10 March 2021

Family Provision Review 2020: The Worm and Robin

A PAPER PRESENTED AT THE 18TH ANNUAL SUCCESSION LAW SYMPOSIUM 2021

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Craig has presented extensively in estate litigation seminars and was named as an Estate Litigation Leading Junior Counsel – New South Wales in the Doyle's Guide for 2019 and 2020.

Before being called to the Bar in 2017 he was a senior associate of the firm of Teece Hodgson & Ward, Sydney. As a solicitor he was an Accredited Specialist in Wills and Estates Law.

About this paper

This is the fourth in a series of papers on the topic of Family Provision in New South Wales after *Family Provision, the turning of the worm* presented for College of Law May 2017, *Family Provision: the worm turns again* presented for St George-Sutherland Regional Law Society in March 2018 and *Worm Forever – review of 2019 family provision judgments* presented in March 2020 at the 2 Wentworth Succession Law Conference. In each paper I have looked at the preliminary statistics for the Supreme Court of NSW for the previous year (published towards the beginning of the following year) as well as the published succession judgments for the previous year available on the NSW Caselaw website (www.caselaw.nsw.gov.au).

The limitation in analysis of the Court statistics and published judgments is that the trends arising from matters filed but settled are not picked up, apart from the fact that the matter has settled, because inspection of all relevant Court files is neither permissible nor practicable [leaving aside the question of whether affidavits referred to in a settlement checklist are read onto the record (and thus public record) in support of orders made by consent].

There is also a distortion because many cases involve multiple parties and multiple claims. I have the impression that multiple party multiple claim litigation means a greater success rate for family provision plaintiffs.

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1. PRELIMINARY COURT STATISTICS FOR 2020

1.1. The preliminary statistics for the Supreme Court of NSW for 2020 were published on 22 February 2021 and are available for download on:

http://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_publications/sco2_statistics.aspx

1.2. In 2020 there were:

a. 1,711 cases commenced in the Equity Division General List (this does not include proceedings commenced in the Admiralty, Adoptions, Commercial, Commercial Arbitrations, Corporations, Probate (Contentious matters), Protective, Real Property, Revenue and Technology and Construction Lists).

b. Of those, 880 were Family Provision cases, and 831 were other cases.

c. There were 886 Family Provision cases disposed of and 412 cases pending at 31 December 2020.

d. 291 cases commenced in the Probate (contentious matters) list, 374 disposals and 174 cases pending at 31 December 2020.

e. 87 cases commenced in the Protective List, 96 disposals and 42 matters pending at 31 December 2020.

f. 26,661 applications lodged for probate.

g. 42% of cases settled at court annexed mediation. No data is available for cases settling at private mediation, nor for cases settling between the date of the mediation and hearing. Considering the number of published judgments in 2020 against the filing data suggests that the rate of settlement prior to delivery of judgment must be much higher than the flat rate for settlements at Court annexed mediation.

1.3. 64% of cases were disposed of within 12 months of filing and 84% of cases were disposed of within 24 months of filing. The average listing delay for a hearing was 6.3 months.

2. ANALYSIS OF SUCCESSION JUDGMENTS BETWEEN 1 JANUARY 2020 AND 31 DECEMBER 2020

2.1. I have conducted a search of the judgments published on NSW Caselaw <www.caselaw.nsw.gov.au> for judgments citing Succession Act 2006 (NSW), Family Provision Act 1982 (NSW) or Probate and Administration Act 1898 (NSW) for the period between 1 January 2020 and 31 December 2020. The results were as follows:

a. There were 32 first instance family provision final judgments with 4 NSW Court of Appeal judgments. *Choras v Farmakidis* [2020] NSWSC 367 concerned an application for separate determination of the issue of extension of time. *Muir v Angeles* [2020] NSWSC 1056 concerned the effect of bankruptcy on a family provision claim.

b. The following judgments concerned testamentary capacity/knowledge and approval:

i. *Lewis v Lewis* [2020] NSWSC 1306

ii. *Ng v Lau*; *In the Estate of Ken Kui Yuen Lau* [2020] NSWSC 713

iii. *Levi v Swaab* [2020] NSWSC 1119

iv. *Bracher v Jones* [2020] NSWSC 1024

c. The following judgments concerned construction of a Will:

i. *The Application of the NSW Trustee and Guardian; The Estate of Alice Maude Critchley* [2020] NSWSC 1635;

ii. *Serwin v Dolso* [2020] NSWSC 370.

d. The following judgments concerned Statutory Wills:

i. *Re The Will of Alexa* [2020] NSWSC 560

ii. *Re The Statutory Will of Rolf Huenerjaeger* [2020] NSWSC 1190

e. The following judgments concerned informal testamentary documents:

i. *Estate of Maria Zbrozek; Katarzyna (aka Kasia) Duszyk v Charles Emmanuel Morgan - Interim Administrator of the Estate of the late Maria Zbrozek* [2020] NSWSC 1591

ii. *Rodny v Weisbord* [2020] NSWCA 22

f. The following judgments concerned rectification:

   i. *The Estate of Terence Byrne; Osborne v Stewart* [2020] NSWSC 507

g. The following judgments concerned a Re Benjamin Application:

   i. *Application by NSW Trustee & Guardian (Estate of Edward Charles Turner)* [2020] NSWSC 944

h. The following judgments concerned burial rights:

   i. *Milson v Milson* [2020] NSWSC 919

i. The following judgments concerned intestate estates:

   i. *Rakovich v Marszalek* [2020] NSWSC 589

   ii. *Re Estate Luce; Turch v Tripolone* [2020] NSWSC 117

   iii. *Bailey v Palombo* [2020] NSWSC 1209

   iv. *Frimont v Case* [2020] NSWSC 850

   v. *Weiss v Weiss; Estate of Anita Hildegard Weiss* [2020] NSWSC 1064

j. The following judgments concerned the presumption of death:

   i. *Estate of Buttonwood* [2020] NSWSC 715

   ii. *The Estate of Alan Bruce Beeby* [2020] NSWSC 1512

k. The following judgments concerned administration of estates:

   i. *The Estate of Wendy Gwynne Price: Lanigan v Price (No 2)* [2020] NSWSC 1518;

   ii. *NSW Trustee & Guardian v Wardy* [2020] NSWSC 18.

   iii. *Rattigan v Hanly* [2020] NSWSC 1722

   iv. *Olsen v James* [2020] NSWSC 1015

l. The following judgment concerned an application for an order that a caveat cease to be in force:

i. *Estate of Theresa Katalinic; Vea & Katalinic v Katalinic* [2020] NSWSC 805

m. The following judgment concerned admissibility of recorded conversations without consent:

i. *Rathswohl v Court* [2020] NSWSC 1490

n. The following judgments concerned accounts and commission:

i. *The Estate of Frances Kadesch Michell* [2020] NSWSC 1300

ii. *The Estate of Maureen Laila Huber; the Estate of Dolf Paul Huber* [2020] NSWSC 1539

o. The following judgment concerned retraction of renunciation:

i. *The Estate of Ron Tee Lim (deceased); the application of Kaye Lim* [2020] NSWSC 322

2.2. Of the family provision first instance judgments, there were:

a. Two successful claims by the deceased's spouse.

b. One successful and one unsuccessful de facto spouse claim.

c. 21 claims by a deceased's child (9 of which were successful and 12 of which were unsuccessful).

d. 1 unsuccessful claim by a deceased's former spouse.

e. 2 successful dependent grandchild claims, 1 unsuccessful grandchild claim and 3 unsuccessful dependent member of the household claims.

I have included multiple claims made in the same estate in calculating this tally.

3. HISTORY OF FAMILY PROVISION LEGISLATION IN NEW SOUTH WALES

3.1. Certain categories of eligible persons are entitled to apply to the Supreme Court of NSW for an order that he or she receive provision, or additional provision, from a deceased person's estate or notional estate (**Family Provision Order**).

3.2. The power to make a Family Provision Order was introduced in New South Wales with the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW). Section 3 of that act provided that:

> "If any person (hereinafter called "the testator") dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any of them."

3.3. The *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW) was repealed with the introduction of the *Family Provision Act* 1982 (NSW). That Act applies where the deceased died on or after 1 September 1983 but before 1 March 2009. The definition of "eligible person" in s 6 of the Act included:

> "(a) a person who
>
> (i) was the wife or husband of the deceased person at the time of the deceased person's death;
>
> (ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or
>
> (iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;
>
> (b) a child of the deceased person;
>
> (c) a former wife or husband of the deceased person; or
>
> (d) a person:
>
> (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
>
> (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member."

3.4. The *Property (Relationships) Act* 1999 (NSW) repealed paragraphs (a) and (b) of the definition of "eligible persons" and they were replaced with:

> "(a) a person:
>
> (i) who was the wife or husband of the deceased person at the time of the deceased person's death, or
>
> (ii) with whom the deceased person was living in a domestic relationship at the time of the deceased person's death,
>
> (b) a child of the deceased person or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the Property (Relationships) Act 1984, a child of that relationship, or"

3.5. Section 9(2) of the *Family Provision Act* 1982 (NSW) provided that:

> "(2) The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that:
>
> (a) the provision (if any) made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate, or
>
> (b) in the case of an order under section 8:
>
> (i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person, or
>
> (ii) the provision made in favour of the eligible person by the deceased person either during the person's lifetime or out of the person's estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person,
>
> is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person."

3.6. Under the *Family Provision Act* 1982 (NSW), the Court applied a "two-stage" process as described in *Singer v Berghouse* [1994] HCA 40; 181 CLR 201 at 208-211 per Mason CJ, Deane and McHugh JJ:

> "The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. [**the jurisdictional question**]
>
> The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant. **[the discretionary question**]".

3.7. In *Vigolo v Bostin* (2005) 213 ALR 692 at 722 Callinan and Heydon JJ said:

> "We do not therefore think that the questions which the Court has to answer in assessing a claim under the Act necessarily always divide neatly into two. Adequacy of the provision that has been made is not to be decided in a vacuum, or by looking simply to the question whether the applicant has enough upon which to survive or live comfortably. Adequacy or otherwise will depend upon all of the relevant circumstances, which include any promise which the testator made to the applicant, the circumstances in which it was made, and, as here, changes in the arrangements between the parties after it was made. These matters however will never be conclusive. The age, capacities, means, and competing claims, of all of the potential beneficiaries must be taken into account and weighed with all of the other relevant factors."

3.8. The *Family Provision Act* 1982 (NSW) was repealed by the *Succession Amendment (Family Provision) Act* 2008 (NSW) and Chapter 3 of the *Succession Act* 2006 (NSW) now applies where the deceased died on or after 1 March 2009.

3.9. Section 57 of the *Succession Act* 2006 (NSW) provides that:

> "(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 wife or husband 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 wife or husband 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 at 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."

3.10. Section 59 of the *Succession Act* 2006 (NSW) provides that:

> "(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."

3.11. The *Succession Act* 2006 (NSW) also introduced, at section 60(2), a list of matters which the Court may take into account in determining claims, the last of which is "any other matter which the court considers relevant". Some of these matters were drawn from section 9(3) of the *Family Provision Act* 1982 (NSW). As cited in judgments by Hallen J (including for example, *Hinderry v Hinderry* (2016) NSWSC 780 at [241], the s60(2) matters have been described by Basten JA in *Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656 at [37], as "a multifactorial list", and by Lindsay J in *Verzar v Verzar* [2012] NSWSC 1380 at [123], as "a valuable prompt".

4. PRACTICE NOTE SC EQ 7

4.1. The Supreme Court of NSW Practice Note SC Eq 7 (Family Provision) was issued on 12 February 2013 and commenced on 1 March 2013. The Practice Note prescribes:

a. The documents required to be filed by the Plaintiff at the time of the filing of the Summons (paragraph 6).

b. The documents required to be filed by the Defendant (paragraph 9).

c. The necessity for mediation, and the procedure between the first directions listing and mediation, and following mediation (paragraphs 10 to 18).

d. That certain matters be noted as agreed between the parties as part of any consent orders (paragraph 19).

e. That certain matters may be proved with less than strict proof (paragraph 21).

f. A pro forma plaintiff's affidavit (annexure 1).

5. HOW THEN HAS THE COURT APPROACHED DETERMINATION OF THESE MATTERS?

5.1. In short, and for the purposes of a short form advice, having established eligibility and filed the application within time, on hearing the Court has a discretion as to what, if any provision or further provision ought to be awarded to a plaintiff.

5.2. For the purposes of submissions as to how the Court should exercise that discretion, it is necessary to go further.

5.3. In *Henry v Hancock* [2016] NSWSC 71 at [69], Brereton J said:

> "Formerly, the yardstick which was applied was that of the wise and just testator. Nowadays, it is fashionable to couch it in terms of "community standards", although I am not at all sure that this is any different from the moral obligation of a wise and just testator and, as has not infrequently been pointed out, there is no ascertainable external community standard to guide the decision, which involves a broad evaluative judgment unconstrained by preconceptions and predispositions, and affording due respect to the judgment of a capable testator who appears to have duly considered the claims on his or her testamentary bounty — subject to the qualification that the court's determination is made having regard to the circumstances at the time of the hearing, rather than at the time of the testator's will or death."

5.4. In *Steinmetz v Shannon* [2019] NSWCA 114:

a. At [40] White JA acknowledged the weight of authority that endorses a judge's bolstering his or her view as to whether an applicant has been left without adequate provision by reference to what the community would expect. But at [44] His Honour said:

> "But unlike the reasonable man on the Clapham omnibus or the Bondi tram, or the reasonable and fair-minded lay observer asked to consider the impartiality of a judge, there is no utility in invoking a community standard or expectation against which the adequacy of provision is to be judged. I agree with Brereton JA that if one is forced to use concepts of "moral duty" or "community standards", the former is preferable. The indication of either expresses a conclusion about the judge's own evaluative assessment as to whether the provision made for the applicant was adequate for his or her proper maintenance and advancement in life (and, where relevant, education)."

b. At [109] Brereton JA said – "Some of the passages to which I refer use the traditional concept of "moral duty" rather than the more fashionable one of "community standards". For my part, I prefer the former…"

5.5. A more useful tool for the purpose of client explanation are “principles” (formerly general principles) which might apply to a particular category of eligible person, as set out in judgments of Hallen J (Succession List Judge).

5.6. The statements of principle are a helpful guide but must be considered having regard to the variables in s 60(2) Succession Act 2006 (NSW). In *Armitage v Fraser* [2020] NSWSC 979 at [153] – [154] Hallen J said:

> “As long ago as 1980, in *White v Barron*, at 440, Stephen J wrote:
>
> “… this jurisdiction is pre-eminently one in which the trial judge’s exercise of discretion should not be unduly confined by judge-made rules of purportedly general application.”
>
> As I have stated in many cases (see, for example, *Bowditch v NSW Trustee and Guardian* at [117]), I do not intend what I have described as “principles” or “general principles” to be elevated into rules of law, propositions of universal application, or rigid formulae. Nor do I wish to suggest that the jurisdiction should be unduly confined, or that the discretion be constrained, by statements of principle found in dicta in other decisions, or by preconceptions and predispositions. Decisions of the past do not, and cannot, put any fetters on the discretionary power, which is left largely unfettered. I do not intend what is provided as a guide to be turned into a tyrant.”

5.7. In relation to a claim by an adult child, a statement of principles was in *Armitage v Fraser* [2020] NSWSC 979 at [151] as follows (citations omitted):

> (a) The relationship between parent and child changes when the child attains adulthood. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.
>
> (b) It is impossible to describe, in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, “… ordinarily the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life — such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation”…
>
> (c) Generally, also, “… the community does not expect a parent to look after his or her children for the rest of [the child’s life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there

are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute"…

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is appropriate provision for the maintenance of the applicant… But the Act does not permit orders to be made to provide for the support of third persons to whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons …

(e) There is no need for an applicant adult child to show some special need or some special claim …

(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: … Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life are relevant… In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased…

(g) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim…"

5.8. In relation to a claim (or competing beneficiary claim) by a spouse the principles were set out in *Sarant v Sarant* [2020] NSWSC 1686 at [241] as follows (citations omitted):

(a) "A spouse, particularly of a long marriage, has a primary right to be considered by the deceased, but the extent that he, or she should provide for that spouse is to be governed by his, or her, needs, both at present, and in the foreseeable future and also the needs of any competing claimants.

(b) The capacity of the spouse, himself, or herself, to provide for those needs must also be considered.

(c) The general duty of the deceased to the spouse, to the extent to which her, or his, assets permit her, or him, to do so, is to ensure that the spouse is secure in the matrimonial home, to ensure that he or she has an income sufficient to permit him or her to live in the style to which the spouse is accustomed, and to provide the spouse with a fund to enable her to meet any unforeseen contingencies. Generally speaking, the amount should be sufficient to free the mind of the spouse from any reasonable fear of any insufficiency as he, or she, grows older and his, or her, health and strength fail…

(d) Concern as to the capacity of the spouse to maintain himself, or herself, independently, and autonomously, may also bear upon the notion of what is proper provision…

(e) Where, after competing factors have been taken into account, it is possible to do so, a spouse ought to be put in a position where he, or she, is the master, or mistress, of his, or her, own life, and in which,

for the remainder of his, or her, life, she is not beholden to beneficiaries...

(f) Greater weight may be given to the claims of parties who have entered "a formal and binding commitment to mutual support…"

5.9. In relation to claims by grandchildren see *Hancock, Shaun v Parker; Hancock, Lisa v Parker* [2017] NSWSC 759 at [122] as follows:

(a) "As a general rule, a grandparent does not have a responsibility to make provision for a grandchild; that obligation rests on the parent of the grandchild. Nor is a grandchild, normally, regarded as a natural object of the deceased's testamentary recognition.

(b) Where a grandchild has lost his, or her, parents at an early age, or when he, or she, has been taken in by the grandparent in circumstances where the grandparent becomes *in loco parentis*, these factors would, prima facie, give rise to a claim by a grandchild to be provided for out of the estate of the deceased grandparent. The fact that the grandchild resided with one, or more, of his, or her, grandparents is a significant factor. Even then, it should be demonstrated that the deceased had come to assume, for some significant time in the grandchild's life, a position more akin to that of a parent than a grandparent, with direct responsibility for the grandchild's support and welfare, or else that the deceased has undertaken a continuing and substantial responsibility to support the applicant grandchild financially or emotionally.

(c) The mere fact of a family relationship between grandparent and grandchild does not, of itself, establish any obligation to provide for the grandchild upon the death of the grandparent. A moral obligation may be created in a particular case by reason, for example, of the care and affection provided by a grandchild to his, or her, grandparent.

(d) A pattern of significant generosity by a grandparent, including contributions to education, does not convert the grandparental relationship into one of obligation to the recipients, as distinct from one of voluntary support, generosity and indulgence.

(e) The fact that the deceased occasionally, or even frequently, made gifts to, or for, the benefit of the grandchild does not, in itself, make the grandchild wholly, or partially, dependent on the deceased for the purposes of the Act.

(f) It is relevant to consider what inheritance, or financial support, a grandchild might fairly expect from his, or her, parents."

5.10. In relation to claims by a former spouse see *Glynne v NSW Trustee and Guardian; Lindsay v NSW Trustee and Guardian* [2011] NSWSC 535 at [89] as follows:

(a) "The policy of the law is to promote the finality of settlements of property disputes by orders made in the Family Court or by the amicable division of matrimonial property prior to death.

(b) Another policy of the law is that parties whose marriage has been dissolved, and in respect of whom orders have been made disposing of their matrimonial property, or where there has been an amicable division of that property, should be able to go their own separate ways. Except for the specific cases provided for under the Family Law Act 1975 (Cth), and provided there has been compliance with the orders, or the agreement for amicable division, made, such parties should, thereafter, face no financial obligation, one to the other.

(c) A settlement, whether by order of the Family Court, or by agreement reached amicably, and complied with, however, does not preclude a claim by a former spouse for a family provision order, but, in those circumstances, additional, and different, considerations will arise. The Act gives a specific entitlement to a former spouse to make a claim. That provision contemplates there will be cases where such a claim will succeed, notwithstanding the public policy of the finality of a property settlement.

(d) It is not the task of this Court to go behind the orders made in the Family Court or the amicable agreement of the parties unless a specific basis is advanced for this Court to do so (e.g. fraud).

(e) In every case involving a former spouse, it will be necessary to examine the actual relationship between the two people concerned, as far as possible without preconceptions based only on the fact of the dissolution of their marriage and their property division.

(f) The terms of the parties division of property will be relevant in determining the Plaintiff's needs and the extent to which those needs may have been satisfied in the deceased's lifetime, as will be the length of time from the separation of the former spouse to the death of the deceased, and the course that the lives of the two spouses have followed since separation.

(g) There is a distinction between "factors which warrant the making of the application' and the factors that warrant the making of an order. Merely establishing that an applicant is a former spouse and that she, or he, has a financial need, would not, as such, entitle her, or him, to an order. In addition, even if there are factors that warrant the making of the application, the applicant may fail in establishing that an order for provision should be made.

(h) What has to be decided is whether what is relied upon in the case by the applicant, in association with all other relevant matters, puts her, or him, within the class of persons to whom the deceased had an obligation to make provision."

5.11. For a more recent outline of principles relating to factors warranting concerning a former spouse claim see *Brindley v Wade (No 2)* [2020] NSWSC 882 at [157] – [177].

6. BREAKING THE PARADIGM: COMMON FEATURES THAT MAKE THE CLAIM BETTER (OR WORSE)

6.1. The principles relating to certain categories of eligible person are a helpful guide but the adequate and propriety of provision made for a plaintiff must be determined according to the text of the legislation.

6.2. It is well known that the Court may take into account the matters in s 60(2) *Succession Act* 2006 (NSW) in determining claims. Taking a broad brush approach, the matters most likely to have an impact on the quantum of provision are to my mind:

a. If the plaintiff receives substantial provision under a deceased's Will (particularly in the context of the size of the estate and the competing claims) his or her prospects become exponentially more difficult.

b. The nature and value of the deceased's estate and notional estate is another significant factor. A mega-estate can dramatically improve a plaintiff's prospects. A mini-estate can dramatically reduce a plaintiff's prospects.

c. The presence or absence of competing financial claims (the relative urgency of claims, subject to sub-paragraph a above) can swing the balance one way or the other.

d. Dependency at the date of death can be important.

6.3. Character and conduct does not often play a significant role in success or failure of claims. In my view evidence of character and conduct, and the nature of the relationship between the plaintiff and the deceased, is more frequently relevant to evaluation of whether provision for claimed "needs" ought be made on a line by line basis. I suggest that the appropriate question is – whether provision should be made from a deceased's estate for the plaintiff's claimed need for accommodation, or income, or otherwise, having regard to the relationship between the deceased and the plaintiff, the circumstances of the plaintiff, the estate and the competing beneficiaries, and other relevant matters. Put another way – why should this plaintiff have provision from this estate for accommodation, or an income?

7. DUTY OF THE EXECUTORS AND THE POWER OF THE COURT TO ACCEPT OR REJECT COMPROMISES

7.1. The duty of the executors was described in *Bartlett v Coomber* [2008] NSWCA 100 by Hodgson JA as follows:

> "The parties to proceedings for such an order are generally just the applicant for the order and the legal personal representative of the deceased person: *Re Lanfear* (1940) 57 WN (NSW) 181; *Re S J Hall* [1959] SR (NSW) 219; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497. These cases were decided under the legislation that preceded the Act, but are still applicable.
>
> According to these authorities, the duty of the legal personal representative is either to compromise the claim or to contest it and to seek to uphold the provisions of the will (or the distribution on intestacy); and to that end, to put before the court evidence made available by beneficiaries that is relevant to the issues…."

7.2. The Court's power to give effect to, or reject, a compromise reached in proceedings was described by Mason P in *Bartlett v Coomber* [56] – [60], and [65] as follows:

> "I accept that the court's power to reject a compromise reached in proceedings under the Act is available both where the sum to be provided is too low or too high. Either extreme might indicate, for example, that the proceedings were being conducted through to completion for a purpose foreign to that of the Act and/or that some fundamental mistake vitiated the settlement process.
>
> But it must be borne in mind that litigation under the Act takes place in an adversary context in which the active parties to the particular litigation are usually expected to be the best judges of what is in their own interests. The policy of Australian law encourages the settlement of disputes (see eg *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 at 9 per Gleeson CJ and Uniform Civil Procedure Rules 2005, Part 20). Our legal system would collapse were it not for the fact that most disputes are resolved by agreement.
>
> One of the principles giving effect to this policy is the principle that a valid compromise gives effect to an agreement that effectively supersedes the antecedent rights of the parties. The possibility of greater success and the risk of greater failure is transposed into an arrangement that frees the litigants and witnesses of the risks, costs and toils of further disputation. This principle is not displaced in the context of proceedings under the Act, although for reasons already outlined, the court may decline to give effect to a settlement if doing so failed to effectuate the specific policies of the Act, amounted to an abuse of process or otherwise offended public policy in a demonstrable way.
>
> The compromise agreement in the present case suffered from none of these difficulties. It was reached in circumstances where the deceased's executrix availed herself of the advice of solicitor and counsel. It was also reached with the concurrence of the appellant,

> albeit given with a qualification about no claim being made on Mrs Thomas' estate.
>
> When determining whether or not to translate a binding agreement into an order, a court proceeds in the full knowledge that it lacks full knowledge about the rights and wrongs of the yet to be litigated dispute. Allegations are necessarily undeveloped and untested.
>
> …
>
> Naturally, there will be situations where a court can be sufficiently satisfied that the proffered compromise agreement lies outside the range of possible outcomes and to such a degree that the proposed order should be regarded as giving effect to some purpose extraneous to those within the Act. But much more is required than that one party to the compromise has repented of it, *a fortiori* a non-party like the present appellant."

7.3. The above passages were set out, with collated other authorities, by Hallen J in *Sergent v Glass (No 2)* [2018] NSWSC 1100 at [60] – [78], in the context of an application for approval of a settlement concerning minor children (pursuant to s 76 of the Civil Procedure Act 2005 (NSW)) in an estate with an estimated gross value of $453,579.

7.4. The upshot is: the consent of affected beneficiaries is not essential, but the absence of consent, or opposition by beneficiaries, is relevant to the Court's consideration of whether or not to approve a compromise. Where the making of orders is opposed by beneficiaries the reasons for opposition may provide 'a convenient focus' by reference to which the Court will consider whether to approve the settlement (Jessup J in *Darwalla Miling Co Pty Ltd v F Hoffman La Roche Ltd* (No 2) [2006] FCA 1388; (2006) 236 CLR 322 at [39] cited by Hallen J in *Fairhurst (bht NSW Trustee 7 Guardian) v Fairhurst* [2012] NSWSC 388 at [39] and in *Sackelariou; Edward v O'Donnell; Sackelariou, George v O'Donnell* [2018] NSWSC 1651 at [83].

7.5. A summary of what the Court is doing in considering an application for orders by consent is in *Sackelariou* (supra) at [64] – [78].

8. THE BURDEN OF PROVISION

8.1. A family provision order must specify the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided: s 65(1)(c) *Succession Act* 2006 (NSW).

8.2. The Court has the power to adjust the interests of any person affected by a family provision order and to be just and equitable to all persons affected by the order: s 66(2) *Succession Act* 2006 (NSW).

8.3. In *Hoobin v Hoobin* [2004] NSWSC 705 at [139] (in respect of s 13 of the Family Provision Act 1982) White J (as his Honour then was) referred to the following considerations in relation to the burden of provision:

a. In an appropriate case weight may be given to what the particular testator or deceased person would have wished.

b. The discretion should be exercised having regard to 'rules of reason and justice' with due regard to the whole of the surrounding circumstances.

c. Where the Court is not satisfied that the deceased's likely assessment would be informed by those rules, the deceased's likely preference carries little weight. Instead, an assessment can be made principally, but not solely, by reference to the proper claims on the deceased's bounty, which in turn includes a consideration of their financial circumstances.

8.4. In *Webster v Strang; Steiner v Strang* [No 2] [2018] NSWSC 1411 Kunc J said at [104] that due weight should be given to the deceased's testamentary scheme.

9. INTERVENTION BY BENEFICIARIES IN PROCEEDINGS

9.1. In *Vasiljev v Public Trustee* [1974] 2 NSWLR 497 Hutley JA (with the agreement of Hardie and Reynolds JJA) said at 503:

> "…Beneficiaries may be allowed to intervene on special grounds, but their intervention is unwelcome.
>
> These rules put the executor in a position of great responsibility, as he is the only defender of the will. In *In the Will of W.F. Lanfear (Deceased)*, Williams J., speaking with the concurrence of Nicholas C.J. in Eq., said:
>
> > "In an ordinary case, specially where the estate is a small one, it is the duty of the executors either to compromise the claim, or to contest it and seek to uphold the provisions of the will. For that purpose they should place all the relevant evidence before the Court relating, not only to the case generally, but to any particular circumstances which the Court should take into consideration relating to any particular gift in the will. In special cases where for instance the executors are themselves beneficiaries under the will, or where very substantial benefits are conferred upon beneficiaries, it can be proper for beneficiaries to intervene and be separately represented, but as a general rule such separate representation should not be necessary if the executors do their duty. If beneficiaries desire to intervene an application to do so must be made before or at the hearing, and it is by no means a matter of course that such application will be granted. If the executors take up an attitude, which compels beneficiaries to seek

> separate representation to protect their gifts, they run a grave risk of the Court holding that they have acted improperly and, in a case where the Court considers that only one set of costs should be allowed between the respondents, the result may follow that the Court will order that set of costs to be applied in the first instance on behalf of the beneficiaries who have been forced to intervene, and only the residue to be applied on behalf of the executors."

9.2. In *Angius v Salier* [2018] NSWSC 808, Robb J made orders joining a beneficiary to proceedings between an alleged creditor and the administrator of a deceased estate, on terms:

a. that the beneficiary bear his own costs unless the Court otherwise orders.

b. Limiting cross-examination by the beneficiary's counsel to areas not otherwise covered by counsel for the administrator, unless the leave of the Court is granted.

c. Limiting evidence by the beneficiary to a discrete issue which affected him independently of his interest in the deceased's estate.

d. On the condition that the beneficiary not file any pleading, without first providing a draft of the pleading to all other parties, and then subject to a grant of leave by the Court.

9.3. His Honour said at [57]:

> "The proposition that the fact that a beneficiary wishes to intervene to protect a very substantial benefit that is conferred on the beneficiary by the instrument creating the estate may provide an exceptional basis that justifies the beneficiary being joined in the proceedings is supported by the decision of the Victorian Court of Appeal in *The Official Trustee in Bankruptcy v Frangos* (7 July 1995, unreported) at 15; and *Boldi v Crozier* [2015] NSWSC 2155 at [4] (Brereton J)."

<u>Sackelariou; Edward v O'Donnell; Sackelariou, George v O'Donnell [2018] NSWSC 1651</u>

9.4. In *Edward Sackelariou v O'Donnell, George Sackelariou v O'Donnell* [2018] NSWSC 1651 there were two family provision claims by the tutor for two plaintiffs who suffered from an intellectual disability and who were under legal incapacity. The plaintiffs were stepchildren of the deceased. "Heads of Agreement" were signed at the conclusion of a private mediation. After the mediation (but before the making of orders resolving the proceedings), four step-grandchildren adversely affected by the proposed resolution of the

proceedings applied by notice of motion to be heard in opposition to the proposed settlement.

9.5. The gifts contained in the deceased's will dated 20 September 2016 were described in paragraph [35] of the judgment. The deceased:

(a) Devised realty at Gladesville ("the Gladesville property") to Asylum Seekers Centre Incorporated, for its general purpose in providing short term accommodation for asylum seekers (Clause 3).

(b) Made three gifts of jewellery to Cassandra, to Laila, and to Eraine (Clauses 4, 5, and 6).

(c) Gave a pecuniary legacy of $100,000 to Cassandra (Clause 7).

(d) Gave a pecuniary legacy of $50,000 to each of her step-grandchildren, Vincent, Alexandra, Christian and Andreas (Clause 8) (who are the applicants).

(e) Gave a pecuniary legacy of $25,000 to each of her nieces and nephews, Erin, Claire, Michaelean, Lachlan, and Laila (Clause 9).

(f) Gave a pecuniary legacy of $50,000 "to my stepdaughter Eraine Grotte for my stepson George [Sackelariou] and my stepson Edward Sackelariou" on trust as set out in the Will (Clause 10).

(g) Gave a pecuniary legacy of $25,000 to Gabrielle, for Paul, on the trusts set out in Schedule 2 of the Will (Clause 11).

(h) Gave a pecuniary legacy of $10,000 to each of three named friends (Clauses 12 and 13).

(i) Gave a pecuniary legacy of $1,000 to each of 15 named friends (Clause 14).

(j) Gave various pecuniary legacies, totalling $270,000, to 14 named charities (Clause 15).

(k) Gave a pecuniary legacy of $20,000 to John (Clause 16).

(l) Left the residue equally to her named siblings, Gabrielle, Antoinette and Eris (Clause 17).

(m) In relation to the step-grandchildrens' application to be heard, the Court said at [76] –[79]:

> [76] "Even though the general rule in claims for a family provision order out of the estate is that the beneficiaries should not be parties, notwithstanding that they have an obvious interest in the proceedings: *Re Lanfear* (1940) 57 WN (NSW) 181, at 183; *Bartlett v Coomber* [2008] NSWCA 100, I have little doubt that the applicants, as beneficiaries, are entitled to be heard on the application to have the orders made and approved. After all, they have an interest under the deceased's Will that would be affected by the orders proposed.
>
> [77] I have based this view, at least in part on what was written in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19, at [131], in which the plurality of the High Court accepted the submission that "where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party, the non-party is a necessary party and ought to be joined". Whilst joinder has not been sought, the principle behind what was written is applicable.
>
> [78] In *State of Victoria v Sutton* (1998) 195 CLR 291; [1998] HCA 56 at [77], McHugh J said, of the foundational principle:
>
> > "The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order."
>
> [79] More *recently*, and, perhaps, more pertinent to the present case is *Hodge v De Pasquale* (2014) 15 ASTLR 1; [2014] VSC 413, in which McMillan J wrote at [81]:
>
> > "A trustee who, in good faith, believes an applicant for further provision has a strong claim or a claim that it would be cheaper to settle than to contest, may still settle the claim and may seek orders giving effect to that settlement by consent, or else by seeking the approval of all beneficiaries who are affected. Beneficiaries who wish to contest such a claim are entitled to be notified and appear, but as litigants are under the same obligations to promote the efficient administration of justice."

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Family Provision Review 2020 – The Worm and Robin

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A PAPER PRESENTED FOR THE 18TH ANNUAL SUCCESSION LAW SYMPOSIUM 2021

ON 10 MARCH 2021

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