



## Review of the *Inheritance (Family Provision) Act 1972 (SA)*

### Fact Sheet 2 – What is the policy behind family provision in inheritance law?

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

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 is something which 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).

However, law makers have also recognised that, in some circumstances, a will may not be conclusive and it may be necessary to 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. Back in the late 1800s, dependants typically included dependent widows or orphans, and the laws dealing with family provision were originally designed 'to prevent family dependants being thrown on the world with inadequate provision' (as Lord Simon of Glaisdale observed in *Schaefer v Schuhmann* [1972] AC 572, 596).

In more modern times, dependants can now include children of a first marriage that could be left out of a will, or a family member with a disability that requires ongoing financial support or care. In such circumstances it will 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'.

In 1972, the South Australian Parliament passed the *Inheritance (Family Provision) Act 1972 (SA)* to help address some of these issues. The Act gives power to the South Australian Supreme Court to make decisions about the fairness of a person's will, if asked to do so by certain specified members of the deceased's family who can show they have been left without adequate provision for their proper maintenance, education or advancement in life.

In this way, the *Inheritance (Family Provision) Act 1972 (SA)* attempts to strike a balance between the idea that people should be free to give away their property by will as they wish after they die and the idea that people also have a responsibility to provide for certain people after their death. It is important to note that under these family provision laws, orders for successful claimants are designed to provide a minimum 'safety net' for genuine dependants, rather than recognising any inherent right of family members to a portion of the deceased's estate.

#### Policy Issues Arising from Practice

Since coming into force, the *Inheritance (Family Provision) Act 1972 (SA)* and similar interstate laws have not always been able to strike the right balance between these competing policy interests.

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.

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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 from out of that estate).

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 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.

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 perfectly able to secure her own income. Similarly, in complex family arrangements, there could be multiple step children, natural children and children of domestic partners that may all once have been dependent upon the deceased for care or financial support.

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.

These issues have led other Australian States and Territories to explore options for reforming their inheritance laws relating to family provision, which would 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.

## Discussion Questions

1. Should the purpose of modern family provision laws be to protect dependants and prevent them from becoming dependent on the state?
2. Are there wider purposes or aims that family provision laws should seek to achieve?
3. 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, financially or otherwise, on the deceased person? Does the age of the surviving family member or other dependent person matter?
4. Would family provision laws be more acceptable if:
  - a. they reflected a person's legal responsibility to their dependents when alive?
  - b. they gave more weight to the testator's intentions?

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