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Family Provision – Courts Overriding Wills

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While all reasonable care has been taken by the author in presenting this publication, the content, statements and issues raised in this paper are by way of general observation as to the law in a summary form and does not seek to address all legal issues comprehensively and does not constitute advice by the author in relation to any particular circumstances which may either directly or indirectly relate to the issues of law addressed in this paper.

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About the Presenter

The presenter at this seminar will be The Honourable Matt Foley. Matt is a practising Brisbane barrister and mediator admitted in 1983. He is also admitted to the High Court of New Zealand.

He served as Attorney-General of Queensland in 1995-96 in the Goss government and again from 1998 to 2001 in the Beattie government. He introduced Queensland's first legislation to provide for the property rights of de facto couples *(Property Law Amendment Act* 1999) and the landmark *Guardianship and Administration Act* 2000 to enhance access to justice for persons with a decision-making incapacity.

He has appeared in a number of leading cases including *Hoch v R* (1988) 165 CLR 292 (High Court - similar fact evidence), *Aldridge v Booth* (1988) 80 ALR 1 (Federal Court - sexual harassment), *Allen's Asphalt P/L v. SPM Group P/L* [2010] 1 Qd R 202 (Queensland Court of Appeal -caveat) and *Gill v New Zealand Home Bonds Limited* [2014] NZCA 506 (NZ Court of Appeal - contract for financing of sale of land).

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The Nature of a Family Provision Application

Consider the case of four young children under six years of age. They are left penniless when their sole parent dies leaving all the estate to some worthy cause such as the Lady Gaga Appreciation Society. In such a case, the children (through a litigation guardian) could make a Family Provision Application under Section 41 of the *Succession Act* 1981. This empowers a Court to make provision for the children out of the estate of the deceased parent, whatever the Will says, even in the case of intestacy.

"SUCCESSION ACT 1981 - SECT 41

41 Estate of deceased person liable for maintenanc*e*

(1) If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.

(1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.

(2) The court may:

- *(a) attach such conditions to the order as it thinks fit; or*
- *(b) if it thinks fit by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or*
- *(c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.*

(3) The incidence of the payment or payments ordered shall, unless the court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the court.

(4) *The court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.*

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

(6) *Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.*

(7) *The personal representative or the public trustee or the chief executive of the department in which the Child Protection Act 1999 is administered, or any person acting as the litigation guardian of a person under a legal incapacity, may apply on behalf of a person under a legal incapacity in any case where such person might apply, or may apply to the court for advice or directions as to whether the person ought so to apply; and, in the latter case, the court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.*

(8) *Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made.*

(9) *A person who, if a declaration of paternity were made upon the person's application under the provisions of the Status of Children Act 1978, would be entitled to make an application under this part may make an application under this part but such application shall not be proceeded with until the person has obtained a declaration of paternity under that Act; and the court may give such directions and act as it thinks fit to facilitate the making and determination of all necessary applications on behalf of that person under that Act and this part.*

(10) *Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.*

(11) *No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the court.*

(12) *Where any sum of money or other property is received by any person as a donatio mortis causa made by the deceased person that sum of money or that other property shall be treated for the purposes of this part as part of the estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that donatio mortis causa.*"

It is worthy of note that Australasia has led the world in reform of this area. New Zealand in 1900 introduced provisions to limit a testator's unfettered right to dispose of property by Will. The New Zealand legislation was consolidated in 1908. In 1914 the Queensland Parliament enacted the *Testator's Family Maintenance Act* which is the forerunner of the current legislation. It is significant to note that this statutory power for Courts is only a century old.

This statutory power for Courts to override a will is a very significant intrusion on the freedom of testators to dispose of their property as they see fit. Like all discretionary great power, it must be exercised with care.

Who may apply for a Family Provision Order?

Section 41(1) of the *Succession Act* 1981 provides that such an application may be made by "*the deceased's person's spouse, child, or dependant*".

Spouse

The definition of "*spouse*" in Section 5AA includes husband or wife, de facto partner, or civil partner:

> ***SUCCESSION ACT 1981 - SECT 5AA***
> ***5AA Who is a person's spouse***
> *(1) Generally, a person's spouse is the person's—*
> *(a) husband or wife; or*
> *(b) de facto partner, as defined in the Acts Interpretation Act 1954 (the AIA), section 32DA; or*
> *(c) registered partner, as defined in the AIA, schedule 1.*
> *(2) However, a person is a spouse of a deceased person only if, on the deceased's death—*
> *(a) the person was the deceased's husband or wife; or*
> *(b) the following applied to the person—*
> *(i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;*
> *(ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased's death; or*
> *(ba) the person was the deceased's registered partner; or*
> *(c) for part 4, the person was—*
> *(i) a person mentioned in paragraph (a), (b) or (ba); or*
> *(ii) the deceased's dependant former husband or wife or registered partner.*
> *(3) Subsection (2) applies—*
> *(a) despite the AIA, section 32DA(6) and schedule 1, definition spouse; and*
> *(b) whether the deceased died testate or intestate.*
> *(4) In this section—*
> *dependent former husband or wife or registered partner, of a deceased person, means—*
> *(a) a person who—*
> *(i) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and*
> *(ii) had not remarried or entered into a registered relationship with another person before the deceased's death; and*
> *(iii) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased; or*
> *(b) a person who—*
> *(i) was in a registered relationship with the deceased that was terminated under the Relationships Act 2011, section 19; and*

(ii) had not married or entered into another registered relationship before the deceased's death; and
(iii) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased.

It is interesting to note in regard to a family provision claim from the de facto partner that the definition in Subsection 5AA(2) applies despite the definition of spouse in Section 32DA(6) of the *Acts Interpretation Act* 1954:

> *"(6) In an Act enacted before the commencement of this section, a reference to a spouse includes a reference to a de facto partner as defined in this section unless the Act expressly provides to the contrary."*

Child

The term "*child*" is defined in Section 40:

> *"child means, in relation to a deceased person, any child, stepchild or adopted child of that person."*

The term "*step-child*" is defined Section 40A:

> *SUCCESSION ACT 1981 - SECT 40A*
>
> *40A Meaning of stepchild*
>
> *(1) A person is a stepchild of a deceased person for this part if:*
>
> *(a) the person is the child of a spouse of the deceased person; and*
>
> *(b) a relationship of stepchild and step-parent between the person and the deceased person did not stop under subsection (2).*
>
> *(2) The relationship of stepchild and step-parent stops on the divorce of the deceased person and the stepchild's parent.*
>
> *(3) To remove any doubt, it is declared that the relationship of stepchild and step-parent does not stop merely because:*
>
> *(a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or*
>
> *(b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died"*

It is important to note that the relationship of step-child and step-parent stops on the divorce of the deceased's person and the step-child's parent. The relationship of step-child and step-parent does not stop, however, merely because the step child's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died.

Consider the following scenarios. John marries Mary who has a son, Tom to a previous relationship. If John dies then Tom still is a step-child to John even if Tom's mother, Mary had previously died. If, however, John and Mary have divorced prior to John's death then Tom is no longer a step-child of John because of Section 40A(2) and so Tom is not eligible to claim for family provision under Section 41.

Dependant

The term "*dependant*" is defined in Section 40 of the *Succession Act*:

> *"dependant means, in relation to a deceased person, any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death being:*
>
> *(a) a parent of that deceased person; or*
>
> *(b) the parent of a surviving child under the age of 18 years of that deceased person; or*
>
> *(c) a person under the age of 18 years."*

A family provision application by a dependant differs from that of a spouse or child in that the Court is required not to make any family provision order for a dependant unless the Court considers it proper to make the provision for the dependant having regard to the matters set out in Section 41(1A):

> *"(1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.*"

Disentitling Conduct

The power given by the Parliament to the Courts to override the provisions of a Will by making family provision includes a power to refuse to make an order in favour of a person who has shown bad character or conduct.

Section 41(2)(c) empowers the Court to "*refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the Court, disentitles him or her to the benefit of an order, or his circumstances are such as make such refusal reasonable*".

In the High Court case of *Hughes v National Trustees Executors and Agency Co (A/Asia) Ltd* [1979] 53 ALJR 249 Murphy J observed about a similar provision (Section 91) in Victorian Legislation at paragraphs 8 and 9:

> *"8. Difficulty arises from the unwarranted introduction of the notion of moral claim into s. 91, from which it follows that the appellant must establish his moral claim; in effect, his character and conduct must qualify him for the benefit of provision out of the estate. In this case, Harris J. (with whom Starke J. agreed) stated:*
>
> > *". . . evidence may be relevant both to the establishment of a moral claim by an applicant, which is part of his case, and also to character or conduct disentitling him to a benefit. In this case, the evidence considered by the learned Judge was clearly relevant to the question whether the appellant had a moral claim upon the bounty of the deceased. In my opinion, what the learned Judge did was to say that the onus lay on the appellant to establish his claim (part of which was to establish a moral claim) and to say that, having considered all the evidence, he was not satisfied that the appellant had a moral claim. In my opinion, the learned Judge did not place on the appellant any burden of proof which did not lie on him." (at p160)*
>
> *9. In my opinion, this confuses the simple operation of the sections. Section 91 specifies the conditions of qualification; s. 96 specifies the conditions of disentitlement of disqualification. To bring himself within s. 91, the appellant does not have to establish any moral claim or qualification other than those specified in the section."*

In the same case, Gibbs J at paragraph 28 expressed the test in the following terms:

> *"28. The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also, to some extent, on the strength of his need or claim to provision from the estate of the testatrix. The stronger the applicant's case for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision.*"

How to apply for a Family Provision Order.

An application for family provision under Section 41 of the *Succession Act* 1981 is made by an Originating Application with supporting Affidavit and a draft Directions Order.

The Originating Application initiating a family provision proceeding will require attendance "*on a date to be fixed by agreement or failing agreement after notice of not less than fourteen (14) days from one party to the other parties*" rather than by specifying a return date (see paragraph 3 of Supreme Court Practice Direction No. 8 of 2001 and District Court Practice Direction No. 8 of 2001).

If the application is instituted outside the time limit for the bringing of applications, the Originating Application shall include a request that the application be heard and determined notwithstanding that: *Succession Act* 1981, Section 41(8).

If the application is instituted when no grant of representation has been made, the Originating Application must include a request that the application be heard and determined notwithstanding the absence of a grant (Section 41(8)).

If the applicant seeks an order exonerating some part of the estate from the incidence of the order, the Originating Application should describe the relevant part of the estate (Section 41(3)). This provision is particularly important when specific chattels, for example jewellery or a motor vehicle, have been left to specific beneficiaries.

The procedure to be followed is set out in Supreme Court Practice Direction No. 8 of 2001 which is in similar terms to the District Court Practice Direction.

The Practice Direction sets out in paragraph 7 the required contents of the applicant's supporting affidavit:

> *"7. The applicant's supporting affidavit shall –*
>
> *(a) show a prima facie case that the applicant is a person who is entitled to apply, that adequate provision has not been made and that the applicant is otherwise entitled to bring the application;*
>
> *(b) provide details of the applicant's assets and liabilities and sources of income;*
>
> *(c) show the identity of all persons who fall within the definitions of "spouse", "child" or "dependant" in section 41(1);*
>
> *(d) contain material identifying persons having an interest in the estate, who should be served;*
>
> *(e) if the application is brought out of time, contain material relevant to an application that the matter be heard and determined notwithstanding that fact;*
>
> *(f) if there is no grant of representation, contain material relevant to an application that the matter be heard and determined despite the absence of a grant; (eg those facts then known to the applicant which may make a grant unnecessary in all the circumstances);*
>
> *(g) contain particulars of any bequest which the applicant seeks to have exonerated from the burden and incidence of any order of the court (eg specific bequests, pecuniary legacies, bequests of personal effects, etc) so that the executors can distribute them in the normal course of administration regardless of the application. If bequests of personal effects or small bequests are not to be exonerated, some justification for that is to be provided;*
>
> *(h) contain material showing that the matter is within the monetary jurisdiction of the District Court pursuant to section 68(1)(b)(x) of the District Court Act 1967 (ie, show that the applicant is not seeking to be awarded further provision with a value in excess of $250,000 or as the jurisdiction may be defined from time to time);*
>
> *(i) include, so far as known to the applicant, information and material as to the assets and liabilities in the estate from which further provision might be made for the applicant;*
>
> *(j) contain the applicant's best estimate of the applicant's costs through to and inclusive of final hearing;*
>
> *(k) contain such other material as may be necessary to support the application."*

The Practice Directions also requires in paragraph 6(b) a draft Directions Order to be supplied. There is a strong emphasis from the Courts on making information available at the earliest practicable date and encouraging an early consensual of applications.

Paragraph 8 of the Practice Direction sets out the requirements for the draft Directions Order:

"8. The draft directions order shall be in the form set out in the schedule to this direction, with appropriate and necessary variations; and –

(a) shall require that any material directed to be sent to any beneficiary whose entitlement is not exonerated and any other person entitled to apply for provision shall be accompanied by a letter to the following effect –

"If any order is made in these proceedings in favour of the applicant, the benefits to which you may be entitled under the will or as next-of-kin (as the case may be) may be affected. Our client, the executor/s, has an obligation to uphold the will and defend the application and to place material before the Court relevant to it, and we would be pleased to hear from you if you have facts or material which you believe should be brought to the attention of the respondent and/or the Court.

You may also have the right, and may wish, to be represented on the hearing of the application, but the costs of any party appearing are in the discretion of the Court and if parties whose interests are identical are separately represented, one set of costs only may be allowed, or the costs of some parties may be refused. You may therefore consider it desirable to communicate with us, or the executor/s or other beneficiaries, on the subject of your being represented or jointly represented.

If you choose to be separately represented then your attention is drawn to clause 3 of the directions order which requires that you give notice to us, and to the solicitors for the applicant, within a specified period, and serve and file any affidavits by you or on your behalf."

(b) contain a dispute resolution plan designed to exhaust the prospects of a consensual resolution of the application. This will –

(i) specify what (if anything) has been done to bring about a consensual resolution;

(ii) specify a timetable and steps towards the early and inexpensive resolution in terms of –

(A) discussions between the parties' representatives;

(B) defining of issues;

(C) exchanges of information and any disclosure necessary to enable the issues to be properly evaluated;

and in addition the parties may provide for:

(D) obtaining independent legal advice on the likely outcome of the proceedings;

(E) meetings or conferences between the parties;

(iii) contain directions about the submission of any continuing conflict to an ADR process such as mediation or case appraisal as agreed between the parties or as may be ordered by the Court."

Procedure following Application

The respondent, usually the Executor, is required to respond promptly to an application for family provision. In particular, the respondent is required under paragraph 9 of the Practice Direction to sign and return the draft Directions Order to the applicant or advise the applicant of any matter in the draft Directions Order with which the Respondent disagrees and put forward an alternative proposal in respect of those matters, as set out in paragraph 9 of the Practice Direction:

"Response by the respondent to the draft directions order

9.(a) Within fourteen (14) days of service of the originating application, applicant's affidavit/s and draft directions order the respondent shall either –

(i) sign and return the draft directions order to the applicant or his/her solicitors; or

(ii) advise the applicant or his/her solicitors of any matter in the draft directions order with which the respondent disagrees and put forward an alternative proposal in respect of that or those matters;

(b) within seven (7) days of receipt of the signed draft directions order from the respondent, the applicant shall file it in the Registry and it shall be operative from that date;

(c) alternatively, in the event of disagreement as to the terms of the draft directions order, the parties shall use their best endeavours to resolve that disagreement and agree to the terms of the order as quickly as possible;

(d) if, but only if, the parties are unable to agree the terms of the directions order, either party may list the originating application before the applications judge upon not less than fourteen (14) days notice to the other party."

In accordance with the timetable set out in the draft Directions Order, the respondent is required to file an Affidavit setting out a list of estate assets and liabilities and the respondent's best estimate of the cost of administering the estate and responding to the application, as set out in paragraph 11 of the Practice Direction:

"Respondent's affidavit

11. The affidavit of the respondent referred to in paragraph 5 of the draft directions order herein shall include –

> (a) *a list of estate assets and liabilities, and estimates of value, specifying the date of estimation/valuation; (b) the respondent's best estimate of the costs of –*
>
> > (i) *administration of the estate through to completion of executorial duties;*
> >
> > (ii) *the respondent of and incidental to the application through to trial and judgment;*
>
> (c) *all facts and matters relevant to any material in the applicant's affidavit concerning exoneration of any bequest from the burden or incidence of an order, and the respondent's responses;*
>
> (d) *any information the respondent has about the assets and liabilities and sources of income of beneficiaries who are natural persons having a competing claim on the bounty of the testator;*
>
> (e) *material relevant to all matters in issue on the application."*

Alternative Dispute Resolution is a compulsory part of the process. The clear majority of family provision applications settle before or at mediation.

If the matter does not settle, paragraph 12 of the Practice Direction provides that when the proceeding is ready for trial, a request for trial date should be signed and filed as if the proceeding were started by claim, and should identify the solicitors for any party (in addition to the respondent) known to have an interest in the matter.

When to apply - Deadline

A nine month time limit applies to applications for family provision but the Court does have a discretion to hear an application out of time.

Section 41(8) of the *Succession Act* 1981:

> *"8) Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made."*

The Court has a broad, unfettered discretion with regard to extension of time. In *Enoch v Public Trustee of Queensland* [2006] 1 QdR 144, Justice Margaret Wilson identified some factors which could be relevant to the exercise of discretion such as explanation for the delay, prejudice to the beneficiaries, unconscionable conduct by the applicant and the strength of the applicant's case:

> *[6] The court has an unfettered discretion whether to extend the time for making such an application. As Sir Robert Megarry VC observed of similar legislation in England in In re Salmond decd [1981] 1 Ch 167, the onus lies on the applicant to establish sufficient grounds for taking the case outside what is not merely a procedural time limit but a substantive one imposed by the Act. Four factors which can be relevant to the exercise of the discretion are –*
>
> *(a) whether there is an adequate explanation for the delay;*
>
> *(b) whether there would be any prejudice to the beneficiaries;*
>
> *(c) whether there has been any unconscionable conduct by the applicant; and*
>
> *(d) the strength of the applicant's case.*
>
> *See Warren v McKnight [1996] NSWSC 419; (1996) 40 NSWLR 390 at 394 and Bird v Bird [2002] QSC 202."*

The Queensland Court of Appeal applied these principles in *Hills v Chalk & Ors (as Executors of the Estate of Chalk (deceased))* [2008] QCA 159 at paragraph [75].

In which Court to apply?

As the monetary limit of the District Court is now $750,000 it is to be expected that most family provision applications would be made in the District Court.

Paragraph 7(h) of the Supreme Court Practice Direction No. 8 of 2001 requires the applicant's initial affidavit contain material showing that the matter is not within the monetary jurisdiction of the District Court pursuant to Section 68(1)(b)(x) of the *District Court Act* 1967. In this regard it is important to note that the monetary value in question is not that of the entire estate but of the further provision which the applicant has reasonable prospects of being awarded. Thus an estate may be worth $1,000,000 but where there are no reasonable prospects of the applicant being awarded a further provision of over $750,000 the matter should be litigated in the District Court.

Mediation

The relevant Practice Directions of the District and Supreme Court refer to alternative dispute resolution. In practice this usually means mediation. It should be noted however that Paragraph 8(b) of the Supreme and District Court Practice Directions require the party's representatives to discuss and define the issues and exchange any information and any disclosure necessary to enable the issues to be properly evaluated:

> *"(b) contain a dispute resolution plan designed to exhaust the prospects of a consensual resolution of the application. This will –*
>
> *(i) specify what (if anything) has been done to bring about a consensual resolution;*
>
> *(ii) specify a timetable and steps towards the early and inexpensive resolution in terms of –*
>
> *(A) discussions between the parties' representatives;*
>
> *(B) defining of issues;*
>
> *(C) exchanges of information and any disclosure necessary to enable the issues to be properly evaluated; and*
>
> *in addition the parties may provide for:*
>
> *(D) obtaining independent legal advice on the likely outcome of the proceedings;*
>
> *(E) meetings or conferences between the parties;*
>
> *(iii) contain directions about the submission of any continuing conflict to an ADR process such as mediation or case appraisal as agreed between the parties or as may be ordered by the Court."*

Court's approach to Family Provision Applications

In *Singer v Berghouse (No. 2)* (1994) 181 CLR 201, the High Court described the approach of Courts to family provision applications in two stages[1]:

1. An assessment of whether adequate provision was made from the Estate for the proper maintenance and support of the applicant; and

2. What is the proper level of maintenance and what is adequate provision?

The High Court held in the majority judgment of Mason, CJ, Deane & McHugh JJ held at [656]-[657]:

> *"18. The first question is, was the provision (if any) made for the applicant "inadequate for (his or her) proper maintenance, education and advancement in life"? The difference between "adequate" and "proper" and the interrelationship which exists between "adequate provision" and "proper maintenance" etc. were explained in Bosch v. Perpetual Trustee Co. ((8) (1938) AC at 476.). The determination of the first stage in the two-stage process calls for an assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc. appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.*
>
> *19. The determination of the second stage, should it arise, involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at an assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant. In saying that, we are mindful that there may be some circumstances in which a court could refuse to make an order notwithstanding that the applicant is found to have been left without adequate provision for proper maintenance. Take, for example, a case like Ellis v. Leeder ((9) [1951] HCA 44; (1951) 82 CLR 645.), where*

[1] Referred to with approval in *Vigolo v Bostin* (2005) 221 CLR 191.

there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors."

The Court may take into account a broad range of factors in assessing whether provision is adequate. Of fundamental importance in assessing adequacy is the size of the estate: See for example *Re Buckland* [1966] VR 404. The financial circumstances and needs of the applicant are also crucial to this assessment.

The relevant time for the Court to assess whether provision is adequate is the date of death. The Queensland Court of Appeal in *Hills v Chalk & Ors (as Executors of the Estate of Chalk (deceased))* [2008] QCA 159 observed at paragraph [47]:

> *[47] As Barwick CJ said in White v Barron:[22] "The question whether the appellant was left without adequate maintenance must be answered at the date of death." In White v Barron, Mason J said:*
>
> > *"The question whether the testator left the appellant widow 'without adequate provision' for her 'proper maintenance' was to be determined by the primary judge by reference to circumstances as they existed at the date of the testator's death. Once this question was answered in the affirmative, it was for the court to exercise its discretion to order adequate provision for proper maintenance for the appellant by reference to circumstances as they existed at the date of the order. See generally Coates v National Trustees Executors and Agency Co Ltd ((1956) [1956] HCA 23; 95 CLR 494). There Dixon CJ observed that in determining the initial question of jurisdiction the Court must look to what is 'necessary or appropriate prospectively from that time', that is, the date of death, including events which are contingent as well as those which are certain or likely. Advantage may be taken of hindsight so long as the subsequent occurrences fall within 'the range of reasonable foresight' ((1956) 95 CLR at 508)."[23]*
>
> *[22][1980] HCA 14; (1980) 144 CLR 431 at 437.*
>
> *[23][1980] HCA 14; (1980) 144 CLR 431 at 441 (citations footnoted in original).*

Costs

Costs are in the discretion of the Court. The general rule regarding this is that costs follow the event.

It is widely believed, albeit incorrectly, that in estate matters, costs will always come out of the estate. This is not the case: See Rebecca Treston *“Family Provision Applications and Costs”* Hearsay Issue 50: July 2011.

The approach of Courts to family provision cases was discussed by Justice Gaudron in the High Court case of *Singer v Berghouse* (1993) 67 ALJR 708 at [709] in relation to an application before the appeal for security for costs:

> *“In most cases, costs follow the event in the sense that, saving special or extraordinary circumstances, costs are awarded in favour of the successful party against the unsuccessful one. … even so, decisions [in family provision matters] involve a discretionary judgment of a very broad kind made by reference to the circumstances of the particular case and not by reference to a rule or rules which direct the decision one way or the other. Family provision cases stand apart from cases in which costs follow the event … costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of unsuccessful applications, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant’s 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.”*

In *Jee v Jee* [2011] QSC 202, Justice Mullins held that an Executor was not entitled to an indemnity from the deceased’s estate for the costs of a sanction application. Her Honour formed the view “*that the Executor did not fulfil his obligation in providing the Court with an accurate statement of the assets and liabilities of the estate at the time of the application*”, and further that “*the Court was not given material that enabled it to properly exercise its obligation under Section 41, Subsection 1 of the Succession Act 1981*”.

In *Daley v Barton & Anor* [2008] QSC 322, Justice Anne Lyons held that an applicant for family provision application was to have his costs paid out of the estate on an indemnity

basis up to a certain date after which the applicant was to pay the costs of the respondent on an indemnity basis. That date corresponded with the making of a Calderbank offer.

In *Manly v Public Trustee of Queensland (No.2)* (2008) QSC 47, McMeekin J referred with approval to a summary of principles from the South Australian Full Court indicating that in appropriate cases a costs order can be made against an applicant:

> *[13] More recently Debelle J sitting in the South Australian Full Court summarised the relevant principles in Bowyer v Woods [2007] SASC 327 as follows:*
>
> > *"In my opinion, the legislature has made it clear that in appropriate cases a costs order can be made against an Applicant, and some of the old cases must now be approached with care. The old rule which, as I say, was a common practice not to award costs against the plaintiff who failed, can no longer be accepted as a general proposition. ...*
> >
> > *There is, therefore, a substantial body of consistent opinion as to the rules which ordinarily operate in relation to an unsuccessful application. The principles are that, generally speaking, there will be no order as to costs of an unsuccessful application. The court may in its discretion make an order in favour of an unsuccessful Applicant who makes a reasonable application founded on a moral claim or obligation. While it is unnecessary to decide the issue in this case, the cases also suggest that the court may in its discretion order an unsuccessful Applicant to pay costs where the claim was frivolous or vexatious or made with no reasonable prospects of success or where the applicant has been guilty of some improper conduct in the course of the proceeding*

Care should be taken regarding the costs implications at each stage, particularly after disclosure and after any formal offer.

FURTHER READING

- Leonie Englefield *Australian Family Provision Law* Thomson Reuters. Sydney 2011
- A A Preece *Lee's Manual of Queensland Succession Law 7th edition* Thomson Reuters 2012
- *Australian Succession Law* Westlaw AU [505.110] to [540.750]