RESEARCH SOLUTION

Damned if you do, damned if you don't: Inclusion and Exclusion in Estate Planning

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This is an understandably emotive topic for testators and those they leave behind. There is a careful balancing act here for practitioners on the Estate planning front. The balancing act is that:

- our job is to record testators' instructions, it is isn't to tell them what their instructions should be; yet

- we should be advising about risks associated with leaving a Will in a particular way, since the extent to which an Estate may be exposed to litigation is an issue that's relevant to our duty to act in our clients' best interests.

This paper is an effort to assist practitioners to advise clients in the context of Estate Planning about the risks of an Estate being subject to a claim for a family provision order. In the writer's view, this is best done by way of 'reverse-engineering'. In other words, we will examine the Court's jurisdiction to make family provision orders across the States and Territories, take lessons in terms of how the jurisdiction is exercised, and look at recent trends in decision-making.

Armed with this information, practitioners can better help guide will-makers to leave their assets in a manner that makes them less likely to be diminished through litigation. The format for our examination will be to review the following, in turn:

- Firstly, an introduction to the family provision order jurisdiction and its foundational principles.
- Secondly, an examination of some recent decision-making trends in the application of those principles;
- Thirdly, a look specifically at cases where estrangement may be an issue;
- Fourthly, a look at the record awards in *Kornwasser v Spiegelman* and *Mead v Lemon*;
- Fifth, a look at how costs in family provision order disputes are dealt with;
- Sixth, pre-empting potential challenges by other means; and
- Seventh, a brief examination of 'letters of wishes' and their place in the scheme of things.

1 Section 1 - Introduction to the jurisdiction and principles.

Freedom of Testation

1.1 In Australia, it is accepted that a person has 'freedom of testation'. In other words, a person is free to leave their assets how they choose. This isn't lip service. It is an important human right[1] which has forceful authority[2]:

> *"No jurisdiction, and certainly not Victoria, has used family provision legislation to abolish freedom of testamentary disposition. That has been frequently emphasised by the High Court. The discretion given to the court was not to 're-write the will of a testator'. Freedom of testamentary disposition was not to have 'only a prima facie effect, the real dispositive power being vested in the court'. In Vigolo v Bostin, Gleeson CJ said the legislation 'preserved freedom of testamentary disposition, but subjected that freedom to a new qualification'*.

1.2 The qualification is that, overlaid on freedom of testamentary disposition is a legal obligation to make adequate provision for the proper maintenance and support of certain people. By extension, a claim can be brought in respect of an alleged failure to make adequate provision for a person's proper maintenance and support. On such a claim, the Court has jurisdiction, subject to certain time limits, to make orders which alter a deceased's will to the extent necessary to make adequate provision for the proper maintenance and support of the plaintiff.

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[1] *Grey v Harrison* [1997] 2 VR 359, per Callaway JA at 366

[2] *Bail v Scott-Mackenzie* [2016] VSC 563 at [73], citing also: *Whitehead v State Trustees Ltd* [2011] VSC 424, [39]; *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9; *In re Allardice* (1910) 29 NZLR 959, 969 (Stout CJ); *Vigolo v Bostin* (2004) 221 CLR 191.

1.3 As stated by his Honour Justice Nettle in the Victorian case of *McKenzie v Topp*[3]*:*

> *the Court is not lightly to interfere with freedom of testation. But in the end it will do so if the results of that freedom constitute a departure from the standards of the wise and just testatrix, and it is the standards of the wise and just testatrix of today, not of an era ago, that are pertinent to that assessment*[4]*.*

1.4 It is a somewhat unique jurisdiction in that the Court is required to make a value judgment, often expressed as the "moral duty" of the testator[5]. The test the Court applies is what "wise and just, rather than a fond and foolish (testator)" "ought to have done, in all the circumstances of the case"[6]. The concept of a moral duty or responsibility to act as a wise and just testator is an exception to the freedom to dispose of one's property as one sees fit[7]. The Court is required to make this value judgment as to a testator's moral duty having regard to prevailing community attitudes[8].

Family Provision Legislation

1.5 If a claim is brought, the questions for the Court to decide are:

(a) whether the deceased owed a duty to make provision for the claimant in death;

(b) whether or not the Will makes 'adequate provision' for the claimant's 'proper maintenance and support';

(b) if the Will doesn't make adequate provision, how much further provision should be awarded from the estate; and

(c) if further provision is to be awarded, from where will it be drawn (in other words, which other beneficiaries will 'pay' for the further provision from their shares).

1.6 There is a table annexed to this paper at ***ANNEXURE A*** which specifies the relevant legislation in each State and Territory. The table goes further and sets out:

(a) Time limits within which claims may be made;

(b) Dates on which applications are deemed to be made;

(c) Whether and how extensions of time may be sought;

(d) When it may be said to be 'safe to distribute'.

1.7 There are time limits which apply to making a claim. Practitioners must be aware of these although this is more relevant from a litigation perspective than an estates planning perspective. Again, the reader should refer to Annexure A.

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[3] [2004] VSC 90

[4] Ibid at [55], citing also: *White v Barron* (1980) 144 CLR 431; *Kearns v Ellis*, unreported, CA (NSW), CA 363 of 1983 *Permanent Trustee Company v Fraser* (1995) 36 NSWLR 24 at [16]*; Baird v National Mutual Trustees*, unreported, 22 November 1995; *Collicoat v Mc Millan* [1999] 3 VR 803 at p. 819[45]*; Allan v Allan* [2001] VSC 242 at [66]; *Penn v Richards [*2002] VSC 378 at [28]

[5] *Blair v Blair* (2004) 10 VR 69, per Nettle JA at [41]; *Forsyth v Sinclair* [2010] VSCA 147, per Neave JA at [83].

[6] *Bosch v Perpetual Trustee Company Ltd*, [1938] AC 463,at 478-9 per Lord Romer, cited by Hargrave J in *Herszlikowicz v Czarny* [2005] VSC 354 at [106].

[7] *Herszlickowicz v Czarny*, op cit, at [110].

[8] *Forsyth v Sinclair,* per Neave JA ibid.

'Adequate' ; 'Proper'

1.8 There is a lot of stock placed in understanding the terms 'adequate' and 'proper' as they are used in the phrase: 'adequate maintenance for proper maintenance and support'.

1.9 If the reader would like a ready definition of those terms to keep to hand, the judgment of Hallen J in *Limberger*[9] is useful:

> *The word "adequate" connotes something different from the word "proper". "Adequate" is concerned with the quantum*[10]*, described by as reached upon "a purely economic and objective basis", whereas "proper" prescribes the standard of the maintenance, education and advancement in life*[11] *which seems to invite more subjective criteria.*

1.10 "Adequate provision" and "proper" maintenance and support are also relative concepts, that depend on all the facts of the case. What is "proper" maintenance and support will depend on the claimant's situation in life, and what is "adequate" provision will depend on his or her financial needs, and capacity to meet those needs[12].

1.11 In terms of needs, poverty is not a pre-requisite to bringing a claim, or establishing need. Particularly in the case of larger estates, provision can be made for the 'well-to-do'[13].

1.12 It is best to understand that, while the words 'adequate' and 'proper' are legal terms of art, they ultimately represent part of a process of analysis, as opposed to some fixed point which can be precisely placed in every case.

Eligibility to make a Claim

1.13 The starting point in making a claim is fitting the statutory eligibility criteria set out in the applicable legislation in each State and Territory. **A person must be eligible to bring a claim or they have no standing and their claim will be dismissed.**

1.14 The table annexed to this paper at ***Annexure A*** sets out the eligibility criteria in each State and Territory.

Duty to Make Provision

1.15 After establishing eligibility, the second matter to establish is duty. This goes hand in hand with showing a failure by the deceased to abide by the duty.

1.16 The third matter is to show that, assuming a person is eligible, owed a duty and there has been a failure by the deceased to abide by the duty, how much is enough to bring the level of provision up to an amount that *is* adequate for one's proper maintenance and support.

1.17 This last factor is done by establishing the plaintiff's *needs* and by setting out the factors that the Court must have regard to in assessing those needs.

1.18 Establishing these matters is usually done by a detailed affidavit which sets out the factors on which the plaintiff relies. However, if the Estate is small, some different case management orders might be made (for example, limiting the length of an affidavit, or instead deferring to position papers).

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[9] *Limberger v Limberger; Oakman v Limberger* [2021] NSWSC 474
[10] Ibid, citing: *Rosalind Atherton in "The Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding?" (1999) 5(1) Australian Journal of Legal History 5, 10*
[11] Ibid. citing: *Devereaux-Warnes v Hall (No 3)* (2007) 35 WAR 127 at 145 [72]; [2007] WASCA 235 at [72], [77] (Buss JA, Pullin JA agreeing),
[12] *Hansen v Hennessey* [2014] VSC 20 at [36], citing *Herszlikowicz v Czarny* [2005] VSC 354
[13] *Vigolo v Bostin* [2005] HCA 11 at [51]

1.19 In answering these questions, the Court will take into account a number of factors. Depending on the jurisdiction, the factors are set out in the applicable legislation exhaustively, or else the Court is given broader grounds for the exercise of its discretion.

1.20 Victoria, New South Wales and the Australian Capital Territory have quite similar provisions which set out a large but specific range of factors. Western Australian, South Australian and the Northern Territory legislation is structured somewhat more freely, in the inverse, by giving the Court a discretion to deny or limit claims in its discretion by reference to certain factors, but the sections are still broadly the same in effect. Queensland sits somewhere in the middle by limiting the factors.

1.21 Another table is annexed to this paper at ***ANNEXURE B*** which sets out the relevant sections of the relevant acts across the States and Territories.

Eligibility does not equal Entitlement

1.22 However, what is important is that we not slip into the approach that a person who is *eligible* is therefore *automatically entitled* to some level of provision. That is not the case.

1.23 The approach is very well set out in NSW in the case of *Plummer v Montgomery*[14] where the Court held that there is no automatic entitlement to provision simply by reason of eligibility to claim, and the deceased's Will applies unless a specific application is made and acceded to by the Court. In *Plummer*, the Court also cited the NSW Court of Appeal in *Bassett v Bassett*[15] in summarising the approach to be taken:

> *"In the exercise of its statutory powers in the determination of an application for a family provision order, the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish, making due allowance for current social conditions and standards and, consulting specific statutory criteria referred to in the Act so far as they may be material."*[16]

Assessing the Statutory Critera

1.24 The assessment of statutory criteria is the Court's evaluation of both the relationship of the plaintiff to the deceased, and the plaintiff's specific needs. It involves evaluating other specific factors including:

(a) Any evidence of the deceased's reasons for making the dispositions in the Will (e.g., one child having provided a greater amount of financial assistance or other care).

(b) The size of the Estate and its ability to fund provision to various beneficiaries;

(c) The financial resources of the plaintiff, including current and future earning capacity, together with financial needs at the current time and in the foreseeable future;

(d) Any physical, mental or intellectual disability of the plaintiff or any other beneficiary;

(e) Any contribution to building up the estate or the welfare of the deceased;

(f) Any benefits previously given to the plaintiff or to any other beneficiary of the estate;

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[14] [2023] NSWSC 175,
[15] [2021] NSWCA 320
[16] Citing also: *(In re Allen* [1921] NZGazLawRp 155; [1922] NZLR 218 at 220-221*; Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479*; Scales Case* (1962) 107 CLR 9 at 19-20*); (Goodman v Windeyer* [1980] HCA 31; (1980) 144 CLR 490 at 502*; Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656)

(g) Whether the plaintiff was in any way financially dependent on the deceased; and

(h) The character and conduct of the beneficiaries (including disentitling conduct).

1.25 How much weight to give each of these factors is a matter of discretion[17]. This is particularly relevant for appeals[18].

1.26 There are a number of relevant principles which apply to the assessment of claims. These are well established principles endorsed across the States and Territories. They include that:

(a) The Court will not simply divide the Estate in a way which is considered 'fair';

(b) There is no obligation to 'reward' a person for having provided care and support to the deceased person, nor any obligation to distribute an Estate according to notions of 'fairness' or 'equity' – reward being a matter ultimately up to the deceased;

(c) Will-makers should, in general, be free to dispose of their private property in the way that they want. The Court must guard against the natural tendency to reform the testator's will according to what it regards as a proper total distribution of the estate rather than to restrict itself to its proper function of ensuring that adequate provision has been made for the proper maintenance and support of an applicant";

(d) If the deceased person failed to make adequate provision for the proper maintenance and support for an applicant, then:

(i) The question of what is 'proper' will depend on the facts of each case and will vary from situation to situation – particularly depending on 'how much' (i.e. the size of the estate) is available to share between beneficiaries;

(ii) If the Court is to make an award of added provision from an estate, the award must only be to the minimum extent necessary to correct the error made by the deceased in failing to make adequate provision;

(e) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim[19].

1.27 When considering the plaintiff's financial position, the Court will also consider the financial position into which the plaintiff will be placed by the Will. In effect, the exercise of determining 'how much is enough' will be assessed from the starting point of where the Plaintiff will be left by the Will if it is not disturbed. Any added provision to the Plaintiff will be assessed by reference to the plaintiff's needs.

Gold Standard Provision?

1.28 As a general guide a plaintiff might look to fundamentally achieve security in relation to accommodation, capital and/or income. However, this does not mean that the deceased owes an obligation to provide those things.

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[17] See, for example *Cowap v Cowap* [2020] NSWCA 19.

[18] Ibid at [42], citing also: *Bugmy v The Queen* (2013) 249 CLR 571 and *House v The King* (1936) 55 CLR 499 at 505, noting that an appellate court considering that greater or lesser weight should have been given to such factors does not constitute a basis for the court interfering with a discretionary decision. Instead, it is necessary for an appellant to establish error of principle or as to the facts, a failure to take into account a relevant consideration, or that the decision is unreasonable or plainly unjust'.

[19] See for example: *Limberger v Limberger; Oakman v Limberger* [2021] NSWSC 474 at [473], citing: *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134 at 149 (Gibbs J, Mason and Aickin JJ agreeing); [1979] HCA 2.

Gold Standard Provision - Widows

1.29 This 'gold standard' is drawn from the judgment of Powell J in *Luciano v Rosenblum*[20]:

> *It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies*[21]

1.30 However, treat this gold 'standard' with caution. As has been observed in other cases, *Luciano* did not involve a completing claim or a need by any other person[22]. The ultimate conclusion will always depend on the facts of the case[23]. The 'gold standard' is simply the result of a process of reasoning where, for example, an elderly widow is permanently unable to increase her income and is never likely to be better off financially except by award of provision. A widow being given primacy, for example, will result if she has no hope of improving herself economically when that is not the position of others concerned in the estate[24].

Gold Standard Provision – Children

1.31 In *Limberger v Limberger*[25] at [473], Justice Hallen of the NSWSC set out what I call 'seminal principles' for considering bequests to children.

(a) *The relationship between parent and child changes when the child attains adulthood. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.*

(b) *It is impossible to describe, in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, 'ordinarily the community expects parents to raise and educate their children to the best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life — such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties justifies it, there might be such an obligation"*[26].

(c) *Generally, also, "… the community does not expect a parent to look after his or her children for the rest of [the child's life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute"*[27].

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[20] (1985) 2 NSWLR 65
[21] Ibid at 69-70 (Powell J).
[22] *Bladwell v Davis* [2004] NSWCA 170
[23] *Re Finnie; Petrovska v Morrison* [2021] VSC 153 at [112] (McMillan J).
[24] *Bladwell v Davis* at [13] (Bryson JA) and [1]-[2] (Ipp JA)
[25] *Limberger v Limberger; Oakman v Limberger* [2021] NSWSC 474
[26] Ibid at [473], citing: *Taylor v Farrugia* [2009] NSWSC 801 at [57] (Brereton J); *McGrath v Eves* [2005] NSWSC 1006 at [67]–[71] (Gzell J); *Kohari v Snow* [2013] NSWSC 452 at [121]; *Salmon v Osmond* (2015) 14 ASTLR 442; [2015] NSWCA 42 at [109]–[110] (Beazley P, McColl and Gleeson JJA agreeing).
[27] Ibid, citing *Taylor v Farrugia* at [58] (Brereton J)

(d) *There is no need for an applicant adult child to show some special need*[28]*.*

(e) *The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration*[29]*.*

(f) *the need for financial security and a fund to protect against the ordinary vicissitudes of life are relevant*[30];

(g) *if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased*[31]:

Gold Standard Provision – Three Elements or One?

1.32 Lastly, the 'gold standard' elements of security of accommodation, capital and income are not necessarily mutually independent[32]. In other words, one form of provision may satisfy one or more of the elements, without requiring further provision.

Other Considerations

1.33 The financial position of other beneficiaries can also be particularly relevant if they assert a competing financial need. If this occurs, evidence as to their financial position will also be evaluated – and so too would the impact on them of any award of added provision to the plaintiff. If, on the other hand, no competing beneficiary was to assert a competing financial need, then their needs would not be assessed in comparison to the plaintiff's.

1.34 A special mention of 'estrangement'. One or more siblings might have had a diminished relationship with their parent. This will not disqualify them from receiving a portion of their Estate, or making a claim on it. Estrangement may diminish a person's expectations, but it does not disqualify them from the jurisdiction. We will return to this later in the paper.

A Natural Pecking Order?

1.35 Lastly, and critically for the purpose of estate planning, there is a tendency to try to understand 'the natural order of things' in terms of how obligations might be owed. That should generally be discouraged, because each case turns on its facts. It is perhaps prudent to consider that it is generally true that a strong obligation will be found to be owed to spouses, and then also to children.

1.36 However, it is also important to bear in mind the starting point of testamentary freedom. A beneficiary named in a will does not have to show that they belong in a certain pecking order in the natural scheme of things[33].

1.37 In the words of Justice McMillan, the longstanding Judge in charge of the Trusts, Equity & Probate Division of the Supreme Court:

> *"*[Beneficiaries] *are entitled to the provision that the deceased made for them in her will, and they are entitled to that provision unless and until the plaintiff can establish a case for further provision.*

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[28] Ibid, citing: *McCosker v McCosker* at 576 (Dixon CJ and Williams J); *Kleinig v Neal (No 2)* at 545–546 (Holland J); *Bondelmonte v Blanckensee* [1989] WAR 305 at 309–310 (Malcolm CJ, Nicholson J agreeing); *Hawkins v Prestage* (1989) 1 WAR 37 at 44–45 (Nicholson J); *Taylor v Farrugia* at [58].
[29] Ibid, citing: *MacGregor v MacGregor* [2003] WASC 169 at [179]–[182] (Templeman J); *Crossman v Riedel* [2004] ACTSC 127 at [49] (Gray J).
[30] Ibid, citing: *Marks v Marks* [2003] WASCA 297 at [43] (Wheeler J, albeit in dissent in the result).
[31] Ibid, citing: *Christie v Manera* [2006] WASC 287 at [74]–[90] (Martin CJ).
[32] *Nagy v Marton* [2014] NSWSC 540, [146] (Hallen J).
[33] See *Briggs v Mantz* [2014] VSC 281.

It is misconceived to say there is a natural order that the child inherits the whole of an estate from the parent and that child, in turn, benefits his or her children or that there was no good reason for the deceased to alter that natural order. Although community standards would expect a parent to make some provision for a child, there must also be a balance between the requirement that a person can do as he or she pleases with his or her own property and that a testator consider those persons closest to him or her as being the first in the line of recipients of his estate. The Court should only interfere with the terms of a will if the testator has failed in his or her moral duty." [34]

2 Section 2 - Judicial decision-making trends in estate challenges. Recent cases.

2.1 When a client asks, how much is enough, there is no way to answer this except by reference to outcomes from challenges, and the lessons learned from them. Going further, the overarching question I am posing in looking at these cases is whether there is some trend toward a 'harder line' approach by the Court in family provision judgments. In examining this, we'll be focusing through the lens of 'needs' and the assessment of needs. We'll see examples of the approach courts have taken in recent cases to both the principle of need, and various attempts by plaintiffs to establish it.

2.2 Of course, as practitioners will appreciate, 'how much is enough' is a somewhat grey area. The predicament is put in a more erudite way by the Court, as being:

> *'a more difficult question, [which] involves an "an instinctive synthesis that takes into account all the relevant factors and gives them due weight. It is not a scientific, or arithmetic, exercise and it is often difficult to articulate the factors which contribute to that "instinctive synthesis".*[35]

2.3 Clients will want direct and practical answers in the estate planning process. A good starting point is that the Court generally accepts a general proposition that there is a need for a fund to protect against the ordinary vicissitudes of life[36]. However, there may be disagreement about the *size* of that fund[37].

2.4 The answer, in practical terms, is that:

(a) It is more than just bare necessities and that the Court must make a moral judgment relative to prevailing community standards;

(b) That moral judgment will depend on the factors we have examined above;

(c) While on the one hand, it's not just bare necessities, on the other hand, it's not just a Wishlist.

2.5 Let's now look at a number of cases which give some guidance on the Court's approach to assessing 'need' in the family provision context.

***Starr v Miller* [2021] NSWSC 426**

2.6 First up is *Starr v Miller* from the New South Wales Supreme Court earlier in 2022. In this case, the Court criticised what it considered to be an approach to need that just amounted to a Wishlist. The Court gave examples of this approach:

> *[The plaintiff's] claimed "needs" demonstrate a problem that occurs in many cases in which a family provision order is sought. The problem is that there is little consideration given to the basis of the claimed "needs" –* ***namely the obligation of the deceased to the***

[34] Ibid at [150] – [151].
[35] *North v Daniel* [2021] NSWSC 828 at [346], citing also *Grey v Harrison* [1997] 2 VR 359 at 367.
[36] See for example: *Nenes v Armouti* [2021] ACTSC 53.
[37] See for example: *Armouti v Nenes* [2022] ACTCA 3.

> ***applicant to meet the perceived needs**. Formulating "needs", such as renovation costs and the purchase of a pizza oven, private schooling for [the plaintiff's] and [her husband's] children, and the completion of a PhD which may be characterised as an extravagant "wish list" of wants rather than genuine "needs", are counterproductive as they may divert the Court's attention from the real "needs" of the applicant.*
>
> *In addition, the "need" should be substantiated in some way. By way of example, a claim for an order which includes a capital sum to build up superannuation entitlements should ordinarily have a solid foundation in the evidence.*[38]

***North v Daniel* [2021] NSWSC 828**

2.7 Another example of criticism of a 'Wishlist' approach was made in *North v Daniel* – again a case from the New South Wales Supreme Court earlier this year. In *North*, the plaintiff succeeded to a modest degree but was criticised for asserting needs which were either 'extravagant' or 'inappropriate'. In the example of extravagance was:

(a) A stated need for funds for a heated therapeutic swim/spa pool – to complement the plaintiff's $1.1 million waterside Surfers Paradise property – which would improve the plaintiff's mental health. The Court observed that the plaintiff's mental health wellbeing plan did not include a spa and also felt that such a luxury would encourage isolation rather than reintegration into the community[39]; and

(b) A stated need for funds to replace a boat which the plaintiff hadn't used for 13 years[40];

(c) In addition, on the 'inappropriate' front was a stated need for funds for new furniture in case the plaintiff's family might come to visit him – although they had not done so for some time having been embroiled in acrimonious litigation[41].

2.8 There is clearly a theme in these two cases of the Court dismissing the notion of there being 'need' for specific luxuries – these being difficult to reconcile to a general statement of duty in the hands of the deceased.

2.9 However, this doesn't mean that the Court sees its task in assessing claims as simply 'whittling away' at a plaintiff's opening gambit[42]. In the case of *Rathswohl v Court*, the Court actually awarded **more** than was submitted to represent the plaintiff's needs.

***Rathswohl v Court* [2021] NSWSC 356**

2.10 *Rathswohl* is a fascinating case which began a year earlier in the context of a dispute about the admissibility of a secret recording of a testator by his daughter, in which he discussed his testamentary intentions[43]. That secret recording was ruled to be admissible, and the process of reasoning is at paragraphs 40 to 48 of that judgment. The reasoning shows considerable judicial discomfort and is at the same time helpful but confronting.

2.11 In the second *Rathswohl* case, which is cited in the sub-heading, the estate was worth $1.36 million and there were two other children competing with the claimant. The deceased's will left the plaintiff and one daughter equal shares in his bank accounts, which at the time the Will was

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[38] *Starr v Miller* [2021] NSWSC 426 at [543]-[544].
[39] See *North v Daniel* [2021] NSWSC 828 at [285]
[40] Ibid at [286] – [288].
[41] Ibid at [289].
[42] This was another point of criticism of the plaintiff's approach in *North v Daniel,* supra at [290 – 291].
[43] See *Rathswohl v Court* [2020] NSWSC 1490, but note with care the specific application of the *Surveillance Devices Act 2007* (NSW), and the fact that there are differences between the States and Territories as to the lawfulness of the act of secretly recording, or otherwise the act of reproducing a secret recording.

made had over $200,000 in it. The residue of the deceased's estate was left to the other daughter (the defendant executor).

2.12 By the time the deceased died, the money in the bank account had almost completely gone. It just so happened that the defendant daughter had been the deceased's attorney and withdrawn most of it. The Court found her to have been a most unsatisfactory witness who it appeared had operated the deceased's bank account in a manner designed to disinherit her siblings[44]. It is not hard to see why conduct like this might motivate the Court to err on the side of generosity to her competing siblings.

2.13 In that regard, the plaintiff was a son of the deceased who was 62 years old assessed to have only slight chances of employment. He lived in a caravan park, suffered from depression and relied on Centrelink unemployment benefits. He needed substantial dental care, had struggled with drugs and alcohol for long periods and his expenses exceeded his income. Importantly, the Court accepted that he had not used drugs for 3 years by the time of the hearing.

2.14 One might imagine that in circumstances such as those, establishing need would not be difficult. Of course, the amount of need is the art of the jurisdiction. In that case, senior counsel for the plaintiff submitted that accommodation needs might be met by a permanent home in a retirement village. A figure of $240,000 to $290,000 was put forward, but the court disagreed on the basis that such a modest figure would only permit the plaintiff to reside in something of a holiday cabin, rather than a suitable dwelling for the next 20 years or so. It found that $450,000 for a dwelling was more appropriate – particularly given there was an intention found in the deceased's Will to leave each of his children enough to have a house.

2.15 In the end, Court ordered provision of $500,000 plus costs. Interestingly, an Offer of Compromise had been put at $499,000 which the defendant had rejected. This resulted in the plaintiff receiving part of his costs on an indemnity basis.

2.16 A final point of interest in *Rathswohl* is how the Court assessed witnesses. It is useful for practitioners to see direct feedback from the bench about the people solicitors put into the witness box. In assessing the witnesses, the Judge made the following remarks[45]:

> *R was cross examined for two days. He made reasonable concessions, was intelligent and forthcoming. R did volunteer some evidence and make some self-serving statements but overall appeared straightforward and genuine and had good recall of details. As the cross-examination progressed, R became slightly unresponsive to questions and volunteered damaging remarks concerning Y, which was explicable by reason of the offensive and protracted nature of the cross-examination. Overall, I concluded that R was an honest historian.*
>
> *L gave evidence is a clear, intelligent and precise manner. L had no financial interest in the outcome of this case. Although L volunteered some damaging remarks about her sister, overall I concluded that L was an honest witness.*
>
> *Y* [the defendant executor] *was a most unsatisfactory witness. She was emotional, argumentative, illogical and prone to making speeches. Her evidence was often given in exaggerated terms and, on occasion, was unbelievable or non-sensical. Y was volatile and lost her temper. On occasion, she adopted a snide and insolent tone and gave answers which were disingenuous. Y appeared to lack insight. It became apparent that Y would say whatever she thought would advance her case. I place no weight on Y's evidence unless it is otherwise established by contemporaneous documents, the evidence of another reliable witness, or was against her own interest. I simply did not believe her.*

[44] *Rathswohl v Court* [2021] NSWSC 356 at [70] to [76].
[45] Ibid at [5] to [8].

2.17 The salient lesson is to make sure that your witness is not assessed in the same way as Y.

Where No Need Pressing or otherwise

2.18 As set out above, Courts have accepted that there may be a general need for provision to account for the vicissitudes of life, which does note have to be an immediate or specific financial need. However, even though there might not be immediate or specific financial needs, there must be a need generally. An example of where the Court found there to be *no need* on the part of a plaintiff was in *Schneider v Kemeny*[46]. In this case, I was dismayed to see that the unsuccessful plaintiff was an estate planning solicitor! It seems extraordinary that in the circumstances a claim could be necessary and more still that one might be brought that the Court felt was unmeritorious.

2.19 The plaintiff and the deceased married with a wide gulf in their wealth – the deceased wife having the bulk. At the time of marriage, each had teenage children and agreed to leave their estates to their children. They kept their finances throughout marriage separate and the plaintiff paid rent to the deceased for living in her property. Living expenses were divided equally, but the deceased became terminally ill and paid for her own carers.

2.20 In the end, the estate was valued at $2.675 million and an apartment in Darlinghurst accounted for $2.3 million. The plaintiff received $209,000 under the Will. He sought added provision of the Darlinghurst apartment initially but then retreated to a mere $1.5 million to fund accommodation and relocation costs. He already owned assets of $1.46 million. He argued that he had primacy in terms of obligations. However, the Court disagreed and found that theirs was not the type of marriage which gave the plaintiff that primacy. The Court also found that he was unemployed by choice and his net assets were sufficient for his proper maintenance and support. The Court also took into account the fact that he had continued to live in the apartment rent free after death. No provision was ordered as there was no need established as a matter of principle, whether specific or otherwise.

Evidence of need in addition to principle of need

2.21 The cases we've looked at so far show the approach of the Court to the principle of need. However, it's worth mentioning that in addition to satisfying the Court as a matter of principle, there is also the small matter of establishing need on the basis of actual evidence, rather than a submission on the applicable principles.

2.22 Actual evidence includes, for example, reports from medical experts which set out expenses related to a medical or health issue, or valuations or sales or rental reports in relation to appropriate properties where the need is for accommodation. It is more than a bare assertion of need.

2.23 The absence of proper evidence can be fatal to a claim. This is not a new proposition of course and practitioners might be familiar with the Victorian case of *Briggs v Mantz*[47] – where her Honour Justice McMillan dismissed a claim on the basis that a plaintiff – whose case it was to establish need – had led insufficient evidence about his financial position, making the Court's task impossible in assessing it:

> *"I had some difficulty in reaching conclusions as to the plaintiff's financial position because he has failed to produce cogent evidence on this issue and was not frank with the Court in explaining either his income or expenses. Ultimately, I can only conclude that as it is his case to establish, and as he has failed to establish it, the plaintiff has not proved any financial need that relevantly or substantially bears on the question of his entitlement to an order for further provision."* [48]

[46] *Schneider v Kemeny; Kemeny v Schneider [2021] NSWSC 524*
[47] Supra, at [124].
[48] Ibid, at [124].

2.24 History repeated itself in *Re Janson; Gash v Ruzicka*[49] in even starker circumstances. In this case, again in the Supreme Court of Victoria, the parties actually agreed that there was a moral duty and that the Will did not provide adequate provision for proper maintenance and support. However, the plaintiff did not give adequate evidence of her financial situation. The Court observed what appeared to be need, but found it *impossible to draw any conclusion as to the extent of that need as at the date of trial*[50].

2.25 For example, the assertion of the plaintiff's financial position was not supported by documentary evidence and her oral evidence was 'equivocal', with the plaintiff saying 'I don't do money' and being unable to reliably inform the Court about things such as savings, super, liabilities and aspects of income[51]. There was also inadequate disclosure of the plaintiff's household income, as she was married and her husband received NDIS benefits. In the circumstances, even though this was a case where need in principle, duty and an apparent inadequacy of provision had all been agreed, the Court's task in assessing quantum was impossible, and it would not guess.

2.26 The plaintiff was very fortunate in that the Court actually gave a further opportunity to file and serve documentary evidence of her financial circumstances, as opposed to just dismissing the case. The plaintiff in *Briggs v Mantz* was not so lucky – presumably this is because all of the other factors to which the Court would have regard were agreed between the parties. I wouldn't rely on ever being given such a second chance.

Accommodation Needs specifically.

2.27 One other emerging trend observed in the paper is a trend away from the concept of a 'kept standard' for accommodation, particularly in the context of competing claims.

2.28 An example is the recent Victorian decision in *Re Finnie*[52], where the Court held

> *"A spouse who is to be provided with accommodation cannot always assume that they will be entitled to the accommodation that they had previously lived in, or that they will be entitled to replicate the way they anticipated living with the deceased, had the deceased lived. It may need to be factored in that what was proper accommodation for both the deceased and the spouse may be greater than is necessary for the proper maintenance and support for the spouse alone*[53]*."*

2.29 This was picked up again in *Bayley v Sivewright (No 2)*[54] where a plaintiff, who was 38 and unemployed, sought further provision from the deceased of about $1.2-1.3 million to purchase a home similar to the one he rented with the deceased. He already received provision of $1.3 million between superannuation and life insurance.

2.30 In *Bayley,* the Court distinguished the plaintiff's circumstances from 'widows cases', holding that the community would expect provision but that the provision was already generous given the plaintiff had a 'long and productive life ahead of him'. In response to the submission that the plaintiff needed an unencumbered home of similar size and neighbourhood to the home he shared with the deceased, the Court found that *'on no view does he [the plaintiff] need a house of the size he currently occupies'*[55]. This is instructive for future cases. It might fit into the trend of being 'harder line' – or it might reflect that our 'community standards' are changing.

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[49] [2020] VSC 449
[50] Ibid. at [39]
[51] Ibid. at [26]
[52] *Re Finnie; Petrovska v Morrison* [2021] VSC 153.
[53] Ibid at [122].
[54] *Bayley v Sivewright; Sivewright v Sivewright (No 2)* [2021] NSWSC 666
[55] Ibid at [85].

3 Section 3: Estrangement & Emotion

3.1 It is well established that estrangement is not a bar to bringing a claim, but a factor to which the Court may have regard. Estrangement does not affect eligibility. Reasons for excluding a person from distribution will not prevent a challenge, nor will they alone determine whether the exclusion is appropriate. Again, that is a matter that will turn on the facts of a particular case.

3.2 In *Limberger v Limberger*[56], the deceased left an estate worth $7 million. The main beneficiaries were two sons. The plaintiffs were a daughter and, relevantly, another son, Joseph. This third son received no provision and the deceased gave reasons for excluding him in her Will. The reason was that he had previously initiated litigation against a family business. This was followed by 27 years of estrangement and then a 3-year period of occasional visits in a nursing home.

3.3 Joseph was 69, had modest assets including a property in which he lived in a modified shed. He relied on the age pension. He sought provision to move homes to somewhere coastal, a car, cleaner, health insurance, a carer when he aged, travel to see family and a capital contingency. He sought provision of $1,199,000.

3.4 The Court's approach was to note that estrangement may reduce moral duty. It gave weight to the fact that from about 1985, Joseph had lived his own life, made his own lifestyle decisions and not sought any support – he wasn't maintained in any way by the deceased. The Court went on to say that it would not compute to find that the deceased owed a duty to fund expenses for cleaning, health insurance, flights to visit family and even an unencumbered home to a child from whom the deceased had been estranged for 27 years.

3.5 In all the circumstances, Joseph was awarded a reduced sum of $475,000. The relative restoration of the relationship was a key factor.

Estrangement and Competing Claims

3.6 In *Christu v Christu*[57], the Victorian Supreme Court found that despite some estrangement, the deceased owed a moral duty to the plaintiff. However, one of the plaintiff's siblings was considered to be considerably worse off and the other was held to also be in a position of some competing need. The result was that:

(a) estrangement lessened the deceased's moral duty; and

(b) the competing needs of the plaintiff's siblings further decreased the duty owed to the plaintiff.

3.7 'Estrangement' in *Christu* was qualified as the Court found that the relationship of the plaintiff to the deceased was:

> *marked by engrained difficulties, punctuated by periods of overt conflict, lack of contact, and attempted reconciliation. Also, that the fractured relationship was at least contributed to in part by physical and verbal abuse of the plaintiff at the hands of the deceased*[58]*.*

3.8 However, there are more extreme examples of estrangement which have effectively extinguished any duty. In *Hansen v Hennessey*[59]*,* complicated family relationships were considered by the Court which ultimately found that two children had effectively 'repudiated' their relationship with their mother[60], where the claimants failed to establish their mother's

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[56] *Limberger v Limberger; Oakman v Limberger* [2021] NSWSC 474
[57] *Re Christu; Christu v Christu* [2021] VSC 162
[58] Ibid at [106].
[59] [2014] VSC 20.
[60] Ibid at [71].

responsibility for that act[61]. In turn, the Court found that the children's repudiation of their relationship with their mother in turn extinguished any responsibility owed by her to them[62].

3.9 I would respectfully urge caution not to get too carried away by the notion of 'repudiation' in *Hennessey*. This is simply because the emotion in close family relationships, or estranged family relationships, will usually see a party feeling like one party is responsible for the relationship breakdown. In layman's terms, the aggrieved party might always feel that the other is responsible for 'repudiating' the relationship. This doesn't mean that a Court would agree.

3.10 As the Court held in *Christu*, the fact that a will-maker might seek to exclude a child from a Will might shed light on their perception of the relationship towards the end of their life, but that might fail to acknowledge previous decades of a subsisting, although difficult relationship. That does not establish a total absence of a relationship or permanent estrangement. Relationship difficulties need to be understood against what may be a lengthy history. In such circumstances, conduct tending towards estrangement might lessen moral duty, but not be so callous or hostile that it eliminated it entirely[63].

4 Section 4: The Record Awards: The *Lemon v Mead* and *Kornwasser* Cases.

4.1 We've looked at a lot of cases between the case studies and the cases cited, but it's worth examining two of the 'record award' cases to see how the court determines 'how much in enough' when it comes to large estates. By large estates, I mean estates that are big enough that there ought to be enough money to give everyone 'adequate provision for their proper maintenance and support'.

4.2 Let's start with some principles that have been articulated in 'large estate' type cases, helpfully summarised in *Limberger*[64]:

(a) In *Anasson v Phillips* (Supreme Court (NSW), Young J, 4 March 1988, unrep), Young J wrote at 20-21:

> *"[W]ith a very large estate… there is great temptation on a court to be overgenerous with other people's money. This is especially so when the Court can see that plaintiffs have been very hardly done by at the hands of a domineering testatrix. However, the case should not be approached in this way as the application has to be determined in accordance with the legal principles. These principles include the fact that in Australia there is freedom of a person to leave her property in whatever way she wishes, to love whom she wishes, to hate whom she wishes, and it is only when there has been a failure to comply with a moral duty to those who in the community's eyes she should have made proper provision for, that anyone can legally complain about another person's will. Even then, the Court has no power to rewrite the will, but can only adjust things, in such a way as, in substitution for the testatrix, to fulfil her moral duty.*
>
> *If the estate is a large one the Court has a slightly different approach. The basic principles are the same, that is, the will can only be affected to the extent that it is necessary to discharge the moral duty by making adequate provision for the plaintiffs, but where there is a large estate, competition between claimant and claimant, and claimant and beneficiary under the will is much reduced or eliminated. Further, there may be a more liberal assessment of the moral duty owed, to be reflected in what is proper provision for the plaintiffs. In particular, the lifestyle that has been enjoyed by the plaintiffs because they have been associated with a wealthy testatrix, is a relevant factor."*

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[61] Ibid at [76].
[62] Ibid at [146].
[63] *Re Christu; Christu v Christu* [2021] VSC 162 at [145] and [146].
[64] Supra, 56.

(b) In *McCann v Ward & Burgess* [2012] VSC 63, Hargrave J, at [32], wrote:

> *"… where the size of the estate permits and there will be no serious prejudice to the rights of other beneficiaries, [the court may] order further provision beyond the immediate and likely future needs of the applicant… [providing] a 'nest egg' to guard against unforeseen events." (Footnotes omitted)*

(c) Yet, it must also be remembered, as McLaughlin AsJ (as his Honour then was) stated in *Lumb v McMillan* [2007] NSWSC 386, at [26]:

> *"The ample size of the estate does not justify the Court in being profligate in disposing of the assets of the Deceased and in awarding to each Plaintiff an amount which is more than that to which that Plaintiff would be entitled. The Court should do no more than remedy the failure on the part of the Deceased to make adequate provision for the proper maintenance of each Plaintiff."*

4.3 So the authorities seem to allow for a more generous provision, but not a 'profligate' one, keeping in mind the objective of doing no more than remedying the failure by the deceased. Of course, on the sliding scale of 'instinctive synthesis', it is counter-intuitive to simply place a limit. It is therefore helpful to look at the 'record award' cases, which include an example of an award considered to be profligate being overturned on appeal.

Lemon v Mead – The Conditions for Controversy

4.4 Perhaps the most famous of the Part IV cases is the case of *Lemon v Mead*[65], which concerned the Estate of the late Michael Wright who the Court estimated left an estate worth in the vicinity of $1 billion[66].

4.5 The late Mr Wright left behind 4 children. Three of those children were born of his earlier marriage to Jennifer Turner. A fourth child, Olivia Mead, who was born out of wedlock from another relationship of Mr Wright, was the plaintiff.

4.6 The plaintiff received $3 million under the deceased's last Will. In this context the Court initially dealt with two issues. The first was that the $3 million bequest was subject to a trust structure which meant that the bequest was not within the plaintiff's control to administer. The second was whether the amount of $3 million was adequate to provide for the proper maintenance and support of the Plaintiff.

4.7 Notably, the trust had some particular terms which appeared to irritate the Court because of its potentially oppressive operation. For example, the Court observed that, on the particular terms of the trust, if the plaintiff were convicted of a drink driving offence, or simple possession of marijuana, or was suspected of involvement with someone who used an illicit substance, or converted to another religion, she would be an 'Excluded Person'[67]. In the circumstances, the trust structure was always going to pose a problem.

4.8 The Court held that the bequest did not provide adequately for the proper maintenance and support of the plaintiff on both fronts, that is:

(a) It was not appropriate for a trustee living in Sydney to be in control of a sum of money for the benefit of the plaintiff, subject particularly to the terms of this trust which meant there was no guarantee of provision[68]; and

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[65] *Lemon v Mead* [2017] WASCA 215, on appeal from an earlier decision in *Mead v Lemon* [2015] WASC 71.
[66] See *Mead v Lemon* at [5] – [6].
[67] Ibid at [27] to [28].
[68] Ibid at [29] and [30].

(b) $3 million was simply not 'suitable'[69].

4.9 Having made this finding, the Court then had to determine 'how much was enough'. It is at this point where things went a little wrong, having regard to all of the principles we have hitherto examined in the paper.

4.10 After considering all of the evidence, the Court went on to observe that an award of family provision involves the exercise of discretion[70]. However, the Court went further, with the Master observing at paragraphs [61] to [62]:

(a) The discretion in the Act is unfettered;

(b) The unfettered discretion must be exercised judicially, but there is no warrant for assuming that the award should be no more than that which will provide adequate provision for a plaintiff – for to do so was to put a 'gloss on the Statute'.

(c) No cases referred to in the course of the hearing bore comparison to this one. The estate was massive and its value irrelevant in determining the outcome, because no individual would be prejudiced no matter what award (within reason) the court made.

(d) There were 'no factors to weigh in the balance'; no markers for the exercise of discretion.

4.11 After this free-swinging approach, the Court awarded $25 million by way of further provision. It was appropriate, in the Master's view, because it would set up the plaintiff and her children and perhaps their children for lives, by providing enough income so that the plaintiff and her relatives will never want for anything again, all against a background of the award making no difference whatever to the position of the other beneficiaries. The Master described this eye-watering sum as, in the context of the Estate, 'little more than a rounding error'[71].

4.12 On one view, one can readily see the Master's logic in the preceding paragraphs. However, as a statement of principle the approach effectively threw away the body of common law principles on the grounds that the Estate was so big that they ceased to matter. This is what led to the decision being appealed.

On appeal – Lemon v Mead[72]

4.13 The Court of Appeal did not cavil with the finding that the Will failed to make adequate provision for Ms Mead's proper maintenance and support. The main issue for appeal was the quantum of the award and the statements of principles made by the Master.

4.14 The Court of Appeal found, in summary, that the Master's discretion to award $25 million by way of added provision was miscarried. The reasons for this were as follows:

(a) The Master's discretion was miscarried in that he regarded his discretion as unfettered because of the size of the Estate[73]. It was not unfettered;

(b) The Court's discretion is enlivened if the Court is of the opinion that the disposition of the deceased's estate is not such as to make 'adequate' provision from the estate for the 'proper' maintenance of the claimant[74];

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[69] Ibid at [31].
[70] Ibid at [61] and following.
[71] Ibid at [65].
[72] *Lemon v Mead* [2017] WASCA 215
[73] Ibid at [220]
[74] Ibid at [221]

(c) If the Court's discretion is enlivened, the Court is empowered to order that such [added] provision as the Court thinks fit is made out of the estate *for that purpose*. The phrase 'as the Court thinks fit' does not confer a discretion that is 'unfettered'. The power is qualified or confined to the making of orders which will ensure that 'adequate' provision is made for 'proper' maintenance'[75]'

(d) It was an error for the Master to suggest that there was no warrant for assuming that an award should be no more than that which will provide adequate provision for a claimant[76]. The Master effectively treated the discretion to award added provision as limitless.

(e) There is no special category of cases which means that the relevant factors to which the Court has regard become irrelevant to the exercise of discretion[77]. Similarly, the size of the Estate does not justify the exercise of discretion to make provision that is more than what is adequate for proper maintenance – for example by reference to a sum that 'will set the plaintiff and her children and her children's children up for life'[78]. The Court cannot exercise discretion on the basis that community expectations require greater provision that what is adequate for proper maintenance and support'.

(f) Although the discretion is broad, it must be exercised by reference to relevant evidence before the Court. The Master made findings that the claimant was 'an honest and level-headed young woman', not one who was ''a gold digger', 'narcissistic' or 'greedy'. Those findings were not relevant, none being referable to factors impacting on the exercise of discretion.

4.15 If the discretion is miscarried, it is open to the Court of Appeal to re-exercise that discretion. It did so, and awarded $6,142,000 – with the earlier $3 million bequest to be brought to account. In other words, a further $3,142,000 was awarded[79]. This sum was directed to be held on trust by an independent trustee until the claimant turned 30 – but with specific and limited terms, not including the terms which had so understandably offended the Court below[80].

4.16 The sum was regarded to be adequate for the claimant's proper maintenance and support on the basis that it would be sufficient to enable the purchase of a reasonably substantial house and for the balance to be invested so as to produce a reasonable substantial annuity for the remainder of the plaintiff's life[81].

4.17 Finally, the Court noted that it was not relevant to consider what other beneficiaries had received under the Will, with the Will presumed to show what the Deceased regarded as his preferred scheme of disposition, and the Court's focus being limited to whether or not provision to the claimant was adequate for her proper maintenance and support. In other words, the exercise is not about fairness, and the fact that one or more beneficiaries receive a greater sum than the claimant is not relevant[82].

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[75] Ibid at [222]
[76] Ibid at [223]
[77] Ibid at [225] – [227]
[78] Ibid at [230]
[79] Ibid at [245] – [248]
[80] See the discussion weighing up the pros and cons of a trust structure and how these impact upon the Court's discretion at [255] – [257].
[81] Ibid at [245].
[82] Ibid at [244] per Buss P and [269] per Mitchell & Beech JJA – the amount given to a beneficiary is not to be used as an indicator of what should be given to a claimant.

Kornwasser v Spigelman

4.18 *Kornwasser v Spigelman*[83] concerned the Estate of Abraham Spigelman, who left an Estate of approximately $11 million. The case concerned 'competition' between the testator's daughter and her mother, the testator's spouse. It is a case with several interesting factors:

(a) Firstly, it is a case where a daughter was held to have competing needs with a spouse;

(b) Secondly, it is a case where the court gave consideration to needs emerging from the expectation and observation of strict religious adherence;

(c) Thirdly, it is a case where the court approached provision through a discretionary family trust by assessing the likelihood of the exercise of discretion, and referencing available remedies in the event of a breach of duty in the exercise of discretion; and

(d) Fourthly, it is a case where the parties agreed that the deceased owed a duty and that provision was inadequate, but where the Court effectively calculated the amount of provision as falling between what was claimed by the plaintiff and what was offered by the defendant.

(e) Fifth, and finally, it is a case where the Court took into consideration as relevant an amount the claimant stood to receive pursuant to a mutual will agreement.

4.19 Let's deal with these factors in turn below.

Primacy of spouse vs competing financial needs

4.20 As was set out above, it is usually the case that a Court will find that a deceased's widow (or spouse) will have primacy in terms of the duty owed by the testator. However, that is a matter of substance, not assumption. That is, primacy arises because it is usually the case that on an evaluation of the circumstances of a spouse as claimant, an elderly spouse will commonly be unable to improve their financial situation except through a bequest from the testator[84].

4.21 In *Kornwasser*, the testator's estate was left entirely to his widow, Freda Spigelman. By the Will she enjoyed a substantial benefit, and was independently wealthy. By the trial, at least, Freda accepted that Abraham owed a duty to make provision to his daughter, Tobi Kornwasser, and that his Will did not make adequate provision (or any provision at all) for her.

4.22 The case illustrates that practitioners should not assume that a spouse will enjoy primacy to the exclusion of all others when it comes to the assessment of the duty owed by the deceased. This is clear enough from the fact that Freda did not even assert a competing need, given her financial position and what she stood to receive under the Will.

4.23 What remained in dispute were two factors:

(a) How much added provision should be awarded; and

(b) What was the relevance of a mutual will agreement between Abraham and Freda.

[83] [2022] VSC 759
[84] See *Bladwell v Davis* [2004] NSWCA 170; *Re Finnie; Petrovska v Morrison* [2021] VSC 153 at [112] (McMillan J).

Enhanced Duty by Created Dependence

4.24 In assessing the extent of Tobi Kornwasser's needs, the Court took into account:

(a) her age (62);

(b) the fact that she did not complete school, had no tertiary, professional or trade qualifications;

(c) the fact that she, for most of her adult life, had invested her energy in her home, her family and her religion;

(d) the obligation imposed on Abraham was higher than that generally owed by any father to an adult daughter because Tobi's parents '*made choices for her early in life that limited her ability to earn an income, and committed her to a marriage with a man of their choosing. At the same time, Abraham's generous support of Toby and her family during his lifetime had the result that she came to depend almost entirely on that support.*'[85]

4.25 In effect, Tobi had been expected to, and did, adhere to strict religious observances and a strict way of living. She was generously supported by her father, but her adherence to the mode of living she was expected to follow brought him much joy. In those circumstances, she had a heightened 'dependence' which had been created by her parents.

Relevance of Mutual Wills and Discretionary Trust

4.26 The Court then assessed Tobi's financial position by reference to the fact that her father and mother had entered into a mutual will agreement pursuant to which she stood to receive what appeared to be a very substantial bequest from her mother's Will. The relevance of the mutual will agreement was observed to be that '*Freda's estate would be held subject to a constructive trust in the terms of the* [mutual will] *which would override any later will that Freda might make, and* [which] *may be specifically enforced by Tobi as a beneficiary of the trust.*'[86] Under Freda's estate, Tobi's benefit was substantial – somewhere in the order of $10 million[87]. However, Tobi had immediate needs not met by the expectation of these funds.

4.27 Furthermore, the relevance altogether of the mutual will agreement was in dispute, because Tobi asserted that the bequest to her pursuant to her mother's (applicable) will was by way of discretionary will trusts, which were controlled by her brothers. There was some considerable acrimony in the relationship between Tobi and her brothers, to the extent that Tobi did not trust that she would receive a benefit from the inheritance controlled by them[88].

4.28 While the Court accepted that Tobi's fears about her brothers' control over her expected inheritance was genuine, the Court was not persuaded that there was an objective factual basis for those fears. The Court declined to conclude that there was any real likelihood that Tobi would not receive the benefit of her inheritance from her mother. The Court went further to hold that if Tobi's fears came to fruition, '*she would have a range of remedies available to her as the*

[85] *Kornwasser v Spigelman* [2022] VSC 759 at [59] – referring to the evidence that Tobi had been a dutiful daughter, raised in the *Adass Israel* congregation of Jewish orthodoxy, had left school early to complete religious schooling, and had married a man through an arranged marriage.
[86] Ibid at [52], citing *Birmingham v Renfrew* (1937) 57 CLR 666, 682-91 (Dixon J); *Baird v Smee* [2000] NSWCA 253, [64]-[65] (Giles JA); *Flocas v Carlson* (2015) 15 ASTLR 192, [178]-[192], but expressing no conclusion about whether the constructive trust would attached to all of Freda's assets, or only to the property she inherited from Abraham.
[87] Ibid at [52].
[88] Ibid at [53]-[54].

primary object of the trusts, up to and including applying to the Court to remove her brothers as trustees'[89].

4.29 Respectfully, this analysis seems a little 'inverted' to the writer. I say this for three reasons:

(a) Firstly, It has long been held that provision by way of a discretionary family trust in the control of another does not guarantee provision (see for example, the decision in *Lemon v Mead* above). It is not historically necessary for a claimant to establish some 'degree of likelihood' that a trustee will or will not distribute to them, merely that the distribution is a matter of discretion.

(b) Secondly, while it is undoubtedly true that a discretionary object of a trust might seek to establish that a trustee has improperly exercised discretions – and that a pattern of distribution might of itself be so skewed might justify such an attack, the Court is not making a finding that excluding Tobi would amount to a breach of the trustee's duties to exercise discretion properly, in good faith and upon real and genuine consideration. The Court is not making a pre-emptive finding on the exercise of discretion;

(c) Thirdly, if a claimant had a right they needed to enforce through litigation (e.g. through an application contesting a breach of duties in the sense done in *Owies*), then this too would be a factor for the Court to take into account.

4.30 However, notwithstanding the writer's difficulty with the analysis at [54] of *Kornwasser*, the fact is the result that the Court took into account Tobi's expected inheritance from her mother in determining what provision she expected to receive from her mother's estate[90].

Amount of Provision

4.31 As set out above, the parties agreed that Abraham owed Tobi a duty to make provision and had failed in that duty. However, the parties disagreed as to the extent of added provision. Tobi contended that an amount of $4,990,000 was needed, whereas Freda accepted only an amount of $2,595,000.

4.32 The needs articulated by Tobi were specific, they were amounts for:

(a) Buying out her ex-husband's share of the matrimonial home (which was held 50/50 as to tenants in common);

(b) repairing and refurbishment of that property;

(c) anticipated future legal costs in family law proceedings with her ex-husband;

(d) furnishings and vehicles; and

(e) the costs for weddings of her two unmarried daughters;

(f) contingencies; and

(g) generating future income (e.g. superannuation).

4.33 The parties generally agreed as to these categories (except for funding future weddings) but the amounts allowed generally differed.

[89] Ibid, citing *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [81]-[98], [153]-[154] and citing ss 48, 51 *Trustee Act 1958* (Vic).
[90] Ibid at [55].

4.34 In the circumstances, the Court, at [59], addressed the mandatory considerations in section 91(4) of the Victorian legislation by commenting on their application, and then turned to the specific needs claimed by Tobi. The result was a 'middle ground', the Court finding that $3,150,000 was adequate for Tobi's proper maintenance and support, this was broken down as follows[91]:

(a) $1,400,000 to buy out the ex-husband's half share of the matrimonial home ($1,400,000 was claimed and conceded);

(b) $600,000 to pay for repairs and renovation ($750,000 was claimed and only $400,000 conceded);

(c) $150,000 for family law legal costs ($150,000 was claimed and only $75,000 conceded);

(d) $250,000 for furnishings and vehicles ($310,000 was claimed and only $220,000 conceded);

(e) No allowance was made for the unmarried daughters' weddings – with the Court accepting evidence that Freda would pay for them anyway;

(f) $750,000 for contingencies was allowed ($1,000,000 was claimed and only $500,000 conceded); and

(g) No further allowance for future income was made, given the Court's finding as to Tobi's expected inheritance from her mother.

5 Will the Estate Pay? Family Provision Order Claims

5.1 Let's turn to costs issues in the context of family provision orders, and consider in turn, costs consequences of successful claims, then unsuccessful claims, and then the costs of defendant executors.

Successful Claims

5.2 A successful claimant for a family provision order is ordinarily entitled to have their costs paid from the Estate[92]. Thus, the ordinary order is not that the Defendant executor must pay their costs and later be indemnified, but rather that the Estate pay the successful plaintiff's costs directly. This reflects the fact that the Defendant is normally involved in the litigation simply by virtue of occupying the office of Executor, rather than by some positive act by them[93].

5.3 A successful claimant may be denied their costs either wholly or partly for any of the reasons which enliven the discretion of the Court. Of these factors, the ones most likely to warrant a denial of costs are that the claimant has:

(a) failed to better an offer of compromise made by the unsuccessful party; or

(b) incurred excessive or disproportionate costs.

5.4 '*Parties and their legal practitioners <u>should always</u> run* [family provision proceedings] *with a keen eye to the minimisation of costs <u>at all stages</u>'* [94]

[91] Ibid at [61] – [63].
[92] *In the Will of Mailes* [1908] VLR 269 at 270; *Re Will of Sitch (deceased) (No 2)* [2005] VSC 383.
[93] See for example: *Ray v Greenwell* [2009] NSWSC 1197.
[94] *Tchadovitch v Tchadovitch* (2010) 79 NSWLR 491.

Can an unsuccessful plaintiff be awarded costs from the Estate?

5.5 There was a time when jurisprudence felt that there was a good chance that an unsuccessful claimant for a family provision order might still get their costs out of an estate. Let's put this to bed.

5.6 The assumption in today's legal practice, particularly in Victoria and New South Wales, is that an unsuccessful applicant will be ordered to pay their own costs[95]. In New South Wales, it has been held that the view that an unsuccessful claimant '*would be very likely to get his or her costs out of the estate'* is one which '*should be recognised, once and for all, as thoroughly discredited*'

5.7 The correct position at the date of this paper is that for an unsuccessful claimant to be awarded their costs out of the Estate (or even for there to be no order as to costs) is an exceptional, even extraordinary result.

5.8 The orthodox outcome for an unsuccessful plaintiff is that they will bear their own costs, and the Estate's costs. For example:

(a) in *Wentworth v Wentworth*[96] where the Court held that: 'it is not the function of family provision legislation to provide to an applicant funds to enable that applicant to pursue hopeless litigation and still less to provide funds to protect an applicant from the consequences of pursuing such litigation.'[97]; and

(b) in *Re Fullard (deceased)*[98] where the Court held that, in the case of smaller estates, the onus on an applicant is a 'heavy burden' and applications in such a context '*ought not to be launched unless there is (or there appears to be) a real chance of success, because the result of these proceedings simply diminishes the estate and is a great hardship on the beneficiaries if they are ultimately successful in litigation.*

5.9 However, there are some instances where an unsuccessful claimant for a family provision order might be awarded their costs from an Estate or at least might escape an order for costs. The features of these cases[99] are consistent, namely that:

(a) The claimant acted reasonably in bringing the action and in the course of proceedings;

(b) The Estate was relatively large;

(c) The claimant was impecunious;

(d) There was a strong moral obligation owed by the deceased to the claimant;

(e) It could not be said that the claimant's claim was so untenable that it should not have been brought'; and

(f) The claim failed not because of a failure to establish need, but because of some other factor/s, such as competing need.

5.10 I hasten to add that in no way do I mean to suggest that if all of those factors are present, an unsuccessful claimant should expect their costs to be borne by the Estate or otherwise to

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[95] *Nicholls v Hall* (2009) 2 ASTLR 419; *Bowyer v Wood* (2007) 99 SASR 190; *Kimberley v Butcher* [2001] WASC 118.
[96] (1995) 37 NSWLR 703.
[97] Ibid at 709.
[98] [1982] Fam 42.
[99] See for example: *Re Bodman* [1972] Qd R 281; *Harkness v Harkness (No 2)* [2012] NSWSC 35; *Lillis v Lillis* [2010] NSWSC 359; *Bartkus v Bartkus* [2010] NSWSC 889.

escape a costs order. I am simply observing that in cases where an unsuccessful plaintiff has been lucky enough to enjoy such a result on costs, the factors listed were consistent features.

5.11 Practitioners should also note that in *Harris v Harris*[100] the Court articulated the principle that Courts should give consideration to orders capping the costs of both parties at an early stage of proceedings where estates were modest[101]. Notably, there is an applicable procedure in Victoria where costs are effectively capped through case management orders confining the manner in which cases are presented where Estates are below a certain value.

Costs of Defendant Executors

5.12 The usual order is that a defendant executor will receive their costs of the proceeding from the Estate, irrespective of the outcome of the proceedings, on an indemnity basis[102]. By extension, this means that if an unsuccessful plaintiff is ordered to pay the executor's costs, and there's a shortfall between the amount assessed to be payable and the total amount of the Executor's costs, the Executor is entitled to indemnification from the Estate in respect of that shortfall.

5.13 In either case, whether the defendant executor is successful or unsuccessful, the focus of the Court is whether the defendant executor has acted properly[103].

5.14 The same justifications for departing from the usual order apply in this context as they do in other cases. An executor who incurs costs which are disproportionate to the size of the Estate and/or the issues in the proceeding may be denied part or all of their indemnity. For example:

(a) an order that the Executor's costs be paid out of the estate on a party-party or standard basis rather than an indemnity basis was made in *Wang v D'Ambrosio*[104]; and

(b) an order that the Executor bear their own costs was made in *Tapp v Public Trustee (No 2)*[105].

5.15 In the context of family provision order disputes, while the primary duty of an executor is to uphold the deceased's Will.[106] this duty does not extend to defending a claim where it is of no commercial benefit to anyone[107]. Regard should be had to the extent to which upholding the will would benefit beneficiaries. A due sense of proportionality in the conduct of any such defence is required, and executors should seek to compromise a claim, if at all possible, in a way that would save both the plaintiff and the other beneficiaries' costs[108].

5.16 Aside from whether the defendant executor is acting properly, the Court also examines whether the defendant executor is acting objectively in that capacity or is, in truth, acting for their own personal interests. This can occur particularly if the defendant executor is also a beneficiary to a claim against an Estate which stands to diminish their personal entitlement if successful. If a defendant executor is in truth protecting their own personal interests, the principle that they will be entitled to an indemnity irrespective of the outcome of the proceeding does not apply.

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[100] [2018] NSWCA 334.
[101] Ibid at [18].
[102] See for example: *Re McGoun* [1910] VLR 153.
[103] *Re Estate of Paul Francis Hodges Deceased; Shorter v Hodges* (1988) 14 NSWLR 698 at 709–710.
[104] [1999] NSWSC 227.
[105] [2009] TASSC 62.
[106] See *Vasiljev v Public Trustee* [1974] 2 NSWLR 497.
[107] See *Morrison v Abbott* [2012] NSWSC 320 at [75].
[108] Ibid, citing *Szlazko v Travini* [2004] NSWSC 610 and *The Application of Ferdinando Scali* [2010] NSWSC 1254.

6 How to avoid inheritance issues

6.1 This section of the paper leaves me somewhat cold, in that it always feels like scheming to avoid the practical impact of a person seeking to pursue legitimate legal rights.

6.2 However, it is certainly possible that a testator may perceive the threat of litigation in relation to their Estate, and wish to avoid plunging those intended to benefit from their Estate into litigation.

6.3 In real terms, there is no way to draft a Will that makes it impervious to challenge. The only way to avoid litigation over an Estate is to make it so small that it is not viable to pursue in litigation.

6.4 The LexisNexis published text: Testamentary Trusts: The Australian Master Guide, 3rd edition, identifies 4 potential strategies which might be pursued. **It is important to note that the strategies identified will not be effective in New South Wales, where the Court has jurisdiction to snaffle assets considered to form part of the deceased's 'notional estate' even if legally disposed of before death.**

6.5 The strategies identified are:

(a) First, Depletion: that is, the deceased divesting themselves of assets or control of assets, by transferring legal title to the intended beneficiaries in life. Of course, depletion as a strategy has several pitfalls, notably:

(i) A loss of control and a consequent vulnerability;

(ii) The potential adverse impact of duty provisions;

(iii) The potential crystallisation of capital gains tax consequences – and the loss of more flexible tax planning options – such as those associated with the transfer of assets pursuant to the terms of a Will;

(b) Second, structuring assets to be jointly held. If a person holds an asset as a tenant in common with an intended beneficiary, that person's interest as tenant in common is an asset of the Estate which will pass according to their Will and thus be susceptible to challenge. By contrast, where assets are jointly held, the survivor retains a sole interest in the asset on the death of the joint owner and there is no asset to pass through an Estate. Restructuring assets can be effective provided there is a means to record a joint ownership (such as with a bank account, a share, or real property). Certain assets, such as chattels, are not readily able to be proven to be jointly held – without some objective evidence such as Deed;

(c) Third, binding death benefit nominations for superannuation – which, if valid, may put the deceased's superannuation beyond the reach of their Estate; and

(d) Fourth, a 'gift and loan-back' which, in substance is the same as the depletion strategy except that, instead of a person divesting themselves of assets, they make a gift of money equal to the value of those assets to an intended beneficiary who then 'lends back' an equivalent sum to the gifter, and takes security for repayment of the sum over the assets the gifter intends to secure in favour of that lender. This is, in effect, the same as the depletion strategy, without forcing a person to hand over legal title to an asset prior to their death. The advantage to this approach is that it gives more security to the asset owner, but the disadvantage is that it is more complex and costly to administer.

6.6 I do not wish to endorse any of the above mentioned strategies, I am simply drawing attention to the fact that they are identified in a published text for your consideration. As always, a client's goals for succession planning need to be considered on a case-by-case basis with a careful focus on ensuring their needs are achievable.

6.7 Despite the awkwardness of approaching succession planning to avoid litigation, it is a laudable objective to avoid the incurring of legal fees which will almost certainly affect an Estate.

6.8 It is probably a trite point, but worth saying in conclusion, that a final strategy is to make provision that is as close as possible to an amount that is adequate for the proper maintenance and support of those to whom the testator owes a duty. Aside from emptying the Estate of all assets, that is the next best way to minimise the threat of litigation. Of course, beneficiaries may have a different view as to what is adequate, which is why the risk of family provision litigation is not possible to avoid altogether (except through depletion).

7 Letters of Wishes: A Final Word?

7.1 As if to reach beyond the grave, let's examine in closing the concept of 'statements of wishes' and ask rhetorically: 'Are they worth the paper they're written on?'.

7.2 The starting point is to acknowledge that statements of wishes or letters of wishes are, by definition, not legally enforceable. This is usually because the author of the letter of wishes has no interest in the corpus of the trust and no power to direct the trustee as to its administration of the trust. If that were not the case, it is difficult to see why a letter of wishes would even be contemplated.

7.3 However, that does not mean that they are totally irrelevant or of no legal effect. They may be a document that the Court takes into account as supporting a particular scheme of distribution.

7.4 In *Kornwasser*, the Court took into account, albeit somewhat indirectly, that the testator had left a letter of wishes in which he had stated that it was his wish that a family trust (in which a significant amount of the family's wealth had been deposited) would be administered in a particular way which would benefit the claimant[109].

7.5 The Court acknowledged that the letter of wishes was not binding:

> *"The joint letter of wishes signed by Abraham and Freda on 11 February 2013 records, among other things, their desires as to the administration of the various trusts they had established, including the will trusts. The letter merely reflects their wishes; it does not seek to impose any legal or binding obligations on the trustees 'except insofar as it is within the discretion of the Trustees to comply with such wishes and insofar as the Trustees are prepared to do so'.*[110]

7.6 In *Kornwasser,* despite the fact that the letter of wishes was not binding, the Court appeared to consider the letter of wishes as reinforcing the likelihood that the claimant would receive a benefit pursuant to the discretionary trusts to which the letter of wishes was directed. This in turn influenced the Court in the assessment of the claimant's stated needs. The Court observed that there was no evidence to support the claimant's fears that the trust would not be administered in her favour, contrary to the letter of wishes[111].

7.7 In *McKenzie v Lucas*[112] the Court had regard to a letter of wishes in considering why it was appropriate that a bequest had been left to a claimant by way of a protective trust:

> *At the time the deceased signed his will, he also signed a letter of wishes and a few months later wrote a letter to each of his children explaining the asset situation of himself and his partner Susan and the reasons why they had made the dispositions. I*

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[109] See *Kornwasser v Spigelman* [2022] VSC 759 at [21].
[110] Ibid at [20].
[111] Ibid at [54].
[112] *Anne Marie McKenzie v Paul Lucas & Anor; Katrina Marie McKenzie v Paul Lucas & Anor* [2011] NSWSC 1012

will return to these reasons later but it should be noted that in it the deceased explained why he did not leave property directly to Katrina. Shortly put, Katrina suffers from extensive medical problems and had been provided for during the lifetime of the deceased by the purchase of a residence in the name of the McKenzie Family Trust so that Katrina could use it as her home.

7.8 For a starker example of the limitations of a letter of wishes, see *Rockman v IPR Nominees & Ors*[113], where the Court held that:

(a) A statement by a trustee to the effect that it intended to act in accordance with a letter of wishes was no guarantee of distribution;

(b) A letter of wishes was not binding on a trustee or successor;

(c) In any event, the trustee had previously acted inconsistently with the letter of wishes; and

(d) An undertaking that a trustee would act in accordance with a letter of wishes would still not provide any certainty or comfort to a beneficiary that it would be paid pursuant to that undertaking [raising the question, what would happen if the trustee was replaced for any reason].

7.9 So is it worth the paper it is written on? The answer depends on the objective of the writer. If the writer is seeking to bind people to a particular course which cannot be effected by a Will or a trust deed, the answer is 'no'. The document will always have limited effect. However, if the limitations of the document are properly understood, they still have a limited use. The proper use of a letter of wishes is therefore to either:

(a) Record a matter to which the Court may have regard in understanding a desired scheme of distribution; or

(b) Otherwise recording matters which the Deceased wishes the executor/trustee/beneficiaries to know, but without an expectation or understanding that the wishes themselves would bind any of those parties to a particular course.

Christian L Teese

18 March 2024

[113] *Rockman v IPR Nominees & Ors* [2015] VSC 623

INHERITANCE CLAIMS - TESTATOR'S FAMILY MAINTENANCE - Page 1

MATTER	A.C.T.	N.S.W.	N.T.	QLD.	S.A.	TAS.	VIC.	W.A.
ACT:	*Family Provision Act* 1969	*Succession Act* 2006	*Family Provision Act* 1970	*Succession Act* 1981	*Inheritance (Family Provision) Act* 1972 *[**NB:** This Act is to be repealed by the Succession Act 2023.]*	*Testator's Family Maintenance Act* 1912	*Administration and Probate Act* 1958 *Pt. IV* *New legislation coming out – Admin and Probate Rules 2023*	*Family Provision Act* 1972
PERIOD WITHIN WHICH CLAIM MUST BE MADE:	6 months from date of grant. *Sec. 9(1)*	12 months from date of death. *Sec. 58(2)*	12 months from date of grant. *Sec. 9(1)*	Notice of intention must be given within 9 months from date of death. *Sec.41(8).* Court may make determination if grant not made. (Notice of intention must be given within 6 months).	6 months from date of grant. *Sec.8(1)*	3 months from date of grant being made. *Sec. 11(1)*	6 months from date of grant. *Sec. 99*	6 months from date on which administrator becomes entitled to a grant in W.A. *Sec. 7(2).*
DATE ON WHICH APPLICATION DEEMED MADE:	When notice of motion or other document instituting the application filed. *Sec. 9(5)*	When application filed. *Sec. 58(3)*	When notice of motion or other document instituting the application filed. *Sec. 9(5)*	When application filed with Court. *Sec.41(6)*	When summons served on administrator. *Sec.8(6)*	When application filed.	When application filed.	When application filed. Notice of application must be served on administrator. *Sec. 12(1)*
CIRCUMSTANCES UNDER WHICH PERIOD IN WHICH CLAIM MUST BE MADE CAN BE EXTENDED:	On such conditions as Court thinks fit and whether period has expired or not. *Sec. 9(3)*	The Court orders on sufficient cause being shown or the parties to the proceedings consent to the application being made out of time. *Sec. 58(2)*	On such conditions as Court thinks fit and whether period has expired or not. *Sec. 9(2) & 9(3)*	Unless the Court otherwise directs. *Sec. 41(8).*	Upon Court thinks fit and whether or not the period has expired. *Sec. 8(2), 8(3)* and *8(4)*	For such period as the Court or Judge thinks necessary. *Sec. 11(2)*	Upon Court thinks necessary and whether or not the period has expired. *Sec. 99(2)*	May apply for leave to file out of time. *Sec. 7(3)*
WHETHER TIME FOR APPLICATIONS MAY BE ABRIDGED/SHORTENED:	No.	No.	No.	No.	No.	No.	No.	No.
WHEN MAY PERSONAL REPRESENTATIVE SAFELY DISTRIBUTE?	Distribution made prior to application; and the administrator had given notice before making distribution and time expired. *Sec. 21*	12 months from date of death. Flows from *Sec. 58(2)*	Distribution made prior to application; and the administrator had given notice before making distribution and time expired. *Sec. 21*	1. If it is for the maintenance support or education. 2. If the claimant gives consent or does not intend to affect the distribution. 3. If distribute after 6 months of grant. *Sec. 44*	At any time provided complies with *Sec. 14.*	After 3 months from date of grant. Flows from *Sec. 11(1).*	1. If it is for the maintenance support or education. 2. If the claimant gives consent or does not intend to affect the distribution. 3. If distribute after 6 months of grant. *Sec. 99A*	At any time provided complies with *Sec.20(1).*
ELIGIBLE CLAIMANTS:	1. Partner of deceased. 2. Person (other than a partner of deceased) who was in a domestic relationship with the deceased for 2 or more years continuously at any time. 3. Child of deceased. 4. Stepchild of deceased who was maintained by deceased immediately before death. 5. Grandchild of deceased whose parent died before the deceased or whose parent(s) do not maintain their child. 6. Parent of the deceased maintained by the deceased or where the deceased left no spouse or children surviving. *Sec. 7*	1. Spouse of deceased. 2. *De facto* spouse (of same or opposite sex). 3. Child of deceased. 4. Former spouse. 5. Grandchild at any time wholly or partly dependent upon the deceased. 6. A person at any time a member of the deceased's household and wholly or partly dependent upon the deceased. 7. A person with whom the deceased person was living in a close personal relationship at the time of death. *Sec. 57*	1. Spouse or *de facto* partner of deceased. 2. Former spouse or *de facto* partner of deceased maintained by deceased. 3. Child of deceased. 4. Stepchild of deceased maintained by deceased. 5. Grandchild of deceased whose parent died before the deceased, or whose parents do not maintain their child. 6. Parent of the deceased maintained by the deceased, or where the deceased left no spouse, *de facto* partner or children surviving. *Sec. 7*	1. Spouse being: (a) husband or wife; (b) *de facto* partner living together on domestic basis for continuous 2 years; (c) civil partner; (d) dependent former husband or wife or civil partner. 2. Child (including an adopted or stepchild). 3. A dependent - a person being wholly or substantially maintained by the deceased and being: (a) a parent of the deceased; (b) a parent of a surviving child under 18 of the deceased; (c) a person under the age of 18 years. *Sec.40, 40A&41* *Definition of spouse: Sec. 5AA*	1. Spouse. 2. Former spouse. 3. Domestic partner (including person declared under the *Family Relationships Act* 1975 or in a registered relationship). 4. Child (including one recognised by the *Family Relationships Act 1975).* 5. Child of a spouse or domestic partner wholly or partly maintained by the deceased. 6. Child of a child of the deceased person. 7. Parent of deceased who has cared for or maintained deceased during deceased's lifetime. 8. Brother or sister of deceased who has cared for or maintained deceased during deceased's lifetime. *Sec. 6*	1. Spouse of deceased. 2. Children of deceased. 3. Parents of deceased if no spouse or children surviving. 4. Person whose marriage to the deceased been dissolved or annulled while receiving, or entitled to receive maintenance from deceased. 5. Person whose significant relationship with the deceased ceased before death while receiving or entitled to receive maintenance from deceased. *Sec. 3A*	1. Spouse or domestic partner. 2. Former spouse or domestic partner. 3. Child of deceased (including adopted child). 4. Stepchild of deceased. 5. Person who believed the deceased was his/her parent and was treated by the deceased as a natural child. 6. Registered caring partner of deceased. 7. Grandchild of deceased. 8. Spouse or domestic partner of child of deceased if the child dies within 1 year of the deceased's death. 9. Member of household of which the deceased was also a member. *Sec. 90*	1. Spouse or *de facto* partner of deceased. 2. Former spouse or *de facto* partner receiving or entitled to receive maintenance from deceased. 3. Child of the deceased (living or born within 10 months of deceased's death). 4. Grandchild of the deceased wholly or partly maintained by deceased (living or born within 10 months of deceased's death). 5. Stepchild wholly or partly maintained by the deceased. 6. A parent of the deceased. *Sec. 7(1)*

INHERITANCE CLAIMS - TESTATOR'S FAMILY MAINTENANCE - Cont'd - Page 2

MATTER	A.C.T.	N.S.W.	N.T.	QLD.	S.A.	TAS.	VIC.	W.A.
FACTORS TO BE CONSIDERED IN MAKING FAMILY PROVISION ORDER:	1. the character and conduct of the applicant; 2. the nature and duration of the relationship between the applicant and the deceased; 3. financial and non-financial contributions by both the applicant and the deceased to the property or financial resources of either or both persons; 4. any contributions by either the applicant or the deceased to the welfare of the other, or of any child of either person; 5. the income, property and financial resources of the applicant and the deceased; 6. physical and mental capacity of the applicant, and the deceased (during life) for appropriate gainful employment; 7. financial needs and obligations of the applicant and the deceased (during life); 8. responsibilities of either the applicant or the deceased (during life) to support others; 9. any order made under the *Domestic Relationships Act 1994*, s15 regarding property of the applicant or the deceased; 10. any payments made to either the applicant or the deceased by the other, under an order of the court or otherwise, in respect of the maintenance of the other person or any child of the other person; 11. any other matter court considers relevant. *Sec. 8(3)*	1. relationship between the applicant and the deceased person, including the nature and duration; 2. nature and extent of any obligations or responsibilities owed by the deceased to the applicant, person of whom the application made for and beneficiaries; 3. nature and extent of the deceased person's estate, and liability or charges; 4. financial resources and needs (present and future) of applicant or person of whom the application made for or beneficiaries; 5. financial circumstances of the co-habitant of the applicant; 6. physical, intellectual or mental disability of the applicant, person of whom the application made for or beneficiaries; 7. age of the applicant; 8. contribution by the applicant to the deceased estate or welfare to the deceased or deceased's family; 9. provision made for the applicant by the deceased during lifetime or from estate; 10. the deceased's testamentary intentions; 11. whether the applicant was maintained, wholly or partly, by the deceased; 12. whether any other person is liable to support the applicant; 13. character and conduct of the applicant; 14. conduct of any other person; 15. any aboriginal customary law; 16. any other matter court considers relevant. *Sec. 60(2)*	1. the Court may refuse to make an order in favour of a person whose character disentitles him to the benefit of an order; 2. the Court shall have regard to the testator's reasons, so far as they are ascertainable. *Sec. 8(3) & 22(1)*	1. the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death; 2. the need of the dependant for the continuance of that maintenance or support and the circumstances of the case. *Sec. 41(1A)*	1. the Court may refuse to make an order in favour of any person on the ground that his character or conduct is to disentitle him to the benefit of this Act, or for any other reason that the Court thinks sufficient. *Sec. 7(3)*	The Court or judge shall have regard, inter alia, to: 1. the net value of the estate, 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; 2. 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. The Court may refuse an application if: 1. 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. *Sec. 7 & 8*	The Court MUST regard to: 1. the deceased's will; 2. the deceased's reasons for making the dispositions; 3. the deceased's intentions. The Court MAY regard to: 1. relationship between the deceased and the eligible person, including nature and length; 2. obligations of the deceased to any eligible person and beneficiaries of the estate; 3. size, nature, charges and liabilities of the estate; 4. any eligible person and beneficiaries' financial resources at the time of hearing and foreseeable future; 5. physical, intellectual or mental disability of any eligible person or beneficiaries; 6. age of the eligible person; 7. contribution of the eligible person; 8. benefits previously given by the deceased; 9. whether the eligible person was being maintained by the deceased before; 10. liability of other person to the eligible person; 11. character and conduct of the eligible person. 12. the effects a family provision order to other beneficiaries; 13. any other matter court considers relevant. *Sec. 91A*	1. The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient. *Sec. 6(3)*