

## FAMILY PROVISION LAW, ADULT CHILDREN AND THE AGE OF ENTITLEMENT

This case raises some profound questions about the nature of family obligations, the relationship between family obligations and the state, and the relationship between the freedom of property owners to dispose of their property as they see fit and their duty to fulfil their family obligations.<sup>1</sup>

The above quote, taken from the judgment of Lady Hale in the recent United Kingdom Supreme Court case of *Ilott v The Blue Cross*,<sup>2</sup> summarises the questions that are raised in the area of family provision law.

Since its first enactment into Victoria in 1906, and subsequently in the other States and Territories of Australia, family provision laws have broadened substantially through judicial interpretation and legislative amendments. What started out as a protective measure to ensure adequate provision for dependent widows and orphans has transformed into a rigid entitlement to inheritance rights for financially comfortable applicants. The current law faces heavy criticism over its excessive encroachment on testamentary freedom and encouragement of opportunistic claims, resulting in calls for reform around Australia.<sup>3</sup>

This article will firstly give a brief overview of the underlying original policy rationale for family provision legislation before undertaking a detailed analysis of the issues arising from the modern rationale. A review conducted of all family provision cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018 as part of this study shows that adult children comprise the greatest proportion of claims made under South Australia's family provision laws.<sup>4</sup> A number of recent

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<sup>1</sup> *Ilott v The Blue Cross* [2018] AC 545, 578 [49]. This case involved an estranged adult daughter who brought a claim under the *Inheritance (Provision for Family and Dependents) Act 1975* (UK) c 63 ('the 1975 Act') against her mother's estate. This case will be discussed in greater detail below.

<sup>2</sup> [2018] AC 545.

<sup>3</sup> Victorian Law Reform Commission, *Succession Laws*, Final Report (2013); 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); New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision*, Report No 110 (2005).

<sup>4</sup> See Appendix 2 for an overview of cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018.

studies indicate that this is an Australia-wide trend. This article will focus on the approach which is taken towards adult children claimants and will reveal that the current law raises significant issues in law, policy, and practice.

## I HISTORICAL PURPOSE AND POLICY

Led by prominent philosophers John Locke, Jeremy Bentham and John Stuart Mill, the 18th century saw a rise of liberal individualism and strict testamentary freedom.<sup>5</sup> Under the principle of testamentary freedom, testators had the right to dispose of their property by will as they liked and to whomsoever they wished, no matter how arbitrary or capricious.<sup>6</sup> As outlined by Cockburn CJ in *Banks v Goodfellow*, ‘the law of every civilized 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’.<sup>7</sup>

The only way a will would be invalidated was by challenging the testator’s testamentary capacity.<sup>8</sup> This high standard resulted in plainly unjust cases where widows and children were left destitute by testators irresponsibly or arbitrarily exercising their absolute testamentary freedom without ensuring adequate provision for their surviving wives and children in their will.<sup>9</sup>

By the late 19th century, liberal individualism was giving way to a more progressive society which saw greater recognition of women’s rights, both within the community and at home.<sup>10</sup> Leading this movement was New Zealand, the first country to recognise a woman’s right to vote, which passed the *Testator’s Family Maintenance*

<sup>5</sup> See Rosalind F Croucher, ‘Statutory Wills and Testamentary Freedom: Imagining the Testator’s Intention in Anglo-Australian Law’ (2007) 7 *Oxford University Commonwealth Law Journal* 241, 243–5; Rosalind Frances Atherton, ‘Family’ and ‘Property’: *A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children* (PhD Thesis, University of New South Wales, 1993) 9–10.

<sup>6</sup> See, eg, Myles McGregor-Lowndes and Frances Hannah, ‘Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?’ (2009) 17 *Australian Property Law Journal* 62, 63–4.

<sup>7</sup> (1870) LR 5 QB 549, 563.

<sup>8</sup> Justice Geoff Lindsay, ‘The TFM Act: Early Days Leading to a 99 Year Centenary’ (Paper presented at Elder Law and Succession Committee, The Law Society of New South Wales, 14 October 2015) 3; South Australia, *Parliamentary Debates*, House of Assembly, 3 October 1918, 803 (Archibald Henry Peake).

<sup>9</sup> Bruce James Cameron, *Family Protection*, An Encyclopaedia of New Zealand 1966 <<http://www.teara.govt.nz/en/1966/family-protection>>; see also South Australia, *Parliamentary Debates*, Legislative Council, 29 October 1918, 1057 (William Morrow and John Herbert Cooke).

<sup>10</sup> Rosalind Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 — The Stouts, the Women’s Movement and Political Compromise’ (1990) 7 *Otago Law Review* 202, 202–5.

*Act 1900* (NZ).<sup>11</sup> Two pioneers of this movement were Sir Robert Stout, who later became Chief Justice of the Supreme Court of New Zealand, and his wife, Lady Anna Stout.<sup>12</sup> This couple were social rights activists who fought for greater recognition of women's rights, and it was Sir Robert Stout who first introduced the family maintenance legislation in Parliament in 1896.<sup>13</sup> However, his proposed 'set shares' scheme proved unpopular with the progressive mood of those times.<sup>14</sup> In response, Robert McNab reintroduced a slightly modified testator's family maintenance legislation which removed the set shares scheme and allowed for greater testamentary freedom, subject only to an application by the deceased's spouse or child if they had been left without adequate provision.<sup>15</sup> This was met with the approval of Parliament and the *Testator's Family Maintenance Act 1900* (NZ) was passed in 1900 — the first of its kind in the common law world.<sup>16</sup>

Australia was not far behind. Australian parliaments were soon debating the value of a woman's contributory role in the partnership of marriage, her subsequent entitlement to a share of the estate, and the need to protect her economically vulnerable state.<sup>17</sup> Two notable cases that helped prompt the introduction of such laws in Australia were those of a well-known bookmaker, Francis O'Neill, and owner of 'Truth' newspaper, John Norton in 1916.<sup>18</sup> O'Neill left his entire estate to his mistress and illegitimate children, leaving his own wife and child penniless,<sup>19</sup> while Norton disinherited his wife and son and left the bulk of his estate to his nine year old daughter, Joan, and niece, Eva Pannett.<sup>20</sup> The public outcry over such unjust outcomes paved the way for justifying the revolutionary intrusion of family provision law into

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<sup>11</sup> Ibid 202–3; Samantha Renwick, 'Responsibility' to Provide: Family Provision Claims in Victoria' (2013) 18 *Deakin Law Review* 159, 161.

<sup>12</sup> Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 — The Stouts, the Women's Movement and Political Compromise', above n 10, 208–9.

<sup>13</sup> Ibid 207, 211–12; Renwick, above n 11, 162; (12 July 1900) IIII NZPD 507.

<sup>14</sup> Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 — The Stouts, the Women's Movement and Political Compromise', above n 10, 211–12, 217; Renwick, above n 11, 162; (12 July 1900) IIII NZPD 508; (12 September 1900) IIII NZPD 614–5.

<sup>15</sup> Renwick, above n 11, 162–3; (12 July 1900) IIII NZPD 507; (12 September 1900) IIII NZPD 615; Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 — The Stouts, the Women's Movement and Political Compromise', above n 10, 213–14, 216, 219; Cameron, above n 9.

<sup>16</sup> Renwick, above n 11, 161; Atherton, 'New Zealand's Testator's Family Maintenance Act of 1900 — The Stouts, the Women's Movement and Political Compromise', above n 10, 203.

<sup>17</sup> South Australia, *Parliamentary Debates*, House of Assembly, 3 October 1918, 803, 805 (Archibald Henry Peake); South Australia, *Parliamentary Debates*, House of Assembly, 15 October 1918, 884 (John Gunn).

<sup>18</sup> Lindsay, above n 8, 2.

<sup>19</sup> *Re O'Neill* (1917) 34 WN (NSW) 72.

<sup>20</sup> Michael Cannon, *John Norton (1858–1916)*, (1988) Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/norton-john-7863>>; Cyril Pearl, *Wild Men of Sydney* (WH Allen, 1958) 245 (Appendix I).

testamentary freedom.<sup>21</sup> The first version of the Victorian legislation, the *Widows and Young Children Maintenance Act 1906* (Vic), was based on the New Zealand Act. All other States and Territories in Australia introduced similar legislation shortly after.<sup>22</sup> Similar legislation was also introduced in the United Kingdom and in parts of Canada.<sup>23</sup>

Since then, the Acts in each Australian jurisdiction have been repealed or have undergone several amendments, as seen in South Australia,<sup>24</sup> with each change bringing a wider access to relief<sup>25</sup> in response to changing family structures and social values.<sup>26</sup> The change of title of most of the Acts from ‘Family Maintenance’ to ‘Inheritance (Family Provision)’ demonstrates the significant shift of emphasis from maintenance of dependents to protection of inheritance rights.<sup>27</sup> The one notable exception in all these changes is Victoria, which has limited the class of persons who may make a family provision claim under a will.

## II FAMILY PROVISION LEGISLATION IN AUSTRALIA

### A *Eligible Applicants*

To make a family provision claim, an applicant must first be eligible under the family provision legislation of the particular state or territory. Eligible applicants differ in each state and territory, however generally include spouses, former spouses, domestic partners, children, step-children, grandchildren, parents, and siblings.

<sup>21</sup> Lindsay, above n 8, 2–3.

<sup>22</sup> *Administration and Probate Act 1929* (ACT); *Testator’s Family Maintenance and Guardianship of Infants Act 1916* (NSW); *Testator’s Family Maintenance Ordinance 1929* (NT) as repealed by *Family Provision Act 2004* (NT) s 3; *Testator’s Family Maintenance Act 1914* (Qld); *Testator’s Family Maintenance Act 1918* (SA); *Testator’s Family Maintenance Act 1912* (Tas); *Guardianship of Infants Act 1920* (WA); *Testator’s Family Maintenance Act 1924* (British Columbia); *Inheritance (Family Provision) Act 1938* (UK) c 63.

<sup>23</sup> See, eg, Frances M Hannah and Myles McGregor-Lowndes, ‘From Testamentary Freedom to Testamentary Duty: Finding the Balance’ (Working Paper No 42, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, 2008) 1; Lindsay, above n 8, 9.

<sup>24</sup> See, eg, *Inheritance (Family Provision) Act 1972* (SA) s 3; *Testator’s Family Maintenance Act Amendment Act 1943* (SA); *Inheritance (Family Provision) Act Amendment Act 1975* (SA); *Statutes Amendment (Domestic Partners) Act 2006* (SA).

<sup>25</sup> *Barns v Barns* (2003) 214 CLR 169, 212 (Callinan J).

<sup>26</sup> See, eg, South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, 3958–9 (Frank Jacques Potter); South Australia, *Parliamentary Debates*, Legislative Council, 21 March 1972, 3998 (Renfrey Curgenvin DeGaris).

<sup>27</sup> See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 3 September 1965, 2520 (Frank Jacques Potter).

In South Australia, Queensland, Victoria, Tasmania and New South Wales, the category of children encompasses adopted children of the deceased.<sup>28</sup> Currently, competent and self-supportive adult children are automatically eligible in all jurisdictions in Australia and will not be presumed ineligible on the mere basis of being able-bodied self-supportive adults.<sup>29</sup>

With respect to adult step-children of the deceased, in the Australian Capital Territory, New South Wales, Northern Territory, South Australia, and Western Australia, a dependency test is applied.<sup>30</sup> Accordingly, in these States, those children that are raised in the home of a step-parent, with the step-parent and child sharing a relationship of parent and child, will be eligible applicants provided that this relationship existed at the time of the step-parent's death. However, where the step-child cannot demonstrate dependency on the step-parent, for example in the case of independent adult step-children, the law considers the natural parents of the children to be responsible for those children and in these cases there is no moral or other duty which extends to the step-parent. In Western Australia, an eligible claimant also includes a step-child if the deceased received or was entitled to receive property from the estate of a parent of the step-child (other than as a creditor) and, at the time of the parent's death, the value of that property is greater than the prescribed amount.<sup>31</sup>

In Queensland, Tasmania and Victoria, step-children are not required to demonstrate dependency and are treated in the same way as biological, foster and adopted children.<sup>32</sup> In these states, if a child's father or mother remarries at any stage in their life, including when the child is an independent adult, they are eligible to make a claim notwithstanding that the child may never have lived in the same household as that step-parent and had never been dependent on the step-parent. In the most extreme case, the child's parent may remarry multiple times, leaving the child in

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<sup>28</sup> For adopted children, see *Inheritance (Family Provision) Act 1972* (SA) s 4 (definition of 'child'); *Administration and Probate Act 1958* (Vic) s 90(b), (d), (f)-(g) (definition of 'eligible person'); *Succession Act 2006* (NSW) s 57(2); *Testator's Family Maintenance Act 1912* (Tas) s 2(1); *Succession Act 1981* (Qld) s 40 (definition of 'child').

<sup>29</sup> *Family Provision Act 1969* (ACT) s 7(1)(c); *Inheritance (Family Provision) Act 1972* (SA) s 6(c), s 4 (definition of 'child') makes no distinction between minors and adults; *Family Provision Act 1970* (NT) s 7(1)(c); *Succession Act 1981* (Qld) s 41(1); *Testator's Family Maintenance Act 1912* (Tas) s 3A(b); *Family Provision Act 1972* (WA) s 7(1)(c); *McCosker v McCosker* (1957) CLR 566, 576 (Dixon CJ and Williams J), cited in *Wall v Crane* [2009] SASC 382 (16 December 2009) [18] (White J).

<sup>30</sup> See *Family Provision Act 1970* (NT) s 7(2)(b); *Family Provision Act 1969* (ACT) s 7(2); *Succession Act 2006* (NSW) ss 57(1)(e), 59(1)(b) – no particular reference to step-children however they would fall within the criteria set out in s 57(1)(e); *Inheritance (Family Provision) Act 1972* (SA) s 6(g); *Family Provision Act 1972* (WA) s 7(1)(ea).

<sup>31</sup> *Family Provision Act 1972* (WA), ss 7(1) (ea) and (eb). Under *Family Provision Regulations 2013* (WA) reg 3 the prescribed amount is \$517 000.

<sup>32</sup> *Succession Act 1981* (Qld) ss 40 (definition of 'child'), 41(1); *Testator's Family Maintenance Act 1912* (Tas) s 2(1) (definition of 'child'); *Administration and Probate Act 1958* (Vic) s 90(c), (f) (definition of 'eligible person').

the position in which there are multiple step-parents upon which a claim can be made against their estate. Furthermore, in Victoria, ‘marriage’ is not required for the definition of step-child, even where a parent is an unmarried domestic partner.<sup>33</sup>

### B Criteria

Once the applicant is eligible, the court must then exercise its discretion to determine whether the applicant has been ‘left without *adequate provision* for his or her *proper maintenance, education or advancement in life*’.<sup>34</sup> As the High Court said in *Vigolo v Bostin*:

‘Maintenance’ may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. ‘Support’ similarly may imply provision beyond bare need.<sup>35</sup>

In the Australian Capital Territory, New South Wales, and Victoria, the legislation provides a list of factors that the court must take into account when determining whether to make an order for family provision.<sup>36</sup> With respect to adult children, in Victoria, the court is further required to consider the degree to which the adult child is not capable, by reasonable means, of providing adequately for their own proper maintenance and support.<sup>37</sup> Courts have questioned whether these lists provide anything more to the general test of whether the applicant has been left without adequate provision for his or her proper maintenance, education or advancement in life.<sup>38</sup>

#### 1 ‘Adequate’ or ‘Proper’

The court’s approach to this criteria differs depending on which of the following distinct<sup>39</sup> but relative terms<sup>40</sup> are emphasised: ‘adequate’ or ‘proper’.<sup>41</sup> ‘Adequacy’

<sup>33</sup> *Scott-Mackenzie v Bail* [2017] VSCA 108 (10 May 2017).

<sup>34</sup> *Inheritance (Family Provision) Act 1972* (SA) s 7(1)(b); *Administration and Probate Act 1958* (Vic) s 91(2)(d), (4)(b); *Family Provision Act 1972* (WA) s 6(1); *Succession Act 2006* (NSW) s 59(1)(c); *Family Provision Act 1970* (NT) s 8(1); *Family Provision Act 1969* (ACT) s 8(2); *Testator’s Family Maintenance Act 1912* (TAS) s 3(1); *Succession Act 1981* (QLD) s 41(1) (emphasis added).

<sup>35</sup> *Vigolo v Bostin* (2005) 221 CLR 191, 228–9 [115] (Callinan and Heydon JJ), quoted in *Pizimolas v Pizimolas and Zannis* (2010) 107 SASR 277, 280–1 [69] (Kourakis J).

<sup>36</sup> *Administration and Probate Act 1958* (Vic) s 91(2); *Succession Act 2006* (NSW) s 60(2); *Family Provision Act 1969* (ACT) s 8(3).

<sup>37</sup> *Administration and Probate Act 1958* (Vic) s 91A(4)(c).

<sup>38</sup> *Blair v Blair* (2004) 10 VR 69, 84, citing *Collicoat v McMillan* [1999] 3 VR 803, 815 [37] (Ormiston JA).

<sup>39</sup> *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476, cited in *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [18] (Lovell J).

<sup>40</sup> *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [20] (Lovell J).

<sup>41</sup> Rosalind Atherton, ‘The Concept of Moral Duty in the Law of Family Provision — A Gloss of Critical Understanding?’ (1999) 5 *Australian Journal of Legal History* 5, 10.

implies an objective consideration of the applicant's financial need to determine the basic level of support necessary to live a sustainable lifestyle without being a burden on the state.<sup>42</sup> 'Proper' implies a more flexible and subjectively moral or ethical approach.<sup>43</sup> What is adequate may not be proper in regard to the applicant's situation in life and testator's wealth.<sup>44</sup> When determining if proper provision is given, the court must take into account all the circumstances of the case. These include: the lifestyle and standard of living the applicant is accustomed to; the applicant's needs, financial position and general situation; whether the applicant's resources are able to maintain those needs, lifestyle and standard of living; the estate's size and nature; relationship between the applicant and the testator; relationship between the testator and beneficiaries; and competing claims.<sup>45</sup>

Where a will does not make adequate provision for the proper maintenance and support of the particular applicant, and further provision for the applicant will not unduly prejudice other beneficiaries for whom the deceased had a responsibility to make provision, the court adopts a reasonably generous approach.<sup>46</sup> The cases include some colourful statements of this approach. For example, Fullagar and Menzies JJ in *Blore v Lang* stated that the need of an applicant for further provision may extend beyond 'the bread and butter of life' to include 'a little of the cheese or jam that a wise and just parent would appreciate should be provided if circumstances permit'.<sup>47</sup>

To similar effect is the approach taken by the High Court in *Worlidge v Doddridge*, where Williams and Fullagar JJ approved the following statement of the South Australian Supreme Court:

Proper maintenance is (if circumstances permit) something more than a provision to keep the wolf from the door — it should at least be sufficient to keep the wolf from pattering around the house or lurking in some outhouse in the backyard — it should be sufficient to free the mind from any reasonable fear of any insufficiency as age increases and health and strength gradually fail.<sup>48</sup>

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<sup>42</sup> Ibid; Justice R N Chesterman, 'Does Morality Have a Place in Applications for Family Provision Brought Pursuant to s 41 of the Succession Act 1981' (Speech delivered at the QLS Annual Succession Law Conference, Sunshine Coast, 1 November 2008) 7.

<sup>43</sup> *Hynard v Gavros* [2014] SASC 42 (25 March 2014) [30] (Dart J), citing *Bowyer v Wood* (2007) 99 SASR 190, 201; Atherton, 'The Concept of Moral Duty', above n 41, 10; Chesterman, above n 42.

<sup>44</sup> *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 476, quoted in *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [18] (Lovell J).

<sup>45</sup> *Carter v Brine* [2015] SASC 204 (22 December 2015) [593] (Blue J).

<sup>46</sup> *Blore v Lang* (1960) 104 CLR 124; *Worlidge v Doddridge* (1957) 97 CLR 1; *Re Harris* (1936) 5 SASR 497.

<sup>47</sup> (1960) 104 CLR 124, 135.

<sup>48</sup> (1957) 97 CLR 1, 12, quoting *Re Harris* (1936) 5 SASR 497, 501.

More recently, it has been said that the court should provide a ‘nest egg’ to protect against the unforeseen events in life.<sup>49</sup> Justice Gzell in *McGrath v Eves* observed that ‘there is no rule to the effect that proper provision for an adult and presently able-bodied child does not extend to providing him or her with a house or money to buy one’.<sup>50</sup>

The relevance of the size of the estate as a significant consideration in determining applications for further provision was discussed by Debelle J in *Bowyer v Wood*.<sup>51</sup> In that case, while recognising that the size of the estate does not justify the court in rewriting the will in accordance with its own ideas of justice and fairness, Debelle J noted the continued reference in the cases to the size of the estate as a relevant factor.<sup>52</sup> The ‘relative urgency’ of an applicant’s need for provision is also a relevant factor.<sup>53</sup>

## 2 Moral Duty

The word ‘proper’ has also been interpreted as including the question of whether the testator had a ‘moral duty’ to provide for the applicant.<sup>54</sup> The concept of moral duty has become an important element in the courts’ reasoning process in family provision claims,<sup>55</sup> despite its absence in the Acts of all states apart from Victoria. In Victoria, the court may take into account the degree of moral duty the deceased had at the time of death.<sup>56</sup>

A moral duty is breached if a testator had not acted as a wise and just husband or father would have.<sup>57</sup> To come to this conclusion, a court must draw upon its own general knowledge and experience of current social standards,<sup>58</sup> but is not allowed to use its own ideas of fairness and justice.<sup>59</sup> However, critics have observed that moral duty or moral claims are subjective expressions which cannot be easily assessed

<sup>49</sup> See, eg, *Penn v Richards* [2002] VSC 378 (6 September 2002) [33].

<sup>50</sup> [2005] NSWSC 1006 (10 October 2005).

<sup>51</sup> (2007) 99 SASR 190.

<sup>52</sup> *Ibid* [41].

<sup>53</sup> *McCosker v McCosker* (1957) 97 CLR 566, 571–2.

<sup>54</sup> *Vigolo v Bostin* (2005) 221 CLR 191, 228–31 (Callinan and Heydon JJ), cited in *Kozlowski v Kozlowski* [2013] SASC 57 (24 April 2013) [24] (Peek J).

<sup>55</sup> *Vigolo v Bostin* (2005) 221 CLR 191, 204–5 (Gleeson CJ), cited in *Kozlowski v Kozlowski* [2013] SASC 57 (24 April 2013) [23] (Peek J); See Virginia Grainer, ‘Is Family Protection a Question of Moral Duty?’ (1994) 24 *Victorian University of Wellington Law Review* 141, 144; Atherton, ‘The Concept of Moral Duty’, above n 41, 12.

<sup>56</sup> *Administration and Probate Act 1958* (Vic) s 91(4)(a).

<sup>57</sup> *McCosker v McCosker* (1957) 97 CLR 566, 571 (Dixon CJ and Williams J), quoted in *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [19] (Lovell J).

<sup>58</sup> *Butler v Tiburzi* [2016] SASC 108 (26 July 2016) [20] (Lovell J).

<sup>59</sup> *Ibid* [21].

or understood,<sup>60</sup> leading courts to make assumptions upon their own assessment of social values which may be incorrect.<sup>61</sup>

In determining the extent of the moral claim that a parent owes a child, Mill has expressed the view that children were only entitled to expect maintenance and education to the extent of making them independent and self-reliant to 'enable them to start with a fair chance of achieving by their own exertions a successful life'.<sup>62</sup> However, a review of the more recent judicial cases indicates that courts may have taken the concept of moral duty beyond what may be acceptable.

Courts have found breaches of moral duties solely upon the testator's own neglect or disinterest in the applicants during their childhood.<sup>63</sup> 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 of the family home into marriage and child-bearing'.<sup>64</sup> Moral obligations have also been found based upon past contributions by the applicant towards the testator or the estate<sup>65</sup> or solely on the bare fact of parentage.<sup>66</sup>

Although a moral claim cannot be based upon a testator's preference for one person over another, courts have held that bequeathing a larger portion to a sibling and charity than to a child was a failure of moral duty because a testator owes a stronger moral obligation to their children over siblings and charity.<sup>67</sup> This happens especially when bequests are made to charitable organisations which the testators had not shown a great interest to during their lifetimes,<sup>68</sup> thus making altruistic acts impossible except in limited circumstances.<sup>69</sup>

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<sup>60</sup> *Kozlowski v Kozlowski* [2013] SASFC 112 (18 October 2013) [43] (Sulan J); Grainer, above n 55, 148.

<sup>61</sup> Pauline Ridge, 'Moral Duty, Religious Faith and the Regulation of Testation' (2005) 28 *University of New South Wales Law Journal* 720, 728; Hannah and McGregor-Lowndes, 'Finding the Balance', above n 23, 16.

<sup>62</sup> John Stuart Mill, *The Principles of Political Economy* (John W Parker, 1848) bk 2, ch 2 [3].

<sup>63</sup> Grainer, above n 55, 146–7.

<sup>64</sup> [2005] SASC 395 (24 October 2005) [157]–[159] (Perry CJ).

<sup>65</sup> Grainer, above n 55, 146–7.

<sup>66</sup> *Ibid* 146; *Hellwig v Carr* [2009] SASC 117 (1 May 2009) [33].

<sup>67</sup> *Bowyer v Wood* (2007) 99 SASR 190, 205–7 [49]–[50], [53]–[54] (Debelle, Nyland and Anderson JJ); Grainer, above n 55, 146. See also *Hynard v Gavros* [2014] SASC 42 (25 March 2014).

<sup>68</sup> *Bowyer v Wood* (2007) 99 SASR 190, 205–7 [49]–[50], [53]–[54] (Debelle, Nyland and Anderson JJ).

<sup>69</sup> Grainer, above n 55, 159–60; Hannah and McGregor-Lowndes, 'Finding the Balance', above n 23, 1. See also Myles McGregor-Lowndes and Frances Hannah, 'Every Player Wins a Prize? Family Provision Applications and Bequests to Charity' (Research Paper, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, October 2008) 5.

This moral obligation persists even if the applicant is in financially secure circumstances.<sup>70</sup> In large estates, courts will extend the moral duty to include an obligation to provide the means that will allow the applicant to continue the affluent lifestyle they are used to.<sup>71</sup> Due to the courts' liberal interpretation of what is 'proper' and what is within a 'moral duty', it appears that courts are quite willing to interfere with a testator's wishes, thus almost guaranteeing applicants a high chance of success once they are eligible.

It should also be noted that due to the factually sensitive nature of family provision cases, the results of cases are highly unpredictable. This is exacerbated by a lack of higher court leadership in the area, given the High Court of Australia's reluctance to hear this sort of dispute. Two cases in the last ten years is not adequate guidance for a jurisdiction like this.

For the purposes of this research paper, a review was conducted of all family provision cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018.<sup>72</sup> In total, 24 cases were found, although it should be noted that these cases are not reflective of the larger proportion of family provision claims which are usually settled in mediation.<sup>73</sup> This analysis showed that 22 out of the 24 cases were successful at increasing the amount of provision awarded.<sup>74</sup> This is consistent with a 74 per cent success rate in judicial case reviews and 77 per cent success rate in public trustee file reviews across Australia.<sup>75</sup>

### III TESTAMENTARY FREEDOM

Testamentary freedom has been described as an important civil right,<sup>76</sup> with the ownership of property rendered incomplete if lacking the power to also give it as

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<sup>70</sup> Grainer, above n 55, 145.

<sup>71</sup> See, eg, Atherton, 'The Concept of Moral Duty', above n 41, 21; *Brennan v Mansfield* [2013] SASC 83 (6 June 2013).

<sup>72</sup> See Appendix 2 for an overview of cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018.

<sup>73</sup> Victorian Law Reform Commission, above n 3, 99. This number also does not include appeals of the cases.

<sup>74</sup> See Appendix 2 for an overview of cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018.

<sup>75</sup> Cheryl Tilse et al, 'Having the Last Word? Will Making and Contestation in Australia' (Project No 10200891, University of Queensland, 2015) 17; Cheryl Tilse et al, 'Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia: Review of Public Trustee Files' (Project LP11020089, 2014) 15. See also Ben White et al, 'Estate Contestation in Australia: An Empirical Study of a Year of Case Law' (2015) 38 *University of New South Wales Law Journal* 880, 899.

<sup>76</sup> Grainer, above n 55, 159. See also *Banks v Goodfellow* (1870) LR 5 QB 549, 563–5 (Cockburn CJ); McGregor-Lowndes and Hannah, 'Tyrannical Testators vs Greying Heirs?', above n 6, 64.

the owner wishes.<sup>77</sup> English political philosophers, John Locke, Jeremy Bentham and John Stuart Mill in the late 18th and early 19th century advocated strongly for preserving testamentary freedom. Locke's view was that 'the end of law', was 'not to abolish or restrain, but to preserve and enlarge Freedom'.<sup>78</sup> Bentham saw a father's testamentary power as providing a way in which to incentivise his children.<sup>79</sup> Bentham described this power as one which would reward 'dutiful and meritorious conduct'.<sup>80</sup> Mill described this power as that of 'showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness'.<sup>81</sup> Any intrusions into this power was limited only to providing maintenance or education for dependent children to 'enable them to start with a fair chance of achieving by their own exertions a successful life' but nothing further.<sup>82</sup> This important civil right led to the enactment of the *Wills Act 1837* (UK) 1 Vict, c 26 which was later mirrored in Wills Acts throughout Australia.<sup>83</sup>

Taking Locke, Mill and Bentham's approach, the legal principles are clear in stating that there should be no unnecessary intrusions upon the testator's testamentary freedom.<sup>84</sup> It was never intended that courts should re-write the testator's will or intrude upon testamentary freedom to the extent that 'a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court'.<sup>85</sup> Any power to vary a testator's will is limited *only to the extent necessary* to ensure adequate provision for the applicant and no more.<sup>86</sup> A testator's reasons cannot justly be ignored unless the evidence does not support such reasons<sup>87</sup> and, if no error is shown, courts will only disturb a disposition if there is a 'strong or cogent' case to do so.<sup>88</sup>

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<sup>77</sup> Mill, above n 62, ch 2 [4] cited in Atherton, 'The Concept of Moral Duty', above n 38, 18. See also *Grey v Harrison* (1997) 2 VR 359, 366 cited in Hannah and McGregor-Lowndes, 'Finding the Balance', above n 23.

<sup>78</sup> John Locke and Peter Laslett (ed), *Two Treatises of Government* (Cambridge University Press, 1963) 11, 57.

<sup>79</sup> Jeremy Bentham and R Hildreth, *Principles of the Civil Code* (Trübner, 1864).

<sup>80</sup> *Ibid.*

<sup>81</sup> Mill, above n 62, ch 2 [3].

<sup>82</sup> *Ibid.*

<sup>83</sup> Rosalind Croucher, 'A Lament for Family Provision — A Good Idea Gone Wrong? Australian Reflections' (Paper presented at Colloquium on 40 Years of The PRA: Reflection And Reform, Auckland, 8 December 2016).

<sup>84</sup> *Barns v Barns* (2003) 214 CLR 169.

<sup>85</sup> *Ibid* [140].

<sup>86</sup> *Hynard v Gavros* [2014] SASC 42 (25 March 2014).

<sup>87</sup> *Wall v Crane* [2009] SASC 382 (16 December 2009).

<sup>88</sup> *Sampson v Sampson & Perpetual Executor Trustee and Agency Co (WA) Ltd* (1945) 70 CLR 576.

However, the past 100 years of family provision law has seriously challenged testamentary freedom<sup>89</sup> to the extent that people now believe ‘their will can effectively be challenged by anyone, and that they do not truly have freedom to dispose of their property by will.’<sup>90</sup> Professor Rosalind Croucher comments that ‘family provision today pays very little heed to testamentary freedom, apart from largely lip service. The litigation that has overtaken wills has made testamentary wishes but a bit of kindling in a costs bonfire.’<sup>91</sup> Courts have shown an increasing willingness to override the testator’s wishes in family provision cases.<sup>92</sup> Family provision cases are decided objectively because the testator’s subjective wishes are given little to no weight.<sup>93</sup>

There are two notable British studies which explore community attitudes with respect to family provision laws. The first study was published in 2009 and was conducted by Gareth Morrell, Matt Barnard and Robin Legard.<sup>94</sup> This study used focus groups of people from ‘non-traditional’ families. The second study was jointly conducted in 2010 by Alun Humphrey, Lisa Mills and Gareth Morrell of the National Centre for Social Research and Gillian Douglas and Hillary Woodward of Cardiff University.<sup>95</sup> These studies identified reasons as to why relatives of a deceased person should be entitled to a share in the deceased’s estate. Primarily, these reasons were centred on bloodline or lineage to maintain family stability or need arising from disability or poverty. Another reason was where the descendant had materially contributed to the deceased’s acquisition of wealth.

In 2006, the New South Wales Law Reform Commission undertook a study on the attitudes to inheritance which reported similar findings to the British studies outlined above. Professor Prue Vines commented that

over the twentieth century the notion that some expectation of inheritance could exist continued to grow, and the idea that the testator could do whatever he or she wished diminished accordingly. In response to this expectation legislatures expanded the range of possible applicants for family provision.<sup>96</sup>

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<sup>89</sup> Hannah and McGregor-Lowndes, ‘Finding the Balance’, above n 23, 1.

<sup>90</sup> Victorian Law Reform Commission, above n 3, 99; Tilse et al, ‘Having the Last Word?’, above n 75, 17–18;

<sup>91</sup> Rosalind Croucher, ‘If We Could Start Again: Re-Imagining Family Provision Law in the 21st Century’ (Paper presented at 2017 STEP Australian Conference, Melbourne, 2–4 August 2017).

<sup>92</sup> Mark Minarelli and Russell Jones, ‘Family Provision Claims in South Australia’ (Summer Report, DW Fox Tucker, 2016) 19.

<sup>93</sup> Grainer, above n 55, 150.

<sup>94</sup> Gareth Morrell, Matt Barnard and Robin Legard, ‘The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families’ (Final Report, National Centre for Social Research, 31 March 2009).

<sup>95</sup> Alun Humphrey et al, ‘Inheritance and the Family: Attitudes to Will-Making and Intestacy’ (Report, National Centre for Social Research, August 2010).

<sup>96</sup> Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011) [2.6].

## IV ADULT CHILDREN

When family provision laws were first introduced in Australia, courts were strict on adult sons.<sup>97</sup> In order for adult sons to make a successful claim, they had to be able to establish a ‘special need’ or ‘special claim’.<sup>98</sup> This could be established in a number of ways, for example, they may have been a dependent on the testator at the time of their death, they may have contributed to the building up of the testator’s estate, they may have suffered from some physical or mental disability, a financial disaster, unemployment or they may have a number of dependents relying on them for support.<sup>99</sup>

Chief Justice Stout in *Allardice v Allardice* commented that ‘[i]f they had any push they should, considering their age, have ere this done something for themselves, and to settle money on them now might destroy their energy and weaken their desire to exert themselves’.<sup>100</sup> The rationale behind this argument is that because an adult son is prima facie able to maintain and support himself,<sup>101</sup> the testator’s responsibility for his son should end once the son is mature, able-bodied and capable of being self-supportive.<sup>102</sup> This is in contrast to the testator’s ongoing responsibility to widows and infant children who are prima facie dependent on him.<sup>103</sup>

However, a dramatic shift in the courts’ approach to adult children, as well as legislative amendment, has led to an expansion of the law in this area. The requirement to demonstrate ‘special circumstances’ no longer forms part of the law of adult child family provision claims under the Acts in all states and territories.<sup>104</sup> Accordingly, currently, competent and self-supportive adult children are automatically eligible in

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<sup>97</sup> *Re Sinnott* [1948] VLR 279; *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 147; *Pontifical Society for Propagation of Faith v Scales* (1962) 107 CLR 9, 19–20.

<sup>98</sup> *Delisio v Santoro* [2002] SASC 65 (27 February 2002) 80 (Besanko J).

<sup>99</sup> Joseph Laufer, ‘Flexible Restraints on Testamentary Freedom: A Report on Decedents’ Family Maintenance Legislation’ (1955) 69 *Harvard Law Review* 277, 308–11.

<sup>100</sup> *Allardice v Allardice* (1910) 29 NZLR 959, 971. Adult daughters were not subject to the same requirement.

<sup>101</sup> *Ibid*; *Re Sinnott* [1948] VLR 279, 280 (Fullagar J), cited in *Fennell v Aherne* [2005] SASC 280 (22 July 2005) [39] (Withers J).

<sup>102</sup> *Re Sinnott* [1948] VLR 279, 281 (Fullagar J), cited in *Fennell v Aherne* [2005] SASC 280 (22 July 2005) [40] (Withers J); Rosalind F Croucher, ‘Conflicting Narratives in Succession Law’ (2007) 14 *Australian Property Law Journal* 179, 186.

<sup>103</sup> *Re Sinnott* [1948] VLR 279, 280 (Fullagar J), cited in *Fennell v Aherne* [2005] SASC 280 (22 July 2005) [39] (Withers J).

<sup>104</sup> See, eg, *Blair v Blair* (2004) 10 VR 69, 77–9 [19]–[22].

all states and territories in Australia<sup>105</sup> and will not be presumed unsuccessful on the mere basis of being able-bodied self-supportive adults.<sup>106</sup>

In this fight for equality among the sexes, and where women are increasingly more like men in respect of having independent financial means, it is interesting to note that the courts appear to have taken a ‘counter-cultural’ approach. Namely, by ‘reducing’ adult sons to the status of prima facie dependent children instead of ‘raising’ adult daughters to the status of prima facie being able to maintain and support themselves.

## V THE AGE OF ENTITLEMENT

It has been held that the purpose of the legislation is to provide a safety net and not a statutory right to a minimum allocation from the estate.<sup>107</sup> However, over the years, through judicial interpretation and legislative amendment,<sup>108</sup> dependency has given way to entitlement.<sup>109</sup> This entitlement appears to be based largely upon recognition of the family relationship, rather than need or reciprocity.<sup>110</sup>

There is considerable concern that the current law allows or encourages opportunistic and non-genuine claims, although views differ over how widespread the issue really is.<sup>111</sup> There is evidence of increasing litigation in succession law,<sup>112</sup> and greed, along with a culture of entitlement, has been nominated by legal practitioners, mediators, and trustees as the main drivers of these family provision applications.<sup>113</sup>

There are growing numbers of adult children who expect a share of the estate as a right, creating the current culture of expectation, which means it is no longer

<sup>105</sup> See, eg, *Inheritance (Family Provision) Act 1972* (SA) s 4 (definition of ‘child’), which does not discriminate between minors and adults.

<sup>106</sup> *McCosker v McCosker* (1957) CLR 566, 576 (Dixon CJ and Williams J), cited in *Wall v Crane* [2009] SASC 382 (16 December 2009) [18] (White J).

<sup>107</sup> *Pizimolas v Pizimolas* [2010] SASC 158 (28 May 2010).

<sup>108</sup> Croucher, ‘Conflicting Narratives in Succession Law’, above n 102, 189.

<sup>109</sup> See, eg, Grainer above n 55, 142; Tilse et al, ‘Having the Last Word?’, above n 75, 21.

<sup>110</sup> Grainer, above n 55, 143.

<sup>111</sup> Victorian Law Reform Commission, above n 3, 99–100.

<sup>112</sup> Christopher Crawford, ‘Case Note: Family Provision Applications in Small Estates: *Cope v the Public Trustee of Queensland*’ (2013) 20 *James Cook University Law Review* 118, 124; McGregor-Lowndes and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 63; 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>>.

<sup>113</sup> Myles McGregor-Lowndes and Frances Hannah, ‘Every Player Wins a Prize?’, above n 69, 75–6; Tilse et al, ‘Having the Last Word?’, above n 75, 16–17.

inappropriate behaviour to contest a will.<sup>114</sup> A 2002 English survey found that 45 per cent of ‘younger people have greater expectations of an inheritance’.<sup>115</sup> This view may be encouraged by the judicial perception that a bare parental relationship is sufficient to find a moral duty.<sup>116</sup> This may also be due to a perception that wills are a mechanism to distribute ‘family money’ and, thus, should be allocated within family.<sup>117</sup>

A review of public trustee files revealed that a sense of entitlement made up 19 per cent of commonly reported grounds for contesting wills.<sup>118</sup> Increasing wealth has also been highlighted as a factor leading to the increase in family provision claims. Increasing wealth has been accumulated by the generation of baby boomers as a result of rising real estate prices, a share market boom and superannuation, thus providing further incentive for opportunistic applicants to get a share of the wealth.<sup>119</sup>

A review of all judicial cases in South Australia from 2000 to 2018 revealed that a vast majority of applicants (19 out of 24 cases) were competent adult children between the ages of 42 and 76.<sup>120</sup> Among the 19 cases, a proportion of these adult children were financially independent.<sup>121</sup>

This research is consistent with that of academics at the University of Queensland, who conducted a study which reviewed all publicly available succession law judgments in Australia during a 12-month period. It involved examining the number of estates subject to family provision claims, who was contesting them, and to what extent those challenges were successful.<sup>122</sup> They reported some of the findings in an

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<sup>114</sup> Ibid 70. See also Carolyn Sappideen, ‘Families and Intergenerational Transfers: Changing Intergenerational Transfers: Changing the Old Order’ (2008) 31 *University of New South Wales Law Journal* 738, 740–3.

<sup>115</sup> Sappideen, above n 114, 755.

<sup>116</sup> McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69, 76.

<sup>117</sup> Tilse et al, ‘Having the Last Word?’, above n 75, 21.

<sup>118</sup> Tilse et al, ‘Families and Generational Asset Transfers’, above n 75, 8.

<sup>119</sup> Ibid 70; Rachel Browne, ‘Where There’s a Will, There’s a Writ’, *The Sydney Morning Herald* (online), 9 May 2014 <<http://www.smh.com.au/nsw/where-theres-a-will-theres-a-writ-20140506-zr5ib.html>>; McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69, 76.

<sup>120</sup> See Appendix 2 for an overview of cases decided under the *Inheritance (Family Provision) Act 1972* (SA) from 2000 to 2018.

<sup>121</sup> See, eg, *Parker v Australian Executor Trustees Ltd* [2016] SASC 64 (1 June 2016); *Hellwig v Carr* [2009] SASC 117 (1 May 2009); *Fennell v Aherne* [2005] SASC 280 (22 July 2005); *Drioli v Rover* [2005] SASC 395 (14 October 2005); *Wall v Crane* [2009] SASC 382 (16 December 2009); *Delisio v Santoro* [2002] SASC 65 (27 February 2002).

<sup>122</sup> White et al, above n 75, 882. The research was supported by the Australian Research Council’s Linkage Projects funding scheme (project number LP110200891), and had contributions from the Public Trustees of Queensland, Tasmania, South Australia, Western Australia, and the Australian Capital Territory, as well as the State Trustees of Victoria and New South Wales Trustee and Guardians.

article published in 2015.<sup>123</sup> Of the sample size chosen for the study, 52 per cent of the claims made were by adult children with no incapacity. The success rate in these cases was 69 per cent, and over 80 per cent for children when the estate was over \$1 million. Taking a conservative approach, the study identified that approximately one-third of the claimants could be regarded as ‘financially comfortable adults just wanting more’.<sup>124</sup>

In 2008<sup>125</sup> and then in 2009,<sup>126</sup> two Queensland academics, Professor McGregor-Lowndes and Frances Hannah, examined family provision laws in Australia and other jurisdictions.<sup>127</sup> They argue that ‘[t]here appear to be few limitations on claims by adult children in Australia. Indeed, claims by adult children have become easier to maintain over time in Australian jurisdictions’.<sup>128</sup>

Professor Rosalind Croucher has expressed concern about adults making claims against the wishes of the testator, when they are not in any financial or any other need.<sup>129</sup> Croucher has described a cohort ‘of independent, self-sufficient 50 and 60 year olds wanting to get more of the pie from their parents, notwithstanding that the parent had made a conscious decision that they had already had enough and/or did not deserve more (or even anything)’.<sup>130</sup>

In very recent times, however, it could be argued that the courts appear to be taking a slightly different approach to opportunistic claims. In *Swanson v Reis*,<sup>131</sup> a 56 year-old son made a family provision application for further provision from his late mother’s estate. In the deceased’s will, the defendant, another adult son, received two thirds of the \$420 000 estate while the plaintiff received one sixth, approximately \$70 000. The plaintiff was described to be in a ‘comfortable position financially’.<sup>132</sup> Conversely, the defendant was ‘in a significantly worse financial position’.<sup>133</sup> The Court dismissed the claim.

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid 901.

<sup>125</sup> McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69.

<sup>126</sup> McGregor-Lowndes and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6.

<sup>127</sup> McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’, above n 69.

<sup>128</sup> McGregor-Lowndes and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 78.

<sup>129</sup> Rosalind F Croucher, ‘Succession Law Reform in NSW — 2011 Update’ (Speech delivered at the Blue Mountains Annual Law Conference, Katoomba, 17 September 2011).

<sup>130</sup> Ibid.

<sup>131</sup> [2018] SASC 20 (2 March 2018).

<sup>132</sup> Ibid [31].

<sup>133</sup> Ibid [72].

### C *Estrangement*

A number of the claims made by adult children under the Acts involve situations where the testator had been estranged from the claimant. These cases touch on the 'reward and punish' notion expressed by Mill and Bentham. The varied outcomes in the cases reveal that courts are not consistent in their views on estrangement, with some courts holding estrangement as a determinative factor sufficient to order provision, and other courts placing it as just one out of the many factors.

In *Malone v Runge*<sup>134</sup>, the testator had made a gift of \$10 000 to each of her 56 year old and 61 year old estranged daughters, representing a small proportion of the overall estate. In her will, the testator referred to the estrangement between her and these two daughters following an incident five years ago. Prior to the incident, the relationship between them was close and loving. The evidence showed the deceased did not make any attempts to improve the relationship with her daughters. Further, based on the totality of the relationship between the testator and her daughters, the Court determined that there was a failure, on the part of the deceased, to make adequate provision for the proper maintenance or advancement in life of each of her daughters.

In *Parker v Australian Executor Trustees Limited*,<sup>135</sup> a testator had five children who, at the time of his death, were in their 50s and 60s. He gifted one son his farm, the daughter \$100 000 and the residue to a charitable trust. All five children challenged the will. With respect to the three estranged children who were not left with anything, the Court found that this was due to the testator's own behaviour and that this created an even stronger moral obligation to properly provide for them after his death. All five children were awarded provision out of the estate.

These cases can be contrasted with that of *Burke v Burke*<sup>136</sup> which involved an estranged adult son who was left with \$100 000 of a \$1.3 million estate, the balance of which was left equally to his two siblings. The adult son was bankrupt and receiving a pension. A compelling letter written by the testator accompanied the testator's will, explaining the heartache caused by the estrangement initiated by the adult son. The Supreme Court of New South Wales referred to the judgment in *Goldberg v Landerer* which held that

the Court should accept that testators are, in certain circumstances, entitled to make no provision for children, particularly in the case of children who treat their parents callously, by withholding without proper justification, their support and love from them in their declining years. Even more so where that callousness is compounded by hostility.<sup>137</sup>

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<sup>134</sup> [2012] NSWSC 1032 (10 September 2012).

<sup>135</sup> [2016] SASC 64 (1 June 2016).

<sup>136</sup> [2014] NSWSC 1015 (25 July 2014).

<sup>137</sup> [2010] NSWSC 1431 (10 December 2010) [39].

The Court did not make any provision for the son and the Court of Appeal upheld the primary judgment. With respect to the issue of estrangement, Ward JA with whom Meagher JA agreed, held that

as a general proposition estrangement (or ‘mere estrangement’) will not be a determinative factor against (nor, I would add, is estrangement in the absence of callousness or hostility a determinative factor in favour of) the making of provision for an adult child. It is simply a factor to be taken into account with all the circumstances of the particular case.<sup>138</sup>

In the recent United Kingdom case of *Illott v The Blue Cross*,<sup>139</sup> the Supreme Court considered the issue of estrangement in the context of adult children claims under the 1975 Act. The case involved a daughter who had been estranged from her mother for many years. The mother gave her estate to a number of charities and did not give anything to her daughter, who was a 50-year-old welfare recipient with five children.

At first instance, District Judge Million awarded the daughter £50 000. The daughter appealed the decision and the Court of Appeal held that the District Judge had failed to take into account the interaction of the award of £50 000 with the daughter’s welfare payments. Accordingly, the award was increased to £143 000, which would enable her to purchase a home and have a capital sum to fund future needs, whilst allowing the welfare payments to continue. The charities appealed to the Supreme Court, which held that the Court of Appeal erred in its approach on the basis that maintenance under the Act was ‘by definition the provision of income rather than capital’.<sup>140</sup> Accordingly, the amount awarded to buy a house was a capital amount and was not appropriate, as it went beyond meeting day-to-day living expenses.<sup>141</sup> Lady Hale discussed the ‘unsatisfactory state of the current law’ with respect to claims by adult children and commented that to a large extent this had been driven by the lack of guidance in the 1975 Act.<sup>142</sup> The approach of the Supreme Court in this case stands in contrast to the manner in which the Australian courts have interpreted the concept of ‘maintenance’ in the Family Provision Acts in Australian states.

## VI ADULT STEP-CHILDREN

The increase in blended family structures is also perceived as a factor impacting on the increase in family provision claims. Due to increased longevity, more marriages are ending by dissolution, resulting in higher rates of second and third marriages.<sup>143</sup>

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<sup>138</sup> *Burke v Burke (No 2)* [2015] NSWCA 195 (13 July 2015) [103].

<sup>139</sup> [2018] AC 545.

<sup>140</sup> *Ibid* [15].

<sup>141</sup> *Ibid* [14].

<sup>142</sup> *Ibid* [66].

<sup>143</sup> Grainer, above n 55, 157; Darryl Browne, ‘Blended Families: Recent Trends in Family Provision Claims’ [2016] *Law Society of New South Wales Journal* 88, 88.

Of the total number of marriages in 2004, 30 per cent had children under 16 years from a previous marriage<sup>144</sup> and in total, 5–6 per cent of Australian families included step-children.<sup>145</sup> Multiple marriages and changing notions of ‘family’ have been cited as reasons for the growing increase of family applications, as partners and children of each blended family strive for a share of the deceased’s estate.<sup>146</sup>

Professor Prue Vines undertook a significant empirical study of estate litigation, published in 2011.<sup>147</sup> This study examined a series of cases in the Supreme Courts of New South Wales and Victoria in the Family Provision jurisdiction. Vines’ research shows that disputes between children of a former marriage and the subsequent partner of the deceased are the ‘fiercest’:

Emotions run high in such situations and there is a risk that litigation may be used as a weapon for vendetta. Several lawyers spoke of clients who said they didn’t care if the entire estate was used up in litigation, as long as the other claimant didn’t get anything.<sup>148</sup>

In Queensland, Tasmania and Victoria, step-children are not required to demonstrate dependency and are treated in the same way as biological, foster and adopted children. This leaves the door open for adult step-children to make a claim against their adult step-parent’s estate (or possibly against the estates of multiple step-parents). However, in these situations it is unlikely that the step-child will be able to make a successful claim under the respective Acts as they will not be able to establish that a moral duty existed for the step-parent to provide for them. In these states, a review of the case law indicates that if it can be shown that the deceased’s estate was derived from the efforts of the step-child’s natural parents, then the step-child will often be successful in those instances, even where they did not share a close personal relationship with the step-parent.

In *James v Day*,<sup>149</sup> a step-child made a claim against his step-parent’s estate despite the fact that he had never lived in the same household as the step-parent. The court took a historical view and considered the source of the step-parent’s estate which was derived from the natural parent of the step-child. This was a key factor which the Court took into account in awarding provision to the step-child. Similar reasoning was applied in the case of *Keets v Marks*.<sup>150</sup>

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<sup>144</sup> Zinta Harris, ‘From “Brady Bunch” to “Modern Family”’: Succession Planning Tips for Blended Families’ *Blended Families and Estate Planning* (November 2014) 1.

<sup>145</sup> Tilse et al, ‘Having the Last Word?’, above n 75, 11.

<sup>146</sup> McGregor and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 69–70; Viellaris, above n 112.

<sup>147</sup> Vines, above n 96.

<sup>148</sup> *Ibid* [3.18].

<sup>149</sup> [2004] VSC 290 (17 August 2004).

<sup>150</sup> [2005] VSC 172 (20 May 2005).

In *Freeman v Jacques*,<sup>151</sup> the step-children made a claim against their step-parent's will, which left the estate to a friend. The step-children had no relationship with their step-parent and all interactions had been hostile in nature. In a similar manner to the cases described above, the Court justified making provision for the step-children even though they had already benefited from their father's estate, based on the fact that the source of the step-parent's estate was derived from their natural parent's work during their lifetime. Another relevant consideration was that the step-children were in necessitous circumstances.

In *McCann v Ward*,<sup>152</sup> a step-child made a claim against the estate of the wealthy deceased step-parent. In this case, the deceased had three children from a previous marriage and two step-daughters from his second marriage. In his will, he left his estate to his children and to his second wife. He did not leave anything to his step-daughters. It was submitted on behalf of the estate that the testator had no responsibility to make provision for his step-daughter for three principal reasons. Firstly, because the relationship between step-father and step-child was not one of parent and child. Secondly, the necessitous situation in which the step-child found herself was a product of her own doing and thirdly, the step-father had met any responsibility he had to make provision to his step-daughter by making provision for her mother, his second wife, with the intention that her mother would leave her with adequate provision when she died. The Court held that the deceased had a responsibility to make adequate provision for the contingency that his step-daughter would be in financial need if he died before his second wife which he failed to do. In making this determination, the Court took into account the wealthy position of the testator and the good relationship which the testator had with his step-daughter.

In the Australian Capital Territory, New South Wales, the Northern Territory, and South Australia the law provides no recourse to those cases involving blended families where the child's parent remarries and then predeceases their subsequent spouse whom they have left their assets to, who then makes a will leaving no provision for their step-children.

## VII LAW REFORM COMMISSION REVIEWS OF SUCCESSION LAW

Given the discussion above, one of the key issues that arises is whether competent adult children should be given automatic eligibility or whether they should first be subject to additional criteria. Many critics have highlighted the unsatisfactorily high incidences of claims made by financially secure adult children.<sup>153</sup> It has been argued that obligations to children should end once they are self-supporting and that the community would only expect parents to provide a buffer for adult children *when*

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<sup>151</sup> [2005] QSC 200 (22 July 2005).

<sup>152</sup> [2012] VSC 63 (1 March 2012).

<sup>153</sup> Chesterman, above n 42, 15; Renwick, above n 11, 173; McGregor-Lowndes and Hannah, 'Reforming 'Tyrannical Testators vs Greying Heirs?', above n 6, 78; Rosalind F Croucher, 'Succession Law Reform in NSW — 2011 Update', above n 129.

they fall on hard times or *if* they lack the resources to meet ill health or advancing years.<sup>154</sup> This implies a further criterion of need or dependency for competent adult children.<sup>155</sup> This issue has been reviewed by law reform commissions in the United Kingdom, New Zealand and Australia.

#### A *United Kingdom Law Commission*

In 1971, the United Kingdom Law Commission published a consultation paper on Family Property Law which resulted in the enactment of the *Inheritance (Provision for Family and Dependents) Act 1975* (UK).<sup>156</sup> The Commission considered whether an age limit or dependency test for adult children claimants would be appropriate, but decided against restricting claims of adult children in this manner, leaving it to the courts to determine whether a claimant was deserving.<sup>157</sup>

The Commission was concerned that limiting the claims of adult children might result in unfairness in those cases where the parent had a moral obligation to support their adult child during their lifetime, but refused to.<sup>158</sup> The Commission was also concerned about instances where an adult child requires support after the death of the parent.<sup>159</sup>

With respect to step-children, the Commission recommended that the law introduce a new category of ‘eligible applicant’. This would apply to any person (not being a child of the deceased), who in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated as a child of the family in relation to that marriage or civil partnership.<sup>160</sup> This recommendation was enacted in the 1975 Act.

More recently, in 2008, the Commission consulted widely on the subject of family provision, producing a report in 2011 on ‘Intestacy and Family Provision Claims on Death’ to the British Parliament.<sup>161</sup> The Commission made reference to the cases

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<sup>154</sup> *Fennell v Aherne* [2005] SASC 280 (22 July 2005) [40] (Withers J), citing *Re Sinnott* [1948] VLR 279, 280 (Fullagar J); *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).

<sup>155</sup> See also Renwick, above n 11, 174–5.

<sup>156</sup> United Kingdom Law Commission, *Family Property Law* (Working Paper No 42, 1971).

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid* [76].

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid* [79].

<sup>161</sup> United Kingdom Law Commission, *Intestacy and Family Provision Claims on Death*, Report No 331 (2011).

of *Re Hancock*<sup>162</sup> and *Ilott*<sup>163</sup> to describe the restrictive approach to adult children taken under the UK case law. The following part of the Court of Appeal's judgment in *Re Hancock* was referenced in the Commission's report:

If ... the adult child is in employment, with an earning capacity for the foreseeable future, it is unlikely he will succeed in his application without some special circumstance such as a moral obligation.<sup>164</sup>

Consultees were asked whether the 1975 Act should be amended to afford adult children a greater chance of success.<sup>165</sup> The strong view was that the current law should not be changed and ultimately, the Commission made no provisional proposal for reform with respect to children.<sup>166</sup> The Commission did recommend an extension of the law with respect to the treatment of step-children. In that regard, the Commission recommended that the relationship between the child and the deceased did not have to be preferable to the deceased's marriage or civil partnership.<sup>167</sup>

### *B New Zealand Law Commission*

In 1997, the New Zealand Law Commission published a report following a review of its family provision laws.<sup>168</sup> The report recommended that with respect to adult children, a stricter approach be taken and that there was no support for an equal shares approach in its consultation.<sup>169</sup> It considered that family provision laws served a 'reward' and 'support' role and that judicial rewriting of wills was inappropriate in all but the most extreme cases.<sup>170</sup>

The Law Commission provided the following reasoning:

Powers to provide for adult children that are as extensive and indeterminate as those in the present law would, if applied to the living, be judged rightly as unacceptable. No reason has been advanced why they should apply after a will-maker's death.<sup>171</sup>

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<sup>162</sup> [1998] 2 FLR 346.

<sup>163</sup> [2011] 2 FCR 1.

<sup>164</sup> United Kingdom Law Commission, *Intestacy and Family Provision Claims on Death*, above n 161, [6.6], quoting *Re Hancock* [1998] 2 FLR 346, 351 (Butler-Sloss LJ).

<sup>165</sup> United Kingdom Law Commission, *Intestacy and Family Provision Claims on Death*, above n 161, [6.12].

<sup>166</sup> *Ibid* [6.13].

<sup>167</sup> *Ibid* [6.31].

<sup>168</sup> New Zealand Law Commission, *Succession Law: A Succession (Adjustment) Act: Modernising the Law on Sharing Property on Death*, Report No 39 (1997).

<sup>169</sup> *Ibid* [48].

<sup>170</sup> *Ibid* [74].

<sup>171</sup> *Ibid* [75].

The Law Commission recommended that adult independent children should only be able to make a claim under certain circumstances: if they provided valuable benefits to the parent during the parent's lifetime; if the adult child is in genuine need and there would be no adverse impact to the beneficiaries under the deceased parents' will to support them with periodic payments; or if the child is seeking a memento or keepsake of sentimental value only.<sup>172</sup> In all other instances, adult claims should be disallowed.

With respect to step-children, the Law Commission recommended that claims be limited to those situations where the child and step-parent shared a relationship of parent and child and where the step-parent has assumed the responsibilities of a parent.<sup>173</sup>

### *C National Committee for Uniform Succession Laws in Australia*

The National Committee for Uniform Succession Laws in Australia completed their Uniform Succession Laws Project in 2009.<sup>174</sup> To date, its recommendations have only been partially implemented in New South Wales in the *Succession Act 2006* (NSW), and Western Australia in the *Inheritance (Family and Dependents Provision) Amendment Act 2011* (WA).

With respect to adult children, the Committee recommended that eligibility should not extend to adult children of the deceased person unless it can be shown that they are a person for whom the deceased person had a responsibility to make provision for the person's maintenance, education or advancement in life.<sup>175</sup> In that regard, the Committee recommended that being an adult child was not enough to bring a claim against the deceased parent.

A draft Family Provision Bill 2004 was produced as part of the project. Clause 6 of the Bill provided that a 'non-adult child' (meaning a minor, but not including a step-child) is 'automatically' entitled to apply. Clause 7 provides that a person to whom the deceased owed a responsibility to provide maintenance, education or advancement in life may apply to the court for a family provision order. Accordingly, step-children, adult children, and other family members are not 'automatically'

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<sup>172</sup> Ibid [77].

<sup>173</sup> Ibid [79].

<sup>174</sup> The National Committee's Report and Supplementary Report on Family Provision have been published by the Queensland Law Reform Commission, Miscellaneous Paper 28, December 1997 and Report 58, July 2004. This was a joint project conducted by the National Committee for Uniform Succession Laws with all States and Territories under the direction of the Queensland Law Reform Commission.

<sup>175</sup> Queensland Law Reform Commission, *National Committee for Uniform Succession Laws, Family Provision*, Report No 58 (2004) 3.

entitled under clause 6 and have to apply under clause 7. Such a provision is yet to be adopted in any state in Australia.<sup>176</sup>

#### D *Victorian Law Reform Commission*

The Victorian Law Reform Commission ('VLRC') announced in March 2012 that it would be undertaking an inquiry into succession laws. The Succession Laws Report of the VLRC was published in 2013.<sup>177</sup> With respect to the *Administration and Probate Act 1958* (Vic) as it applies to children, the Commission recommended that the Victorian Parliament implement the New South Wales test for eligibility, but extend it to include step-children.<sup>178</sup> Accordingly, it was recommended that adult children and step-children should be eligible to make a claim in all circumstances. This recommendation was despite earlier references in the report to cases involving 'opportunistic, or non-genuine claims, which although they lack merit, are settled by estates for "go away money" in order to avoid the depletion of the estate through legal costs'.<sup>179</sup>

On 20 August 2014, the Justice Legislation Amendment (Succession and Surrogacy) Bill 2014 was tabled in the Victorian Parliament. Controversially, adult children were excluded from the list of eligible claimants, unless the adult child suffered from a disability or was between the ages of 18 and 25 and a full-time student, or was wholly or partially dependant on the deceased.<sup>180</sup> Any 'special circumstances' the child could raise would be irrelevant under the Bill. The proposed amendments went far beyond any other jurisdiction in Australia, beyond what was recommended by the VLRC and applied an even stricter test than that for 'adult sons' in the early 1900s. The Bill elevated the position of step-children giving them equal status to biological children.

It is clear that a primary objective of the Bill was to prevent unmeritorious claims and to mitigate against the costs in these matters. The policy behind the Bill was discussed in the second reading speech as follows:

The starting point is that a deceased is entitled to dispose of their estate as they see fit, and this should only be departed from where they had a moral duty to provide for the needs of the claimant and yet failed to do so.

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<sup>176</sup> Department of Justice (NSW), 'Statutory Review of the Succession Act 2006' (Report, February 2018). Most recently, the New South Wales Department of Justice Review conducted a statutory review of the *Succession Act 2006* (NSW). It was recommended that there be no reform to the eligibility of adult children or step children.

<sup>177</sup> Victorian Law Reform Commission, above n 3.

<sup>178</sup> *Ibid* 114 (Recommendation 38).

<sup>179</sup> Lachlan Wraith, 'Family Provision — A Year in Review' (Paper presented at the Law Institute of Victoria Succession Law Conference, 12 September 2014) 6.

<sup>180</sup> Justice Legislation Amendment (Succession and Surrogacy) Act 2014 s 3 (see definition of *eligible person* (b)).

Thus, for example, adult children successfully leading independent lives would not usually have grounds to claim on an estate.<sup>181</sup>

The Law Institute of Victoria ('LIV') raised serious concerns with the Bill to the Attorney-General and successfully lobbied that the Bill not be passed unless adult children were able to make family provision claims.<sup>182</sup> The LIV provided examples of adult children who would not be able to make a claim under the Bill.<sup>183</sup> The first involved the deceased parent providing for one child and not the other or others based on the gender of their children. The adult children who miss out would not be able to make a claim. The second and third involved an unemployed child living away from home or an adult child living away from home due to their parent's mental health issues. These adult children are dependant at the time of their parent's death and would not be able to make a claim. Finally, an example was provided of a financially dependent adult child who shortly after their parent's death is diagnosed with a disease and is unable to work. Again, this adult child would be independent at the time of their parent's death and would not be able to make a claim.

The Government acknowledged that the Bill went too far in taking away the rights of the adult family members who might have good reason to contest a will. The amended Bill was passed on 16 October 2014 resulting in the enactment of the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* which was given royal assent on 21 October 2014. The current position in Victoria is that adult children and step-children are eligible claimants in all circumstances.<sup>184</sup> However, in determining the extent of provision to be made by a family provision order, if any, the court must take into account the degree to which the adult child or step-child is not capable, by reasonable means, of providing adequately for their proper maintenance and support.<sup>185</sup> This new provision which applies to adult children and step-children may deter some of the opportunistic claims made by adult children under the Victorian family provision legislation. At the 2017 STEP Australia Conference, Justice Kate McMillan of the Supreme Court of Victoria highlighted that the number of family provision cases in Victoria has reduced since the passing of the Act, although, simultaneously, there has been an increase in constructive trusts claims.

#### E *South Australian Law Reform Institute*

The authors of this article are two of the co-authors of the South Australian Law Reform Institute's ('SALRI') final report on the *Inheritance (Family Provision)*

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<sup>181</sup> Victoria, *Parliamentary Debates*, Legislative Council, 20 August 2014, 2617 (Edward John O'Donohue).

<sup>182</sup> Law Institute of Victoria, Submission to the Attorney General, *Justice Legislation Amendment (Succession and Surrogacy) Bill*, 28 August 2014.

<sup>183</sup> *Ibid* [3], [9].

<sup>184</sup> *Administration and Probate Act 1958* (Vic) s 90(f).

<sup>185</sup> *Ibid* s 91(4)(c).

*Act 1972 (SA)*, which was referred to the Attorney General in December 2017.<sup>186</sup> With respect to independent adult children, SALRI took the view that, whilst legitimate concerns were raised during consultation with respect to independent adult children, it would be problematic to restrict the circumstances in which adult children are able to make a claim under the Act.<sup>187</sup> In particular, SALRI's final report notes that imposing restrictions on the eligibility for adult children leads to a real risk of precluding deserving claims and may in some situations encourage dependency.<sup>188</sup>

With respect to adult step-children, SALRI took the view that the present automatic eligibility to make a claim is inappropriate for step-children and that there should be exceptions to permit adult step-children to make a claim under the Act but only in limited circumstances.<sup>189</sup> These circumstances include: that the adult step-child is significantly vulnerable (such as with a physical or intellectual disability); the adult step-child substantially contributed to the testator's estate or care; the adult step-child was genuinely dependent on the testator at the time of the testator's death; or the assets accumulated by the adult step-child's natural parent substantially contributed to the estate of the testator.<sup>190</sup>

## VIII COSTS

The extensive implications arising from the complex issue of costs in family provisions claims are beyond the scope of this article. However, it is important to note that the problem of costs is very closely related to opportunistic claims.<sup>191</sup> There are complaints of practitioners who exploit the common assumption that all costs are paid out of the estate,<sup>192</sup> resulting in an increase of opportunistic claims being brought forward at the expense of the beneficiaries and the estate.<sup>193</sup> Executors may be forced to settle such opportunistic claims in order to protect the estate from further costs

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<sup>186</sup> South Australian Law Reform Institute, *Review of the Inheritance (Family Provision) Act 1972 (SA)*, Report No 9 (2017).

<sup>187</sup> Ibid 64, 67 (Recommendation 10): SALRI recommended that the law should remain as it is, and adult children who are competent and self-supporting and all other adult children should automatically be eligible to make a family provision claim, just like children under the age of 18.

<sup>188</sup> Ibid 64.

<sup>189</sup> Ibid 65.

<sup>190</sup> Ibid 67 (Recommendation 11).

<sup>191</sup> Victorian Law Reform Commission, above n 3, 100.

<sup>192</sup> Crawford, above n 112, 120 quoting New South Wales, *Parliamentary Debates*, Legislative Council, 26 June 2008, 9423–4 (John Hatzistergos). See, eg, Richard Guilliat, 'Wishful Thinking', *The Australian* (online), 29 May 2010 <<http://www.theaustralian.com.au/life/weekend-australian-magazine/wishful-thinking/story-e6frg8h6-1225872356328?>>; McGregor-Lowndes and Hannah, 'Every Player Wins a Prize?', above n 69, 77; Victorian Law Reform Commission, above n 3, 99–101.

<sup>193</sup> McGregor-Lowndes and Hannah, 'Every Player Wins a Prize', above n 69, 77.

and delays,<sup>194</sup> as indicated by a high 87 per cent success rate in mediation.<sup>195</sup> Even without demonstrating need, applicants may walk away with \$10 000 or \$20 000 as ‘go away’ money.<sup>196</sup> Whether defended or settled, these opportunistic claims result in an unnecessary diminishment of the estate size due to the excessive and highly disproportionate legal costs that are usually borne out of the estate.<sup>197</sup>

However, there have been recent discussions on a re-evaluation of the probate costs rule. In 2014, the Chief Justice of South Australia observed that ‘[t]he probate costs rule is arguably anachronistic in modern times in which there is a greater concern with the need for proportionality in litigation. It may soon be necessary to reconsider it’.<sup>198</sup> Subsequent cases have emphasised the need to develop a stricter approach to costs,<sup>199</sup> although a major change is yet to be seen.

## IX REFORMS TO AUSTRALIA’S FAMILY PROVISION LAW

This article has focused on the role of adult children in family provision litigation. The studies referred to in this paper indicate this as one of the major issues in family provision litigation around Australia. With respect to the issues of law, these concerns have arisen from liberal interpretations of the grounds of criteria by courts and, with respect to the issues of policy, they have arisen from a serious encroachment on testamentary freedom and an unhealthy culture of entitlement.

Family provision law is one of the most fundamental frameworks with respect to the role that property plays in families and it is an area where community expectations must align with the law. In that regard, it is apparent that the modern rationale of family provision is flawed and misaligned with community expectations. It has led to opportunistic claims and costly litigation, largely by competent adult children. Reform is necessary to resolve the inefficiencies and to align the Acts with their original purposes and with community expectations.

It is important that reform seeks to find a balance between the two competing aims: respecting testamentary freedom and ensuring adequate provision for those with

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<sup>194</sup> McGregor-Lowndes and Hannah, ‘Tyrannical Testators vs Greying Heirs?’, above n 6, 63; Victorian Law Reform Commission, above n 3, xvii, 99–100.

<sup>195</sup> Tilse et al, ‘Having the Last Word?’, above n 75, 17; Victorian Law Reform Commission, above n 3, 99–100.

<sup>196</sup> McGregor-Lowndes and Hannah, ‘Every Player Wins a Prize?’ above n 69, 77; Victorian Law Reform Commission, above n 3, 100.

<sup>197</sup> Victorian Law Reform Commission, above n 3, 99. See also Vines, above n 96, 31.

<sup>198</sup> [2014] SASC 98 (7 August 2014) [65].

<sup>199</sup> See, eg, *Harkness v Harkness (No 2)* [2012] NSWSC 35 (2 February 2012); *Barbon v Tessar (No 2)* [2015] VSC 597 (30 October 2015); *Re Frances Ponikvar (Deceased) (No 2)* [2016] SASC 166 (4 November 2016); *Roche v Roche (No 2)* [2017] SASC 75 (5 June 2017) [17]–[18].

legitimate claims.<sup>200</sup> Practically, this would be focused on reducing the number of opportunistic claims, while ensuring those with legitimate claims are not excluded.<sup>201</sup>

One option for reform is to disallow adult children to be able to make a claim unless they can establish that the deceased had a responsibility to provide for them, or require adult children to establish further criteria before they are eligible to make a claim. This criteria could be either financial need or demonstration of contributions to the testator's welfare or estate. Other possible options include attributing greater weight to the testator's wishes and reasons through legislative amendment in those states that do not provide this requirement as well as a possible exclusion of the concept of moral duty to be replaced by a statutory list of considerations.

## X CONCLUSION

This article has provided an overview of the underlying original policy rationale concerning family provision legislation and then undertook a detailed analysis of the issues arising from the current modern rationale. With respect to adult children claimants, this article has revealed that the current law in operation raises significant issues in law, policy and practice.

While this article strongly advocates restricting the claims of adult children to reduce the initial occurrence of opportunistic claims and the flow-on costs, the authors of this article recognise that this action is insufficient on its own to address the deeper societal issues at play. By placing a higher emphasis on testator's wishes and excluding or clarifying the concept of moral duty, this may focus on restoring the importance of testamentary freedom and establishing a logical basis for the success of family provision claims. Ultimately, a comprehensive investigation and reform involving community education, legal education and in-practice processes is necessary to challenge the underlying perception of entitlement.<sup>202</sup>

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<sup>200</sup> Justice Roslyn Atkinson, 'Family Provision in Australia: Addressing Interstate Differences and Family Provision Law Reform' (Speech delivered at the Queensland Law Society Conference on Family Provision, Queensland, 25 July 2014) 18.

<sup>201</sup> *Ibid.*

<sup>202</sup> Tilse et al, 'Having the Last Word?', above n 75, 6.

**APPENDIX 1 — FAMILY PROVISION LAW IN AUSTRALIA  
(LIST OF ELIGIBLE APPLICANTS AND DISCRETIONARY FACTORS)<sup>203</sup>**

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
South Australia <i>Inheritance (Family Provision) Act 1972</i>	s 6 (a) Spouse (b) Former spouse (ba) Domestic partner (including former domestic partners under s4) (c) Children (g) Step-children (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	s 7(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 <i>Administration and Probate Act 1958</i>	s 90 (a) Spouse or domestic partner (b) Children (including adopted) if under 18 OR full-time student between 18-25 OR disabled child (c) Step-children 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	s 91(1): On an application under section 90A, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person. s 91A(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

<sup>203</sup>

Please note that some extracted sections of legislation in this table have been paraphrased for simplicity and clarity. For the exact wording, please refer to the original Acts.

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
Victoria <i>cont.</i>	<p>(e) Former spouse/domestic partner if at the time of the deceased's death, they could have taken proceedings under the <i>Family Law Act 1975</i> (Cth)</p> <p>(f) Child / step-child not referred to in (b) and (c)</p> <p>(g) Person who for a substantial period of deceased's life, believed deceased was parent and was treated as such</p> <p>(h) Registered caring partner of deceased</p> <p>(i) Grandchild</p> <p>(j) Spouse or domestic partner of deceased's child where child dies within one year of deceased's death</p> <p>(k) Person who was a member of the deceased's household</p>	<p>s 91A(2): the court may have regard to the following criteria:</p> <p>(a) Relationship between deceased and applicant</p> <p>(b) Obligations or responsibilities of deceased to applicant, other applicants and beneficiaries</p> <p>(c) Size and nature of estate</p> <p>(d) Financial resources, including earning capacity and financial needs of applicant and beneficiary of estate</p> <p>(e) Any physical, mental or intellectual disability of applicant or beneficiary of estate</p> <p>(f) Age of applicant</p> <p>(g) Contribution of applicant to estate or welfare of deceased or deceased's family</p> <p>(h) Benefits previously given by deceased to applicant or beneficiary</p> <p>(i) Whether applicant maintained by deceased before deceased's death</p> <p>(j) Liability of any other person to maintain applicant</p> <p>(k) Applicant's character and conduct</p> <p>(l) Effect of family provision order on amounts received from deceased's estate by other beneficiaries</p> <p>(m) Any other relevant matter</p> <p>s 91(2)(c)–(d): Applicants from (h)–(k) must have been wholly or partly dependent on the deceased for their maintenance and support, AND</p> <p>at the time of death, the deceased had a moral duty to provide for the applicant's proper maintenance and support, AND</p> <p>his distribution of his estate failed to make adequate provision for the proper maintenance and support of the applicant</p> <p>s 91(4): Court may take into account the degree:</p> <p>(a) of moral duty the deceased had at the time of death</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
Western Australia <i>Family Provision Act</i> 1972	s 7(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) step-child 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 step-child's parent above the prescribed value. (f) Parents, if relationship was admitted by deceased or established in lifetime of deceased	(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) s 91(5)(b): for applicants (h)–(k), the definition of 'eligible person' must be proportionate to the applicant's degree of dependency on the deceased s 6(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.

Jurisdiction	List of Eligible Applicants	Grounds of Criteria
New South Wales <i>Succession Act 2006</i>	s 57(1) (a) Spouse (b) Domestic partners (c) Children (s 57(2): including adopted children, children born in a de facto relationship by virtue of <i>Status of Children Act 1996</i> and a child for whose long-term welfare both parties have parental responsibility by virtue of <i>Children and Young Persons (Care and Protection) Act 1998</i> ) (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 (where one or each of whom provides domestic support and personal care: s 3(3))	s 59(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  s 60(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 <i>Family Provision Act 1970</i>	s 7(1) (a) Spouse or de facto partner (b) Former spouse or de facto partner – must be maintained by deceased before deceased's death (s 2(b)) (c) Child (d) Step-child – must be maintained by deceased before deceased's death	s 8(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.  s 22: the court shall have regard to the testator's reasons for making the dispositions.

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
<p>Northern Territory <i>cont.</i></p>	<p>(e) Grandchild – if parent was a child of the 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 spouse, de facto partner or any children</p>	<p>s 8(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. s 8(3) – criteria for decision under subsection (2): (a) Applicant’s character and conduct (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 <i>Domestic Relationships Act 1994</i> (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 s 22: the court shall have regard to the testator’s reasons for making the dispositions</p>
<p>Australian Capital Territory <i>Family Provision Act 1969</i></p>	<p>s 7(1) (a) Partner (s 7(9)): defined to include someone who was the domestic partner of the deceased at any time AND either: deceased’s spouse, civil union partner or civil partner at any time OR deceased’s domestic partner continuously for 2 or more years at any time OR parent of a child of the deceased (b) Person in domestic relationship with deceased for 2 or more years continuously (c) Child (d) Step-child – must be maintained by the deceased immediately before the deceased’s death (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</p>	

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
<p>Tasmania <i>Testator's Family Maintenance Act 1912</i></p>	<p>s 3A (a) Spouse: including domestic partners (s 2(1)) (b) Children: including adopted, step-children and surrogate children (s 2(1)) (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 <i>Relationships Act 2003</i>, had ceased before date of deceased's death and who was receiving or entitled to receive maintenance from the deceased</p>	<p>s 3(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. s 7: 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 s 8A: 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</p>
<p>Queensland <i>Succession Act 1981</i></p>	<p>s 41(1): spouse, child or dependant s 5AA: spouse = husband or wife; de facto partner (as defined in <i>AIA</i>); civil partner; former husband or wife; former civil partner (if had not remarried or entered into civil partnership with another person before deceased's death AND was entitled to receive maintenance at time of deceased's death) s 40: child = any child, step-child or adopted child s 40: dependant = 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 s 40A: step-child = person is the child of deceased's spouse AND the relationship between the step-child and step-parent did not stop due to a divorce, ending of civil partnership or ending of a de facto relationship between the step-parent and step-child's parent</p>	<p>s 41(1): if adequate provision is not made for the proper maintenance and support of the deceased's spouse, child or dependant, the court may order such provision as it thinks fit out of the deceased's estate. s 41(1A): the court shall not make an order for dependant unless satisfied it is proper that some provision is made for the dependant, having regard to the extent to which the dependant was maintained or supported by deceased before the deceased person's death and the dependant's need for continue maintenance and support</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
<p>Queensland <i>cont.</i></p>	<p>The relationship of step-child and step-parent does not stop merely because:</p> <ul style="list-style-type: none"> <li>(a) the step-child's parent had predeceased the step-parent, and the marriage, civil partnership or de facto relationship between the step-parent and step-child's parent subsisted when the parent died, or</li> <li>(b) the step-parent remarried, entered into a civil partnership or formed a de facto relationship after the parent's death, if the marriage, civil partnership or de facto relationship between the parent and step-parent subsisted when the parent died</li> </ul>	
<p>South Australia <i>Inheritance (Family Provision) Act 1972</i></p>	<p>s 6 The following persons are, in respect of the estate of a deceased person, entitled to claim the benefit of this Act:</p> <ul style="list-style-type: none"> <li>(a) the spouse of the deceased person;</li> <li>(b) a person who has been divorced from the deceased person;</li> <li>(ba) the domestic partner of the deceased person;</li> <li>(c) a child of the deceased person;</li> <li>(g) a child of a spouse or domestic partner of the deceased person being a child who has maintained wholly or partly or who was legally entitled to be maintained wholly or partly by the deceased person immediately before his death;</li> <li>(h) a child of the deceased person;</li> <li>(i) a parent of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime;</li> <li>(j) a brother or sister of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime.</li> </ul>	<p>s 7(1): Where –</p> <ul style="list-style-type: none"> <li>(a) a person has died domiciled in the State or owning real or personal property in the State; and</li> <li>(b) by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life,</li> </ul> <p>the Court may in its discretion, upon application by or on behalf of a person so entitled, order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled.</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
<p>Victoria <i>Administration and Probate Act 1958</i></p>	<p>s 90:</p> <ul style="list-style-type: none"> <li>(l) a person who was the spouse or domestic partner of the deceased at the time of the deceased's death;</li> <li>(m) a child of the deceased, including a child adopted by the deceased who, at the time of the deceased's death, was — <ul style="list-style-type: none"> <li>(i) under the age of 18 years; or</li> <li>(ii) a full-time student aged between 18 years and 25 years; or</li> <li>(iii) a child with a disability;</li> </ul> </li> <li>(n) a step-child of the deceased who, at the time of the deceased's death, was — <ul style="list-style-type: none"> <li>(i) under the age of 18 years; or</li> <li>(ii) a full-time student aged between 18 years and 25 years; or</li> <li>(iii) a child with a disability;</li> </ul> </li> <li>(o) 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 — <ul style="list-style-type: none"> <li>(i) under the age of 18 years; or</li> <li>(ii) a full-time student aged between 18 years and 25 years; or</li> <li>(iii) a child with a disability;</li> </ul> </li> <li>(p) a former spouse or former domestic partner of the deceased if the person, at the time of the deceased's death — <ul style="list-style-type: none"> <li>(i) would have been able to take proceedings under the Family Law Act 1975 of the Commonwealth; and</li> <li>(ii) has either — <ul style="list-style-type: none"> <li>(A) not taken those proceedings; or</li> <li>(B) commenced but not finalised those proceedings; and</li> </ul> </li> <li>(iii) is now prevented from taking or finalising those proceedings because of the death of the deceased;</li> </ul> </li> <li>(q) a child or step-child of the deceased not referred to in paragraph (b) or (c);</li> </ul>	<p>s 91(1): Despite anything to the contrary in this Act, on an application under section 90A, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of an eligible person.</p> <p>s 91(2): The Court must not make a family provision order under subsection (1) unless satisfied —</p> <ul style="list-style-type: none"> <li>(a) that the person is an eligible person; and</li> <li>(b) in the case of a person referred to in paragraphs (h) to (k) of the definition of 'eligible person', that the person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support; and</li> <li>(c) that, at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support; and</li> <li>(d) that the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person, whether by — <ul style="list-style-type: none"> <li>(i) the deceased's will (if any); or</li> <li>(ii) the operation of Part 1A; or</li> <li>(iii) both the will and the operation of Part 1A.</li> </ul> </li> </ul> <p>s 91(4): In determining the amount of provision to be made by a family provision order, if any, the Court must take into account —</p> <ul style="list-style-type: none"> <li>(a) the degree to which, at the time of death, the deceased had a moral duty to provide for the eligible person; and</li> <li>(b) the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person; and</li> </ul>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
	<p>(r) 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);</p> <p>(s) a registered caring partner of the deceased;</p> <p>(t) a grandchild of the deceased;</p> <p>(u) a spouse or domestic partner of a child of the deceased (including a step-child or a person referred to in paragraph (d) or (g)) if the child of the deceased dies within one year of the deceased's death;</p> <p>(v) a person who, at the time of the deceased's death, is (or had been in the past and would have been likely in the near future, had the deceased not died, to again become) a member of the household of which the deceased was also a member;</p>	<p>(c) in the case of an eligible person referred to in paragraph (f) or (g) of the definition of 'eligible person', the degree to which the eligible person is not capable, by reasonable means, of providing adequately for the eligible person's proper maintenance and support; and</p> <p>(d) in the case of an eligible person referred to in paragraphs (h) to (k) of the definition of 'eligible person' the degree to which the eligible person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support at the time of the deceased's death.</p> <p>s 91A(1):</p> <p>In making a family provisions order, the Court must have regard to –</p> <p>(a) the deceased's will, if any; and</p> <p>(b) any evidence of the deceased's reasons for making the dispositions in the deceased's will (if any); and</p> <p>(c) any other evidence of the deceased's intentions in relation to providing for the eligible person.</p> <p>s 91A(2):</p> <p>In making a family provision order, the Court may have regard to the following criteria:</p> <p>(a) any family or other relationship between the deceased and the eligible person, including –</p> <p>(i) the nature of the relationship; and</p> <p>(ii) if relevant, the length of the relationship;</p> <p>(b) any obligations or responsibilities of the deceased to –</p> <p>(i) the eligible person; and</p> <p>(ii) any other eligible person; and</p> <p>(iii) the beneficiaries of the estate;</p> <p>(c) the size and nature of the estate of the deceased and any charges and liabilities to which the estate is subject;</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
Victoria <i>cont.</i>		<p>(d) the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of –</p> <ul style="list-style-type: none"> <li>(i) the eligible person; or</li> <li>(ii) any other eligible person; or</li> <li>(iii) any beneficiary of the estate;</li> </ul> <p>(e) any physical, mental or intellectual disability of any eligible person or any beneficiary of the estate;</p> <p>(f) the age of the eligible person;</p> <p>(g) any contribution (not for adequate consideration) of the eligible person to –</p> <ul style="list-style-type: none"> <li>(i) building up the estate; or</li> <li>(ii) the welfare of the deceased or the deceased's family;</li> </ul> <p>(h) any benefits previously given by the deceased to any eligible person or to any beneficiary;</p> <p>(i) whether the eligible person was being maintained by the deceased before that deceased's death either wholly or partly and, if the Court considers it relevant, the extent to which and the basis on which the deceased had done so;</p> <ul style="list-style-type: none"> <li>(j) the liability of any other person to maintain the eligible person;</li> <li>(k) the character and conduct of the eligible person or any other person;</li> <li>(l) the effect of a family provision order would have on amounts received from the deceased's estate by other beneficiaries;</li> <li>(m) any other matter the Court considers relevant.</li> </ul>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
Western Australia <i>Family Provision Act</i> 1972	<p>s 7(1):</p> <ul style="list-style-type: none"><li>(a) a person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person;</li><li>(b) a person who at the date of the death of the deceased was receiving or entitled to receive maintenance from the deceased as a former spouse or former de facto partner of the deceased whether pursuant to an order of any court, or to an agreement or otherwise;</li><li>(c) a child of the deceased living at the date of the death of the deceased, or born within 10 months after the deceased's death;</li><li>(d) a grandchild of the deceased –<ul style="list-style-type: none"><li>(i) who was being maintained wholly or partly by the deceased immediately before the deceased's death; or</li><li>(ii) who, at the date of the deceased's death, was living and one of whose parents was a child of the deceased who had predeceased the deceased; or</li><li>(iii) who was born within 10 months after the deceased's death and one of whose parents was a child of the deceased who had predeceased the deceased;</li></ul></li><li>(ea) a step-child of the deceased who was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased immediately before the deceased's death;</li><li>(eb) a step-child of the deceased, if<ul style="list-style-type: none"><li>(i) the deceased received or was entitled to receive property from the estate of a parent of the step-child, otherwise than as a creditor of that estate; and</li><li>(ii) the value of that property, at the time of the parent's death, is greater than the prescribed amount;</li></ul></li></ul> <p>a parent of the deceased, whether the relationship is determined through a legal marriage or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased.</p>	<p>s 6(1):</p> <p>If any person (in this Act called the <i>deceased</i>) dies, then, if the Court is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of the persons mention in section 7 as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose.</p>

Jurisdiction	List of Eligible Applicants	Grounds of Criteria
<p>New South Wales <i>Succession Act 2006</i></p>	<p>s 57: (1) The following are ‘eligible persons’ who may apply to the Court for a family provision order in respect of the estate of a deceased person: (a) a person who was the spouse of the deceased person at the time of the deceased person’s death, (b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person’s death, (c) a child of the deceased person, (d) a former spouse of the deceased person, (e) a person: (i) who was, at any particular time, wholly or partly dependent on the deceased person, and (ii) who is a grandchild of the deceased person or was, at that particular time or any other time, a member of the household of which the deceased person was a member, (f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person’s death. (2) In this section, a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the <i>Property (Relationships) Act 1984</i>, at the time of death, a reference to the following: (a) a child born as a result of sexual relations between the parties to the relationship, (b) a child adopted by both parties, (c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the <i>Status of Children Act 1996</i>, to be the father (except where the presumption is rebutted),</p>	<p>s 59: (1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that: (a) the person in whose favour the order is to be made is an eligible person, and (b) in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of ‘eligible person’ in section 57 – having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and (c) 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. (2) The Court may make such order for the provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made. s 60: (1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining: (a) whether the person in whose favour the order is sought to be made (the “applicant”) is an eligible person, and (b) whether to make a family provision order and the nature of any such order.</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
	<p>(d) in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the <i>Status of Children Act 1996</i>,</p> <p>(e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the <i>Children and Young Persons (Care and Protection) Act 1998</i>).</p>	<p>(2) The following matters may be considered by the Court:</p> <p>(a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,</p> <p>(b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,</p> <p>(c) the nature and extent of the deceased person's estate (including any property that is, or could be, designed 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,</p> <p>(d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,</p> <p>(e) if the applicant is cohabiting with another person – the financial circumstances of the other person,</p> <p>(f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated;</p> <p>(g) the age of the applicant when the application is being considered,</p> <p>(h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,</p>

Jurisdiction	List of Eligible Applicants	Grounds of Criteria
New South Wales <i>cont.</i>		<ul style="list-style-type: none"> <li>(i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,</li> <li>(j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,</li> <li>(k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,</li> <li>(l) whether any other person is liable to support the applicant, date of the death of the deceased person,</li> <li>(m) the character and conduct of the applicant before and after the death of the deceased person,</li> <li>(n) the conduct of any other person before and after the date of the death of the deceased person,</li> <li>(o) any relevant Aboriginal or Torres Strait Islander customary law,</li> <li>(p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.</li> </ul>
Northern Territory <i>Family Provision Act 1970</i>	<p>s 7(1): Subject to this section, each of the following persons is entitled to make application to the Court for provision out of the estate of a deceased person:</p> <ul style="list-style-type: none"> <li>(a) a spouse or de facto partner of the deceased person;</li> <li>(b) a former spouse or de facto partner of the deceased person;</li> <li>(c) a child of the deceased person;</li> <li>(d) a step-child of the deceased person;</li> <li>(e) a grandchild of the deceased person;</li> <li>(f) a parent of the deceased person.</li> </ul>	<p>s 8(1): Subject to this Act, upon application made by or on behalf of a person entitled to apply to the Court under section 7, if the Court is satisfied that adequate provision is not available, under the terms of the will of a deceased person or under the law applicable on the death of the person as an intestate or under the will and that law, from the estate of the deceased person for the proper maintenance, education and advancement in life of the person by whom, or on whose behalf the application is made, the Court may, in its discretion and having regard to all the circumstances of the case, order that such provision as the Court thinks fit be made out of the estate of the deceased person.</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
Australian Capital Territory <i>Family Provision Act 1969</i>	s 7(1): Subject to this section, each of the following persons is entitled to make application to the Supreme Court for provision out of the estate of a deceased person: (a) a partner of a deceased person; (b) a person (other than a partner of the deceased person) who was in a domestic relationship with the deceased person for 2 or more years continuously at any time; (c) a child of the deceased person; (d) a step-child of the deceased person; a grandchild of the deceased person; (g) a parent of the deceased person.	s 8: (1) On application by a person entitled, under section 7, to apply for provision out of the estate of a deceased person, the Supreme Court may order that the provision as that court thinks fit to be made for the applicant out of the estate. (2) The Supreme Court shall only make an order under subsection (1) if satisfied, in consideration of the criteria set out in subsection (3), that as of the date of the order, adequate provision for the proper maintenance, education or advancement in life of the applicant is not available – (a) under the will of the deceased; or (b) if the deceased died intestate – under the law applicable to that intestacy; or (c) under that will and that law combined. (3) The criteria for the Supreme Court’s decision under subsection (2) in relation to the deceased and the applicant are as follows: (a) the character and conduct of the applicant; (b) the nature and duration of the relationship between the applicant and the deceased; (c) any financial and non-financial contributions made directly or indirectly by or on behalf of either or both the applicant and the deceased to the acquisition, conservation or improvement of any of the property or financial resources of either or both persons; (d) any contributions (including any in the capacity of homemaker or parent) by either the applicant or the deceased to the welfare of the other, or of any child of either person; (e) the income, property and financial resources of the applicant and the deceased; (f) the physical and mental capacity of the applicant, and the deceased (during his or her life), for appropriate gainful employment;

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
<p>Australian Capital Territory <i>cont.</i></p>		<p>(g) the financial needs and obligations of the applicant and the deceased (during the life of the deceased);</p> <p>(h) the responsibilities of either the applicant or the deceased (during his or her life) to support any other person;</p> <p>(i) the terms of any order made under the Domestic Relationships Act 1994, section 15 with respect to the property of the applicant or the deceased;</p> <p>(j) any payments made to either the applicant or the deceased by the other, under an order of the court or otherwise, in respect of the maintenance of the other person or any child of the other person;</p> <p>(k) any other matter the court considers relevant.</p> <p>s.22:</p> <p>(1) The Supreme Court shall, in determining an application for an order under section 8 or 9A, have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by will or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Act.</p> <p>(2) The Supreme Court may receive in evidence a statement signed by the testator and purporting to bear the date when it was signed and to set out reasons for making or not making provision or further provision by the will of the testator for a person as evidence of those reasons.</p> <p>(3) If a statement of a kind referred to in subsection (2) is received in evidence, the Supreme Court shall, in determining what weight (if any) ought to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn about the accuracy of the matters referred to in the statement.</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
<p>Tasmania <i>Testator's Family Maintenance Act 1972</i></p>	<p>s 3A: An application under subsection (1) of section three for provision out of the estate of a deceased person may be made by or on behalf of all or any of the following persons, that is to say: (a) The spouse of the deceased person; (b) The children of the deceased person; (c) The parents of the deceased person, if the deceased person dies without leaving a spouse or any children; (d) A person whose marriage to the deceased person has been dissolved or annulled and who at the date of the death of the deceased person was received or entitled to receive maintenance from the deceased person whether pursuant to an order of a court, or to an agreement or otherwise; and (e) A person whose significant relationship, within the meaning of the Relationships Act 2003, with the deceased person had ceased before the date of the death of the deceased person and who was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court or to an agreement or otherwise.</p>	<p>s 3(1): If a person dies, whether testate or intestate, and in terms of his will or as a result of his intestacy any person by whom or on whose behalf application for provision out of his estate may be made under this Act is left without adequate provision for his proper maintenance and support thereafter, the Court or a judge may, in its or his discretion, on application made by or on behalf of the last-mentioned person, order that such provision as the Court or judge, having regard to all the circumstances of the case, thinks proper shall be made out of the estate of the deceased person for all or any of the persons by whom or on whose behalf such an application may be made, and may make such other order in the matter, including an order as to costs, as the Court or judge thinks fit.</p> <p>s 7: In granting or refusing any such application, and in fixing the amount of the provision to be made under this Act for any person who is entitled to make an application under subsection (1) of section three, the Court or judge shall have regard, <i>inter alia</i>, to – (a) the net value only of the estate of the deceased person, as ascertained by deducting from the gross value thereof all debts, testamentary and funeral expenses, and all other lawful liabilities to which the said estate is subject; and (b) whether any such person is entitled to independent means, whether secured by any covenant, settlement, transfer, or other provision made by the deceased person during his life or derived from any other source whatsoever.</p> <p>s 8A: (1) On the hearing of an application under subsection (1) of section three, the Court or judge may have regard to the deceased person's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision</p>

Jurisdiction	List of Eligible Applicants	Grounds of Criteria
Tasmania <i>cont.</i>		<p>or further provision, as the case may be, for any person, and the Court or judge may accept such evidence of those reasons as it or he considers sufficient, whether that evidence would otherwise be admissible in a court of law or not.</p> <p>(2A) Where an application under section 3(1) relates to a will made under Part 3 of the Wills Act 2008 by the Guardianship and Administration Board or the Court, the Court or judge may have regard to the records of the Board or Court relating to the person for whom the will was made and the reasons given by the Board or Court for making an order authorising the making or alteration of a will in specific terms.</p> <p>(2) Nothing in this section shall be construed as restricting the evidence that is admissible, or the matters that may be taken into account, on the hearing of an application under subsection (1) of section three.</p>
Queensland <i>Succession Act 1981</i>	<p>s 41(1):</p> <p>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.</p> <p>s 5AA:</p> <p>(1) Generally, a person's 'spouse' is the person's –</p> <p>(a) husband or wife; or</p> <p>(b) de facto partner, as defined in the <i>Acts Interpretation Act 1954</i> (the 'AIA'), section 32DA; or</p> <p>(c) civil partner, as defined in the AIA, schedule 1.</p>	<p>s 41:</p> <p>(1) If any person (the <i>deceased person</i>) 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.</p> <p>(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.</p>

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
	<p>(2) However, a person is a 'spouse' of a deceased person only if, on the deceased's death –</p> <ul style="list-style-type: none"><li>(a) the person was the deceased's husband or wife; or</li><li>(b) the following applied to the person –<ul style="list-style-type: none"><li>(i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;</li><li>(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</li></ul></li><li>(ba) the person was the deceased's civil partner; or</li><li>(c) for part 4, the person was –<ul style="list-style-type: none"><li>(i) a person mentioned in paragraph (a), (b) or (ba); or</li><li>(ii) the deceased's dependant former husband or wife or civil partner.</li></ul></li></ul> <p>(3) Subsection (2) applies –</p> <ul style="list-style-type: none"><li>(a) despite the AIA, section 32DA(6) and schedule 1, definition 'spouse'; and</li><li>(b) whether the deceased died testate or intestate.</li></ul> <p>(4) In this section –</p> <ul style="list-style-type: none"><li>'dependant former husband or wife or civil partner', of a deceased person, means –<ul style="list-style-type: none"><li>(a) a person who –<ul style="list-style-type: none"><li>(i) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and</li><li>(ii) had not remarried or entered into a civil partnership with another person before the deceased's death; and</li></ul></li><li>(iii) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased; or</li></ul></li></ul>	

Jurisdiction	List of Eligible Applicants	Grounds of Criteria
Queensland <i>cont.</i>	<p>(b) a person who –</p> <ul style="list-style-type: none"> <li>(i) was in a civil partnership with the deceased that was terminated under the <i>Civil Partnerships Act 2011</i>, section 19; and</li> <li>(ii) had not married or entered into another civil partnership before the deceased's death; and</li> <li>(iii) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased.</li> </ul> <p>s 40:</p> <p>In this part –</p> <p>'child' means, in relation to a deceased person, any child, step-child or adopted child of that person.</p> <p>'dependant' means, in relation to a deceased 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 –</p> <ul style="list-style-type: none"> <li>(a) a parent of that deceased person; or</li> <li>(b) the parent of a surviving child under the age of 18 years of that deceased person; or</li> <li>(c) a person under the age of 18 years.</li> </ul> <p>s 40A:</p> <ul style="list-style-type: none"> <li>(1) A person is a <b>step-child</b> of a deceased person for this part if – <ul style="list-style-type: none"> <li>(a) the person is the child of the spouse of the deceased person; and</li> <li>(b) a relationship of step-child and step-parent between the person and the deceased person did not stop under subsection (2).</li> </ul> </li> <li>(2) The relationship of step-child and step-parent stops on the divorce of the deceased person and the step-child's parent.</li> <li>(3) To remove any doubt, it is declared that the relationship of step-child and step-parent does not stop merely because –</li> </ul>	

<b>Jurisdiction</b>	<b>List of Eligible Applicants</b>	<b>Grounds of Criteria</b>
	<p>(a) the step-child's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or</p> <p>(b) the deceased person remarried after the death of the step-child's parent, if the deceased person's marriage to the parent subsisted when the parent died.</p>	

**APPENDIX 2 — CASES DECIDED UNDER THE INHERITANCE (FAMILY PROVISION)  
ACT 1972 (SA) FROM 2000 TO 2018**

Year	Case	Relationship of Claimant/s to Deceased	Value of Estate <sup>204</sup>	Outcome	
				Application granted	Application dismissed
2018	<i>Swanson v Reis</i> [2018] SASC 20	Adult son (aged 56).	\$420 000.00		The plaintiff is in a financially comfortable position in comparison to the defendant who is in a significantly worse financial position.
2017 / 2016	<i>Butler v Tiburzi</i> [2016] SASC 108 (This decision was subsequently affirmed in <i>Tiburzi v Butler</i> [2017] SASCFC 89)	Adult daughter (aged 67).	\$1 567 850.55	The plaintiff was granted \$725 000.	
2016	<i>Parker v Australian Executor Trustees Ltd</i> [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.	

204

Monetary figures outlined in this table may not reflect the true value of the estate as some estates include transfers of interests which do not have a monetary value.

Year	Case	Relationship of Claimant/s to Deceased	Value of Estate	Outcome	
				Application granted	Application dismissed
2015	<i>Carter v Brine</i> [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	<i>Broadhead v Prescott</i> [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	<i>Daniel v Van Zwoel</i> [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	<i>Hynard v Gavros</i> [2014] SASC 42	Adult daughter (aged 49).	\$372 000.00	The plaintiff would receive an amount equal to 55 per cent of the residue of the deceased's estate.	

Year	Case	Relationship of Claimant/s to Deceased	Value of Estate	Outcome	
				Application granted	Application dismissed
2013	<i>Kozłowski v Kozłowski</i> [2013] SASFC 112	Adult son (aged 38).	\$255 416.10	The adult son is entitled to half of three quarters of the balance of the estate, following the payment of funeral expenses and the costs of administration being paid from the proceeds of the sale of the estate property.	
2013	<i>Brennan v Mansfield</i> [2013] SAS 83	Domestic partner.	\$2 825 000.00	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	<i>R v Bong</i> [2013] SAS 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	<i>Cavallaro v Cavallaro</i> [2011] SAS 123	Adult son (aged 76).	\$1.2 million	The plaintiff's right of residence of the home property to be converted to a life interest, and the plaintiff's one-quarter remainder interest in the home property to be converted immediately into cash (\$75 000).	
2010	<i>Pizimolas v Pizimolas &amp; Zannis</i> (2010) 108 SASR 153	Adult son (aged 53).	\$650 000.00	Adult son would receive a legacy of \$100 000 and one-third of the residue of the estate.	

Year	Case	Relationship of Claimant/s to Deceased	Value of Estate	Outcome	
				Application granted	Application dismissed
2009	<i>Helwig v Carr</i> [2009] SASC 117	Adult children (aged 43 to 61).	\$130 000.00	The four plaintiffs received \$30 000, \$30 000, \$20 000, and \$7 500 respectively.	
2009	<i>Whittington v Whittington</i> [2009] SASC 142	Deceased's wife.	\$202 547.00	The plaintiff would be entitled to 60.8 per cent of the net proceeds from the sale of the estate.	
2009	<i>Wall v Crane</i> [2009] SASC 382	Two separate claims by deceased's adult daughter (aged 52) and deceased's grandson. The will provided that the testator's daughter would not receive any provision because financial assistance and adequate provision had been given to them during his lifetime.	\$1 138 978.24	The deceased's daughter would receive \$1 60 000 from the residual estate, The deceased's grandson would receive a pecuniary legacy of \$50 000.	
2007	<i>Bowyer v Wood</i> (2007) 99 SASR 190	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 and because the plaintiff and her husband were self-supporting.	\$1.2 million	The plaintiff would receive \$200 000 borne by the gifts to the charities and to the siblings of the testatrix, their spouses and children.	

Year	Case	Relationship of Claimant/s to Deceased	Value of Estate	Outcome	
				Application granted	Application dismissed
2006	<i>Arnalis v Kasselouris</i> [2006] SASC 198	Adult daughter with severe disabilities (aged 50).	\$390 000.00	Plaintiff's legacy of \$40 000 increased to a one-half-share of the net estate.	
2005	<i>Fennell v Aherne</i> [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	<i>Drioli v Rover</i> [2005] SASC 395	Two estranged adult daughters (aged 45 and 48).	\$443 337.16	One daughter would receive \$125 000 and the other \$75 000.	
2004	<i>Lock v Tower Trust Limited</i> [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 \$200 000.00		Appeal dismissed.
2003	<i>Barns v Barns</i> (2003) 214 CLR 169	Adult daughter (aged 46). Whether a deed excluding the plaintiff from the estate is valid.		Appeal allowed, and order that the deed (which precludes the plaintiff from provision out of the estate) should be set aside.	
2003	<i>McGuffie v Korczynski</i> [2003] SASC 178	Grandchildren applying for provision, where there was a dispute as to the paternity of the plaintiffs' mother.			Plaintiffs excluded as eligible applicants to the estate.
2002	<i>Delisio v Santoro</i> [2002] SASC 65	Application by adult daughters (aged 52 and 46) and counterclaim by one adult son (aged 51).	\$206 750.65	\$15 000 each for the plaintiffs and counterclaimant.	
2000	<i>Carrail v Carrail</i> [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.	