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South Australian Law Reform Institute

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

Mount Gambier Legal Experts Roundtable Report

The Roundtable

On 7 April 2017, the South Australian Law Reform Institute ('the Institute') hosted a Roundtable of legal experts from Mount Gambier 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 Group Training Employment Training Rooms in Mount Gambier, 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 Berri 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 Mount Gambier. It was noted that rural and regional estates typically are less in value than in Adelaide but it is not unusual to find farming estates of up to $2 million. The issues in relation to family succession and potential claims especially arise in farming families. Participants also noted that the number of cases going to trial obscures the problem as these cases are usually settled in practice. Participants further noted that there is a widely held perception that the broad discretion contained in the current South Australian laws leads to uncertainty and encourages greedy claims and pressure to settle.

One participant noted that in the family farming context, maintaining the viability of the farm can be difficult. If the farm is left to one child, and you want to maintain the business viability of the farm, which is harder and harder, you need to try and find assets to provide for the rest of the family.

There are no other assets to give to other children and can cause major problems. In these wills it can be very hard to also meet the IFPA tests.

Participants discussed the policy behind the *Inheritance (Family Provision) Act 1972* (SA).

Many participants noted that testamentary freedom must be preserved in principle and it is not the role of the law to dictate how to write a will. This accords with the public view: 'I don't want lawyers or the law to interfere. It is my estate and my role to divide as I want.'

However, there was general agreement that a balance needs to be struck between testamentary freedom and fairness. Participants explained that, in their experience, there are cases of undue influence, but also unfair influence. Unless there is some way to get inside the head of a testator, there is room for injustice. **It was agreed that there is a real need to ensure the law has the power to qualify testamentary freedom. The Court should be able to step in and adjust a will to ensure fairness.**

Participants also noted that clients often do not know what they want to do with their will. They are looking for guidance from a law like this to help ensure wills are fair. For example, some participants noted that they are seeing more and more very old people make wills, including families with step children. There is often scope for undue influence, where the will may reflect the wishes of the beneficiary and not the testator.

Participants also discussed the difference between the moral duty of the testator to provide for his or her spouse and dependent children, and the question of whether independent adult children should be able to make a claim.

There was a shared view that the scope of who can claim and when is presently too wide. The bar has been lowered so far. For example, one participant noted that "the current law is too welcoming of family provision claims. I have encountered many clients who bow to a kind of 'blackmail', and 'surrender' to unmeritorious or dubious claims to avoid the costs coming out the estate. 'Go away' or '[****] off' money."

Participants also discussed the reality that testamentary freedom is far more accessible for the rich and resourceful, who can get proper legal advice and protect their estate from family provision claims.

Participants also discussed the issue of training for lawyers in this area.

A number of participants also noted that there are cases where a testator has raised an expectation, and led to a material contribution to the estate by the child who is then omitted from the will and left nothing. This is a real problem. The child may have worked on the farm or the fishing boat for their life unpaid in the expectation from the deceased that they would inherit the farm or business upon death. In these cases, the child should have a claim. See the cases of *Morton v Morton* and *Rodder v Rodder*.

Some participants likened these cases to the law of promissory estoppel. This is where the claimant has substantially contributed to the contribution, maintenance or improvement of the asset. This is connected to the idea of equity in life and death. One participant suggested that the test in the *Inheritance (Family Provision) Act 1972* (SA) should be based around the question of whether there hadbeen a reliance on that promise to the detriment of the child/other claimant. It was noted that the current laws do not address this issue.

Consideration was also given on to how to reform the law to ensure that the testator's wishes can be more closely respected, for example through a statutory declaration at time of drafting the will. Some participants noted that this should be admissible as relevant evidence. It should be an exception to the hearsay rule, but should also be accompanied by other supporting evidence. It was

noted that many testators are not acting irrationally, vindictively or harshly but their decisions are the result of mature and calm deliberation.

Who should be able to make a claim and what criteria should apply?

Participants discussed the current criteria contained in sections 6 and 7 of the *Inheritance (Family Provision) Act 1972* (SA) which 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 agreed that there is strong benefit in the law being accessible and comprehensible. The current court's discretion is perceived as too wide and uncertain. Stricter criteria and a list of specific factors as in Victoria is preferable.

Participants also agreed that there is a need to reframe the criteria for a family provision claim in the SA law. The criteria should be more specifically described in a check list form. The Victorian model [particularly s91A] would be a good start. At a minimum it should require consideration of the (1) claimant's vulnerability and dependence on the deceased, (2) the claimant's contribution to the estate, (3) whether a promise was made, and relied upon to detriment, (4) character and conduct of the claimant and (4) the reasons the testator acted as they did when drafting the will.

Participants noted that the Victorian list approach has further dual benefit in allowing succession lawyers to take and provide proper instructions in showing clients the law clearly set out in statute and to draft wills in that light (notably to be aware of the grounds of a potential claim and prepare a will accordingly) and in giving frank and specific advice to potential claimants to discourage greedy or vexatious claims. It was noted for example that setting out the criteria in a more detailed way, like the Victorian approach, would help when advising people about estate planning, and when advising people who are seeking to make a claim.

In reaching this agreed position, participants highlighted that the current test relating to adult children needs to be more qualified. Some felt that adult children as a general class should be removed.

Participants also noted that the promissory estoppel issue is a huge issue to farming and fishing estates. **Participants agreed that adult children should only be eligible to claim if they are (a) particularly vulnerable (for example with a physical or intellectual disability) and/or (b) contributed to the value of the estate to their detriment. This would align with the promissory estoppel position of promise, reliance and detriment.** This is a particularly important issue for farming and fishing communities. For example, one participant gave the example of a son who may have worked his father's crayfish or abalone license as a deck hand for decades while the father lives it up on Harvey Bay. Meanwhile the license has increased in value from $300 to $75 000. The son should be able to make a claim against the estate.

Others noted that stepchildren are a 'huge issue' in practice, and expressed the view that when it comes to step children, it is important to provide some kind of qualified protection. Participants noted a particular example of a step child who was eligible to make a family provision claim in Queensland, but not in South Australia. There was general agreement on the need to make some provision for step children, but also agreement that it would be a 'perverse result' if a stepchild had more rights than own child. Participants also discussed the practicalities of multiple stepchildren.

Participants agreed that adult stepchildren should be treated in the same way as adult children. In other words, they should not be excluded from applying, but should be subject to the vulnerability/contribution test proposed above.

There was also support for the testator's reasons setting out the distribution of the estate if included in a statutory declaration or affidavit being admissible as an express exception to

the hearsay rule. The testator's statement would become relevant, but not conclusive evidence. Further evidence would most likely need to be adduced to corroborate the testators' statement.

Participants also discussed the issue of jointly held property, noting that there is a real opportunity for community education about what joint tenants and what tenants-in-common means. This is particularly important for blended families, and couples in a second marriage.

In addition to these issues, participants noted that no one wants to spend lots of money on complex estate planning, they just want a cheap will. This means that, in practice, only the rich and resourceful can plan their affairs and avoid family provision claims.

Participants also discussed the option of a two tier system. One tier would be the 'off the shelf' will, where the *Inheritance (Family Provision) Act 1972* (SA) applies. The other tier could be a will prepared after a family conference and with sound legal advice, that could be certified and then exempt from the *Inheritance (Family Provision) Act 1972* (SA).

Participants also discussed difficulties with the resolution of family provision claims in the Supreme Court. For example, one participant noted that the current test is supposed to be about 'adequate provision for the person's maintenance' but the court doesn't have proper disclosure processes in place. Claimants don't have to set out their full income and maintenance details. This is very different to the Family Court process. There ought to be a requirement that both claimant and residual beneficiaries be required to file a Family Court-like financial statement when resolving these disputes.

Timing of Claims and Costs

Participants noted that, under the current law, 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 agreed that under the current approach, costs escalate swiftly and the existing settlement conference after the issue of proceedings comes 'too little, too late.' For example, it was noted that at the time of the settlement conference costs could already be at $45 000.

Other practitioners noted that many clients are afraid of lining lawyers' pockets out of the estate. Judicial ordered conciliation is too late. These practitioners expressed the view that a settlement conference needs to happen earlier, when the parties can still avoid the big costs consequences associated with filing fees etc.

Participants also generally supported robust judicial intervention in these settlement conferences, similar to the Family Court model. There is a need for swift, effective and cost-effective procedures outside existing procedures.

For example, some participants noted that there is a need for a preliminary stage at the outset to try and resolve the dispute before proceedings are issued. A robust conciliation type approach by the Master at this stage would be valuable. **'Banging heads together**.' This could include warnings as to costs if the claim is unsuccessful. A claimant would not be able to issue proceedings until this stage had been tried and had not worked and a certificate to this effect would be required. This scheme has particular advantage in small estates. There was strong support for this model.

While there was strong support for a shift towards a 'loser pay' costs model, participants also acknowledged the need for the court to retain a broad discretion. It was noted that may not always be appropriate for costs to follow the event. For example, sometimes you have unusual events

where the executor may not have acted properly. So the general rule should be costs follow the event, but there should be some room for exceptions.

A number of participants highlighted particular concerns associated with family provision claims involving small estates. One participant suggested that for small estates, you should be able to apply to the Magistrates Court or SACAT. When the Supreme Court is involved, costs get high. Others suggested that there is a need to define 'small estates' and give more power to the Registrar to facilitate conferences and get a resolution early. Another suggested that perhaps the Supreme Court could introduce a clear process for 'notice of offer' for family inheritance claims.

It was noted that SALRI, in its Small Estates Report, had noted the benefit of existing judicial mediation and considered the role of the Supreme Court and other options in relation to succession, but its consultation had found little support for transferring the Supreme Court's role in light of its specialised role, resources and expertise. Left scope to revisit in the future. There was support for $500 000 to define a small estate as at present it is $250 000.

Participants agreed that 'small estate' should be defined as something around $500 000, excluding superannuation. A Family Court style conciliation method with full disclosure requirements could be very useful and would reduce costs. There was support for an expedited early hearing before the existing settlement conferences and before formal proceedings are commenced with a robust judicial conciliation role to try and resolve the dispute before costs mount and proceedings are commenced. Proceedings can only be commenced after this initial effort at resolution.

Participants also agreed that there should be full disclosure of the assets and the financial circumstances of the parties. Delays in this disclosure adds to costs and delays in family succession cases. However, there was also some concern about requiring beneficiaries to undertake disclosure.

Notional Estates

Dr Sylvia Villios provided a brief overview, slide show presentation and case notes and described 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.

A range of views were expressed, but most participants were opposed to the introduction of NSW style notional estate or clawback regime in South Australia.

For example, one participant noted that notional estate is not a bad idea as a principle of fairness. Why should someone be able to hide everything away from genuine claimants? However, it was also noted that unless the Act is reformed to ensure that the threshold for claims is high, including notional estate could add to the current problems relating to opportunistic claims.

Other participants were reluctant to support the introduction of notional estate on the grounds that it undermines testamentary freedom, explaining that a person should be able to plan their estate and protect it against family provision claims.

Some participants highlighted the potential unfairness that arises from the distribution of superannuation funds, but expressed the view that the NSW approach to national estate and clawback is too broad.

There was also reluctance to include trusts in notional estate. One participant warned that we need to remember that trusts are an independent legal entity, so the idea of going behind or undoing a valid trust is problematic.

Very Small Estates

The SE Community Legal Service raised the issue of very small estates where the assets are under $20 000 and it is unnecessary and unrealistic to involve the Supreme Court. Participants explained there is not enough to pay the costs in these cases. It was also noted that small estates can be just as emotional as larger estates and the items and issues at stake as important.

The SE Community Legal Service explained that there is a need for a simplified procedure and make decisions without fear of consequences and grant of authority to distribute the estate swiftly and effectively. For example, this could be based on models currently employed by banks for small estates under $50 000. This could include an expedited grant of probate to enable swift and flexible disposal of cars, chattels, etc and make decisions without fear of authority.

Roundtable Participants

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