

Chapter 7

FAMILY PROVISION

701 Introduction

Family Provision applications were once referred to as Testator's Family Maintenance or TFM claims¹ but for many years have been known as Family Provision applications.

In New South Wales, the *Succession Act*² provides the court with the jurisdiction to order 'adequate provision for the proper maintenance, education or advancement in life' for a person who has not been adequately provided for by a deceased under a will or on intestacy.³

In determining Family Provision applications, the Act provides a statutory scheme which includes when an application can be made, matters to be considered by the court, other possible applicants and interim orders.⁴

The High Court has applied, under the statutory scheme, a two-stage process in its considerations: determining whether the applicant has not received adequate provision for proper maintenance and support (the jurisdictional question) and what provision, if the provision is found inadequate, that ought be made for the applicant.⁵

Eligible applicants⁶ may apply for a Family Provision order in relation to an estate or notional estate⁷ of a deceased person. Notional estate means property designated as notional estate by the court⁸ and is property which would have been part of the deceased's estate if it had, or had not, been dealt with by the deceased in a particular way.⁹ Notional estate orders may be made where property of an estate has been distributed, where an estate is affected by a relevant property transaction¹⁰ and where property of a deceased transferee's estate is

-
1. Being the name of the Act which originally introduced these rights (see *de Groot & Nickel* [1.5]).
 2. Chapter 3, *Succession Act* 2006 (throughout this chapter referred to as the *Succession Act*) commenced on 1 March 2009 replacing the *Family Provision Act* 1982.
 3. See s 59, *Succession Act*.
 4. See ss 59–62, *Succession Act*.
 5. See *Singer v Berghouse* [1994] HCA 40; see also *Vigolo v Bostin* [2005] HCA 11. In New South Wales, the continuing relevance of the two-stage process has been questioned, see *Andrew v Andrew* [2012] NSWCA 308.
 6. See s 57, *Succession Act* and [702].
 7. See s 3(1), *Succession Act*.
 8. See ss 78–86, *Succession Act*.
 9. See *Galt v Campagnon: Re Estate of John Galt* (unreported, NSWSC, Einstein J, 4668/95, 12 March 1998).
 10. See s 74, *Succession Act*; and see s 75 (relevant property transactions), s 76 (examples of relevant property transactions) and s 77 (when relevant property transactions take effect).

held by a legal representative or has been distributed.¹¹ The court may make an order designating property as notional estate only where the estate of the deceased is insufficient to satisfy a Family Provision claim or certain costs orders.¹²

For a detailed discussion of the notional estate provisions see *de Groot & Nickel* [2.50]–[2.56].

Instructions for a solicitor to act in these matters may arise as follows:

1. A client is dissatisfied with the terms of the will of a deceased and wishes to ‘dispute’ the will, if possible, or is dissatisfied with the statutory distribution of the estate of a deceased intestate and wishes to dispute that distribution – discussed at [702]–[719.2].

2. A solicitor is acting for a personal representative in the administration of a deceased estate and in the course of so acting an application is served on the personal representative – discussed at [720]–[721.2].

3. A client is a beneficiary under a will or under the estate of a deceased intestate and an application is served on the client – discussed at [722].

4. A parent or guardian of a minor instructs a solicitor to protect the minor’s interests:

(a) where the minor is a beneficiary under a deceased estate and a claim has been made against the estate under chapter 3 of the Act – discussed at [723]–[723.1];

or

(b) where such parent or guardian believes that adequate provision for the maintenance of the minor has not been made by the deceased from the deceased’s estate – discussed at [724]–[725].

5. A client is the holder or recipient of actual or potential notional estate (eg. by way of a distribution or superannuation entitlement) and has been joined as a defendant by an applicant who seeks provision out of that notional estate – discussed at [726].

6. A client has been joined by an existing defendant who seeks contribution out of actual or potential notional estate held by the client – discussed at [726].

Turning now to these situations:

11. See ss 79–82, *Succession Act*.

12. See s 78, *Succession Act*.

708.1 *Any family or other relationship between the plaintiff and the deceased person, including the nature and duration of the relationship*

708.1.1 *The family relationship should be identified with related information, as appropriate. For example:*

1. *Widows/widowers simpliciter (whether first or subsequent)*
 - (a) date of marriage and number of years married to the deceased;
 - (b) if a co-habitation or prenuptial agreement has been entered into, are its provisions relevant?⁶⁹
 - (c) brief history of the marriage including:
 - (i) any periods of separation and details of any proceedings past or present between the proposed applicant and the deceased;
 - (ii) details of any children of the marriage and any special care or attention they require/required (see [708.7] for details that may be relevant in this context);
 - (d) details of the relationship between the deceased and the proposed applicant – and see [708.1.2].⁷⁰ The ‘broad general rule’ is that a widow be secure in her home, have income sufficient for her accustomed lifestyle and a fund for contingencies.
2. *Former wife or husband*
 - (a) date of divorce from the deceased;
 - (b) whether s/he has been receiving or was entitled to receive maintenance from the deceased at the time of the deceased’s death;
 - (c) has there been a property settlement and, if so, what were the terms?
 - (d) what are the ‘factors warranting’ the making of the application?⁷¹

69. See *Singer v Berghouse* (1994) 181 CLR 201; *Neil v Jacovou* [2011] NSWSC 87.

70. See also *Churton v Christian* (1988) 13 NSWLR 241; 12 Fam LR 386. *Helmore v Helmore* [2007] QSC 345.

71. See [702.1].

3. *De facto spouse*

If a de facto relationship:⁷²

- (a) details of the time and circumstances surrounding the establishment of the de facto relationship;⁷³
- (b) details of the relationship, addressing the definition of a de facto relationship as set out in s 21C, *Interpretation Act* 1987;
- (c) confirmation of its continuance at the time of the deceased's death; and
- (d) details which may establish that the proposed applicant was being wholly or substantially maintained or supported by the deceased (otherwise than for full valuable consideration):⁷⁴
 - consider matters referred to at [708.2](2), with the necessary changes.

4. *Person living with deceased at the time of the deceased's death in a close personal relationship*⁷⁵

- (a) details of the time and circumstances surrounding the establishment of the close personal relationship;
- (b) nature of the close personal relationship;
- (c) confirmation of its continuance at the time of the deceased's death;
- (d) what are the factors warranting the making of the application?⁷⁶

5. *Minor children*

- (a) name, age and date of birth;
- (b) consider appropriate person to act as tutor.⁷⁷

6. *Grandchild*

- (a) details of child of deceased through which grandchild relationship is established;
- (b) when was the grandchild wholly or partly dependent on the deceased?
- (c) details of the nature and length of dependency;

72. 'De facto partnership' includes same-sex couples (s 21C, *Interpretation Act* 1987).

73. See *Piras v Egan* [2006] NSWSC 328.

74. As to which, see *de Groot & Nickel* [4.12]–[4.22].

75. See [702](6).

76. See [702.1].

77. See *de Groot & Nickel* [7.28].

(d) what are the factors warranting the making of the application?⁷⁸

7. *If eligibility arises from a person being or having been a member of the household of which the deceased was a member*

(a) details of the time and circumstances in which membership of the household arose;

(b) duration of membership of the household;

(c) details of the nature and length of dependency;

(d) what are the factors warranting the making of the application?⁷⁹

708.1.2 Relationship with the deceased

Details of the history and quality of the relationship between the proposed applicant and the deceased.⁸⁰

(a) If the relationship has been poor, what were the reasons for that?

(b) If there has been an estrangement:⁸¹

(i) details of its duration;

(ii) reasons behind it – caused/maintained by the deceased?⁸² and

(iii) any reconciliation(s) and if so when?⁸³

Bare paternity does not necessarily preclude an order for Family Provision in favour of an applicant,⁸⁴ nor does estrangement combined with hostility by the applicant to the deceased.⁸⁵

708.2 The nature and extent of any obligations or responsibilities owed by the deceased person to the plaintiff

1. *Station in life*

(a) The lifestyle which the proposed applicant has enjoyed.⁸⁶

(b) The influence of the deceased on such lifestyle (if any). For example, a child may have undertaken study with the support and encouragement of the deceased.⁸⁷

78. See [702.1].

79. Ibid.

80. See *Re Jennings* [1940] GLT 546, cf *Re Crewe* [1956] NZLR 315; *Re Calder* [1950] GLR 465.

81. See generally *de Groot & Nickel* [2.10].

82. See *Riches v Holdman* [2001] WASC 321.

83. See *Cooper v Dungan* (1976) 50 ALJR 539; *Walsh v Perpetual Trustee Co* (1992) ACL Rep 395 VIV 15.

84. See *Nicholls v Hall* [2007] NSWCA 356.

85. See *Foley v Ellis* [2008] NSWCA 288.

86. See *Luciano v Rosenblum* (1985) 2 NSWLR 65 at 69.

87. See *Re Adams* [1967] VR 881.

- (c) Has the proposed applicant based his/her lifestyle on the expectancy of receiving a share of the deceased's estate? If so, why?⁸⁸
2. *Deceased's maintenance or support of the proposed applicant, whether direct or indirect*
- (a) Details of support, maintenance or assistance (financial or otherwise) given by the deceased before death to the proposed applicant.
- The deceased may have made contributions to the proposed applicant of a financial and personal nature, or may have:
- (i) worked free of charge for the proposed applicant, whether in a business or domestic capacity;
 - (ii) made gifts or loans to the proposed applicant;⁸⁹
 - (iii) established a trust under which the proposed applicant was a beneficiary or a potential beneficiary; or
 - (iv) provided rent-free accommodation, annual vacations and the like.⁹⁰
- (b) Whether such support, maintenance or assistance was for valuable consideration paid by the proposed applicant to the deceased.⁹¹
- (c) Did the deceased indirectly support the proposed applicant, eg. by paying his/her children's school fees, vacations and the like?

708.3 *The nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered*

708.3.1 *The value and location of the estate of the deceased*

Details, value and location of the assets and liabilities of the estate of the deceased. Again, care should be taken to ensure that the details are accurate and the values realistic. The true value of the estate is a matter of fundamental importance in every application.⁹²

88. *Hughes v National Trustees, Executors and Agency Co of Australia Ltd* (1979) 143 CLR 134 at 148; 53 ALJR 249 at 254.

89. See *de Groot & Nickel* [2.14].

90. See *Re Beaumont* [1980] 1 All ER 266; *Jelley v Iliffe* [1981] 2 All ER 29.

91. As to which, see *de Groot & Nickel* [2.7].

92. See *Blore v Lang* (1960) 104 CLR 124 at 138.