australian High Court authority.⁵⁴

Superannuation

2.3.9 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 2018.⁵⁵ The average account balance was \$69,807.⁵⁶ 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,⁵⁷ comprising more than 70 per cent of the life insurance policies in Australia.⁵⁸

2.3.10 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 effective⁵⁹ binding death benefit nomination that directs all of their death benefits to a beneficiary, for example to a spouse or other dependant.

2.3.11 Death benefits that a fund pay directly to a beneficiary 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 challenge under the Act.

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 TFM claim under the *TFM Act*.

⁵³ [1990] 3 NZLR 243.

⁵⁴ *Russell v Scott* (1936) 55 CLR 440.

⁵⁵ APRA, *Statistics: Annual Superannuation Bulletin* (June 2018, Reissued 22 January 2019) 6.

⁵⁶ *Ibid* 8.

⁵⁷ Metlife Insurance Limited, *Insurance Inside Super: A detailed report into members' awareness, attitude and engagement with Insurance Inside Super* (2018).

⁵⁸ Michael Easson, 'Super changes could leave thousands without enough superannuation', *Sydney Morning Herald* (Sydney, 2 September 2018).

⁵⁹ *Ie*, it complies with the rules of the particular fund and superannuation legislation.

Proceeds of a life insurance policy

2.3.12 Treatment of the proceeds of a life insurance policy 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.

2.3.13 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 TFM claims.

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*.

Trust assets and property the subject of a power of appointment

2.3.14 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 within the trust.

2.3.15 A testator may have a controlling role in relation to a trust, for example as a trustee, appointor, protector or guardian. Often 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, and if they were to make such a distribution, then the amount distributed would become part of their estate.⁶⁰ Despite a person having had effective control of a trust during their life, including the ability to appoint income and capital to themselves, 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 TFM applicant.

2.3.16 The terms of a trust deed also often provide the ability for that individual to appoint a successor controller of the trust by deed or by will. When a testator exercises a power of appointment by will, the property appointed is not part of the testator’s estate.⁶¹ The exercise of such a power therefore falls outside of a possible TFM claim.⁶²

⁶⁰ See discussion of White J 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 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’.

⁶¹ The National Committee for Uniform Succession Law has pointed out, however, that: ‘If the power is of the kind described as general, that is, it can be exercised by the donee of the power in favour of anyone, now the testator can deal with that property by will virtually as if it was his or her own property’: Queensland Law Reform Commission (‘QLRC’), *Report to the Standing Committee of Attorneys General on Family Provision* (Miscellaneous Paper 28, December 1997) 92.

⁶² Note that the *Wills Act 2008* (Tas) s 50, however, provides that: ‘A general disposition in a will of all or the residue of the testator’s property, or of all or the residue of his or her property of a particular description,

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 TFM claim against Mr Nguyen's estate.

2.4 Summary

2.4.1 These examples demonstrate the ability for individuals to defeat potential TFM claims, or at least reduce the assets at risk. In response to this circumstance, New South Wales has enacted notional estate provisions within family provision legislation. These enable assets to be treated as though they comprised part of a person's estate for the purpose of making an award of provision to a successful TFM applicant. These provisions are explained in more detail in Part 4.

2.5 Effect of an estate having been distributed

2.5.1 The Act requires a TFM claim to be filed with the Court within three months of the grant of administration.⁶³ Section 11(4) provides that any application seeking an extension of this time limit must be made before the estate has been fully distributed.⁶⁴ 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.

2.5.2 This was the situation that arose in the Tasmanian decision of *Williams v Williams*.⁶⁵ 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.

includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an execution of the power.'

⁶³ *TFM Act* (n 4) s 11(1).

⁶⁴ *Ibid* s 11(4). See also *Easterbrook v Young* [1977] HCA 16.

⁶⁵ *Williams v Williams* [2018] TASSC 19. See also *Williams v Williams (No 2)* [2018] TASSC 61.

2.5.3 Whilst the Court approved the applicant's claim being made out of time,⁶⁶ it was confirmed that, as a consequence of s 11(4) the *TFM Act*, the distribution of St Helens property could not be disturbed for the purpose of making provision to the applicant.⁶⁷ This significantly reduced the pool from which additional provision could be made for the spouse.

2.5.4 Notional estate provisions in New South Wales provide for this circumstance. They enable the court to designate assets distributed from an estate as notional estate. Using the example of *Williams v Williams*, the ability to make a notional estate order could have enabled the Court to treat the St Helens property as part of Mr Williams' notional estate for the purpose of making provision for the spouse (assuming the requirements of the legislation were met). Details of the tests applying in New South Wales are outlined in Part 4.

⁶⁶ *Williams v Williams* [2018] TASSC 19.

⁶⁷ See *Williams v Williams (No 2)* [2018] TASSC 61, [5].

Part 3

Development of the Idea of the 'Notional Estate'

3.1 Introduction

3.1.1 Preceding parts of this Issues Paper have considered the development of family provision law, the position in Tasmania arising under the *TFM Act* and those assets that can be claimed as part of a TFM claim in Tasmania.

3.1.2 This Part is concerned with:

- what is meant by a 'notional estate'; and
- the historical backdrop leading to the passing of notional estate provisions in New South Wales.

3.1.3 In broad terms, development of notional estate laws are intended as 'anti-avoidance' provisions⁶⁸ to eliminate (or at least substantially reduce) the ability to defeat family provision claims by removing assets from challenge within that jurisdiction.

3.2 What is meant by a 'notional estate'?

3.2.1 Part 3.3 of the *Succession Act 2006* (NSW) ('*NSW Succession Act*') allows the court to make orders designating property not strictly 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 TFM applicant as though it were part of the estate.⁶⁹ The effect is to enable the New South Wales Supreme Court to make provision for a successful applicant from a broader pool of assets than are available to the Supreme Court in Tasmania.

3.2.2 As explained by the New South Wales Law Reform Commission ('NSWLRC'):

Notional Estate orders are orders issued by the Court which are intended to make available for family provision orders assets that are no longer part of the estate of a deceased person because they have been distributed either before or after the deceased's death (either with or without the intention of defeating application for family provision). Without legislative provisions allowing for notional estate orders, the Courts are unable to make family provision orders with respect to property that is no longer part of the deceased estate.⁷⁰

3.2.3 The New South Wales legislation explains the effect of the provisions as follows:

⁶⁸ See description of the QLRC (n 61) ch 6.

⁶⁹ *Succession Act 2006* (NSW) s 63(5).

⁷⁰ NSWLRC, *Uniform Succession Laws: Family Provision* (Report No 110, 2005) 37.

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).⁷¹

3.2.4 New South Wales is the only jurisdiction in Australia to have provisions of this type. Similar laws, however, exist in the United Kingdom⁷² and the United States.⁷³

3.3 Historical backdrop

Introduction of notional estate orders in New South Wales

3.3.1 In 1977, the NSWLRC was the first Australian law reform commission to examine and recommend adoption of notional estate laws.⁷⁴ 'Notional estate' was considered to be:

- 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.

3.3.2 These recommendations, not all in their original form, were put into effect by the *Family Provision Act 1982* (NSW). This Act was subsequently repealed, and family provision laws incorporated into the NSW *Succession Act* with the provisions relating to 'notional estate' contained in ch 3, pt 3.3.

Recommendations of the National Committee for Uniform Succession Laws

3.3.3 The National Committee for Uniform Succession Laws⁷⁵ (the 'National Committee') examined the merits of notional estate provisions as part of an overall consideration of uniform succession laws in Australian jurisdictions in 1997.⁷⁶ The report presented to the National Committee closely examined the New South Wales approach and recommended that similar

⁷¹ *Succession Act 2006* (NSW) Part 3.3 – Notional estate orders, Notes.

⁷² *Inheritance (Provision for Family and Dependents) Act 1975* (UK), see for example ss 9–13.

⁷³ *Uniform Probate Code* (US) §§ 2-202–2-209.

⁷⁴ NSWLRC, *Testator's Family Maintenance and Guardianship of Infants Act 1916* (Report No 28, 1977).

⁷⁵ Established in 1991 by the Joint Steering Committee of Attorneys-General.

⁷⁶ QLRC (n 61), ch 6.

provisions be included in the model legislation.⁷⁷ These recommendations were consistent with recommendations of the New Zealand Law Commission (‘NZLC’) made in the same year.⁷⁸

Subsequent recommendations of the National Committee

3.3.4 The National Committee revisited the matter in a Supplementary Report to the Standing Committee of Attorneys General in 2004.⁷⁹ The report outlined draft model succession law legislation for Australia⁸⁰ which included replicating, in broad terms, the notional estate provisions from New South Wales. This report also considered specific aspects of the New South Wales legislation particularly in relation to joint tenancies.⁸¹

3.3.5 The NSWLRC subsequently published a report containing commentary in relation to the draft model legislation.⁸² The draft legislation has not been implemented in any other Australian jurisdiction.

Victorian Law Reform Commission Review

3.3.6 The VLRC released a Consultation Paper in 2012 as part of its review of succession law in Victoria.⁸³ Amongst other matters, it dealt with the possibility of introducing notional estate provisions in Victoria as contained in the New South Wales legislation and as recommended by the National Committee.⁸⁴

3.3.7 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.⁸⁵

3.3.8 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.⁸⁶ 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

⁷⁷ Ibid 93.

⁷⁸ NZLC, *Succession Law: A Succession (Adjustment) Act* (Report 39, August 1997). See for example 127–135, C176–C191.

⁷⁹ QLRC, *Family Provision Supplementary Report to the Standing Committee of Attorneys General* (Report No 58, July 2004).

⁸⁰ Ibid Appendix 2.

⁸¹ Ibid [3.9]–[3.31].

⁸² NSWLRC (n 70).

⁸³ VLRC, *Succession Laws: Family Provision* (Consultation Paper No 12, 2012).

⁸⁴ Ibid [2.69]–[2.93]. For the National Committee’s recommendations see [3.3.3] above.

⁸⁵ VLRC, *Succession Laws* (Final Report, 2013) [6.180].

⁸⁶ Ibid [6.181].

person risks being too far-reaching and unduly limiting of a person's right to dispose of their property during their life...⁸⁷

3.3.9 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.⁸⁸

3.3.10 The Report discussed the New South Wales provisions and noted that the National Committee, in 1996, had been advised that:

Whether it would be possible to persuade the other States and Territories to follow this approach may perhaps depend on how successful it has been in New South Wales in practice ... An evaluation of the legislation, from a New South Wales perspective, must be undertaken as part of the project.⁸⁹

3.3.11 It commented 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:⁹⁰

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'.⁹¹

3.3.12 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.'⁹²

South Australian Law Reform Institute

3.3.13 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.⁹³

3.3.14 The majority of respondents to SALRI's preceding Background Paper⁹⁴ 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

⁸⁷ Ibid [6.183].

⁸⁸ Ibid [6.185].

⁸⁹ QLRC, *Uniform Succession Laws for Australian States and Territories* (Working Paper No 47, 1995) 43.

⁹⁰ VLRC (n 85) [6.175].

⁹¹ Ibid [6.175] citing R Croucher, 'Towards Uniform Succession Laws in Australia' (2001) 83 *Australian Law Journal* 728, 740.

⁹² VLRC (n 85) [6.186].

⁹³ SALRI, *Distinguishing Between the Deserving and the Undeserving: Family Provision Laws in South Australia* (Report No 9, December 2017) Part 8.

⁹⁴ 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).

testator entering into arrangements during his or her lifetime other than seeking to defeat a future family provision claim.

3.3.15 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.⁹⁵ In other words, if assets have been given to beneficiaries prior to death, that benefit should be available for clawback for the purposes of family provision claims.

3.3.16 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 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.⁹⁶

3.3.17 SALRI recommended that notional estate laws not be introduced in South Australia.⁹⁷

Western Australia: the Gregson Paper

3.3.18 In 2017, Craig Gregson⁹⁸ released a comprehensive paper entitled, *Notional Estate Provisions: A case for Implementation in Western Australia*.⁹⁹ The paper does not confine itself to the Western Australian jurisdiction, but considers the matter generally across all jurisdictions. It argues strongly for the implementation of notional estate provisions.

3.3.19 Gregson observes that 'there are a large number of examples of capricious and unreasonable distributions that have come before the courts over time' and that there needs to be some restraint on complete, unfettered testamentary freedom.¹⁰⁰ The report identifies areas where the intent of family provision legislation has been circumvented, either wilfully or inadvertently, including joint tenancies, superannuation, pre-death transactions, trusts and business succession planning. Gregson observes how other jurisdictions deal with avoidance, including the Family Court, bankruptcy law and under social security law.¹⁰¹

3.3.20 The review includes the results of qualitative research conducted on the views of the legal profession in relation to notional estate laws. Participants were asked whether they supported or opposed notional estate provisions and 17.02% responded that they were neutral, 12.77% declared

⁹⁵ SALRI (n 93) [8.3.16]–[8.3.17].

⁹⁶ Ibid [8.4.1].

⁹⁷ Ibid [8.4.2] Recommendation 27.

⁹⁸ Craig Gregson LLM TEP, principal solicitor at Gregson & Associates and Senior Associate at Havilah Legal.

⁹⁹ Craig Gregson, *Notional Estate Provisions: A Case for Implementation in Western Australia* (5 March 2017) (A531550).

¹⁰⁰ Ibid 11–12.

¹⁰¹ Ibid 16–28.

themselves in support with another 8.51% in strong support of the provisions. On the other hand, 37.23% opposed the provisions with another 24.47% in strong opposition.¹⁰² Arguments put forward against implementation of notional estate provisions included the encroachment on testamentary freedom, the increase of possible 'illegitimate claims', the interference with property rights, increased costs and increased complexity and time in administering estates as 'the costs of litigation and time taken to get to mediation will increase as a result of the work in tracing pre-death transactions.'¹⁰³ In addition, respondents suggested that lawyers would simply give advice on how to get around any family provision anti-avoidance legislation (although Gregson points out that the mere existence of the provisions would make defeating the purposes of the legislation much more difficult).¹⁰⁴

3.3.21 Gregson concludes with the following comments:

In the author's opinion, without NEP [notional estate provisions], TFM legislation in today's society is as effective as the succession law that existed in England circa 1724. It is difficult to see why NEP should not be implemented when other areas of law, such as family law, bankruptcy law, and many others, have effectively implemented anti-avoidance provisions... This paper's research suggests that the opposition stems from a historical deep-rooted objection to any reform that limits the extent of testamentary freedom. On reading the historical overview it can be seen that testators have only ever had limited rights to testation. Freedom of testation has always been somewhat restricted as a form of Kantian safety net and wealth distribution vehicle. The objection seems to be against the existence of the TFM legislation itself rather than an objection to its enforcement. Further research needs to be undertaken into the effectiveness of the NSW provisions in order to lend support to a political mandate.¹⁰⁵

¹⁰² Ibid 38.

¹⁰³ Ibid 42–50.

¹⁰⁴ Ibid 49.

¹⁰⁵ Ibid 51.

Part 4

New South Wales Notional Estate Provisions

4.1 Introduction

4.1.1 This Part explains the notional estate laws applying in New South Wales.¹⁰⁶

4.2 Property that may be deemed ‘notional estate’

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

- property that has been distributed from an estate;¹⁰⁷
- property that has been the subject of a ‘relevant property transaction’;¹⁰⁸ and
- property falling within the preceding two scenarios and which has been the subject of a subsequent ‘relevant property transaction’.¹⁰⁹

These are explained below.

A ‘relevant property transaction’

4.2.2 The court must be satisfied that there has been a ‘relevant property transaction’. A ‘relevant property transaction’ is explained as follows:

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.¹¹⁰

¹⁰⁶ Appendix B contains a full extract of ss 55, 74, 75, 76, 80, 87 and 88 of the *Succession Act 2006* (NSW).

¹⁰⁷ *Succession Act 2006* (NSW) s 79.

¹⁰⁸ *Ibid* s 80.

¹⁰⁹ *Ibid* s 81.

¹¹⁰ *Ibid* s 75.

Examples of 'relevant property transactions'

4.2.3 The legislation specifies a number of examples of 'relevant property transactions'.¹¹¹ 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.

4.2.4 It is explicitly stated that this list is not exhaustive.¹¹²

4.2.5 The key case on the meaning of 'prescribed transaction' (applying the former *Family Provision Act*) remains *Kavalee v Burbidge and Ors*.¹¹³ In deciding whether a prescribed transaction had occurred, Mason P observed that:

It is obvious that the legislature has cast the net very wide, in pursuit of its goal of providing adequate provision in favour of eligible persons. As beneficial legislation, a liberal approach to construction is called for, notwithstanding the obvious impact of a designating order upon existing property rights.¹¹⁴

His Honour went on to conclude that:

I do not see s 22(1)(a) as confined to acts or omissions that are the operative cause of property becoming held by the deceased's intended donee. To do so would ignore the thrust of this liberal enactment which emphasises its scope with the words 'directly or indirectly', 'as a result of which' (emphasis added) and 'whether or not the property becomes ... so held immediately' ... The legislation is clearly intended to operate in a context of human agents where several may have to act in concert and where there is the possibility that one may not co-operate. To paraphrase Mason J in *Fagan v Crimes Compensation Tribunal* (at 673) – 'the fact that other unconnected events may also have

¹¹¹ Ibid s 76(2).

¹¹² Ibid s 76(3).

¹¹³ (1998) 43 NSWLR 422. This case concerned the estate of Charles Keith Hyland, who took steps since at least 1972 to limit claims on his estate by his wife and children. As part of these steps, Hyland formed a stiftung, the Gartner Foundation. A stiftung foundation is a form of civil law construct found mainly in German-speaking countries and is a type of entity with its own legal personality but one which answers absolutely to its founder. Hyland registered his Gartner Foundation in Liechtenstein and transferred his assets to it. Before and following Hyland's death, the Gartner Foundation was administered by Yves Defago, who received all instructions regarding the formation and running of the Foundation from Hyland himself, or through Hyland's representatives. The nature of this relationship was considered critical by the court, as the firms that Defago ran were, by law, the founders of the Gartner Foundation. However it was the court's view that in effect, Hyland 'pulled the strings' that controlled the founder, in this case Defago's firms. This was seen as important as, technically, it was the Gartner Foundation, not Hyland himself, that actually made the decision to exclude some family members from the distribution of the estate.

¹¹⁴ Ibid 441.

had some relationship to the occurrence is not material if the ... act was a cause, even if not the sole cause'.¹¹⁵

4.2.6 In other words, despite any complicated legal relationships that may obscure the transactions made, the court should look at the practical reality of whether the deceased had taken actions (or failed to take actions) that indirectly resulted in claimants being prevented from accessing the estate.

Where valuable consideration given

4.2.7 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.

4.2.8 In *Wade v Harding*,¹¹⁶ it was noted that owners of assets should still be able to deal with assets while alive and that the consideration received will form part of the estate. This decision followed a long line of common law authority on the nature of valuable consideration and agreed that the notion of 'fair equivalent' should be applied. This was later approved in the case of *Vaughan v Duncan; Vogt v Duncan*¹¹⁷ where the deceased agreed with her son to give him half her shares in the family company in order to entice him into the company. In that discussion she said that her intention was to allow her remaining shares to acquire no value after her death, which would cause the remaining shares in the company to rise in value. This part of the offer, apparently, convinced the son to join the business.

4.2.9 The view of the court was that the agreement that the deceased allow her shares to become valueless amounted to a transaction for valuable consideration, one that created an equitable interest. This particular transaction is significant because it was not completed before the deceased died, indicating that the New South Wales courts will take a liberal view of what constitutes valuable consideration even in respect of incomplete transactions.

4.3 When notional estate orders may be made

4.3.1 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

¹¹⁵ Ibid 446–447.

¹¹⁶ (1987) 11 NSWLR 551.

¹¹⁷ [2005] NSWSC 670.

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.¹¹⁸

4.3.2 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 another person or subject to a trust or as otherwise provided by this section.' The section goes on to confirm that a relevant property transaction can take effect upon the deceased's death.

4.3.3 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.¹¹⁹ 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.¹²⁰

Test that is applied

4.3.4 Broadly, 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 entitled to apply for a family provision order.

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

- directly or indirectly disadvantaged:
 - the estate of the principal party to the transaction;¹²¹ or
 - a person entitled to apply for a family provision order; or
 - if the deceased person was not the principal party to the transaction, the deceased person; or
- involved the exercise (or failure to exercise) by the principal party to the transaction or any other person¹²² 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 estate of the principal party to the transaction; or
 - a person entitled to apply for a family provision order from the estate; or
 - if the deceased person was not the principal party to the transaction, the deceased person.¹²³

¹¹⁸ *Succession Act 2006* (NSW) s 80.

¹¹⁹ *Ibid* s 81.

¹²⁰ *Ibid* s 82.

¹²¹ 'Principal party to the transaction' is defined as follows: 'principal party to the transaction, in relation to a relevant property transaction, means the person who, under section 75 or 76, enters into the relevant property transaction': *ibid* s 83(2).

¹²² Including alone, or jointly or severally.

¹²³ *Succession Act 2006* (NSW) s 83(1).

4.4 Restrictions on power

4.4.1 There are a number of restrictions on the power of the court to designate property as notional estate.¹²⁴

4.4.2 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;¹²⁵ 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.¹²⁶

4.4.3 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.¹²⁷

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

4.4.4 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;
- 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.¹²⁸

4.4.5 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).¹²⁹

4.4.6 The NSW *Succession Act* also clarifies that, where property becomes held by a person as a trustee only, the court may not designate any property held by that person as notional estate apart

¹²⁴ Ibid div 3.

¹²⁵ Ibid s 88.

¹²⁶ Ibid s 79.

¹²⁷ Ibid s 87.

¹²⁸ Ibid s 89(1).

¹²⁹ Ibid s 89(2).

from the property held by them as a trustee as a consequence of a relevant property transaction or distribution.¹³⁰

4.4.7 It is possible to apply to the court to vary a notional estate order to change the property affected.¹³¹ This enables property affected to be substituted for alternative property.

4.4.8 In *Charnock v Handley*¹³² the defendant was a friend of the deceased and the plaintiffs, the deceased's adult children. The entire estate, amounting to almost \$63,000, had been distributed to the defendant to the exclusion of the plaintiffs.

4.4.9 The case considered whether the court can designate property of the defendant as notional estate even in circumstances where that property has not been acquired with monies received from the deceased's estate. Hallen AsJ held that the NSW *Succession Act* does not require that the property designated as notional estate has to be the same as the property distributed or property into which the distributed property can be traced. His Honour said:

It follows, then, that if the court is satisfied that someone (the Defendant) has received a distribution from the deceased's estate (the distributed property), it is possible to designate as notional estate, property of that person (moneys in the Navigator Personal Retirement Fund), even if that property is not something into which it would be possible to trace any specific property of the deceased.¹³³

4.4.10 Property of the defendant was designated as notional estate and provision for the plaintiffs was made out of that estate.

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.¹³⁴

4.6 Case examples

4.6.1 This next section summarises some decisions in New South Wales where notional estate orders have been considered or made. These cases demonstrate the way that notional estate orders may be used to enlarge an estate for the purpose of making an order for further provision for a successful TFM applicant.

Superannuation Transactions

4.6.2 Section 76(2)(e) of the NSW *Succession Act* expressly provides that where property becomes held by another person because of the deceased's membership of a superannuation fund, that can form the basis of a relevant property transaction. In addition, the making, not making or

¹³⁰ *Ibid* s 89(3).

¹³¹ *Ibid* s 92.

¹³² [2011] NSWSC 1408.

¹³³ *Ibid* [191].

¹³⁴ *Succession Act 2006* (NSW) s 84.

changing of binding death benefit nominations falls within the definition of a relevant property transaction.

4.6.3 Problems in this area often arise in the context of self-managed superannuation funds as was the case in *Kelly v Delucchi* ('*Kelly*').¹³⁵

4.6.4 In *Kelly*, the deceased made a will leaving various cash gifts to his three children. His will made a further gift to a friend, left the proceeds of a life insurance policy to his grandchildren and the residue of his estate to his wife (who was not the mother of his children). This distribution was frustrated by the size of the estate: it was not possible to pay the gifts in full and as a result they abated rateably.

4.6.5 The deceased was a member of a self-managed superannuation fund. Following the deceased's death, his wife, in her capacity as sole director of the trustee company, presided at a general meeting where it was resolved to allocate the deceased's death benefit to her. This resulted in the deceased's children not receiving any of the death benefits. The children made applications to the court as a result, and two of these, Peter and Michelle, went to hearing.

4.6.6 Hallen AsJ had no difficulty in holding that the resolution was a relevant property transaction falling within s 75 of the NSW *Succession Act*. His Honour also held that s 83(1)(a) of the NSW Act was satisfied in that the relevant property transaction directly disadvantaged each of the plaintiffs, each of whom were persons entitled to apply for a family provision order. Particularly, Hallen AsJ designated the property of the superannuation fund as notional estate to the extent that the actual estate was insufficient to meet the order for provision and costs.

Joint tenancies

4.6.7 Where the deceased is a joint tenant and does not sever the joint tenancy before death so that the right of survivorship operates to transmit their property to the other joint tenant(s), that can constitute the basis of a relevant property transaction.¹³⁶

4.6.8 In *Cetojevic v Cetojevic*¹³⁷ (decided under the former *Family Provision Act*), the deceased owned property as a joint tenant with his parents. Following his death, his wife claimed provision from his estate. The question was whether the deceased's interest as a joint tenant could be designated as notional estate.

4.6.9 The New South Wales Court of Appeal upheld the original decision that the parents held one third of the proceeds of the property on a constructive trust for the wife but went on to consider the notional estate question (although not strictly necessary following the constructive trust decision) because there had been conflicting decisions in *Wade v Harding*¹³⁸ and *Cameron v Hills*.¹³⁹

4.6.10 On the one hand, in *Wade v Harding*, Young J had held that the failure by the deceased to sever a joint tenancy was not a prescribed transaction because, based on the evidence before him, there was an 'even chance' that the other joint tenant might have died first. In that case the husband

¹³⁵ [2012] NSWSC 841.

¹³⁶ *Succession Act 2006* (NSW) s 76(2)(b).

¹³⁷ [2007] NSWCA 33.

¹³⁸ (1987) 11 NSWLR 551.

¹³⁹ (unreported 26 October 1989).

survived the wife by only 20 days. His Honour held that what was forgone in not severing the joint tenancy was received by continuing to be a joint tenant. In his view full valuable consideration was received.

4.6.11 In *Cameron v Hills*, Needham J disagreed with the view expressed by Young J. In his Honour's view, because the court had to consider the matter immediately before the death of the deceased, he could not see how a joint tenant about to die immediately can be said to have an equal chance of surviving the joint tenant. The Court of Appeal in *Cetojevic* unanimously preferred the approach of Needham J.

4.6.12 This being the case, the decision to remain a joint tenant cannot be said to be 'valuable consideration' for the purposes of determining that no prescribed transaction (or under the current wording of the NSW *Succession Act*, a 'relevant property transaction') has been made.

Part 5

Options for Reform

5.1 Introduction

5.1.1 Testamentary freedom is an issue close to many. Individuals want the freedom to direct what happens to their assets, and the reason for wanting this basic freedom is simply the essence of property: ‘if I own this thing I should have the freedom to dispose of it in the way I want’.

5.1.2 Australia has tried to find a balance between allowing a certain amount of freedom of testation and denying total freedom of testation. One reason for this is that, in the case of dependants of a deceased, there is no good reason why the taxpayer should bear the burden of support when that support could have been provided from the deceased’s estate. As a result, TFM legislation has been introduced to limit freedom of testation, but only in relation to defined dependants of the deceased and only if a court considers that an applicant has been left without adequate provision for their proper maintenance and support in the circumstances.

5.1.3 Notional estate legislation works with TFM legislation — that is, only *after* the courts have decided that a TFM application should be allowed does the question of where provision should come from arise. In other words, Australia has already accepted limited freedom of testation with the introduction of TFM legislation. Notional estate legislation merely broadens the asset base available to satisfy an order. In that way, notional estate laws are effectively ‘anti-avoidance’ provisions intended to complement existing legislation.

5.1.4 The Institute has been asked to provide advice to the State Government about whether Tasmania should introduce notional estate provisions. Part 2 explained that only assets in a person’s ‘estate’ can be claimed in an application under the *TFM Act*. Part 3 summarised the development of notional estate laws and previous views expressed about the potential expansion of these laws to other Australian jurisdictions beyond New South Wales. Part 4 outlined the notional estate provisions that apply in New South Wales to extend the notion of a person’s estate to assets that would otherwise not fall within an estate. This Part asks a series of questions to ascertain the degree of community support for introduction of notional estate legislation in Tasmania and the perceived advantages and disadvantages of each option.

5.2 Is there a problem?

5.2.1 In deciding whether to introduce notional estate legislation, the preliminary question is ‘is it needed?’ Certainly there are cases from New South Wales that indicate that there is an amount of deliberate TFM avoidance, but neither does there seem to be an avalanche of instances of such avoidance. Is there so much avoidance of TFM legislation in Tasmania that it is a problem in the community?

5.2.2 This is something about which there is little, if any, empirical evidence. For this reason, the Institute seeks information about experiences practitioners and others may have had in relation to TFM avoidance or TFM implementation.

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.¹⁴⁰

5.3 Advantages and disadvantages

5.3.1 There are various arguments advanced both for and against notional estate legislation. These have been highlighted throughout this Issues Paper. In 1977, the NSWLRC summed up the quandary as follows:

Should the Courts have power to override what would otherwise be valid dispositions of property? 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 recognising a potential interest in that property which must clog its alienability and adversely affect its utility and value.¹⁴¹

5.3.2 As demonstrated in Part 2, it is possible for Tasmanians to arrange their affairs in a way that reduces the size of their estate. This may be an unintentional consequence of the way assets are held for other purposes, or it may be to reduce the pool of funds available to challenge through a TFM claim.

5.3.3 The NSWLRC points to two situations that it considers support the use of notional estate legislation:

- where a father seeks, in favour of the children of his first marriage, to defeat the claims of his second wife or, in favour of his second wife, to defeat the claims of the children of his first marriage or, in favour of his mistress, to defeat the claims of both his wife and his children;¹⁴² or
- where there has been an 'unjust gift', perhaps from a socially isolated, vulnerable individual who rewards a carer for 'a few months of institutional care ... at the expense of many years of family devotion'.¹⁴³

¹⁴⁰ This question is based upon a question originally formulated by the VLRC. See VLRC (n 83) 34 Question FP7.

¹⁴¹ NSWLRC (n 74) [2.22.3].

¹⁴² Ibid [2.22.11].

¹⁴³ Ibid [2.22.12].

5.3.4 In order to claim provision from assets gifted prior to death, currently, a disgruntled beneficiary would have to resort to equitable doctrines to obtain an interest, or an argument based on a lack of capacity. A claim of undue influence, for example, in relation to an asset given away during life simply determines whether the asset should be returned to the original donor (or, in this situation, the donor's estate). If such an argument is successful, a claimant then needs to make a TFM claim in order to obtain any share of that property. A court with the ability to make a notional estate order could simply recall that gift (providing it was made within the relevant time period) to fund provision for a successful TFM applicant if there were otherwise insufficient funds within the estate from which to fund that provision. Consolidating these issues into the one proceeding may save time and money.

5.3.5 A key question is whether the Tasmanian community believes that notional estate legislation is appropriate and necessary. To this end, the Institute seeks feedback on the following questions:

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)?¹⁴⁴ Please provide reasons for your opinion.

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.

Potential implications if notional estate provisions were introduced

5.3.6 The VLRC observes that people deal with their assets in particular ways before their death for a variety of reasons, including to minimise tax and to provide for their family during their lifetime, and that to introduce notional estate legislation would interfere with this.

5.3.7 The use of time limits to restrict notional estate orders to gifts or transfers made within a certain period before (or at) death could reduce these issues. There is other legislation that affects

¹⁴⁴ This question was originally formulated by the VLRC. See VLRC (n 83) 34 Question FP8.

gifts made during life for longer periods — for example, when calculating pension entitlements,¹⁴⁵ and under bankruptcy legislation where assets are able to be clawed back for bankruptcy purposes.¹⁴⁶ Additionally, it has been observed that the Family Court can clawback assets placed in trusts and superannuation if a party is still alive.¹⁴⁷

5.3.8 One matter that commonly gives rise to concern is farming property. Farms are often handed down through a family for generations and also are often inherited by particular members of the family who are thought to be most likely to keep the farm on foot and hand it on to the next generation. The result can be that some (non-farming) members of the family are left with very little in the way of provision from (usually) their parents' estate.¹⁴⁸ SALRI's report made the point that there is no 'magic bullet' to resolve this issue.¹⁴⁹ This is particularly so where there is one major asset that is relatively indivisible and a number of claimants upon that asset.

5.3.9 The Institute requests feedback about any adverse implications that may result if notional estate legislation were introduced in Tasmania.

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?

5.4 The New South Wales provisions

5.4.1 In order to fully consider the question of whether Tasmania should introduce notional estate legislation, it is necessary to articulate what those provisions might look like. One option would be to simply introduce New South Wales' notional estate laws without amendment. These provisions are broadly consistent with the National Committee's recommendations about the approach that national uniform succession laws should take. Alternatively, it may be that there is opposition to

¹⁴⁵ See for example *Social Security Act 1991* (Cth) ss 1126–1126E.

¹⁴⁶ See for example *Bankruptcy Act 1966* (Cth) ss 120–121A.

¹⁴⁷ SALRI (n 93) [8.3.5].

¹⁴⁸ The classic case is *Bridgewater v Leahy* (1998) 194 CLR 457, in which Bill York made some lifetime transactions to benefit his nephew, Neil York, whom he believed was the only person who could carry on his farm. (A portion of land was sold to Neil for a substantial undervalue of around \$546,000.) However, his benevolence left his widow and four daughters with little in the way of assets from his estate. They were successful in claiming undue influence and unconscionable conduct in relation to the lifetime transaction. However, the decision of the High Court was split, and later commentators have expressed disquiet at the acceptance of the two doctrines in this case.

¹⁴⁹ SALRI (n 93) [10.1].

particular parts of the New South Wales approach and that, if notional estate laws are to be introduced, certain variations to the New South Wales legislation are required.

5.4.2 Part 4 of this Issues Paper summarised New South Wales' notional estate provisions. The Institute seeks feedback about whether there are any perceived difficulties with the NSW *Succession Act* and whether, if Tasmania were to introduce notional estate legislation, there should be any variation to the laws operating in New South Wales.

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:

- (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.

5.4.3 Finally, the Institute invites respondents to advance any other matters that it is considered ought to be taken into account when determining the question of 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?

APPENDIX A

Testator's Family Maintenance Act 1912

An Act to assure to the family of a deceased person a certain interest in the estate of the deceased person

[Royal Assent 6 December 1912]

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

1. Short title

This Act may be cited as the *Testator's Family Maintenance Act 1912*.

2. Interpretation

(1) In this Act –

adopted child –

(a) in the case of a child that is adopted in this State, means a child that is adopted by a person, or by a person and his spouse jointly, in accordance with the law relating to the adoption of children; or

(b) in the case of a child that is adopted elsewhere than in this State, means a child that is adopted by a person, or by a person and his spouse jointly, in accordance with the law of the State, Territory, or country where the adoption takes place, as in force at the date of the adoption;

child includes –

(a) an adopted child; and

(b) a stepchild; and

(c) a surrogate child;

Court means the Supreme Court;

spouse includes the person with whom a person is, or was at the time of his or her death, in a significant relationship, within the meaning of the *Relationships Act 2003*;

stepchild means, in relation to a person –

(a) a child of that person's spouse; and

(b) a child whose natural parent was the spouse of that person at the time of the natural parent's death;

surrogate child means, in relation to another person, a person (whether or not the person has attained the age of 18 years) –

(a) who is a child of the other person by virtue of the operation of section 26(1) of the *Surrogacy Act 2012*, or a law, of another State or a Territory or a foreign country, that corresponds to that Act; and

(b) who has not ceased to be a child of the other person under that Act or law;

will includes a codicil and a nomination made in accordance with the rules of a society within the meaning of the Friendly Societies (Tasmania) Code.

(2) For the avoidance of doubt, the definition of stepchild, as substituted by the *Justice and Related Legislation (Miscellaneous Amendments) Act 2015*, does not apply in respect of a claim against the estate of a person whose death occurred before the commencement of that Act.

(3)

(4)

(5)

3. Claims for maintenance against estate of deceased person

(1) If a person dies, whether testate or intestate, and in terms of his will or as a result of his intestacy any person by whom or on whose behalf application for provision out of his estate may be made under this Act is left without adequate provision for his proper maintenance and support thereafter, the Court or a judge may, in its or his discretion, on application made by or on behalf of the last-mentioned person, order that such provision as the Court or judge, having regard to all the circumstances of the case, thinks proper shall be made out of the estate of the deceased person for all or any of the persons by whom or on whose behalf such an application may be made, and may make such other order in the matter, including an order as to costs, as the Court or judge thinks fit.

(2) In addition to, and without prejudice to, any other powers conferred on the Court or a judge by subsection (1) of this section, the Court or judge may order that the provision to be made out of the estate of the deceased person shall consist of –

- (a) the payment to the applicant of a lump sum;
- (b) a life interest or any lesser interest in any dwelling-house belonging to that estate; or
- (c) a life interest or any lesser interest in a dwelling-house that the Court or judge may order to be purchased for occupation by the applicant –

and may, in any case, order that that provision shall be made upon and subject to such terms and conditions, if any, as the Court or judge may think desirable in the circumstances of the case.

(3) For the purposes of paragraph (c) of subsection (2) of this section, the Court or judge may, notwithstanding any provision or direction to the contrary in the will of a deceased person, order that any moneys belonging to or forming part of the estate of that person shall be expended in the purchase of the fee simple of any real property.

(4) Where an application under subsection (1) of this section is made by or on behalf of any person, the Court or a judge may order that it shall be regarded as an application on behalf of all persons who are entitled under this Act to make such an application, and if the Court or a judge so orders, the application shall, for the purposes of section eleven, be treated as an application made by all of those persons.

(5) The executor or administrator of the estate of a deceased person, on behalf of a person who is entitled to make an application under subsection (1) of this section and who is not of full age or mental capacity, may –

- (a) make an application under that subsection; or

(b) apply to the Court or a judge for directions as to whether he should make an application under that subsection –

and, in the latter case, the Court or judge may treat the application for directions as an application under that subsection on behalf of that person.

3A. Persons entitled to claim under this Act

An application under subsection (1) of section three for provision out of the estate of a deceased person may be made by or on behalf of all or any of the following persons, that is to say:

- (a) The spouse of the deceased person;
- (b) The children of the deceased person;
- (c) The parents of the deceased person, if the deceased person dies without leaving a spouse or any children;
- (d) A person whose marriage to the deceased person has been dissolved or annulled and who at the date of the death of the deceased person was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court, or to an agreement or otherwise; and
- (e) A person whose significant relationship, within the meaning of the *Relationships Act 2003*, with the deceased person had ceased before the date of the death of the deceased person and who was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court or to an agreement or otherwise.

4. Application by summons in chambers

(1) Every such application shall be made by summons in chambers, entitled “In the matter of the *Testator's Family Maintenance Act 1912*, and in the matter of the estate of _____ deceased”.

(2) A summons under this section shall be served on –

- (a) the executor of the will of the deceased person or the person to whom letters of administration with the will annexed have been granted, or, in the case of an intestate estate, the administrator of that estate; and
- (b) such other persons as the Court or a judge may direct to be served therewith.

(3) The judge may, if he thinks fit, adjourn such summons into Court.

5.

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6. Powers of Court or judge

At the hearing of such application the Court or judge shall inquire fully into the estate of the deceased person, and for that purpose may –

- (a) summon and examine the persons who are entitled to make an application under this Act, or such of them as the Court or judge may think it desirable to examine, and also such witnesses as may be necessary; and

- (b) require the executor or person applying for probate or letters of administration to furnish full particulars of the estate.

7. Court or judge to consider net estate and means of widow or child

In granting or refusing any such application, and in fixing the amount of the provision to be made under this Act for any person who is entitled to make an application under subsection (1) of section three, the Court or judge shall have regard, *inter alia*, to –

- (a) the net value only of the estate of the deceased person, as ascertained by deducting from the gross value thereof all debts, testamentary and funeral expenses, and all other lawful liabilities to which the said estate is subject; and
- (b) whether any such person is entitled to independent means, whether secured by any covenant, settlement, transfer, or other provision made by the deceased person during his life or derived from any other source whatsoever.

8. Cases in which Court or judge may refuse application

- (1) The Court or judge may refuse any such application if the character or conduct of any person by or on behalf of whom the application is made is such as in the opinion of the Court or judge should disentitle him or her to the benefit of any provision under this Act.
- (2) The Court or judge in making any order under this Act may impose such conditions, restrictions, and limitations, whether to prevent, restrict, or defeat any alienation or charge of or upon the benefit of any provision made under such order or otherwise, as the Court or judge may think fit.
- (3)

8A. Evidence as to deceased’s reasons for dispositions

- (1) On the hearing of an application under subsection (1) of section three, the Court or judge may have regard to the deceased person's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or further provision, as the case may be, for any person, and the Court or judge may accept such evidence of those reasons as it or he considers sufficient, whether that evidence would otherwise be admissible in a court of law or not.
- (1A) Where an application under section 3(1) relates to a will made under Part 3 of the *Wills Act 2008* by the Guardianship and Administration Board or the Court, the Court or judge may have regard to the records of the Board or Court relating to the person for whom the will was made and the reasons given by the Board or Court for making an order authorising the making or alteration of a will in specific terms.
- (2) Nothing in this section shall be construed as restricting the evidence that is admissible, or the matters that may be taken into account, on the hearing of an application under subsection (1) of section three.

9. Contents of order

- (1) Every order under this Act making provision for any person shall specify, *inter alia* –
 - (a) the amount and nature of such provision;

- (b) the manner in which such provision shall be made; or be raised or paid, out of some, and what, part of the estate of the deceased person;
 - (c) how and by whom the burden of any such provision shall be borne; and
 - (d) any conditions, restrictions, or limitations imposed by the Court or judge.
- (2) The Court or judge shall in every case in which provision is made under this Act direct that a certified copy of such order be made upon the probate of the will or letters of administration, with the will annexed, of the estate of the deceased person, or, as the case may be, upon the letters of administration of the estate of the deceased person, and for that purpose shall retain such probate or letters until such copy is made.
- (3) Subject to this Act, every provision made under this Act operates and takes effect –
- (a) in the case of the estate of a person who dies testate, as if it had been made by a codicil to the will of the deceased person executed immediately before his death; or
 - (b) in the case of the estate of a person who dies intestate, as a modification of the provisions of the *Intestacy Act 2010*.
- (4) If in the opinion of the Court or a judge it is desirable so to do, having regard to all the circumstances of the case, the Court or judge may, in any order under this Act making provision for the spouse of a deceased person, direct that that provision shall operate for the benefit of the spouse notwithstanding that he or she may, at any time after the making of the order, remarry or enter into a significant relationship, within the meaning of the *Relationships Act 2003*.
- (5) The Court or a judge may, at any time, on the application of the executor or administrator of the estate of a deceased person or of any person who is beneficially entitled to, or interested in, any part of that estate –
- (a) rescind any order making any provision under this Act out of that estate or any part thereof; or
 - (b) alter any such order by increasing or reducing the amount of any provision made thereby or by varying such order in such manner as the Court or judge thinks proper.
- (5A) The Court or a judge shall not, in the exercise of the power conferred on it or him by paragraph (b) of subsection (5) of this section, alter an order under this Act so as to disturb a distribution of any part of the estate that was lawfully made before the making of the application for the alteration.
- (6) A person who makes an application under subsection (5) of this section shall cause notice of the application to be served on all persons taking any benefit under the order sought to be rescinded or altered.
- (7) Upon an order being made under this Act, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

10. Provision for class fund

- (1) Without prejudice to the powers conferred on the Court or a judge under any other provision of this Act, the Court or a judge may order that any amount specified in an order made on an application under subsection (1) of section three shall be set aside out of the estate to which the order relates and held on trust as a class fund for the benefit of two or more persons specified in the order (being persons who are entitled under section three A to make an application under that subsection).

(2) Where an amount is ordered to be held on trust as a class fund for any persons, pursuant to this section, that amount shall be invested, and the trustee may –

(a) in his discretion but subject to such directions and conditions as the Court or judge may give or impose, apply the income and capital of that amount, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance or education (including past maintenance or education provided after the death of the deceased person), or the advancement or benefit, of those persons or of any one or more of them to the exclusion of the other or others of them, in such shares and proportions, and generally in such manner, as the trustee thinks fit; and

(b) so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.

(3) For the purposes of this section, the expression trustee means the executor or administrator of the estate of the deceased person unless the Court or judge appoints any other trustee (whether by the order creating the class fund or subsequently), in which case it means the trustee so appointed.

(4) If the trustee is not the executor or administrator of the estate of the deceased person, the Court or judge may give such directions as it or he thinks fit relating to the payment to the trustee of the amount that is to be held on trust as a class fund, and may exercise any power conferred on the Court by section forty-seven of the *Trustee Act 1898*, either on the creation of the class fund or at any time during the continuance of the trusts thereof.

10A. Incidence of payments ordered

(1) The incidence of any payment directed to be made by an order under this Act shall, unless the Court or a judge otherwise orders, fall ratably upon the whole estate of the deceased person, or, where the authority of the Court does not extend or cannot be made to extend to the whole estate, ratably upon such part of the estate as is subject to the authority of the Court.

(2) The Court or a judge may exonerate any part of the estate of a deceased person from the incidence of an order under this Act, after hearing such of the parties who may be affected by the exoneration as the Court or judge thinks necessary, and may, for that purpose, direct any executor or administrator to represent, or appoint any person to represent, any of those parties.

(3) The Court or a judge may, at any time, fix a periodical payment or lump sum to be paid by any beneficiary in the estate of the deceased person to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which that beneficiary is interested, and may exonerate that portion from further liability, and may direct in what manner the periodical payment shall be secured, and to whom the lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment is payable.

10B. Adjustment of estate duty

For the purpose of apportioning the duty payable on the estate of a deceased person, any provision directed to be made by an order under this Act shall –

(a) if the deceased person died testate, be deemed to be a bequest made by the deceased person by a codicil executed immediately before his death; or

(b) if the deceased person died intestate, be deemed to be a bequest made by the deceased person as if effected by a will made by him immediately before his death.

11. Time within which application to be made

(1) Except as provided by subsection (2) of this section, the Court or judge shall have no jurisdiction to hear any application, or to make any order under this Act, unless the summons hereinbefore mentioned be taken out before or not later than three months after the date of grant of probate of the will of the deceased person, or letters of administration of the estate of the deceased person, as the case may be.

(2) Notwithstanding anything in subsection (1) of this section, upon application being made in that behalf by a person claiming the benefit of this Act, the Court or a judge may, after hearing such of the persons affected or likely to be affected by that application as it or he may think fit, extend the time limited by that subsection for the taking out of a summons for such further period as the Court or judge may think necessary.

(3) The powers conferred on the Court or a judge by subsection (2) of this section may be exercised notwithstanding that the time limited by subsection (1) of this section for the taking out of a summons may have expired (whether that time expired or expires before or after the commencement of this subsection).

(4) An application under subsection (2) of this section 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 under that subsection shall be disturbed by reason of that application or of any order made thereon or in consequence thereof.

APPENDIX B

Succession Act 2006 (NSW) No 80

Chapter 3 Family Provision

Part 3.1 Application of Chapter

55 Interpretation

- (1) For the purposes of this Chapter, **administration** is granted in respect of the estate of a deceased person if:
 - (a) probate of the will of the deceased person is granted in New South Wales or granted outside New South Wales but sealed in accordance with section 107(1) of the *Probate and Administration Act 1898*, or
 - (b) letters of administration of the estate of the deceased person are granted in New South Wales or granted outside New South Wales but sealed in accordance with section 107(1) of the *Probate and Administration Act 1898*, whether the letters were granted with or without a will annexed and whether for general, special or limited purposes, or
 - (c) an order is made under section 24 or 25 of the *NSW Trustee and Guardian Act 2009* in respect of the estate of the deceased person, or
 - (d) an election is made by the NSW Trustee and Guardian under Division 1 of Part 3.2 of the *NSW Trustee and Guardian Act 2009* in respect of the estate of the deceased person, or
 - (e) an election is made by a trustee company under section 15A or 15AA of the *Trustee Companies Act 1964* in respect of the estate of the deceased person.
- (2) For the purposes of this Chapter, the **legal representative** of the estate is the person to whom administration is granted.
- (3) A reference in this Chapter to a **person entitled to exercise a power** means a person entitled to exercise a power, whether or not the power:
 - (a) is absolute or conditional, or
 - (b) arises under a trust or in some other manner, or
 - (c) is to be exercised solely by the person or by the person together with one or more other persons (whether jointly or severally).
- (4) A reference in this Chapter to **property held by a person** includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

...

Part 3.3 – Notional Estate Orders

74 Definition

In this Part:

relevant property transaction means a transaction or circumstance affecting property and described in section 75 or 76.

75 Transactions that are relevant property transactions

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

76 Examples of relevant property transactions

- (1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 75.
- (2) The circumstances are as follows:
 - (a) if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time) becomes, or continues to be, entitled to exercise the power,
 - (b) if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,
 - (c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,

- (d) if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death or if some other event occurs to a person other than the legal representative of the person's estate, to exercise a power:
 - (i) to substitute a person or a trust for the person to whom, or trust subject to which, money is payable under the policy, or
 - (ii) to surrender or otherwise deal with the policy,
 and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,
 - (e) if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,
 - (f) if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.
- (3) Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 75.
 - (4) For the purposes of this Chapter, in the circumstances described in subsection (2) (b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.

...

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

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

Note. The kinds of transactions that constitute relevant property transactions are set out in sections 75 and 76.

- (2) This section applies to the following relevant property transactions:
 - (a) a transaction that took effect within 3 years before the date of the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,
 - (b) a transaction that took effect within one year before the date of the death of the deceased person and was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction,

- (c) a transaction that took effect or is to take effect on or after the deceased person's death.
- (3) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
 - (a) a person by whom property became held (whether or not as trustee) as the result of a relevant property transaction, or
 - (b) the object of a trust for which property became held on trust as the result of a relevant property transaction,whether or not the property was the subject of the relevant property transaction.

...

87 General matters that must be considered by Court

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

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

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

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

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