



# Family Provision and the Uniform Succession Act

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All the Australian jurisdictions have legislation, known as 'Family Provision', or 'Testator's Family Maintenance' legislation which allows certain applicants to challenge the provisions in a Will on the basis that the Testator has failed to adequately provide for the applicant's maintenance and advancement in life. The legislation can also be used in the event of intestacy.

With forthcoming Uniform Succession Legislation being implemented throughout Australia care will be needed to ensure that both assets held within the Estate or held outside and of the Estate or controlled outside of the Estate are adequate for the needs of all Beneficiaries or potential Beneficiaries.

What follows is an overview of the Family Provision Legislation and the need for careful planning and provisioning.

## **Eligible Applicants**

The classes of Eligible Applicants include the spouse and children.

If the court is satisfied that there is an Eligible Applicant and that inadequate provision has been made for an Eligible Applicant, then it may make an order for further provision out of the Estate. The classical exposition of the jurisdiction appeared in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463

where the Testator was extremely wealthy but had died leaving his infant sons a relatively small trust fund, and the bulk of his estate to Sydney University. The court held (at 478-9):

*"In every case the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father."*

The court held that the legacies to the children should be increased. The size of the Estate, the circumstances of the applicant including their age, sex and health, and any services the applicant rendered to the deceased will all be taken into account. There is no presumption that adult males as opposed to adult females can support themselves. The applicant's moral claim will be weighed up against any other person's moral claim, if the estate is insufficient to meet all claimants. In some cases the Applicant will be regarded as having disintitiled himself. In the past, desertion or adultery (for widows or widowers) or neglect of parents (for children) have been regarded as relevant. Evidence of the deceased's reasons for not providing for the applicant will be admissible as evidence of the deceased's state of mind.



Until the forthcoming Commonwealth Uniform Succession Act New South Wales was the only jurisdiction which allowed further provision to come out of the non-estate assets of the deceased. It was thus relatively easy to defeat the family provision legislation by giving away property before death, or by holding property in joint tenancies or by entering contracts which increase the liabilities on the estate. With the advent of the new Commonwealth Uniform Succession Act in certain circumstances a court will be able to designate property which had already been given away or sold as 'notional estate' and use it to make further provision for Eligible Applicants.

In many instances with careful planning and provisioning the effects of the Family Provision Legislation can be mitigated to prevent disputes.

For information in respect to the next ili workshop covering Family Provision Planning visit the ili website [www.ili.com.au](http://www.ili.com.au).

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