

## INTRODUCTION TO THE SUCCESSION ACT

1. The *Succession Act* (NSW) was introduced in 2006 and is gradually consolidating all of the various statutes laws relating to succession, probate administration and family provision claims, as well as attempting to harmonise NSW laws with the laws of other states of Australia.

### Intestacy

2. The most recent reforms introduced into the *Succession Act* are the laws relating to intestacy, which is now in Chapter 4.<sup>1</sup> It applies to intestate estates of persons who died after 1 March 2010.<sup>2</sup> These laws apply to intestate estates not intestate persons – this means it not only applies to the estates of deceased persons who do not have a will, but also in the case of total and partial intestacy of an estate because a gift in an otherwise valid will fails (for example, because the named beneficiary has died) and there is no gift over or no residuary beneficiary.
3. The most significant change is the more generous entitlements to a spouse and the expanded definition of a spouse.<sup>3</sup> Previously, if there was only one spouse and only one set of children with that spouse, the spouse and children would share the intestate estate. Now, that spouse is entitled to the whole of the estate.<sup>4</sup> The *NSW Law Reform Report*<sup>5</sup> noted that the laws of intestacy should reflect the community's view of what should be done with the estate, and suggested that changing community expectations were that the deceased's primary duty was to the spouse.<sup>6</sup> If there is more than one spouse, and/or if the children are not children of the spouse, then the spouse/s and children continue share the deceased's estate.<sup>7</sup> However, previously the spouse was entitled to the house, whereas now, generally speaking the spouse, may elect to take the house but the spouse must acquire it as part of their share of the estate.<sup>8</sup>
4. A spouse is defined<sup>9</sup> as a person who is legally married to the deceased or a person who is in a domestic partnership, that is, generally speaking, a person who has been in a de facto relationship for more than 2 years or that has resulted in the birth of a child.<sup>10</sup> This expands the definition to same sex relationships and allows multiple spouses.<sup>11</sup> The multiple spouses will share the estate in accordance with a written "distribution agreement" or a court "distribution order".<sup>12</sup> Multiple spouses is not as far fetched as you may think - the *Pratt* litigation illustrates that a person may have two spouses by continue to be legally married to one person and yet be living with another person. And in *Quijarro v Robson*, Justice Windeyer described the deceased as "something of a philanderer" with a fiancée and a flatmate / business partner who he was still in a sexual relationship with.<sup>13</sup> He said (at para 46)

"It is an extraordinary relationship where a man can share a bottle of champagne by candlelight in bed and have sexual relations with one woman on

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<sup>1</sup> Sections 101 - 140

<sup>2</sup> Schedule 1, Part 4, Section 13

<sup>3</sup> Section 104

<sup>4</sup> section 112

<sup>5</sup> NSW Law Reform Report, Report 116, *Uniform Succession Laws: Intestacy*

<sup>6</sup> *ibid* at para 3.20, 3.22 – 3.34

<sup>7</sup> Chapter 4, Part 4.2, Division 1 and Division 3

<sup>8</sup> Chapter 4, Part 4.2, Division 2

<sup>9</sup> Section 104

<sup>10</sup> Section 105

<sup>11</sup> Chapter 4, Part 4.2, Division 3

<sup>12</sup> section 125

<sup>13</sup> *Quijarro v Robson* [2008] NSWSC 818

the morning of his trip north to visit another woman and yet will die the next day in bed with that other woman to whom he had proposed marriage and with whom he has discussed a marriage date to take place some months later.”

5. The other significant change is expanding the group of possible claimants on an intestate's estate. If a person is intestate, the estate goes to the spouse, then the issue,<sup>14</sup> then the parents,<sup>15</sup> then the siblings (and their issue, that is, the nieces and nephews and their issue),<sup>16</sup> then the grandparents,<sup>17</sup> and then aunts and uncles.<sup>18</sup> The Succession Act now extends the list to the children of aunts and uncles that is, the cousins.<sup>19</sup>

### Family Provision claims

6. Family Provision now forms part of Chapter 3 of the Succession Act, and the new provisions apply to the estates of all persons who died after 1 March 2009.<sup>20 21</sup>
7. A person may bring a claim if they are an eligible person, that is, that they are a husband, wife or de facto; child; former wife or husband; a person who was partly dependant on the deceased and a grandchild or member of the deceased's household;<sup>22</sup> or a person with whom the deceased was living in a close personal relationship.<sup>23</sup> Further, a former wife or husband, grandchild or other persons who lived in the household or were in close personal relationship with the deceased must demonstrate there are factors warranting their application.<sup>24</sup> The factors warranting are the types of factors that give the person the status of a person who would generally be regarded as a natural object of testamentary recognition.<sup>25</sup>
8. The claim must be brought within 12 months of death, unless the court gives leave.<sup>26</sup> For this reason, it may not be prudent to distribute an estate if there is a suggestion of a claim.
9. The court will first determine whether adequate provision has been made by the will or under intestacy for the claimant's proper maintenance, education or advancement in life of the person.<sup>27</sup> Generally speaking, the court considers the claimant's need for accommodation, medical expenses, payment of debts, and a fund for contingencies.

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<sup>14</sup> Section 127

<sup>15</sup> Section 128

<sup>16</sup> Section 129

<sup>17</sup> Section 130

<sup>18</sup> Section 131

<sup>19</sup> Section 131(2)

<sup>20</sup> Schedule 1, Part 3, section 11

<sup>21</sup> The Testators Family Maintenance and Guardianship Act 1916 applies to any claims relating to estates where the deceased died before 1 September 1983, and the Family Provision Act applies to any claims against estates where the deceased died after 1 September 1983 but before 1 March 2009

<sup>22</sup> A grandchild must show that they are wholly or partly dependant on the deceased. A grandchild will have a stronger claim if the deceased was in loco parentis, such as the grandchild moving in with the deceased because the mother died or was incapable of looking after the child. For example, in *Fede v Dell'Arte* [2010] NSWSC 1113, the claimant's mother was schizophrenic so the claimant lived with her grandfather when she was growing up. Contrast *Sherborne Estate: Vanvalen v Neaves* [2005] NSWSC 593 where the grandmother was providing for the grand-daughter as part of providing for her daughter and not providing for the grand-daughter directly

<sup>23</sup> Section 57

<sup>24</sup> Section 59(1)(b)

<sup>25</sup> *Re Fulop Deceased* (1987) 8 NSLR 679 at 681 per McClelland J

<sup>26</sup> Section 58(2)

<sup>27</sup> section 59(1)(c)

10. If the court considers that adequate provision has not been made, the court then has a discretion to determine whether provision ought to be made.<sup>28</sup> <sup>29</sup> The court may take into account a broad range of factors including the nature of the relationship, the nature and extent of the deceased's obligations to the claimant, the nature and extent of the estate, the claimant and their partner's financial resources and needs and that of other persons, the claimant's age, if the claimant has any disability, the claimant's contribution to the deceased's assets or to the deceased's welfare, provision made for the claimant during the deceased's life, whether the deceased was maintaining the claimant, any evidence of the deceased's testamentary intentions, and whether any other person is liable to support the claimant, the claimant's conduct to the deceased before and after the death, and any other matter the court considers relevant.<sup>30</sup>
  
11. Some of the facts that the courts have considered include whether the spouse has accommodation and if it is a life estate or absolute title,<sup>31</sup> the age and life expectancy of the spouse,<sup>32</sup> whether de facto or married,<sup>33</sup> the length of the relationship,<sup>34</sup> whether the claimant or any other person has looked after the deceased during a difficult final illness,<sup>35</sup> the claimant's financial position,<sup>36</sup> the claimant's health,<sup>37</sup> the size of the estate,<sup>38</sup>

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<sup>28</sup> section 59(2)

<sup>29</sup> The High Court suggested the two stage approach in *Singer v Berghouse* (1994) 181 CLR 201

<sup>30</sup> Section 60

<sup>31</sup> *Golosky v Golosky* NSWCA 5 October 1993, unreported (court order widow left life estate receive absolute title to Palm Beach house. Kirby P said "A mere right of residence will usually be an unsatisfactory method of providing for a spouse's accommodation to fulfil the foregoing normal presupposition. This is because a spouse may be compelled by sickness, age, urgent supervening necessity or otherwise, with good reason, to leave the residence"); *Hertzberg v Hertzberg* [2003] NSWCA 311 (court order widow left life estate given absolute title to Darling Pt apartment), *Luciano v Rosenblum* (1985) 2 NSWLR 65 (court order widow left life estate receive transferable life estate so can move to another property), *Gregory v Hudson* [1999] NSWCA 221 (court order widow left life estate received absolute title to North Sydney apartment), *Robertson v Pearce* (court order widow left life estate received Peakhurst house)

<sup>32</sup> *Clifford v Mayr* [2009] NSWSC 16 (widow aged 39), *Tchadovitch v Tchadovitch* [2009] NSWSC 1398 (widow aged 44), contrast *Milillo v Konnecke* [2009] NSWCA 109 (widow had cancer and probability of dying within 2 years), *Nudd v Mannix* (widow with 1 – 2 years life expectancy)

<sup>33</sup> *Marshall v Carruthers* [2002] NSWCA 47 (Hodgson JA said "Although the Family Provision Act does, in some respects, equate de facto spouses with de jure spouses, this does not, in my opinion, make the existence or otherwise of a marriage irrelevant. In my opinion, a formal and binding commitment to mutual support through good times and bad, other factors being equal, adds strength to a legitimate claim.")

<sup>34</sup> *Tchadovitch v Tchadovitch* (married 25 years), *Golosky v Golosky* (married 12 weeks), *Singer v Berghouse* (married 1 year)

<sup>35</sup> *Sayer v Sayer* [1999] NSWCA 340 (widow cared for deceased who had dementia for 3 years), *Fede v Dell'Arte* (beneficiary daughter and her sons cared for deceased during final illness whereas grand-daughter claimant rarely visited), *Carey v Robson* [2010] NSWSC 212 (beneficiary son at deceased's "beck and call" and lived on farm whereas claimant daughters lived their own life with their families)

<sup>36</sup> *Vigolo v Bostin* (2005) 221 CLR 191 (claimant adult son with \$1M+ assets)

<sup>37</sup> *McGarry v McGarry* [2009] NSWSC 504 (claimant daughter had cystic fibrosis, diabetes, asthma, depression)

<sup>38</sup> *Hertzberg v Hertzberg* (\$10M+), *Gregory v Hudson* (\$10M), *Anasson v Phillips*, (unreported, 4 March 1988, Young J "If the estate is a large one, the court has a slightly different approach. The basic principles are the same, that is, the will can only be affected to the extent that it is necessary to discharge the moral duty by making adequate provision for the plaintiffs, but where there is a large estate, competition between claimant and claimant, and claimant and beneficiary under the will is much reduced or eliminated. Further, there may be a more liberal assessment of the moral duty owed, to be reflected in what is proper provision for the plaintiffs. In particular, the lifestyle that has been enjoyed by the plaintiffs, because they have been associated with a wealthy testatrix is a relevant factor."); contrast *Ellis v Leeder* (1951) 82 CLR 645 (no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors);

whether the claimant has done something which brought shame on the deceased,<sup>39</sup> and other factors.<sup>40</sup>

12. Family provision orders interfere with and overrule the testator's intentions in the will. However, the court will give due respect to the deceased's freedom of testamentary intention and recognize the deceased is in a far better position to evaluate the claims of persons close to them. The court is not meant to re-write the will, and will only interfere to the extent necessary to make proper and adequate provision for the claimant in light of prevailing community standards.<sup>41</sup>
13. Family provision orders may also disrupt careful estate planning by ordering that property owned by other persons forms part of the estate.<sup>42</sup> If the estate is not sufficient, the court may order that assets that were alienated by the deceased without full valuable consideration are notional estate.<sup>43</sup> This includes assets that were alienated on death such as property in joint tenancy, property alienated within 1 year if there was a moral obligation to make provision for a person, and alienated within 3 years if the deceased intended wholly or partly to deny or limit provision for a person.<sup>44</sup> This may include generous gifts, inter-generational transfers of primary production land for nominal consideration, transferring assets to a company or transferring assets to a discretionary trust.<sup>45</sup>
14. Family provision claims are particularly problematic in blended families. If there is a dispute between a mother and a son about their relative share of the deceased's estate, the son may be willing to settle the claim on the basis that the mother will ultimately leave her estate to the son. However, in blended families, if the court orders further provision to the second wife, there is no assurance that the second wife may leave her estate to the first wife's children. The court often considers the deceased's primary responsibility is to the surviving spouse<sup>46</sup> rather than adult able-bodied children<sup>47</sup> who have an earning capacity, and so may order further provision to the second wife. For example, in *Luciano v Rosenblum*<sup>48</sup>, Powell J said<sup>49</sup>

“It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies.”

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<sup>39</sup> *Hastings v Hastings* (claimant was drug dealer son whose US jail term ashamed deceased); *Ford v Simes* [2009] NSWCA 351; contrast *Wheatley v Wheatley* [2006] NSWCA 262 (very hostile relationship and no personal contact for 13 years but deceased was extremely difficult personality and she was not blameless in breakdown in relationship); *Foley v Ellis* [2008] NSWCA 288 (estranged after traumatic custody proceedings)

<sup>40</sup> *Milillo v Konnecke* (deceased's ex-wife agreed no property settlement on basis deceased leave Blacktown house to their daughters); *Sayer v Sayer* (house had extensive garden which deceased and widow had created over many years that gave widow much pleasure)

<sup>41</sup> *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 per Dixon CJ at 19

<sup>42</sup> Part 3.3 “Notional Estate Orders”

<sup>43</sup> section 75, Succession Act

<sup>44</sup> section 80, Succession Act

<sup>45</sup> *Kavalee v Burbidge* (1998) 43 NSWLR 422; *Flinn v Fearnie* [1999] NSWSC 1041

<sup>46</sup> *Singer v Berghouse*; *Luciano v Rosenblum* [1985] 2 NSWLR 65; *Golosky v Golosky* (NSW Court of Appeal, 5 October 1993, unreported), *Hertzberg v Hertzberg* [2003] NSWCA 311; *Tchadovitch v Tchadovitch* [2009] NSWSC 1398

<sup>47</sup> *Vigolo v Bostin* (2005) 221 CLR 191

<sup>48</sup> *Luciano v Rosenblum* [1985] 2 NSWLR 65

<sup>49</sup> *ibid* at 69 - 70

15. This effectively reduces the first family's relative share of the estate.
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### **Court Approved Releases**

17. It is possible for a person to “contract out” of family provision by executing a release of rights. However, the release must be approved by a court and cannot have been revoked by the court.<sup>50</sup> The court may approve the release before or after the deceased's death.
18. The court will not “rubber-stamp” the release, and will take into account whether the release was to the releasing person's advantage financially or otherwise, whether it was prudent for the releasing person to make the release, whether the provisions of the release were fair and reasonable at the time, and whether the releasing party has taken independent advice and given due consideration to the advice.<sup>51</sup> The court's consideration whether the release was to the releasing person's advantage effectively means the releasing person is “paid out”.
19. Generally speaking, releases are executed before the deceased's death as part of a pre-nuptial agreement or a family law property settlement, and executed after the deceased's death as part of settling a family provision claim. It may be prudent to include a family provision release in a binding financial agreement under the Family Law Act for couples intending to enter a de facto relationship<sup>52</sup> or intending to get married,<sup>53</sup> or for couples who have ended their de facto relationship<sup>54</sup> or their marriage.<sup>55</sup> Binding financial agreements do not need to be approved by the court to be effective, but the family provision release clause needs to be approved.
20. It may be difficult to resist a family provision claim through a release that has not been court approved. The court may say that the release would never have been approved. The court may say that even if the release was reasonable at the time, the claimant's circumstances have changed since the release was executed.
21. For example, in *Singer v Berghouse*,<sup>56</sup> the deceased was 65 when he met the widow. He married the widow the following year and died less than a year later. They signed a deed shortly before they were married that provided that each of them would release any claims they may have against the other's estate. The deed had not been approved by the court. The High Court held that the deed did not preclude the widow's claim, and the relevance was merely to show that the parties thought its terms fair when they signed it and that the widow could not say that she had expectations of a more affluent life than she had led before the marriage.<sup>57</sup> Similarly, in *Hertzberg v Hertzberg*,<sup>58</sup> the parties executed a deed that had not been approved by the court. The will recited that the deceased had not made provision for his widow because he had made generous provision for her during the marriage and had executed a deed pursuant to which he paid her \$1 million and agreed to pay her future expenses. However, the NSW Supreme Court held that the widow was still entitled to make a claim for the family home.

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<sup>50</sup> section 95(1)

<sup>51</sup> section 95(4)

<sup>52</sup> section 90UB Family Law Act 1976 (Cth)

<sup>53</sup> section 90B Family Law Act

<sup>54</sup> section 90UD Family Law Act

<sup>55</sup> section 90D Family Law Act

<sup>56</sup> *Singer v Berghouse* (1994) 181 CLR 201

<sup>57</sup> *ibid* per Mason CJ, Deane and McHugh JJ at para 12

<sup>58</sup> *Hertzberg v Hertzberg* [2003] NSWCA 311

Indeed, when the widow was asked in cross-examination why she changed her mind in the 2 years since she executed the deed, she said "It is my home and I want my home to be my home."<sup>59</sup>

### **Right to inspect wills**

22. A person who has possession or control of a deceased person's will (including a copy of a will, or a revoked will) is required to allow certain persons to inspect and make copies of the will.<sup>60</sup> A person may have "possession or control" of a will even if it is holding it on behalf of a client, such as the executor.
23. This means that an accountant who has a copy of the will must allow inspection and copying, even if the client is adamant that the accountant should not do so and expressly forbids the accountant from doing so.
24. The persons entitled to inspection and to make copies include a person referred to in the will or in any previous will (as a beneficiary or otherwise); the deceased's surviving spouse, de-facto or issue; deceased's parent or guardian; any person who would be entitled if the deceased was intestate; parent or guardian of a minor who is referred to in the will or who would be entitled on an intestacy; and any creditor.<sup>61</sup>
25. It may be prudent for persons who hold their client's wills to set up a process to confirm that a person applying for inspection of a deceased client's will is entitled to do so – for example, requiring the person to produce identification such as a drivers licence, birth certificate or passport, and requiring the person to sign a statutory declaration confirming that they are a person entitled to inspect the will.

Therese Catanzariti  
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<sup>59</sup> *ibid* cited in McColl JA judgment at para 36

<sup>60</sup> section 54(1)

<sup>61</sup> section 54(2)