Background Paper
February 2016

South Australian Law Reform Institute

Looking after one another

Family Provision Laws in South Australia

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Publications:

SALRI publications, including this Report and the Issues Paper that preceded it, are available to download free of charge from the SALRI webpage under *Publications: Reports and Papers*.

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1 Introduction

The South Australian Law Reform Institute and its succession reference

1.1 The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the Adelaide University Law School. SALRI conducts inquiries or references into various areas of the law. The subject of a reference is determined by the SALRI Advisory Board and also at the request of the South Australian Attorney-General. SALRI before coming to its conclusion examines the relevant research and consults widely with interested parties, experts and the community and it also looks at similar laws and their operation in other jurisdictions. SALRI is assisted by its expert Advisory Board. Based on the work and research throughout an inquiry, SALRI makes recommendations to the Attorney-General so that the Government and South Australian Parliament can make informed decisions about any changes to the law. SALRI's recommendations do not necessarily become law. Rather any decision on accepting and implementing its recommendations is for the Government and South Australian Parliament.

1.2 When undertaking its work, SALRI has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with other States and Territories.

1.3 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. Further information about SALRI and its various projects (both past and present) is available at https://law.adelaide.edu.au/research/law-reform-institute/

1.4 SALRI's current inquiry into the role and operation of the *Inheritance (Family Provision) Act 1972* (SA) is part of its wider work on succession law in South Australia.

1.5 It is important that South Australia's succession laws keep up with changing values and conditions and community expectations and the law remains responsive and effective.[1] In 2011, the Attorney-General, the Hon John Rau MP, invited SALRI to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms.. Funding was also generously provided from the Law Foundation of South Australia for the research and consultation necessary for the Institute's review of succession law.

1.6 As part of its succession law reference, SALRI has identified seven topics for review, and is in the process of completing reports on each of these issues. This work is ongoing and includes

- Review of sureties' guarantees for letters of administration

An Issues Paper entitled *Dead Cert: Sureties' Guarantees for letters of administration* was released December 2012 and a Final Report entitled *Sureties' Guarantees for letters of administration* was released in August 2013.[2]

[1] Victorian Law Reform Commission, *Succession Laws Report* (2013) ix (Cummins J).
[2] See *Administration and Probate (Removal of Requirement for Surety) Amendment Act 2014* (SA).

- Wills Register: State schemes for storing and locating wills

This topic explores the question of whether there should be a public will register in South Australia. An Issues Paper, *Losing it: State schemes for storing and locating wills,* was released in July 2014. The Final Report on this topic was released in late 2016.

- *Small Estates: Review of the procedures for administration of small deceased estates and resolution of minor succession law disputes in South Australia*

An Issues Paper, *Small Fry: Administration of small deceased estates and resolution of minor succession law disputes,* was released in January 2014 and a further Consultation Paper was circulated in December 2015. This was followed by a Final Report released in December 2016.

1.7 SALRI is also looking at the complex law of Intestacy. A Discussion Paper, *Cutting the cake: South Australian rules of intestacy*, was released in December 2015. The Final Report is now being prepared and is expected to be released in early 2017.

1.8 SALRI is intending to look at the law relating to funeral instructions and the disposal of human remains and the resolution of disputes that may arise. These issues were highlighted to SALRI in its initial consultation and raise particular sensitivities, especially for Indigenous communities.[3]

1.9 SALRI also intends to look at the operation of the common law forfeiture rule in cases of homicide, drawing on work of Victorian Law Reform Commission.[4]

1.10 You can find copies of the Papers and Reports mentioned above at https://law.adelaide.edu.au/research/law-reform-institute/

Inheritance (Family Provision) Act Reference

1.11 SALRI's latest reference is topical and one that has relevance for the lives of many South Australians. It is about investigating whether the current laws that apply to the division of a person's estate upon his or her death are fair and effective and are working as is most appropriate in 2017. These laws are largely contained in the *Inheritance (Family Provision) Act 1972* (SA).

1.12 Under the current law, when a person dies with a will (or without leaving a will and their property is subject to the law of intestacy),[5] certain people within that person's family may be able to contest the will (or entitlement under the law of intestacy) if they claim that they have not been adequately provided for in the will or under the law of intestacy. While originally designed with good intentions in mind, this law has become problematic and contentious. It can produce unwelcome results in practice, particularly as modern families become more complex, family property becomes more valuable with increases in house prices and superannuation.[6] Claims

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[3] Various aspects of succession law are especially problematic for Indigenous communities. SALRI proposes to examine these issues in the context of its consideration of the law relating to the disposal of human remains and the resolution of disputes. This project will be progressed in close consultation with Indigenous communities.

[4] Victorian Law Reform Commission, *The Forfeiture Rule* (September 2014).

[5] *Inheritance (Family Provision) Act 1972* (SA) s 5(1); *Public Trustee Act 1995* (SA) s 9.

[6] These themes have emerged from the Institute's initial consultation to date. The Institute has had the benefit of discussing some of the issues with succession lawyers in consultation sessions held at Mount Gambier, Adelaide, Port Lincoln, Berri and Naracoorte on 27 June 2016 and 9 November 2016, 1 August 2016, 17 August 2016, 12 October 2016 and 9 November 2016 respectively, and with staff at the Office of the Public Trustee on 12 September 2016.

against the estate, depending on the perspective, may be viewed as justified or as opportunistic and greedy.

1.13 The concerns about the operation of family provision laws are not confined to South Australia. As the Victorian Law Reform Commission observed of these laws in Victoria:

> *'In the course of its reference, the Commission has heard a number of criticisms about the operation of family provision law in Victoria…:*
>
> *1. A belief that the current law encourages opportunistic or non-genuine claims*
>
> *2. The high legal costs in family provision proceedings and the fact that they are often borne by the estate, even where a family provision claim fails*
>
> *3. The settlement of a high proportion of claims that may not otherwise have succeeded at trial*
>
> *4. The fact that, due to the high rate of settlement, the courts have little oversight over costs in family provision matters*
>
> *5. The lack of certainty that exists in this jurisdiction and the difficulties experienced by legal practitioners when advising clients about the validity and strength of the claim*
>
> *6. The perception of some members of the public that their will can effectively be challenged by anyone, and that they do not truly have freedom to dispose of their property by will.'* [7]

1.14 SALRI is examining these and other issues in relation to family provision in a South Australian context. This Reference seeks to balance the deserving from the opportunist. This reference is designed to identify the problems or concerns with the current law, gather the views of the South Australian community about how the law can be best improved and consider alternative options implemented in other Australian jurisdictions. SALRI will provide a Report with its recommendations for the Government about how the law should be improved. This Report is due to be provided by July 2017.

Consultation Approach

1.15 SALRI is committed to conducting an inclusive and accessible consultation with the South Australian community and, in particular, with the legal profession. As Neil Rees has observed:

> *'Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies…community participation has two major purposes: to gain responses and feedback and to promote a sense of public 'ownership' over the process of law reform … consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter …'* [8]

1.16 In collaboration with the Law Society of South Australia's Succession Law Committee, SALRI commenced its public consultation on its review of the *Inheritance (Family Provision) Act 1972* in February 2017. This was facilitated through the launch of the SALRI YourSAy online consultation website [http://yoursay.sa.gov.au/decisions/looking-after-one-another/about] that contains everything you need to know about how to engage with SALRI as part of this reference. For example, the YourSAy site allows you to complete a short online survey, send us a lengthy

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[7] Victorian Law Reform Commission, *Succession Laws: Report* (2013) 99 [6.8].

[8] Neil Rees, 'The Birth and Rebirth of Law Reform Agencies', Australasian Law Reform Agencies Conference 2008, Vanuatu, 10-12 September 2008, http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf.

written submission or download plain English Fact sheets about the main issues that SALRI is exploring.

1.17 SALRI wants to hear from you about your experiences with the *Inheritance (Family Provision) Act*, or other related experiences concerning the division of property among family members. Our consultation period ends on **30 April 2017**, so get in quick with your feedback!

1.18 There are four main ways that you can be involved:

- filling out the survey on the YourSAy site http://yoursay.sa.gov.au/decisions/looking-after-one-another/about;
- by participating in one of SALRI's community roundtables to be held in Adelaide on 31 March 2017, Berri, Mt Gambier and Clare;
- sending us a written submission or letter via salri@adelaide.edu.au; or
- requesting a one-on-one meeting with a SALRI team member.

2 Broad Policy Considerations

What better way to see the gamut of domestic despair, distrust, estrangement, recrimination, spite, and the bounty of the lawyer honey pot, than through families tearing at each other in courtrooms. Wills, succession and family provisions provide the landscape for some of the spellbinding human dramas that unfold in the equity courts.

There's nothing quite like an intra-family dispute over a relatively small amount of money to stir the passions, bring out the silks and the no win, no fee speculators.[9]

2.1 The right to pass property down from one generation to the next is a central part of Australian law, and Australian culture. In particular, the family home or family farm or family business is something that parents often want to make sure is passed down to their sons and daughters, or have its value shared out amongst the most important people in their life. Inheritance law has developed a range of rules designed to make sure that this occurs legally and in line with the wishes of the deceased person (the testator).

2.2 However, legislators have also recognised that in some circumstances, it may be necessary to dilute the freedom of someone to dispose of their property as they wish and adjust these rules to make sure that deserving or dependent members of the deceased person's family are adequately provided for out of the deceased person's estate. In the late 1800s, dependents included dependent widows or orphans, and the laws dealing with family provision were designed to 'to prevent family dependants being thrown on the world with inadequate provision'.[10]

2.3 In more modern times, dependents can include children of a first marriage that may be left out of a will, children or stepchildren from a second marriage (increasingly common with modern blended families) or a family member with a physical or intellectual disability that requires ongoing financial support or care. In such circumstances it may well be up to the State (or the taxpayer) to support that child or dependent person, even if the deceased person was very wealthy, and even if the will does not seem 'fair'.

2.4 In this part of the Background Paper, we briefly outline the history of the *Inheritance (Family Provision) Act 1972* (SA) and some of the key policy tensions that have arisen in the modern application of the law. This will be followed by some specific questions for you to consider.

Policy Behind the *Inheritance (Family Provision) Act 1972* (SA)

2.5 The idea of enacting laws for the purpose of 'family provision' was a radical measure, introduced in the early 1900s in response to the injustice suffered by widows and young children who were left destitute when their husbands or fathers irresponsibly or arbitrarily exercised their absolute testamentary freedom without ensuring adequate provision for them. Family provision laws were based on the idea that the cost of maintaining, educating and supporting one's family, including one's extended family, was a moral duty that should be borne by the individual, rather than by the State, and that this could legitimately be achieved by a redistribution of the individual's estate after his death if it had sufficient assets. This was during a period in which the economic opportunities for wives or mothers, especially to secure employment, were strictly limited.

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[9] Richard Ackland, "Where's there a way, there's a chance for Wasteful Litigation', *Sydney Morning Herald* (online), 13 April 2012, http://www.smh.com.au/federal-politics/political-opinion/where-theres-a-will-theres-a-chance-for-wasteful-litigation-20120412-1wwfk.html.

[10] *Schaefer v Schuhmann* [1972] AC 572, 596 (Lord Simon of Glaisdale).

2.6 The first family provision Acts in Australia[11] were based on the landmark 1900 New Zealand Act.[12] The New Zealand Act and its Australian counterparts overrode (or least undermined) the long-established common law principle of testamentary freedom[13] which had its fullest expression in 19th century England. That principle is that competent adults (typically men in this period) could dispose of their property by will however they chose. Testamentary freedom gave property owners complete discretion to give their assets (rights to property) to whomsoever they wished by will.

2.7 Australian and New Zealand testator's family provision laws in the early 20th century placed the testamentary freedom of a person with a spouse or children within the context of certain family responsibilities, to alleviate the effects of its inappropriate use. Courts were given a discretion to change the distribution of a deceased estate in particular circumstances from what the testator had provided by will, to protect a narrow class of dependants from suffering economic hardship when a husband or father died and his will did not provide adequately for his spouse and children (assets were usually held in the name of the husband or father). The legislation recognised the partnership of the spouses[14] in a marriage and the obligations arising from that partnership in respect of the assets accumulated during the marriage.

2.8 South Australia introduced its *Testator's Family Maintenance Act* in 1918.[15] The Act aimed to achieve the social purpose of preventing the destitution of family members who would otherwise need maintenance (in those days there was no adequate social security net and very little opportunity for widows to enter the workforce and support themselves and their dependent children).[16] The rationale was that it was every citizen's moral duty to look after his or her dependants, after death as well as during life, and that married couples both contribute to their combined wealth.[17]

2.9 Over time, testators' family maintenance legislation changed to accommodate the evolving nature of the family and family obligations in relation to property owned at death. The most significant changes in Australia were in the 1970s and 1980s, widening the range of eligible claimants and allowing claims to be made in respect of assets passing under the rules of intestacy.

2.10 This approach is now reflected in the current *Inheritance (Family Provision) Act 1972* (SA).

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[11] These Acts were generally called *Testators Family Maintenance Acts,* because they applied only when the deceased had made a valid will (and could be called a 'testator') and not when the deceased had died without making a will or had made a will that was invalid or which did not dispose of all his or her assets.

[12] *Testator's Family Maintenance Act 1900* (NZ). The *Testator's Family Maintenance Act 1900* (NZ) was the first family provision legislation in the common law world. It was directed to the protection of the surviving spouse and the children of the marriage where the deceased had failed his family responsibilities by not leaving them 'due provision' in his will. See further Rosalind Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and the Political Compromise' (1990) 7(2) *Otago Law Review* 202.

[13] The basis of the proper use of testamentary freedom was explained by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549, 563-565. This classic formulation is examined in Myles McGregor–Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs' (2009) 17 *Australian Property Law Journal* 62, 63-64.

[14] South Australia, *Parliamentary Debates,* House of Assembly, 3 October 1918, 805 (Chief Secretary).

[15] *Testator's Family Maintenance Act 1918* (SA).

[16] 'A man is on an entirely different footing to a woman. When she is married the duties which devolve upon her keep her from earning her own living and she is economically dependent on the man, and she should have some protection when the husband dies, and he should not be able to will his property to whom he choses [sic] irrespective of the claims of wife and family. The purse of the married couple should be a joint purse.' See South Australia, *Parliamentary Debates,* House of Assembly, 3 October 1918, 884 (Mr Gunn).

[17] 'I think we will recognise that the property of a married couple belongs to the married couple, because both have worked in partnership to produce the result represented in the testator's estate': South Australia, *Parliamentary Debates,* House of Assembly, 3 October 1918, 805 (Chief Secretary).

2.11 While the policy basis of the 1972 Act remains influenced by the original Acts passed in the early 1900s, it now exists in the context of a comprehensive social security net, and so can no longer be said to be aimed at preventing the kind of destitution envisaged by the original family provision legislation. Reflecting this, the provisions of the current Act are no longer framed in terms of preventing the destitution of close family members who had previously relied on the deceased for financial support, but rather focus on providing for a person who could prove (a) some need for financial support in the future or for reward for past contribution to the estate or to the welfare of the deceased and (b) some personal connection to the deceased whether by blood relationship or by coming within a new wider definition of 'family' relationship.

2.12 It is important to note that while they share certain feature in common, family provision laws around Australia are not uniform. The need to improve consistency across jurisdictions was recognised by the Standing Committee of Attorneys-General, who in 1995 established a national committee in to review Australia's succession laws (including family provision laws) and to propose uniform legislation. South Australia was ultimately not represented on that committee.

2.13 The national model proposed by the committee for family provision in 2004 (the Model Bill)[18] was based on the policy that:

- all people with a strong moral claim to a share of the deceased person's estate should be entitled to apply for provision;[19]
- and that the courts should be able to exercise their discretion to make appropriate decisions regarding an applicant's entitlement to provision.[20]

2.14 Only New South Wales has relied on the Model Bill to date as the basis for changes to its family provision laws (in 2006), but it has not followed the Model Bill in all respects. The NSW changes were based on recommendations by the NSW Law Reform Commission (NSWLRC) in 2005 on the Model Bill.[21] The Victorian Law Reform Commission (VLRC) also considered the Model Bill in its review of family provision laws. The VLRC supported a more restrictive approach than that favoured by the national committee and the VLRC's 2013 Report[22] recommended changes which would incorporate only some parts of the Model Bill. Part 1V of the *Administration and Probate Act 1958* (Vic) was amended in 2014 to address these recommendations.[23] Western Australia, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory have not made substantive amendments addressing the model, and nor has South Australia.

A table outlining the key features of family provision laws across Australia is provided at **Appendix A.**

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[18] The Family Provision Bill 2004: Queensland Law Reform Commission (National Committee for Uniform Succession Laws) *Family Provision: Supplementary Report to the Standing Committee of Attorneys General,* Report No 58 (2004) 88. The Committee received various reports on family provision laws between 1997 and 2004, and in 2004 proposed draft model laws (referred to hereafter as the Model Bill) which amended the *Family Provision Act 1982* (NSW). Further discussion of this Bill and the Committee's recommendations is provided later in this Paper.

[19] New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report No 110 (2005) (referred to hereafter as the 'NSWLRC Report') Preface [0.5].

[20] Ibid.

[21] The NSWLRC Report (see above n 19) sets out the Model Bill clause by clause, commenting on each. It lists all relevant Australian legislation (see 70), and lists relevant cases (see 70). The link to the online version of this Report is <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r110toc>.

[22] VLRC, *Succession Laws: Report*, above n 7, 98-136.

[23] See Appendix 6 of the Act (this came into operation on 1 January 2015).

Policy Issues Arising From Practice

2.15 Since coming into force, the *Inheritance (Family Provision) Act 1972* (SA) and similar interstate laws have not always proved able to strike the right balance between the competing policy interests in this area. These laws have struggled to reconcile the deserving from the greedy.

2.16 In particular, in recent years, these laws have given rise to what has been described as greedy or 'opportunistic claims'. That is, claims made by family members who do not appear to be truly dependent on the testator but who seek to challenge his or her will nonetheless. Sometimes these claims are successful, but even where they are not, they can diminish the value of the testator's estate (particularly when costs are awarded (as they are often are) from out of that estate).

2.17 These claims can lead to long-lasting and expensive legal disputes among family members and cause considerable heartache and expense for all involved. Some have suggested that these types of 'opportunistic claims' reflect an increasingly litigious modern community and/or a 'culture of entitlement', particularly among adult children. Others have suggested that with rising house prices in Australian cities and suburbs and compulsory superannuation, a large proportion of elderly Australians are now dying with significant estates that provide a strong incentive for even estranged family members to contest a testator's will. SALRI has heard in its initial consultation that the current law acts as a green light to bring opportunistic and even vexatious claims.[24] It has even been described to SALRI as a charter for greed and entitlement.

2.18 The categories of family members who are eligible to make a claim for family provision may also no longer reflect the lived experience of modern families. For example, legitimate questions may be asked about whether a person's wife or ex-wife should always be considered a dependant if she is able to secure her own income. Similarly, in complex family arrangements, there could be multiple stepchildren, natural children and children of domestic partners that may have all once have been dependent upon the deceased for care or financial support.

2.19 Charities, too, may have a strong interest in ensuring that people are able to leave significant portions of their estate to charitable causes without risking challenge by family members who may not share the testator's charitable wishes. There are particular concerns that charities are disadvantaged under present law and practice.[25]

2.20 These issues have led other Australian jurisdictions to examine options for reform of their inheritance laws relating to family provision to adjust the balance between the wishes of the testator, on the one hand, and the need to protect those actually dependent upon a will-maker for economic support at the time of death on the other hand. SALRI is interested in your views on these issues.

2.21 Some specific policy tensions that you may wish to consider relate to:

- Is there an inherent moral duty to provide for your family upon your death?

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[24] SALRI has been told that not only are there claims motivated by greed or entitlement, but claims may also be motivated by malice such as settling a score with the inheriting relative and litigating to diminish the eventual inheritance.

[25] Frances Hannah and Myles McGregor-Lowndes, *From Testamentary Freedom to Testamentary Duty: Finding the Balance* (Queensland University of Technology, 2008). See Ibid I and 1: 'In recent years legal challenges to charitable bequests by testators' family members have become more common in Australia. Many charities faced with the prospect of a disputed bequest have been reluctant to pursue the matter in the courts. A review of leading reported cases involving charitable bequests in wills reveals that the courts are vigorous in upholding proper family provision as against charitable bequests, portraying this provision as based on moral obligation… A review of major reported cases shows that charities have been deprived of bequests, or had bequests substantially reduced, as a result of the primacy of family claims.'

- The rise of inter-family litigation, including the threat of litigation. This can include genuine claims, but also those designed to reduce a beneficiary's share in the deceased's estate. How should the law distinguish between the two?
- Wide eligibility for family provision claims versus testamentary freedom. There seems a public perception that a will can be challenged by anyone and a concern that the family provision laws unduly inhibit people's freedom to dispose of their property by will. Is this perception accurate? Are all appropriate family members covered? Has the right balance between struck?
- Is family provision still needed having regard to our sophisticated modern welfare state?

2.22 To assist your consideration of these issues a Table of Recent Cases decided under the *Inheritance (Family Provision) Act 1972* (SA) is provided at **Appendix B**.

2.23 **Discussion Questions**

- Should the purpose of family provision legislation be to protect dependants and prevent them from becoming dependent on the state?
- Are there wider purposes or aims that family provision laws should seek to achieve?
- To what extent should individuals be required to take responsibility, after they die, for the support of surviving dependent family members?
- Would family provision laws be more acceptable if
  - They reflected a person's *legal* responsibility to their dependents when alive?
  - They gave more weight to the testator's intentions?

3 Specific Law Reform Issues

3.1 This next section of the Background Paper describes a range of specific law reform issues upon which SALRI welcomes your feedback and comments. These are:

- Testamentary freedom;
- Who should be able to make a claim;
- What further criteria should apply to making a claim;
- Timing of claims;
- Costs; and
- Other issues, including clawback provisions and notional estates.

3.2 Specific discussion questions are included at the end of each issue. SALRI particularly welcomes any (de-identified) case study examples you may have of these issues arising in practice. Such case studied are valuable in illustrating the issues and supporting the case for potential law reform.

Testamentary Freedom

What is Testamentary Freedom?

3.3 A person's right to leave his or her property to whoever they choose is known as 'testamentary freedom'. It is a concept that has been described as a fundamental individual right, deeply connected to the right to own and dispose of property when the person is alive. As one judge famously remarked: 'The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass.'[26]

3.4 Testamentary freedom has been described as an important civil right with the ownership of property rendered incomplete if lacking the power to also bequest it as the owner wishes.[27]

3.5 In general, the law in Australia has taken as its starting point the idea that only the testator should decide how his or her estate is disposed of after death.[28] The court should not be 're-writing' a person's will, even if that will seems inconsistent, unfair, hard to understand or leaves certain family members out.[29] The common law has developed to include the principle that any power to vary a testator's will is limited only to the extent necessary to ensure adequate provision for an applicant and no more.[30] A testator's reasons cannot justly be ignored unless the evidence does not support such reasons[31] and if no error is shown, courts will only disturb a disposition if there is a 'strong or cogent' case.[32]

3.6 However, as discussed in above, legislators in Australia and other common law jurisdictions such as New Zealand and the UK have since adjusted these common law principles with laws such as

[26] *Banks v Goodfellow* (1870) LR 5 QB 549, 563 (Cockburn CJ) .
[27] *Bonyer v Wood* [2007] SASC 327 [49]–[50], [53]–[54] (Debelle, Nyland and Anderson JJ). See also *Hynard v Gavros* [2014] SASC 42 (25 March 2014); Virginia Grainer, 'Is Family Protection a Question of Moral Duty?' (1994) 24 *Victorian University of Wellington Law Review* 141, 146.
[28] *Barns v Barns* (2003) 214 CLR 169.
[29] *Barns v Barns* (2003) 214 CLR 169, [140].
[30] *Hynard v Gavros* [2014] SASC 42.
[31] *Wall v Crane* [2009] SASC 382.
[32] *Sampson v Sampson & Perpetual Executor Trustee and Agency Co (WA) Ltd* (1945) 70 CLR 576.

the *Inheritance (Family Provision) Act 1972* (SA). These laws set out certain circumstances in which a court may vary a testator's will where necessary to ensure adequate provision for eligible family members. In effect, these laws allow the court to override the will of deceased person (subject to certain requirements being met). Often the court is given a discretion – that is a relatively broad decision making window – to set aside a will and make orders for certain family members to receive portions of the estate.

Testamentary Freedom and the *Inheritance (Family Provision) Act 1972* (SA)

3.7 In recent years, there is a growing perception that courts around Australia have become more willing to use laws like the *Inheritance (Family Provision) Act 1972* (SA) to override the wishes of testators to provide for eligible family members.[33] This can occur in various situations such as where the testator leaves a substantial proportion of his or her estate to a charity, excludes children from one relationship in favour of the children from another, excludes one sibling in favour of another, or where the testator's wishes are difficult for family members to understand or explain.

3.8 Courts in these cases can be asked to make family provision orders without any knowledge of the subjective wishes of the deceased person, which may have been unknown to his or her family members. In such cases, it is difficult to 'balance' the wishes of the testator with the merits of the family provision claim.

3.9 The following three recent South Australian case studies illustrate some of these difficulties:

- In *Parker v Australian Executor Trustees Ltd*,[34] the testator was given advice about the family provisions law and still insisted on excluding certain children from the will. His will was overridden and these children, despite their modest financial circumstances, were bequeathed between $150 000 and $170 000.

- In *Hynard v Gavros*,[35] the court held that it was inappropriate for a testator to prefer the interests of a sibling over a child and awarded 55% of the estate's residue to the applicant, the testator's daughter, although she was in a better financial position than the testator's sibling.

- In *Wall v Crane*,[36] the testator's exclusion of his daughter because of the financial assistance provided during the testator's lifetime was ignored and the court held that a wise and fair-minded testator, reflecting dispassionately and free from prejudice arising from the estrangement would make provision for the daughter. This was at the expense of the other two beneficiaries, despite the superior financial position of the applicant and her husband in comparison to the beneficiaries.

3.10 These and other similar cases have led some commentators to question the significance of making a will when there is a very real chance that the person's wishes can be overruled after

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[33] See, for example, Ackland above n 9; Barbara Drury, 'Making your Last Wishes Everlasting', *Sydney Morning Herald* (online), 16 June 2015, http://www.smh.com.au/money/planning/make-your-last-wishes-everlasting-20150610-ghkt37.html.
[34] [2016] SASC 64.
[35] [2014] SASC 42.
[36] [2009] SASC 382.

they die.[37] A strong theme noted to SALRI in its initial consultation is the frustration and concern at the apparent dilution in testamentary freedom. This is consistent with wider concerns.[38]

3.11 As one recent study noted:

'In the 108 years since their introduction in New Zealand, family provision laws have had their influence extended through judicial interpretation and active promotion of the priority of family claims on a testator's estate as part of public policy. Testamentary freedom, although never completely dominant in English law, is now seriously challenged in Australia.'[39]

3.12 In other Australian States and Territories, reforms have been recommended that would limit the classes of family members who would be eligible to make a family provision claim, and to impose more narrow criteria as to who is eligible to make a claim.[40]

3.13 **Discussion Questions**

- To what extent should the law implement the wishes of the testator as expressed in a valid will?
- Should there be any exceptions where the law should intervene to improve the fairness of the will?

Who should be able to make a Claim?

Who can make a claim under the current South Australian law?

3.14 A relatively wide class of persons are eligible under s 6 of the *Inheritance (Family Provision) Act 1972* (SA) to make a claim for family provision under the Act. This includes the deceased person's child, grandchild, husband or wife, ex husband or wife, or domestic partner (this includes heterosexual or non-heterosexual couples who live together for at least three years or have a child together or who have registered their relationship). A parent or sibling of the deceased person may also be able to make a claim, provided he or she also satisfies the court that they cared for, or contributed to the maintenance of, the deceased person during his lifetime. Similarly, a stepchild of the deceased person may be able to make a claim, but only if the deceased person was practically or legally responsible for the stepchild's care.

3.15 As discussed below, a person in one of these categories will not automatically be entitled to part of the deceased person's estate. They must first meet the other criteria prescribed by the Act.

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[37] See, for example, Ackland, above n 9; Drury, above n 33; Mark Minarelli and Russell Jones, 'Family Provision Claims in South Australia' (Summer Report, DW Fox Tucker, 2016) 19.

[38] See, for example, Ackland above n 9; Drury, above n 33; Renee Viellaris, 'Kids Fight for Your Cash as Legal Squabbles among Families Eat into Estates', *The Courier Mail* (online), 13 April 2013, http://www.couriermail.com.au/news/queensland/kids-fight-for-your-cash-as-legal-squabbles-among-families-eat-into-estates/story-e6freoof-1226619468014; Shane Rogers, 'Sense of entitlement at the fore in estate-draining battle of wills', *The Australian* (online), 8 April 2015, http://www.theaustralian.com.au/business/legal-affairs/sense-of-entitlement-at-the-fore-in-estatedraining-battle-of-wills/news-story/7fdfe6f25e819b62a86e8fdabcf011c7.

[39] Hannah and McGregor-Lowndes, above n 25, 1.

[40] See, for example, VLRC, *Succession Laws: Report,* above n 7, recommendations 38-40.

3.16 A number of law reform questions arise from these categories of eligible family member. Some of these are outlined below.

Adult children

3.17 One issue arising is whether competent adult children should be given automatic eligibility or whether they should be subject to an extra criteria of dependence first.

3.18 Under the current law, adult children who are competent and self-supportive are automatically eligible to make a family provision claim, just like children under the age of eighteen.

3.19 Some commentators have highlighted the unsatisfactorily high incidences of claims made by financially secure adult children.[41] Others have said that the inclusion of adult, self-sufficient children is contrary to the policy aims of family provision laws. It is argued, for example, that the ongoing obligations in marriage-like relationships should remain distinct from the obligations to children which should end once they are self-supporting.[42]

3.20 The notion of an automatic eligibility for financially secure adult children is questionable. The community is likely to only expect parents to provide a buffer for adult children *when* they fall on hard times or if they *lack* the resources to meet ill health or advancing years.[43] This implies a further criteria of need or dependency for competent adult children.[44]

3.21 A review of judicial cases in South Australian from 2000 until 2016 reveals that a vast majority of applicants (18 out of 23 cases) were competent adult children between the ages of 42 and 76.[45] Among the 18 cases, there is evidence that a portion were made up of financially independent adult children. For example:

- In *Fennell v Aherne,*[46] one of the plaintiffs had enjoyed long-term employment and accumulated reasonable assets, was receiving a permanent pension, and his wife was securely employed. Another plaintiff was more financially successful with a secure well-paid job and an estate bigger than the testator's estate. However, the court still found that both plaintiffs had been left without adequate provision and awarded them $10 000 each out of a $162 659 estate.

- In *Hellwig v Carr*,[47] Withers J doubted whether the testator's failure to provide was sufficient to find jurisdiction due to the plaintiff's wealthy position. However, his Honour

[41] See, for example, Justice R N Chesterman, 'Does Morality Have a Place in Applications for Family Provision brought pursuant to s41 of the *Succession Act 1981'* (Speech delivered at the QLS Annual Succession Law Conference, Sunshine Coast, 1 November 2008) 15, http://archive.sclqld.org.au/judgepub/2008/chesterman011108.pdf; Samantha Renwick, 'Responsibility to Provide: Family Provision Claims in Victoria' (2013) 18(1) *Deakin Law Review* 159, 173; McGregor–Lowndes and Hannah, above n 13, 78; Rosalind Croucher, 'Succession Law Reform in NSW – 2011 Update' (Speech delivered at the Blue Mountains Annual Law Conference, Katoomba, 17 September 2011), https://www.alrc.gov.au/news-media/2011/succession-law-reform-nsw-2011-update.

[42] *Fennell v Aherne* [2005] SASC 280 (22 July 2005) [40] (Withers J) citing *In re Sinnott* [1948] VLR 279, 280 (Fullagar J)

[43] *Parker v Australian Executor Trustees Ltd* [2016] SASC 64 (1 June 2016) [28] (Lovell J) citing *Taylor v Farrugia* [2009] NSWSC 801 (5 June 2009) [57]–[58] (Brereton J) and *MacGregor v MacGregor* [2003] WASC 169 (28 August 2003) [179] (Templemen J). See also *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147 (Gibbs CJ) cited in *Fennell v Aherne* [2005] SASC 280 (22 July 2005) [13] (Withers J).

[44] See also Renwick, above n 41, 161; Atherton, above n 12, 205.

[45] See **Appendix 2** for an overview of cases decided under the South Australian Act from 2000 to 2016.

[46] [2005] SASC 280 (22 July 2005) See in particular [50]-[56].

[47] [2009] SASC 117 (1 May 2009) [69] (Withers J).

departed from the testator's wishes and still awarded the plaintiff $7500 out of the $130 000 estate for the purpose of meeting any unexpected contingencies.

3.22 The above outcomes are consistent with empirical studies and public trustee reviews which estimate that over half of family provision claims were brought by competent adult children, most between the ages of 45 and 70.[48] About one-third were described as 'financially comfortable adults just wanting more'.[49]

Proof of prior maintenance, contribution or care of deceased

3.23 Contested family provision disputes in Australia often involve claims by a person other than the surviving spouse (and in South Australia possible claimants can include divorced spouses, domestic partners, registered partners and children or grandchildren of the deceased). For some claimants, standing to make a claim or achieving a successful result depends on proof of prior maintenance by or contribution to or care of the deceased in his or her lifetime. Claimants' assertions on these issues are disputed by those who would otherwise stand to inherit, and litigation is often the result.

What about in other States and Territories?

3.24 Efforts have been made by law reform bodies around Australia to develop a standard list of categories of eligibility to make a family provision application. For example, the National Committee for Uniform Succession Laws has suggested that the list should only include the following family members:

- a person who was the wife or husband of the deceased person at the time of the deceased person's death
- a person who was the de facto partner (similar to 'domestic partner' in South Australia) of the deceased person at the time of the deceased person's death
- a non-adult child of the deceased person (defined as a person who was under the age of 18 at the time of the deceased person's death; including natural and adopted children, but not stepchildren)
- a person to whom the deceased person owed a responsibility to provide maintenance, education or advancement in life.

3.25 A broader approach has been taken in New South Wales, where, in addition to the list above, grandchildren of the deceased person are included, as are:

- a member of the deceased person's household who was, at any time, wholly or partly dependent on the deceased person, and
- a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

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[48] Drury, above n 33; Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, *Having the Last Word? Will Making and Contestation in Australia* (Project No 10200891, University of Queensland, 2015) 3, 17; Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia: Review of Public Trustee Files* (Project LP11020089, 2014) 7; Ben White et al, 'Estate Contestation in Australia: An Empirical Study of a Year of Case Law' (2015) 38(3) *University of New South Wales Law Journal* 880, 896.
[49] White et al, above n 48, 901.

3.26 However, under the NSW model, the court may only make an order in favour of this second group of applicants if there are 'factors warranting the making of the application' *and* 'at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both'.[50]

3.27 Victoria modified its approach in 2014 as a result of the recommendations in the VLRC Final Report (and which came into operation on 1 January 2015). The new model is set out in the rewritten Part IV of the *Administration and Probate Act 1958* (Vic). There is a new definition of 'eligible person' in s 90. This definition gives automatic status to

(a) a person who was the spouse or domestic partner of the deceased at the time of the deceased's death;

(b) a child of the deceased, including a child adopted by the deceased who, at the time of the deceased's death, was—

(i) under the age of 18 years; or

(ii) a full-time student aged between 18 years and 25 years; or

(iii) a child with a disability;

(c) a stepchild of the deceased who, at the time of the deceased's death, was—

(i) under the age of 18 years; or

(ii) a full-time student aged between 18 years and 25 years; or

(iii) a stepchild with a disability;

(d) a person who, for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and was treated by the deceased as a natural child of the deceased who, at the time of the deceased's death, was—

(i) under the age of 18 years; or

(ii) a full-time student aged between 18 years and 25 years; or

(iii) a child with a disability;

(e) a former spouse or former domestic partner of the deceased if the person, at the time of the deceased's death—

(i) would have been able to take proceedings under the Family Law Act 1975 of the Commonwealth; and

(ii) has either—

(A) not taken those proceedings; or

(B) commenced but not finalised those proceedings; and

[50] *Succession Act 2006* (NSW) s 59. See also *Succession Act 2006* (NSW) s 57.

(iii) is now prevented from taking or finalising those proceedings because of the death of the deceased;

(f) a child or stepchild of the deceased not referred to in paragraph (b) or (c);

(g) a person who, for a substantial period during the life of the deceased, believed that the deceased was a parent of the person and was treated as a natural child of the deceased not referred to in paragraph (d); ...

3.28 All other eligible persons (subsections (h) to (k) of s 90) have to meet further criteria of dependence (s 91(2)(b)) and all claimants must demonstrate the deceased had a moral duty to provide for the claimant's proper maintenance and support (s 91(2)(c)) and that the distribution of the deceased's estate fails to make adequate provision for such (s 91(2)(d)). There are also criteria to be satisfied in determining the amount of provision to be made (s 91(4)), and these incorporate different criteria depending on the claimant's category of 'eligible person'. Section 91A sets out the factors which must be considered by a court in making a family provision order.

3.29 SALRI is interested in your thoughts on what are the appropriate categories of family members to be included within the *Inheritance (Family Provision) Act 1972* (SA), keeping in mind the other eligibility criteria discussed below.

3.30 **Discussion Questions**

- Do you think all or only some family members should be able to make a family provision claim?
- Is a simple eligibility list (like that proposed by the National Committee) the way to go, or should some categories of family members only be eligible in certain circumstances (such as the NSW approach)?
- What categories of family members should be eligible *in all circumstances*?
  - Current spouses or domestic partners of the deceased?
  - Former spouses or domestic partners of the deceased?
  - Non-adult children? Natural, adopted or step?
  - Grandchildren?
  - Other dependents?
  - Other categories - please describe
- What categories of family members should be eligible *in certain circumstances*?
  - Current spouses or domestic partners of the deceased?
  - Former spouses or domestic partners of the deceased?
  - Non-adult children? Natural, adopted or step?
  - Grandchildren?
  - Other dependents?
  - Other categories - please describe

What Further Criteria, if Any, Should Apply?

What other criteria apply to eligible family members seeking to make a family provision claim in South Australia

3.31 As noted above, laws like the *Inheritance (Family Provision) Act 1972* (SA) were originally designed to ensure that deceased persons did not leave dependent family members inadequately provided for and totally dependent on the State. For this reason, the idea of 'dependence' lies at the policy heart of these laws and is reflected in South Australia in s 7 of the Act. This provision requires a claimant (that falls within one of the s 6 categories) to show that he or she was ***left without adequate provision for his or her proper maintenance, education or advancement in life.***

3.32 If this threshold is met, then the court *may* (but does not have to) make an order that the claimant receive a proportion of the deceased person's estate to provide for the claimant's maintenance, education or advancement of the person.

3.33 The High Court has described this as 'two stage' process.[51] The first step is work out whether the claimant has been left with 'adequate provision' for his or her 'proper maintenance, education or advancement in life'. These terms are not defined in the Act, and the meaning has to be understood by looking at the various cases in which the courts have considered this provision.

3.34 If the answer is no to the first question, the second step is for the court to decide what 'adequate provision' will be. This involves having regard to all relevant circumstances in the individual case, which could include the relationship between the deceased person and the claimant, and the deceased person and his or her other family members who may be provided for in the will. It could also involve looking at the property and income of the claimant, and/or the size of the deceased's estate.

3.35 This has led some commentators to take the view that in practice these laws have given way to a culture of entitlement among family members, rather than a need to demonstrate genuine dependency. Rather than real need, the focus is on what is a family member's 'share'. Others have suggested that 'dependency' tests for family provision claims encourage a culture of 'bludging' off wealthy parents or grandparents in order to satisfy a dependency test upon their death.

3.36 Some of these perceptions have arisen from the court's interpretation of the words 'adequate' and proper' and approach to the concept of moral duty.[52] These terms have become increasingly problematic. Several issues have arisen from the court's interpretation of the words 'adequate' and proper' and approach to the concept of moral duty.

3.37 The court's approach of this provision differs depending on which of the following distinct[53] but relative terms[54] are emphasised: 'adequate' or 'proper'. 'Adequacy' implies an objective consideration of the applicant's financial need to determine the basic level of support necessary

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[51] See, for example, *Singer v Berghouse* (1994) 181 CLR 201, 209-210.

[52] 'Maintenance' means a continuity of pre-existing state of affairs, while 'support' and 'advancement in life' similarly imply a provision beyond bare need or the necessities of life. See *Vigolo v Boston* (2005) 221 CLR 191, 228–229 [115] (Callinan and Heydon JJ) cited in *Pizimolas v Pizimolas & Zannis* [2010] SASC 158 (28 May 2010) [69] (Kourakis J).

[53] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476 cited in *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [18] (Lovell J).

[54] *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [20] (Lovell J).

to live a sustainable lifestyle without being a burden on the State.[55] 'Proper' implies a more flexible and subjectively moral or ethical approach.[56] What is adequate may not be proper in regard to the applicant's station in life and testator's wealth.[57]

3.38 Courts have increasingly accepted over recent years the ethical approach as the correct approach. In *Brennan v Mansfield*,[58] for example, despite acknowledging the applicant's extensive assets of up to $2.11 million, substantial salary and generous pension (all of which would be capable of supporting the applicant's current lifestyle), the court still found that the testator's bequest of $100 000 was inadequate to support the lifestyle that the applicant was used to. The applicant was awarded $1 million from the testator's $2.5 million estate with an additional $900 000 from the residue of the deceased's estate.

3.39 The word 'proper' has also been interpreted as including the question of whether the testator had a 'moral duty' to provide for the applicant.[59] Despite the absence of 'moral duty' in the South Australian Act, the concept of moral duty has become an important element in the courts' reasoning process in family provision claims.[60] However, its inclusion is not universally accepted by the High Court.[61]

3.40 A review of judicial cases indicate that courts may have taken the concept of moral duty beyond what many commentators and members in the community would consider to be appropriate. For example, courts have found breaches of moral duties solely upon the testator's own neglect or disinterest in the applicants during their childhood.[62] In *Drioli v Rover,* the court found that despite the lack of contact, the testator's self-supporting daughters had a moral claim because more could have been expected from the testator, especially during the early years when the daughters moved out into marriage and child-bearing.[63]

3.41 The above analysis suggests that when a liberal interpretation of what is 'proper' and what is within a 'moral duty' is adopted, courts may be willing to interfere with a testator's wishes, thus almost guaranteeing applicants a high chance of success once they are eligible. An analysis of recent South Australian cases shows that 22 out of 23 cases were successful at increasing the amount of provision awarded.[64] This is consistent with other research. A recent study found a 74% success rate in judicial case reviews and 77 % success rate in Public Trustee file reviews across Australia.[65]

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[55] See, for example, Chesterman, above n 41; Renwick, above n 41, 173; McGregor–Lowndes and Hannah, above n 13, 78; Croucher, above n 41.
[56] *Hynard v Gavros* [2014] SASC 42 [30] (Master Dart).
[57] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476 cited in *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [18] (Lovell J).
[58] [2013] SASC 83 (6 June 2013).
[59] *Vigolo v Boston* (2005) 221 CLR 191, 228–231 (Callinan and Heydon JJ) cited in *Kozlowski v Kozlowski* [2013] SASC 57 (24 April 2013) [24] (Peek J).
[60] *Vigolo v Boston* (2005) 221 CLR 191, 204-205 (Gleeson CJ) cited in *Kozlowski v Kozlowski* [2013] SASC 57 (24 April 2013) [23] (Peek J). See also Chesterman, above n 41; Grainer, above n 27, 144.
[61] *Drioli v Rover* [2005] SASC 395 (24 October 2005) [134] (Perry CJ). See further Chesterman, above n 41.
[62] See Grainer, above n 27, 144.
[63] [2005] SASC 395 (24 October 2005) [157]–[159] (Perry CJ).
[64] See **Appendix 2** for an overview of cases decided under the South Australian Act from 2000 to 2016
[65] Cheryl Tilse et al, 'Having the Last Word', above n 48, 3, 17.

What about in other States and Territories?

3.42 Efforts have been made by law reform bodies around Australia to develop standard eligibility criteria to apply to family provision claims, and to set out in detail the factors to which the court should have regard when exercising its discretion to make an order.

3.43 Victoria, for example, takes a more restrictive approach than South Australia. Under the Victorian *Administration of Probate Act 1958*, in order to be eligible for a family provision order, an eligible family member must satisfy the court that (a) he or she was wholly or partly dependent on the deceased for his or her proper maintenance and support and (b) that at the time of death, the deceased had a moral duty to provide for his or her proper maintenance and support.

3.44 When considering whether to make an order under the Victorian Act, the court *must* take into account the following factors (set out in s 91A):

- the degree to which, at the time of death, the deceased had a moral duty to provide for the claimant; and
- the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the claimant; and
- in the case of certain categories of family members, such as adult children and step children, the degree to which the claimant is not capable, by reasonable means, of providing for his or herself.

3.45 In addition, the Victorian Act provides that the court *may* have regard to a range of factors (set out in ss 91 and 91A) including:

- the deceased person's reasons for making the dispositions he or she did in the will;
- any other evidence of the deceased's intentions in relation to providing (or not providing) for certain family members;
- any family or other relationship between the deceased and the claimant, including the nature of the relationship; and if relevant, the length of the relationship;
- any physical, mental or intellectual disability of any eligible family member or any beneficiary of the estate;
- the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of any eligible family members or any beneficiary of the estate;
- any contribution of the claimant in building up the estate or taking care of the deceased or his or her family;
- the character and conduct of the claimant or any other person;

3.46 SALRI is interested in your thoughts on the appropriate criteria that should apply to determining claims to family provision under the South Australian *Inheritance (Family Provision) Act 1972* (SA), keeping in mind the categories of family members discussed above.

3.47 **Discussion Questions**

- Should more detailed criteria be applied to those seeking to make family provision claims in South Australia?
- Is the current South Australian approach, which provides the court with a broad discretion to make an order in favour of an eligible person, appropriate or should the law set out the factors to which the court must and may have regard?
- Should South Australia require claimants to show dependence on the deceased person? If so, how should 'dependence' be defined?
- Do you think including a dependence requirement risks encouraging dependence on the deceased person during their lifetime, in order to benefit after their death?

Timing of Claims

Time frames for making family provision claims

3.48 Under s 8 of the *Inheritance (Family Provision) Act 1972* (SA), the general rule is that claims for family provision must be made within six months from the date of the grant of probate.

3.49 Different time frames apply in other States and Territories in Australia.[66] For example, the Australian Capital Territory, Northern Territory and New South Wales providing twelve months to make a claim, whereas only three months is provided in Tasmania.

3.50 Most States and Territories measure the time period for family provision applications as starting from the date of the grant of probate, except New South Wales and Queensland, where time begins to run at the date of the death of the testator.

3.51 The court has the power to extend the time limit for making an application in all Australian jurisdictions, and will consider each individual case on its merits, having regard to matters including the strength of the claim, the length of the time delay, the amount of estate which remains undistributed and the motives of the applicant in applying for an extension of time.

3.52 However, seeking an extension of time may be of limited practical benefit in South Australia. This is because once the deceased's estate has been fully distributed (that is, allocated to each of the beneficiaries in the will) a person is precluded from making a family provision claim. Typically, the distribution of a deceased's estate will occur relatively soon after the grant of probate. This type of restriction does not apply in New South Wales or Western Australia.

3.53 SALRI is interested in your views on whether these rules governing the time frames for making a family provision claim in South Australia are appropriate.

3.54 **Discussion Questions**

- Is the current six-month time frame, with extensions available through the court, appropriate for family provision claims in South Australia?

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[66] *Family Provision Act 1969* (ACT) s 9(1) (12 months after grant of probate); *Family Provision Act 1970* (NT) s 9(1) (12 months after grant of probate); *Succession Act 2006* (NSW) s 58(2) (12 months after the date of death of the testator); *Succession Act 1981* (Qld) s 41(8) (nine months after date of death of the testator); *Inheritance (Family Provision) Act 1972* (SA) s 8(1) (six months after grant of probate); *Testator's Family Maintenance Act 1912* (Tas) s 11 (three months after grant of probate); *Administration and Probate Act 1958* (Vic) s 99 (six months after grant of probate); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7(2) (six months after grant of probate).

- Is the date of grant of probate the appropriate date from which to commence time limits for making family provision claims, or would the date of death be more appropriate?
- Is it appropriate for a family provision claim to be precluded by the full distribution of the deceased estate, or should a claim still be able to be made within a reasonable time after death or the grant of probate?

Costs

3.55 Legal practitioners who practise in the area of succession law give advice on many potential claims for family provision. They help clients to reach settlement of their claims by negotiation. They advise if there appears no basis for a claim. They advise on costs. They assist the final resolution of claims, both pre-trial and at trial. Anecdotal evidence from both practitioners and the Supreme Court in South Australia is that most family provision claims do not proceed to trial. The records of the South Australian Supreme Court show that there were about 320 claims lodged pursuant to the family provision legislation in the last five years.

3.56 There is, however, concern about what are perceived as greedy and opportunistic claims (which inevitably receive media attention) and about perceptions that there is more value in continuing to litigate rather than to settle a family provision claim. Claims brought or treated this way disrupt the administration of the deceased's estate, and have the potential to cause family disharmony and high legal costs, particularly if the claim does end up in court.

3.57 For many commentators and lawyers who express concern that the current family provision laws have shifted too far in favour of opportunistic family members, and too far away from preserving testator's intentions, costs is a critical issue.[67]

3.58 This is because when the costs associated with a person making a claim for family provision come out of the deceased's estate (which they generally do in practice), there is encouragement for eligible family members to make a claim, even if they do not have strong grounds (or could be described as a 'speculative claim').

3.59 For example, imagine an adult son who was estranged from his mother for ten years before his mother's death and was excluded from his mother's will, which instead left the mother's entire estate to her daughter who faithfully cared for her in old age. The adult son may even be financially comfortable. If the costs come out of the deceased mother's estate, this son could still make a claim for family provision under the Act without any financial risk to himself. Even if the son's claim is weak or tenuous, the daughter or the executor of the mother's estate may decide to settle the son's claim (sometimes known as 'go away money') with costs coming out of the estate, rather than risk the stress and uncertainty of taking the claim to court and a potential large costs award later down the track.

3.60 The financial side of running a dispute for any length of time often plays a large factor in the parties reaching a compromise.[68] Even without the cost pressures, 'litigation fatigue' is often observed by lawyers whereby the sheer length of time a case takes to resolve, often accompanied by the emotional stresses of the action, often lead to the parties resolving the dispute on their

[67] Tilse et al, 'Having the Last Word?, above n 48, 17; VLRC, *Succession Laws: Report,* above n 7, 99; Drury, above n 33.
[68] See, for example, Tilse et al, 'Having the Last Word', above n 48, 17-18; VLRC, *Succession Laws: Report*, above n 7, 99 [6.8], 100-102 [6.13]-[6.20].

own terms without the need for the court to determine the matter.[69] All too often, the stress and large costs of a case going to court, and the uncertain outcome, are such that the claim will be settled out of court, even if the claim may seem greedy or unfounded. Succession lawyers have confirmed to SALRI in its initial consultation this is a strong theme in succession claims.

3.61 If the case proceeds to court, even if the claimant is ultimately unsuccessful and ordered to pay their own costs, the estate will usually still be reduced by the costs associated with the 'personal representative' (that is the executor original or administrator of the will) in defending the claim.

3.62 Other costs related issues have been described as 'disproportionate costs'. That is, circumstances where a successful claim for family provision is made, and a proportion of the estate ordered to the eligible family member along with a large costs order which also comes out of the estate. This can leave very little left in the estate for those family members or other beneficiaries originally provided for by the testator.

Costs in South Australia

3.63 Under the *Inheritance (Family Provision) Act 1972* (SA) the 'Court may make such order as to the costs of any proceeding under this Act as it considers just'.[70] The costs rules that apply are those that apply to any civil claim[71] because the Act does not contain costs provisions specific to family provision claims. Despite this, the kinds of costs orders that courts have made in family provision cases have often been different from the orders that they have made in other kinds of civil claim.

3.64 In *Singer v Berghouse (No 2)*, for example, Gaudron J confirmed the then unusual costs practice in this area:

> *Family provision cases stand apart from cases in which costs follow the event. Leaving aside cases under the [Family Provision Act 1982 (NSW)] which, in s 33, make special provision in that regard, costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applicants, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicants' financial position. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate.*[72]

3.65 However, there remains a strong concern that the courts may order costs against the deceased estate for unsuccessful family provision claims. In addition, the costs of the administrator of the estate, who is often to defend a family provision claim, will ordinarily come from the deceased estate. In some cases, even settling early will not prevent the costs involved having an unfair effect on the beneficiaries of the estate as, the costs of the administrator are generally ordered to be paid out of the estate. SALRI has been widely informed in its initial consultation that, whatever case law, rules or practice directions might strictly provide, the general rule[73] is that costs (including of the claimant) will come out of the estate in relation to succession disputes, especially where such cases are settled (as the vast majority are). This is said to even further encourage opportunist claims.

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[69] See, for example, Tilse et al, 'Having the Last Word', above n 48, 17-18; VLRC, *Succession Laws: Report,* above n 7, 102-103 [6.23]-[6.24]; McGregor–Lowndes and Hannah, above n 13, 63.
[70] *Inheritance (Family Provision) Act 1972* (SA) s 9(8).
[71] *Supreme Court Civil Rules 2006* (SA).
[72] (1993) 114 ALR 521, 522.
[73] Indeed, a succession lawyer in initial consultation advised SALRI that this happens in '99.9%' of cases.

3.66 The South Australian rules of court relating to proceedings under the *Inheritance (Family Provision) Act 1972 (SA)* also give powers to the court to determine claims with an estimated value below $500 000 summarily[74] where 'it is in the interests of justice to do so' and to make costs orders against parties who could have used this procedure but did not do so and thereby incurred avoidable costs.[75] The primary object of a family provision order made summarily is 'the minimisation of costs and an expeditious but just resolution of the action'.[76]

3.67 There is a strong public interest in promoting access to justice and addressing high legal costs, especially in succession disputes. The need to address high legal costs and develop more flexible, efficient and effective ways to progress and resolve civil disputes, especially succession disputes, in South Australia and elsewhere, has been widely raised.[77] There have been particular concerns about the potentially high and disproportionate costs in resolving succession disputes.[78] The importance of addressing legal costs and supporting and promoting access to justice for all parties in the resolution of succession disputes (especially for small estates) is obvious. The professional role of lawyers involved in succession disputes and advising clients is important in both promoting access to justice and addressing legal costs.

3.68 SALRI notes the strong view expressed to it in its consultation that the size or value of an estate does not necessarily denote its complexity or the likelihood of litigation. Indeed, it was pointed out to SALRI that some of the most difficult estates to administer and intractable succession disputes that arise are not in relation to large estates, but small estates. This theme also emerges from wider research.[79] As one study notes, '[t]o a large degree, the data indicates that smaller estates generate at least as much, if not more, controversy than large estates.'[80]

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[74] *Supreme Court Civil Rules 2006*, r 312(12).
[75] Ibid r 312(13).
[76] Ibid r 312(12A)(d).
[77] See, for example, Chief Justice Tom Bathurst, 'Opening Address' (Speech delivered at the 2011 Advanced Alternative Dispute Resolution Workshop, Sydney, 13 August 2011) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst130811.pdf/$file/Bathurst130811.pdf>; Chris Merritt, 'Middle Australia excluded as court costs put "justice out of reach"', *The Australian* (online), 18 May 2012 <http://www.theaustralian.com.au/business/legal-affairs/middle-australia-excluded-as-court-costs-put-justice-out-of-reach/story-e6frg97x-1226359315208>; Candice Keller, 'Justice beyond the Mean of Most as Legal Costs Double', *The Advertiser* (online), 15 July 2012, <http://www.adelaidenow.com.au/news/south-australia/justice-beyond-the-means-of-most-as-legal-costs-double/story-e6frea83-1226426669650>; Community Law Australia, *Unaffordable and Out of Reach; the Problem of Access to Justice* (Community Law Australia, 2012); Miles Kemp, 'DIY Justice as South Australian Legal Costs too much of many', *The Advertiser* (online), 21 October 2013, <http://www.adelaidenow.com.au/news/south-australia/diy-justice-as-south-australian-legal-costs-too-much-for-many/story-fni6uo1m-1226743505317>.
[78] See, for example, Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011); Justice Bergin, 'Executors/Trustees and Mandatory Mediations' (Paper presented at the proceedings of the Society of Trust and Estate Practitioners in the Banco Court of the NSW Supreme Court, 25 November 2009, [6]-[9], <http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/Pre-2015%20Speeches/Bergin/bergin251109.pdf>; Renee Viellaris, 'Kids Fight for Your Cash as Legal Squabbles among Families Eat into Estates', *The Courier Mail* (online), 13 April 2013, <http://www.couriermail.com.au/news/queensland/kids-fight-for-your-cash-as-legal-squabbles-among-families-eat-into-estates/story-e6freoof-1226619468014>.
[79] See, for example, Jeffrey Schoenblum, 'Will Contests: an Empirical Study' (1987) 22 *Real Property, Probate and Trust Journal* 607; Vines, above n 78: Tilse et al, Having the Last Word? , above n 48, 17; Shane Rodgers, 'Today, where there's a will, there's a way to fight over it', 10 April 2015, *The Australian* (online), <http://www.theaustralian.com.au/business/legal-affairs/today-where-theres-a-will-theres-a-way-to-fight-over-it/news-story/759dd1c335c4fe78ab068bc930a990a2>.
[80] Schoenblum, above n 79, 615.

Mediation and Conciliation

3.69 Part of the solution to the concerns around costs, and the impact costs may have on a potential claimant's decision to commence or pursue a claim, could lie in reforms that encourage and support mediation and conciliation as means of resolving inheritance disputes.

3.70 Both Judges and Masters in South Australia are already actively involved in mediation and seeking to resolve succession disputes, especially in small estates. The Supreme Court encourages the settlement of claims under the *Inheritance (Family Provision) Act 1972* (SA) and assists parties to achieve settlement. The Court conducts many mediations in succession estates disputes and such mediation is swiftly available and has a very high success rate.[81]

3.71 Providing options for disputes to be resolved through mandated mediation or conciliation could be a vehicle for address some of concerns able relating to costs. There may be procedural and other changes which might further facilitate the cost effective and timely resolution of succession law disputes.

3.72 SALRI is interested in your thoughts on appropriate time frames for making family provision claims in South Australia, and on the issue of how costs should be awarded. SALRI raises if there is a need for any changes in relation to the provisions governing costs in family provision claims and, if so, is it preferable that such change are made by statute, Court Rules or Practice Direction?

Alternative Options for Costs

3.73 There has been concern at existing practices in relation to costs in succession cases.[82] A range of law reform options have been identified to help alleviate the above concerns relating to costs in family provision claims.

3.74 One approach is to adopt a simple 'loser pays' rule, which would mean that an unsuccessful claimant would bear the costs of both parties to the proceedings. This would provide a disincentive to those otherwise considering speculative or opportunist claims, but it may be too harsh for those claimants who are genuinely deserving and/or may genuinely consider that they have a dependency on the deceased, such as adult children with disabilities, but to whom the court ultimately declines to exercise its discretion in favour.

3.75 Another approach is to make family provision claims 'no cost', however this is likely to encourage, rather than discourage, speculative and opportunistic claims and could place considerable pressure on the administration of justice in the courts.

3.76 A hybrid approach has been pursued in Victoria, which has a specific provision to protect 'personal representatives' of the estate (eg: executors or administrators) from costs orders in family provision claims (see *Administration and Probate Act 1958* (Vic) 99A). This provision goes some way towards protecting the deceased estate from speculative claims and would allow personal representatives to resist settlement offers in favour of a final outcome in court.

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[81] Letter from Chief Justice to South Australian Law Reform Institute dated 29 September 2016.

[82] See, for example, *Burgess v Field* [2014] SASC 98 (Kourakis CJ).

3.77 **Discussion Questions**

- Is there a need for any changes in relation to the provisions governing costs in family provision claims and, if so, is it preferable that such change are made by statute, Court Rules or Practice Direction?
- Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?
- Could judicial mediation and/or conciliation help to resolve these disputes and avoid costly litigation? If so, what reforms should be made to facilitate this?
- What further measures might be taken to support the Court in encouraging resolution, discouraging opportunistic claims and addressing legal costs?

Other Issues: Clawback Provisions and Notional Estate

What is a 'notional estate' and what do 'clawback' provisions do?

3.78 In most States and Territories, including South Australia, it is possible to avoid the application of family provision laws such as the *Inheritance (Family Provision) Act 1972* (SA) if, before the person dies, he or she gives away, or otherwise disposes of, his or her property.[83] This apparently is not unusual. The VLRC was 'told that people commonly deal with their property before they die so that little of it remains in their estate and the way in which they choose to distribute their property cannot be challenged under family provision legislation.'[84]

3.79 However, the NSW law allows a court to treat property that was disposed of prior to death in order to avoid family provision claims, as part of the person's estate when they died. In other words, a house or car or shares give to son A by his father could be included by the court as part of the father's 'notional estate' when making family provision orders in favour of son B after the father's death. So, too, could more complex transactions like shifting property into superannuation, setting up family trusts and holding property as a joint tenant with another.

3.80 These laws are sometimes called 'clawback' provisions or 'anti-avoidance' provisions because their purpose is to allow the court to 'claw back' property disposed of by a testator in his/her lifetime or where a testator fails to take a step to ensure that property over which a testator has control in his/her lifetime becomes an asset of his/her estate.

3.81 Under these laws, the person who received the property from the person prior to death will no longer have any rights to that property, if the court orders that it be given to a successful family provision claimant.

3.82 However, the court must consider a range of factors before it makes orders concerning a deceased person's notional estate, including having regards to the importance of not interfering with reasonable expectations in relation to property, the substantial justice and merits involved in making or refusing to make an order, and any other relevant matters.

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[83] See, for example, Sylvia Villios, 'Will drafting – clarifying the scope of the duty owed by a solicitor to a client and to the intended beneficiaries in Australia' (2016) *Legal Ethics* 1-3.

[84] Victorian Law Reform Commission, *Succession Laws: Consultation Paper - Family Provision* (2012) 30 [2.69].

3.83 The NSW model also set out in some detail what types of property transactions fall under the umbrella of 'notional estate' (for example see *Family Provision Act 1982* (NSW) s 22(1)). The time when a prescribed transaction takes effect is an important consideration.

Should South Australia consider clawback provisions as part of its family provision laws?

3.84 The National Committee for Uniform Succession Laws has recommended that provisions be implemented based on the previous NSW clawback laws[85] to ensure that the primary object of the family provision laws (that is, to provide for dependent family members) cannot be frustrated by people disposing of all of their property immediately prior to their death.

3.85 However, other reform bodies such as the Victorian Law Reform Commission (the VLRC) received mixed views about the way in which people should be permitted to deal with their property while they are still alive. In its review of the relevant family provision laws in Victoria, the VLRC noted that '[t]here are many reasons why a person may deal with their property in a certain way during their lifetime, including to minimise tax and to provide for their family during their lifetime. The Commission does not have any evidence that people are dealing with their assets during their lifetime in order to deprive their family of provision or inheritance.'[86] The VLRC was unconvinced in the absence of clear evidence to the contrary of the need for a NSW style law.[87]

3.86 A law such as the NSW clawback model would dilute the concept of testamentary freedom, the testator's ability to dispose of his or her property as they wish whether during or after their lifetime.

3.87 SALRI is interested in your views on this topic, and in particular on the extent to which people currently deal with their assets to minimise property in their estates and thereby frustrate the operation of family provision laws.

3.88 **Discussion Questions**

- To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?
- Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

[85] *Family Provision Act 1982* (NSW) ss 21-29, now replaced by the *Succession Act 2006* (NSW) Pt 3.3.
[86] VLRC, *Consultation Paper - Family Provision,* n 84, 33 [2.89].
[87] Ibid 33 [2.92].

4 Summary List of Discussion Questions

What is the Policy behind family provision in inheritance law?

Should the purpose of modern family provision laws be to protect dependants and prevent them from becoming dependent on the state?

Are there wider purposes or aims that family provision laws should seek to achieve?

To what extent should individuals be required to take responsibility, after they die, for the support of surviving family members or other individuals who may be dependent on the deceased financial or otherwise? Does the age of the family member or other dependent matter?

Would family provision laws be more acceptable if:

- They reflected a person's legal responsibility to their dependents when alive?
- They gave more weight to the testator's intentions?

Testamentary Freedom

To what extent should the law fully implement the wishes of the testator (the person who makes the will) as expressed in a valid will?

Should there be any exceptions where the law should intervene to improve the fairness of the will?

If so, what should be the exceptions where the law should intervene to improve the fairness of the will?

Who should be able to make a claim?

Do you think all or only some family members should be able to make a family provision claim?

Is a simple eligibility list (like that proposed by the National Committee) the best solution, or should some categories of family members only be eligible in certain circumstances (such as the NSW approach)?

What categories of family members should be eligible in all circumstances?

Current spouses or domestic partners of the deceased?

- Former spouses or domestic partners of the deceased?
- Non-adult children? Natural, adopted or step?
- Grandchildren?
- Other dependents?
- Other categories - please describe.

What categories of family members should be eligible in certain circumstances?

- Current spouses or domestic partners of the deceased?
- Former spouses or domestic partners of the deceased?
- Non-adult children? Natural, adopted or step children?
- Grandchildren?
- Other dependents?
- Other categories - please describe.

What further criteria, if any, should apply?

Is the current South Australian test for eligibility for potential family provision orders (that asks whether the claimant has been left without adequate provision for proper maintenance, education or advancement in life) still appropriate?

Should more detailed criteria be applied to those seeking to make family provision claims in South Australia?

Is the current South Australian approach, which provides the court with a broad discretion to make an order in favour of an eligible person, appropriate or should the law set out the factors to which the court must and may have regard?

Should South Australia require claimants to show dependence on the deceased person? If so, how should 'dependence' be defined?

Do you think including a dependence requirement risks encouraging dependence on the deceased person during their lifetime, in order to benefit after their death?

Timing of claims and costs

Is the current six month time frame, with extensions available through the court, appropriate for family provision claims in South Australia?

Is the date of grant of probate the appropriate date from which to commence time limits for making family provision claims, or would the date of death be more appropriate?

Is it appropriate for a family provision claim to be precluded by the full distribution of the deceased estate, or should a claim still be able to be made within a reasonable time after death or the grant of probate?

Is there a need for any changes in relation to the provisions governing costs in family provision claims and, if so, is it preferable that such change are made by statute, Court Rules or Practice Direction?

Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?

Could judicial mediation and/or conciliation help to resolve these disputes and avoid costly litigation? If so, what reforms should be made to facilitate this?

What should be the role of judicial mediation in helping resolve these disputes?

What further measures might be taken to support the Court in encouraging resolution, discouraging opportunistic claims and addressing legal costs?

Notional Estate and Clawback Provisions

To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?

Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

Appendix A: Table of Family Provision Laws in Australia (Eligible Applicants and Discretionary Factors)

JURISDICTION	LIST OF ELIGIBLE APPLICANTS	GROUNDS OF CRITERIA
South Australia *Inheritance (Family Provision) Act 1972*	s6 (a) Spouse (b) Former spouse (ba) Domestic partner (c) Children (g) Stepchildren (including of former domestic partners) if they were maintained wholly or partly or legally entitled to be maintained wholly or partly by the deceased immediately before his death (h) Grandchildren (i) Parents if they cared for, or contributed to the maintenance of the deceased during his lifetime (j) Siblings if they cared for, or contributed to the maintenance of the deceased during his lifetime	s7(1)(b): If the applicant is left without adequate provision for his proper maintenance, education or advancement in life, the Court may order such provision as the Court thinks fit out of the deceased's estate for the applicant's maintenance, education or advancement in life.
Victoria *Administration and Probate Act 1958*	s90 (a) Spouse or domestic partner (b) Children (including adopted) if under 18 OR full-time student between 18-25 OR disabled child (c) Stepchildren if under 18 OR full-time student between 18–25 OR disabled child (d) Person who for a substantial period of deceased's life, believed deceased was parent and was treated as such– if under 18 OR full-time student between 18–25 OR disabled child (e) Former spouse/domestic partner if at the time of the deceased's death, they could have taken proceedings under the *Family Law Act 1975* (Cth) (f) Child / stepchild not referred to in (b) and (c) (g) Person who for a substantial period of deceased's life, believed deceased was parent and was treated as such (h) Registered caring partner of deceased (i) Grandchild (j) Spouse or domestic partner of deceased's child where child dies within one year of deceased's death (k) Person who was a member of the deceased's household	s91A(1): in making a family provisions order, the Court must have regard to: (a) The deceased's will (b) Deceased's reasons for making dispositions (c) Deceased's intentions to providing for applicant s91A(2): the court may have regard to the following criteria: (a) Relationship between deceased and applicant (b) Obligations or responsibilities of deceased to applicant, other applicants and beneficiaries (c) Size and nature of estate (d) Financial resources, including earning capacity and financial needs of applicant and beneficiary of estate (e) Any physical, mental or intellectual disability of applicant or beneficiary of estate (f) Age of applicant (g) Contribution of applicant to estate or welfare of deceased or deceased's family (h) Benefits previously given by deceased to applicant or beneficiary (i) Whether applicant maintained by deceased before deceased's death (j) Liability of any other person to maintain applicant (k) Applicant's character and conduct (l) Effect of family provision order on amounts received from deceased's estate by other beneficiaries (m) Any other relevant matter

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		s92(2)(c)–(d): Applicants from (h)–(k) must have been wholly or partly dependent on the deceased for their maintenance and support, AND at the time of death, the deceased had a moral duty to provide for the applicant's proper maintenance and support, AND his distribution of his estate failed to make adequate provision for the proper maintenance and support of the applicant s92(4): Court may take into account the degree: (a) of moral duty the deceased had at the time of death (b) to which the distribution of the deceased's estate failed to make adequate provision for the proper maintenance and support of the applicant (c) to which the applicant is not capable, by reasonable means, of providing adequately for his own proper maintenance and support — for applicants from (f)–(g) (d) to which the applicant was wholly or partly dependent on the deceased at the time of the deceased's death for their proper maintenance and support — for applicants (h)–(k) s92(5)(b): for applicants (h)–(k), the definition of 'eligible person' must be proportionate to the applicant's degree of dependency on the deceased
Western Australia *Family Provision Act 1972*	s7(1) (a) spouse or domestic partner (b) former spouse or domestic partner who at the time of the deceased's death was receiving or entitled to receive maintenance from the deceased (c) child (including children born within 10 months after the deceased's death) (d) grandchild if maintained wholly or partly by the deceased OR one of the parents was the deceased's child and had predeceased the deceased OR if born within 10 months after the deceased's death and one of the parents was the deceased's child and had predeceased the deceased (e) stepchild if maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased OR where deceased received or was entitled to receive property from estate of the stepchild's parent above the prescribed value. (f) Parents, if relationship was admitted by deceased or established in lifetime of deceased (g)	s6(1): if the disposition of the deceased's estate does not make adequate provision for the proper maintenance, support, education or advancement in life of any of the person mentioned in s7, the Court may order such provision as the Court thinks fit out of the deceased's estate.

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New South Wales *Succession Act 2006*	s57(1) (a) Spouse (b) Domestic partners (c) Children (s57(2):including adopted children, children born in a de facto relationship by virtue of *Status of Children Act 1996* and a child for whose long-term welfare both parties have parental responsibility by virtue of *Children and Young Persons (Care and Protection) Act 1998*)) (d) Former spouse (e) Person who was wholly or partly dependent on the deceased AND was a grandchild OR a member of the deceased's household (f) Person in a close personal relationship with the deceased at the time of the deceased's death	s59(1)–(2): if adequate provision for the proper maintenance, education or advancement has not been made for the applicant, the court may make such order for provision out of the estate s60(1)–(2): in determining whether to make a family provision order, the Court may have regard to: (a) Relationship between applicant and deceased (b) Obligations or responsibilities owed by deceased to applicant (c) Nature and extent of deceased's estate (d) Financial resources and financial needs of applicant (e) Financial circumstances of person applicant is cohabitating with (f) Physical, intellectual or mental disability of applicant (g) Age of applicant (h) Any contribution by applicant to the deceased's estate or welfare (i) Any provisions for the applicant by the deceased (j) Evidence of deceased's testamentary intentions (k) Whether applicant was maintained, wholly or partly, by the deceased (l) Whether any other person is liable to support applicant (m) Character and conduct of applicant (n) Character and conduct of any other person (o) Relevant Aboriginal or Torres Strait Islander customary law (p) Any other relevant matter
Northern Territory *Family Provision Act*	s7(1) (a) Spouse or de facto partner (b) Former spouse or de facto partner – must be maintained by deceased before deceased's death (c) Child (d) Stepchild – must be maintained by deceased before deceased's death (e) Grandchild – if parent was a child of the deceased had had predeceased the deceased OR grandchild was not maintained by parent or parents at time of deceased's death (f) Parent – if maintained by deceased immediately before deceased's death OR deceased was not survived by spouse, de facto partner or any children	s8(1): if adequate provision is not available from the estate of the deceased for the proper maintenance, education and advancement in life of the applicant, the court may order such provision as fit out of the estate of the deceased. s22: the court shall have regard to the testator's reasons for making the dispositions.
Australian Capital Territory *Family Provision Act 1969*	s7(1) (a) Partner (b) Person in domestic relationship with deceased for 2 or more years continuously (c) Child (d) Stepchild – must be maintained by the deceased immediately before the deceased's death	s8(2): the court shall make an order if adequate provision for the proper maintenance, education or advancement in life of the applicant is not available. S8(3) – criteria for decision under subsection (2): (a) Applicant's character and conduct

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	(e) Grandchild – if parent of grandchild was child of deceased and had predeceased the deceased OR grandchild was not maintained by parent or parents at time of deceased's death (f) Parent - if maintained by deceased immediately before deceased's death OR deceased was not survived by partner or any children	(b) Relationship between applicant and deceased (c) Financial and non-financial contributions by either or both applicant and deceased to the property or financial resources or either or both persons (d) Any contributions by applicant or deceased to welfare of another or of child of either person (e) Income, property and financial resources of applicant and deceased (f) Applicant and deceased's physical and mental capacity for gainful employment (g) Financial needs and obligations of applicant and deceased (h) Responsibility of either applicant and deceased to support any other person (i) Terms of any order under the *Domestic Relationships Act 1994* (j) Any payments to either the applicant or deceased by the other in respect of the maintenance of the other person or child of other person (k) Any other relevant matter s22: the court shall have regard to the testator's reasons for making the dispositions
Tasmania *Testator's Family Maintenance Act 1912*	s3A (a) Spouse (b) Children (c) Parents, if deceased dies without leaving spouse or children (d) Former spouse, if receiving or entitled to receive maintenance from the deceased (e) Person whose significant relationship with deceased, within meaning of *Relationships Act 2003*, had ceased before date of deceased's death and who was receiving or entitled to receive maintenance from the deceased	S3(1): if applicant is left without adequate provision for his proper maintenance and support, the court may order such provision as the court, having regard to all the circumstances of the case, thinks proper out of the deceased's estate. s7: in fixing the amount of provision, the court shall have regard to the net value of the estate and whether any such person is entitled to independent means s8a: the court may have regard to the deceased's reasons for making the dispositions and the court may accept such evidence of those reasons as it considers sufficient
Queensland *Succession Act 1981*	s41: spouse s40: child = any child, stepchild or adopt child s40: dependent = any person who was being wholly or substantially maintained or supported by the deceased being: (a) Parent of deceased (b) Parent of surviving child under 18 of deceased (c) Person under 18 S40A: stepchild = person is the child of deceased's spouse AND the deceased person and the stepchild's parent has not divorced	41(1): if adequate provision is not made for the proper maintenance and support of the deceased's spouse, child or dependent, the court may order such provision as it thinks fit out of the deceased's estate. S41(1A): the court shall not make an order for dependent unless satisfied is if proper some provision is made for the dependent, having regard to the extent to which the dependent was maintained or supported by deceased and the dependent's need for continue maintenance and support

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Appendix B – Cases Decided Under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2016

	Case	Relationship of Plaintiff/s to Deceased	Value of Estate	Outcome	
				Application granted	Application dismissed
2016	*Butler v Tiburzi* [2016] SASC 108	Adult daughter (aged 67)	$1 567 950.55	The plaintiff was granted $725 000.	
2016	*Parker v Australian Executor Trustees Ltd* [2016] SASC 64	Five adult children (aged between 57 and 63) Most of the estate had been left to the defendant for charitable purposes.	$1 173 250.17	The plaintiffs were granted $75 000, $175 000, $150 000, $150, 000 and $185 000 respectively.	
2015	*Carter v Brine* [2015] SASC 204	Domestic partner	$3 924 000.00		The plaintiff had been left with life interests in the deceased's principal residence, a French townhouse and an English apartment. The Court ruled that she had not been left without adequate provision for her proper maintenance, education or advancement in life.
2015	*Broadhead v Prescott* [2015] SASC 34	Adult children (aged between 61 and 63)	$333 423.81	Each plaintiff to obtain a provision out of the estate in the amount of $47 500	
2015	*Daniel v Van Zwol* [2015] SASCFC 38	Adult son (aged 66) The will provided that he would not receive any part of the deceased's estate because he had never repaid the value of another property of the deceased's that he had received earlier.	$326 761.12	The deceased's reason for excluding the plaintiff from any provision from her estate was held to be incorrect and the plaintiff was awarded equal shares with the other beneficiaries.	
2014	*Hynard v Gavros* [2014] SASC 42	Adult daughter (aged 49)	$372 000	The plaintiff would receive an amount equal to 55% of the residue of the deceased's estate.	
2013	*Kozlowski v Kozlowski* [2013] SASFC 112	Adult son (aged 42)	$275 000	The adult son is entitled to half of three quarters from the proceeds of the sale of the property.	

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2013	*Brennan v Mansfield* [2013] SASC 83	Domestic partner	$2.5 million	The plaintiff is to receive the sum of $1 000 000, with an additional $900 000 from the residue of the deceased's estate.	
2013	*R (Plaintiff) v Bong* [2013] SASC 39	Domestic partner Whether the plaintiff and the deceased were domestic partners so as to enable the plaintiff to seek an order for provision out of the deceased's estate.		The plaintiff was found to be a domestic partner from January 1989 – March 1990 and was so entitled to make an application for provision out of the deceased's estate.	
2011	*Cavallaro v Cavallaro* [2011] SASC 123	Adult son (aged 76)	$310 000	The plaintiff's right of residence of the home property to be converted to a life interest, and the plaintiff's one-quarter interest in the home property to be converted immediately into cash ($75 000)	
2010	*Pizimolas v Pizimolas & Zannis* [2010] SASFC 34	Adult son (aged 47)	$650 000	Adult son would receive a legacy of $100 000 and one-third of the residue of the estate.	
2009	*Hellwig v Carr* [2009] SASC 117	Adult children (aged 43 to 61)	$130 000	The four plaintiffs received $30 000, $30 000, $20 000, and $7 500 respectively.	
2009	*Whitington v Whitington* [2009] SASC 142	Wife	$202 547	The plaintiff would be entitled to 60.8% of the net proceeds from the sale of the estate	
2009	*Wall v Crane* [2009] SASC 382	Two separate claims by deceased's adult daughter (aged 52) and deceased's grandson. The will provided that the deceased's daughter would not receive any provision because financial assistance and adequate provision had been given to them during the deceased's lifetime	$ 1 138 978.24	The deceased's daughter would receive $160 000 from the residual estate The deceased's grandson would receive $50 000	

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2007	*Bowyer v Wood* [2007] SASC 327	Adult daughter (aged 48) Appeal against the trial judge's order to dismiss the application because the Plaintiff had already received gift of $77 464 along with substantial financial assistance from the deceased during his lifetime. Furthermore, the plaintiff and her husband were self-supporting.	$1.2 million	The plaintiff would receive $200 000 borne out of the legacy to the charities and siblings of the testatrix.	
2006	*Armalis v Kasselouris* [2006] SASC 198	Adult daughter with severe disabilities (aged 50)	$390 000	Plaintiff's legacy of $40 000 increased to a one-half-share of the net estate	
2005	*Fennell v Aherne* [2005] SASC 280	Three adult sons and one adult daughter – all estranged from the deceased (aged 41 to 53)	$162 659.60	Plaintiffs would receive $10 000, $10 000, $25 000, and $25 000 respectively.	
2005	*Drioli v Rover* [2005] SASC 395	Two estranged adult daughters (aged 45 to 48)	$443 337.16	One daughter would receive $125 000 and the other $75 000	
2004	*Lock v Tower Trust Limited* [2004] SASC 96	Adult son (aged 60) Appeal from a Master's order to award $40 000 on the basis that it was inadequate.	Under $200 000		Appeal dismissed.
2003	*Barns v Barns* [2003] 214 CLR 169	Adult daughter (aged 46) Whether a deed excluding the plaintiff from the estate is valid		Order that the deed should be set aside	
2003	*McGuffie v Korcynski* [2003] SASC 178	Whether grandchildren could apply for provision when there is a dispute to the paternity of the plaintiffs' mother.			Plaintiffs excluded as eligible applicants
2002	*Delisio v Santoro* [2002] SASC 65	Application by adult daughters (aged 52 and 46) and counterclaim by one adult son (aged 51)	$206 730.65	$15 000 each for the plaintiffs and counterclaimant	
2000	*Carraill v Carraill* [2000] SASC 55	Application by adult son (aged 51) and counterclaim by adopted grandchildren	1.7 million	Adult son would receive the deceased's estate and interest in a particular plot of land absolutely. The adopted grandchildren would receive $10 000 each.	

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