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South Australian Law Reform Institute

Looking After One Another: Review of the *Inheritance (Family Provision) Act 1972* (SA)

Berri Legal Experts Roundtable Report

The Roundtable

On 10 April 2017, the South Australian Law Reform Institute ('the Institute') hosted a Roundtable of legal experts from Berri and surrounding areas to discuss the Discussion Questions identified in the Institute's Background Paper *Looking After One Another: Review of the Inheritance (Family Provision) Act 1972* (SA). This forms part of the Institute's broader reference on Succession Law and Family Inheritance Law, received from the Attorney General in 2011 and supported by the Law Foundation of South Australia

The Roundtable was conducted at the Berri Hotel under Chatham House rules. The Institute is grateful for the time and valuable contributions of all participants.

The following report contains the views of the Roundtable. These views are not the confirmed views of the Institute, however they provide an important framework for further consultation and research. They will be considered alongside the Reports of similar Roundtables conducted in Adelaide and Mt Gambier with legal experts and community members, as well as the views received from the broader South Australian community through the traditional submission process and the SA Government's YourSAy website.

We want to hear from you

The Institute welcomes written submissions in response to the issues raised in this Report **by 15 May 2017** and intends to finalise its Report to Government during the second half of 2017.

Further information about the Institute, this Reference, terminology and the Background Paper containing the Discussion Questions considered during the Roundtable can be found at https://law.adelaide.edu.au/research/law-reform-institute/ or https://www.yoursay.sa.gov.au/decisions/looking-after-one-another/about

Views of the Roundtable

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

Participants began by noting the particular character of family provision disputes in regional areas such as Berri. An example of these laws in practice was a case involving a 80 year old millionaire on a second marriage, who received $150 000 but still instigated proceedings against her deceased husband's estate. This included a 200 page affidavit and generated massive costs. This highlights the urgent need to address the issue of costs. Participants also noted that whilst a typical house in Adelaide may be worth $750 000, in Berri it is $120 000. A real problem in farming areas is a capital rich but asset poor estate.

Roundtable participants then discussed the policy behind the *Inheritance (Family Provision) Act 1972* (SA), and whether certain policy interests should be better reflected in any future reforms of the Act.

A range of views on the policy interests behind the current law were expressed, however there was a general view that the notion of testamentary freedom has been diluted in recent years. There was also a general acceptance that testamentary freedom cannot be absolute, and must be balanced with other public interests such as ensuring adequate provision is made for genuine dependants and other particularly vulnerable people.

Some participants also explained that, in some cases, the will itself maybe unfair due to undue or unfair influence or when the son or daughter contributes to the estate. Other times it may be poor decisions by the testator. For example, when second wives 'fly in' and clear out their new husband's estate at the expense of the children of the first wife. The second wife may have only been on the scene for a short time, say three years.

Participants also noted that great damage is done to relationships in these claims. Often this is very severe and never recovered from. One participant noted that she had been involved in a number of cases where if mediation could have occurred very early it would be much better. Often mediation comes too late, instead of being the first option. Often these cases arise due to sibling rivalry that could be resolved at an early stage. Claims often arise out of family issues as opposed to greed or need.

Others underscored the need to avoid ‘messing around with testators freedoms’, and noted that some of the outcomes under the current law seem to ‘fly in the face of what the testator actually wants’. This can be compounded by very high costs, especially when you have multiple charities involved.

Some participants underscored the need to leave some discretion to the judiciary. For example, one participant was not in favour of prescribing ‘the full alphabet of issues to be taken into account’. This denigrates the common sense and ability of the judiciary. It should be about what is fair and equitable.’

Who should be able to make a claim?

Participants discussed the current criteria contained in sections 6 and 7 of the *Inheritance (Family Provision) Act 1972* (SA) that govern the categories of family members who are eligible to make a family provision claim, and that prescribe the criteria for determining the claim.

Participants generally agreed that there is a need to include adult step children in the list of eligible claimants, at least in limited circumstances. The inclusion of grandchildren was also generally thought to be subject to limitations.

Participants also agreed that adult children should continue to be eligible to claim, although views were mixed as to whether additional criteria should apply.

Some participants favoured all, or parts of, the Victorian ‘check list’ approach to criteria applying to family provision claims. Others considered the Victorian model to raise additional problems and confusion, and give rise to higher costs. For example, one participant said that they ‘have some problems with the Victorian model. It includes 10 dot points - lawyers could spend big money on each of these dot points in preparing affidavits and it could drive up costs even more.’

For other participants, the criteria to be applied should vary depending on the size of the estate. For example, one participant said that when you are dealing with small estates, you need a special resolution process.

Participants also expressed the view that there needs to be a mechanism to more properly take into account the testators wishes. It was noted that there are some vexatious testators but many times they are reasonable people acting carefully and properly and wish the instructions in their will to be binding.

Participants also discussed the complications arising from including or excluding former spouses. **It was generally agreed that there is no reason why a former spouse should be able to claim after they have received a financial settlement through the Family Court.**

Participants also discussed whether carers (such as non-close relatives who would be otherwise ineligible to claim) should be eligible to make a family provision claim. A number of participants were strongly opposed to including carers, noting that they had seen many examples of a carer of a person with dementia, whose assets have decreased substantially since the carer was involved. Including carers was seen to 'invite abuse'**. Participants agreed that such carers should be ineligible.**

What criteria should apply?

Participants discussed the current South Australian approach to determining the merits of a family provision claim (in s7) to the more prescribed Victorian 'check list approach'.

A range of views were expressed on this issue. For example, many participants supported the retention of the current test, noting that with proper legal advice its meaning is clear. Others noted that the case of *Rodder v Rodder* adequately covers the promissory estoppel type situations of a child contributing to the estate to his or her detriment following a promise from the testator.

Others saw merit in the Victorian approach, particularly in so far as it included a clearer focus to the importance of a testator's views – which is particularly evident in the first three criteria in s 91A (1) of the Victorian Act. The other criteria in s91A(2) were seen to be less desirable, and risk increasing costs.

Some favoured middle ground between the South Australian and Victorian tests.

Participants agreed that there is a need to change the current law to include stronger and more explicit recognition of the testators wishes [such as that based on some or all of the first three criteria in s 91A (1) of the Victorian Act]. It was also agreed that the court should accept a statutory declaration of the testator explaining his or her reasons for a will and its distribution. This should be admissible as an exception to the hearsay rule as truth of its contents as relevant though not necessarily decisive [though care and legal advice would be prudent in its drafting].

Timing of Claims and Costs

Participants noted under the current law that costs usually come out of the estate in practice (this encourages vexatious and greedy claims). **It was agreed that costs should usually follow the event (loser pays) to deter dubious claims and support was given to a greater and more robust role for judicial mediation and conciliation.**

Participants noted that the current approach to costs is plainly not working. 'It's go away money 9 times out of 10, as the beneficiaries can't risk going to trial.' It was agreed that the message should be that you will be up for your own costs if you are making a claim.

Participants also noted the benefit of existing judicial mediation, but called for further efforts beyond existing procedures to contain costs and promote resolution, especially in small estates and a robust judicial role.

There was general support for a streamlined approach to settlement conferences [as proposed at the Adelaide and Mt Gambier Roundtables], particularly for small estates. However some participants raised practical questions such as: how do you ensure all relevant parties have been notified?

Participants also briefly discussed the issue of timing, noting that the above approaches to mediation and conciliation could be further supported if the rules around timing were changed to a 12 month period, or even “six months or until after the matter has been heard by a Master".

Participants also noted the need for full disclosure to accompany family provision claims, but noted that you should protect the beneficiary from this requirement to avoid rising costs.

Notional Estates

Dr Sylvia Villios provided a brief overview, slide show presentation and case notes, describing the NSW approach to notional estate and clawback.

Participants discussed the concept of notional estate – a legal mechanism employed in NSW family provision laws to discourage testators from dealing with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws.

There was no support for either notional estate or NSW clawback. It was seen as a drastic intrusion into testamentary freedom and a person’s ability to distribute their estate as they want. Notional estate also raises practical and policy concerns. Participants noted that succession and wills are very different to the divorce and Family Court context.

Roundtable Participants

Stuart Andrew	Partner, Andrew & Dale
Dimitria Dale	Barrister and Solicitor, Andrew & Dale
Trevor Wedding	Principal Solicitor, Riverland Community Legal Service Inc
Tim O'Brien	Principal, O'Briens Solicitors
Michael Atsaves	Lawyer, O'Briens Solicitors
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