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Eligibility to Make a Family Provision Claim

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1. FAMILY PROVISION LEGISLATION

1.1. Chapter 3 of the *Succession Act* 2006 (NSW) applies where the deceased died on or after 1 March 2009. The predecessor legislation, the *Family Provision Act* 1982 (NSW) continues to apply to (well out of time) claims where the deceased died prior to 1 March 2009. The *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW) continues to apply to (extremely out of time) claims where the deceased died prior to 1 September 1983.

1.2. 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 spouse 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 spouse 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."

1.3. 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."

1.4. 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**]".

1.5. 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."

1.6. Since it was suggested by Basten JA in *Andrew v Andrew* [2012] NSWCA 308; (2012) 81 NSWLR 656 that the two stage test is no longer apparent in the structure of ss 59 and 60 of the *Succession Act* 2006 (NSW), family provision discourse has trended against emphasis on a two stage process, even if *Singer v Berghouse* continues to apply until the High Court of Australia determines otherwise. It undoubtedly remains the case that the plaintiff must satisfy the Court that they have been left without adequate provision before an order can be made.

1.7. The *Succession Act* 2006 (NSW) 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".

1.8. 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."

1.9. 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…"

1.10. What must be remembered is that before any of the s 60(2) factors or questions of community standards or moral duty arise, a plaintiff must establish that they are an eligible person to make a claim for provision or additional provision.

1.11. In *Lodin v Lodin* [2017] NSWCA 327 at [106] Sackville AJA referred to the following propositions drawn from *Re Fulop* (1987) 8 NSWLR 679 at 681 (considering the words "factors which warrant the making of the application" under the predecessor legislation the *Family Provision Act* 1982 (NSW)):

"(i) The question posed by s 9(1) of the *FP Act* cannot be resolved until all admissible evidence relevant to the issue of whether there are factors warranting the application has been tendered. Despite s 9(1) using language that apparently contemplates determining the question as a

preliminary issue, ordinarily it is impracticable to isolate the evidence bearing on that issue from other evidence in the case.

(ii) Section 9(1) is premised on a distinction between "factors which warrant the making of the application" and the circumstances which justify the making of the family provision order. Otherwise the subsection would be pointless. This means that in a particular case an applicant might establish that there are factors warranting the application, yet the court might decline to make a family provision order in the applicant's favour.

(iii) The legislation also requires a distinction to be drawn between "eligible applicants" who do not have to satisfy s 9(1) (a spouse, de facto partner or child of the deceased) and those who do (such as a former spouse or grandchild). The difference is that the former are generally regarded as natural objects of testamentary recognition by a deceased, while the latter are not generally so regarded. Accordingly, the "factors" referred to in s 9(1) of the *FP Act* are those that give an eligible person in the second category "the status of a person who would be generally regarded as a natural object of testamentary recognition by a deceased".

1.12. It is eligibility that is the focus of this paper, rather than the evaluative factors. What must a plaintiff do in order to establish that he or she is eligible to make a claim?

2. SPOUSE

2.1. The *Miscellaneous Acts Amendment (Marriages) Act* 2018 (NSW) amended s 57 *Succession Act* 2006 (NSW) with effect from 15 June 2018 to replace the previous reference to "wife or husband" with "spouse" following amendments to the *Marriage Act* 1961 (Cth).

2.2. A marriage is one solemnised in Australia in accordance with the *Marriage Act* 1961 (Cth). A foreign marriage may also be recognised by Part VA of the *Marriage Act* 1961 (Cth).

2.3. Section 5 of the *Marriage Act* 1961 (Cth) defines "marriage" as the union of two people to the exclusion of all others, voluntarily entered into for life.

2.4. The object of Part VA of the *Marriage Act* 1961 (Cth) is expressed to be to give effect to Chapter II of the Convention on Celebration and Recognition of the Validity of Marriages signed at The Hague on 14 March 1978.

2.5. The definition of "spouse" for the purposes of the part of the *Succession Act* 2006 (NSW) dealing with family provision should not be conflated with the definition of "spouse" in s 104 of the Act for the purpose of the intestacy provisions. A person who is a party to a domestic partnership (referred to in ss 104 and 105 of the Act) is not a spouse for the purpose of a family provision claim.

2.6. Relevant recent cases on family provision claims by a spouse include *Steinmetz v Shannon* [2019] NSWCA 114 (first instance *Steinmetz v Shannon* [2018] NSWSC 1090), *Sarant v Sarant* [2020] NSWSC 1686 and *Ibrahim v Nasr* [2021] NSWSC 1321. Compare *Cowap v Cowap* [2020] NSWCA 19 (first instance *Cowap v Cowap* [2019] NSWSC 1104) and *Schneider v Kemeny; Kemeny v Schneider* [2021] NSWSC 524.

3. DE FACTO SPOUSE

3.1. Section 21C(2) of the *Interpretation Act* 1987 (NSW) provides that a person is in a de facto relationship with another person if:

(a) they have a relationship as a couple living together, and

(b) they are not married to one another or related by family.

3.2. Section 21C(3) of the *Interpretation Act* 1987 (NSW) provides:

> (3) Determination of "relationship as a couple"
>
> In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the duration of the relationship,
>
> (b) the nature and extent of their common residence,
>
> (c) whether a sexual relationship exists,
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,
>
> (e) the ownership, use and acquisition of property,
>
> (f) the degree of mutual commitment to a shared life,
>
> (g) the care and support of children,
>
> (h) the performance of household duties,
>
> (i) the reputation and public aspects of the relationship.
>
> No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple.

3.3. In *Marando v Rizzo* [2012] NSWSC 739 at [49] – [57] Hallen AsJ (as his Honour then was) summarised the principles as follows:

> [49] In *Ingamells v Western Australia Trustees Ltd* (Full Court of the Supreme Court of WA, 5 March 1993, unreported), the Full Court (Malcolm CJ, Rowland and Ipp JJ) quoted, with approval, the following passage from the judgment of Fitzgerald J in *Lynum v Director General of Social Security* (1983) 52 ALR 128 at 131:
>
> > "Each element of a relationship draws its colour and significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meet the statutory test."
>
> [50] Although each of these cases was decided many years ago (as evidenced by the reference to "the opposite sex" in the passage quoted), the general principle stated applies equally now as it did then.
>
> [51] Once the physical, or factual aspects, of the relationship have been examined, whether a mental ingredient also existed should be considered. That ingredient involves some commitment, by each of the parties, to their relationship. It need not necessarily be a commitment intended to last forever, or indefinitely. Nor need it be a commitment to a long-term relationship. But it should, at least, be a mutual commitment for the foreseeable future.
>
> [52] Furthermore, in assessing the degree of mutual commitment to a shared life, it is not essential that there be entire harmony, entire fidelity, entire satisfaction with the relationship, or entire commitment; the degree of commitment may be high even though there are qualifications. Dissatisfactions, infidelities, expressed complaints, and grievances, and less than entire commitment are often found in personal relationships, including marriages, and are not inconsistent with a relationship of two parties having a relationship as a couple living together, but not married to one another.
>
> [53] The significance of qualifications of these kinds appears from passages in Basten JA's leading judgment in *Robson v Quijarro* [2009] NSWCA 365 at [14]-[16], and from passages which his Honour cited from *Bar-Mordecai v Hillston* [2004] NSWCA 65 at [120]-[124]: *Dion v Rieser* [2010] NSWSC 50, per Bryson AJ at [162].
>
> [54] Thus, the determination of the existence of a de facto relationship is essentially impressionistic. If sufficient pieces of evidence exist which, when viewed cumulatively, and through the application of common sense and proper reasoning, satisfy the finder of fact that the relationship is a de facto relationship then the statutory test is met: Scragg v Scott [2006] NZFLR 1076 at [64].
>
> [55] The concept of a de facto relationship was discussed by Gzell J in Ye v Fung [2006] NSWSC 243, at paragraphs [64] - [65] of the judgment:
>
> "[64] A de facto relationship requires more than adult persons living together. They must live together as a couple. When one thinks of persons as a couple, one thinks of two people in a

> romantic relationship. That is the first meaning given in the Macquarie Dictionary (4th ed) with reference to people as a couple. The Oxford English Dictionary in defining the word in the sense of the union of two, or a pair, gives as its first meaning with reference to two people: 'A man and woman united by love or marriage; a wedded or engaged pair'.
>
> [65] In my view the word in the Property (Relationships) Act 1984, s 4(1)(a), in the context of the extension of relief under the Act to persons in a domestic relationship, connotes two adult unmarried persons living together, united by love, or living together in a romantic relationship. The effect of such a construction is that de facto relationships are confined to heterosexual and homosexual romantic relationships."

[56] Cummins J in Dow v Hoskins [2003] VSC 206 said that "the determination of whether the Plaintiff was living with the deceased ... should not be construed on narrow, formal, pedantic or merely geographical criteria, but should be considered taking into account the human reality of the personal, emotional and cultural complex".

[57] In Dion v Rieser Bryson AJ, at [14], said:

> "[14] A de facto relationship is a continuing course of conduct and behaviour, not an event at a fixed point of time. No matter how close their involvement in each other's emotional lives, a conclusion that people are living together as a couple involves consideration of the circumstances in which they are living, including the places at which they are living. The test is not primarily locational, but it has a locational element."

3.4. In *Yesilhat v Calokineros* [2021] NSWCA 110 at [129], Brereton JA (with whom Bathurst CJ agreed) said at [129] that “living together” was indispensable to the existence of a de facto relationship as defined (in s21C(2) *Interpretation Act* 1987 (NSW)); and at [134] that each of the sub-categories of eligibility (de facto relationship, member of the household, close personal relationship) involves “living together”, “a concept which involves mutual living in a common residence, at least to some extent, though not necessarily exclusively or on a full-time basis. It is not essential to a finding of a de facto relationship that there be unbroken common residence, and it is not incompatible with the existence of a de facto relationship, as defined, that a party spend some nights each week elsewhere than in the “matrimonial home””.

3.5. In *Smoje v Forrester* [2017] NSWCA 308 at [42], Meagher JA with whom Basten JA and Macfarlan JA agreed said:

> “Whilst the state of living “together” does not require that the living occur at and from a single place, or that the two adults spend all of their time together at the same place, it will ordinarily include elements of interaction and sharing whilst engaging in activities associated with occupying the same place. Repeated visits for a singular purpose, without more, do not satisfy that description.”

3.6. In *Pollock v NSW Trustee & Guardian* [2022] NSWSC 923, Hallen J said:

> [417] "…the concept of "living together" must also be read in the context of the concept of "as a couple". It seems to me, then, that the notion includes the following elements that require evaluation:
>
> 1. Co-habitation, although not necessarily fulltime; however, there must be sufficient shared residence, which invites a consideration of such factors as whether the persons said to be living together had a common residential address; where they usually slept at night (for example, when not absent temporarily for holidays, employment or for other reasons); and where they usually kept their clothing, domestic and personal effects; regardless of the number of days or nights spent, perhaps, at another place.
>
> 2. There being no present intention of definite or early removal; a continuity of association with the place; remaining for an undetermined period, not infrequently, but not necessarily combined with design to stay permanently.
>
> 3. Physical proximity in the same residence, in the sense of simultaneous physical presence.
>
> 4. Some personal association with each other.
>
> 5. The sharing of facilities of day-to-day living on a regular and recurrent basis, often described as sharing a household, including but not limited to, the performance of domestic tasks.
>
> 6. Deciding household questions together and, whilst a social and economic partnership of the parties is not required, there should be some sharing of the burden of maintaining a household.
>
> 7. Regarding the place, or places, in which the two adults live as 'their home'.
>
> 8. Whether one party, or both parties, fundamentally acts, or act, contrary to the interests or needs of the other."

3.7. Where the two persons are asserted to be "living together" but maintained separate residences, see *Bezjak v Wyatt* [2018] NSWSC 199 at [40] –[73]; *Vaughan v Hoskovich* [2010] NSWSC 706; but compare *Piras v Egan* [2008] NSWCA 59.

3.8. For examples of the type of evidence that might be led to establish a de facto relationship, see *Estate of Shirley Joan Violet Gardiner; Bernengo v Leaney* [2019] NSWSC 1324.

3.9. Relevant recent cases of claims by a de facto spouse include *Sun v Chapman* [2022] NSWCA 132 (first instance *Sun v Chapman* [2021] NSWSC 955); *Pollock v NSW Trustee & Guardian* [2022] NSWSC 923; *Karpin v Gough* [2022] NSWSC 471; *Finlay v Pereg* [2022] NSWSC 32 and *Coss v Norman* [2021] NSWSC 1464.

3.10. A former de facto spouse is not an eligible person unless he or she is eligible under another category of eligibility. In *Fairbairn v Radecki* [2022] HCA 18 the

High Court of Australia considered the time at which a de facto relationship will be found to have "broken down".

3.11. The Court said at [30] that "in the context of a human relationship, "breakdown" refers to the "end" or "breakup" of what had been an enduring emotional bond". The Court rejected the contention that the relationship had broken down when the appellant had been placed into an aged care facility such that the parties were no longer physically living together. The Court said at [32] that if that contention were accepted "it would be productive of injustice if two people who live apart (including for reasons of health) were incapable of maintaining a de facto relationship". The Court said at [37] that involuntary and enduring separation will not automatically justify a conclusion that a relationship has ended. The Court found at [46] that the relationship had broken down when the respondent refused to make the "necessary or desirable adjustments" to support the appellant, and, by his conduct, acted contrary to her needs.

4. CHILD

4.1. Often there will be no dispute that an applicant is a child of the deceased.

4.2. Section 11 of the *Status of Children Act* 1996 (NSW) provides:

> (1) A person is presumed to be a child's parent if the person's name is entered as the child's parent in the Births, Deaths and Marriages Register or a register of births or parentage information kept under a law of the Commonwealth, another State or a Territory or a prescribed overseas jurisdiction.
>
> (2) Nothing in this section affects the operation of Chapter 5 (Recognition of adoptions) of the *Adoption Act* 2000.

4.3. Section 57(2) of the *Succession Act* 2006 (NSW) provides:

> (2) In this section, a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the *Property (Relationships) Act* 1984, at the time of death, a reference to the following—
>
> (a) a child born as a result of sexual relations between the parties to the relationship,
>
> (b) a child adopted by both parties,
>
> (c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the *Status of Children Act* 1996, to be the father (except where the presumption is rebutted),
>
> (d) in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act* 1996,

(e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act* 1998).

Status of Children Act 1996 (NSW) presumptions

4.4. Section 9 of the *Status of Children Act* 1996 (NSW) provides:

(1) A child born to a woman during a marriage to which she is a party is presumed to be a child of the woman and her spouse.

(2) If a child is born to a woman within 44 weeks after her spouse dies, the child is presumed to be the child of the woman and her deceased spouse.

(3) If a child is born to the woman within 44 weeks after a purported marriage to which the woman is a party is annulled, the child is presumed to be a child of the woman and her purported spouse.

(4) If:

(a) the parties to a marriage separated at any time, and

(b) after the separation, resumed cohabitation on one occasion, and

(c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart, and

(d) a child is born to the woman within 44 weeks after the end of the cohabitation, but after the dissolution of the marriage,

the child is presumed to be the child of the woman and her former spouse.

(5) For the purposes of this section, a marriage is dissolved by a decree of dissolution or annulled by a decree of nullity on the making of the decree nisi.

4.5. Section 10 of the *Status of Children Act* 1996 (NSW) provides:

A child born to a woman is presumed to be a man's child if, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the man and the woman cohabit but are not married.

4.6. Section 14 of the *Status of Children Act* 1996 (NSW) provides:

(1) When a woman who is married to a man has undergone a fertilisation procedure as a result of which she becomes pregnant:

(a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and

(b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

(1A) When a woman who is married to or who is the de facto partner of another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:

(a) the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, and

(b) the woman who has become pregnant is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

4.7. Section 15 of the *Status of Children Act* 1996 (NSW) provides: "A presumption arising under this Division, or a parentage presumption arising under any other Act or rule of law, that is rebuttable, is rebuttable by proof on the balance of probabilities".

Parentage testing procedures

4.8. The Court has the power to make an Order that a parentage testing procedure be carried out pursuant to s 26 of the *Status of Children Act* 1996 (NSW) if parentage is an issue in proceedings. It will be necessary to demonstrate, by affidavit evidence, that there is doubt as to paternity and that the testing proposed is likely to resolve or substantially assist in resolving the issue.

4.9. Section 28 of the *Status of Children Act* 1996 (NSW), provides that a medical procedure or other act shall not be carried out in relation to a child under 18 years of age unless the parent or guardian consents.

4.10. Where a parentage testing order has been made, there is no legal compulsion for it to be obeyed. If a parentage testing procedure is ordered but a person the subject of the order does not comply with the order, the Court will draw the appropriate "just inference" (that the parentage testing procedure would not assist the person who fails to comply with the order).

4.11. A parentage testing procedure includes DNA typing which must be carried out in accordance with the *Status of Children Regulation* 2019 (NSW). The principal requirements of the *Regulations* are:

a. The parentage testing be carried out at an accredited laboratory in accordance with the standards of practice that entitle a laboratory to be accredited by NATA (clause 5).

b. A report must be prepared in accordance with clause 6 of the Regulation.

c. Samples must be collected in accordance with clause 7 of the Regulation, and stored and sealed in accordance with clauses 8 and 11 of the Regulation.

4.12. A Form of Order (under the previous regulations) is set out in paragraph 54 of *Kohari v NSW Trustee & Guardian* [2016] NSWSC 1372.

Adoption

4.13. Section 95 of the *Adoption Act* 2000 (NSW) provides:

> (1) An adoption order made by the Court gives sole parental responsibility for a child to the person or persons named in the order (**"the adoptive parent or adoptive parents"**).
>
> (2) For the purposes of the law of New South Wales, if an adoption order is made--
>
> (a) the adopted child has the same rights in relation to the adoptive parent, or adoptive parents, as a child born to the adoptive parent or adoptive parents,
>
> (b) the adoptive parent or adoptive parents have the same parental responsibility as the parent or parents of a child born to the adoptive parent or adoptive parents,
>
> (c) the adopted child is regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are regarded in law as the parents of the adopted child,
>
> (d) the adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child.
>
> (3) Despite subsection (1), an adopted child does not cease to be regarded in law as the child of a birth parent or adoptive parent, and the birth parent or adoptive parent does not cease to be regarded in law as the parent of the child, if an adoption order is made in relation to a step parent with whom the birth parent or adoptive parent is living.

4.14. Section 98 of the *Adoption Act* 2000 (NSW) provides:

> "Subject to section 97(1), section 95 has effect in relation to a disposition of property, whether by Will or otherwise, and whether made before or after the commencement of this section, and to a devolution of property in relation to which a person dies intestate after 7 February 1967…"

5. FORMER SPOUSE (FACTORS WARRANTING REQUIRED)

5.1. An applicant under this category must establish that he or she was previously married to the deceased person, that their marriage has been dissolved and that there are factors which warrant the making of the application.

5.2. In *Lodin v Lodin* [2017] NSWCA 327, Sackville AJA (with whom Basten JA and White JA agreed) said:

> [127] What more a claimant must show cannot be defined with precision since all the circumstances have to be taken into account. Some cases may be comparatively straightforward. An example commonly given is where the claimant and the deceased, although divorced, had not reached a financial settlement prior to the deceased's death. Other cases, such as *Dijkhuijs*, may involve a considerably more difficult evaluative judgment.
>
> [128] One matter of significance is whether the claimant and deceased finalised their financial relationship at the time of the divorce or

> subsequently, whether by agreement or by means of court orders (as occurred in the present case after contested hearings). As *Dijkhuijs* shows, a final property settlement is not necessarily an absolute bar to a family provision application being considered on its merits, but in most cases such a settlement, if otherwise unimpeachable, is likely to terminate any obligation on the deceased to make testamentary provision for his or her former spouse.
>
> [129] Another significant matter is likely to be the nature of the relationship between the claimant and the deceased. In particular, it may be very important to determine whether there were (or are) features of that relationship that can be said to create a moral obligation on the deceased to make testamentary provision for the claimant. In this respect considerable care needs to be taken to prevent a family provision claim becoming a forum for litigating questions of matrimonial fault long since removed from family law. Nonetheless the conduct of the deceased may be relevant to the question posed by s 59(1)(b) of the *Succession Act* if, for example, physical or sexual abuse during the marriage (or later) has caused the claimant to suffer a physical or psychological disability impairing his or her capacity to earn an adequate income."

5.3. In *Brindley v Wade* (No 2) [2020] NSWSC 882 the plaintiff and the deceased had commenced a relationship in 1999. They married in 2006 and separated mid-December 2012. It had been a second marriage for both of them. The plaintiff and the deceased entered into a property settlement prior to the deceased's death. The deceased received a cash settlement of $50,000 in addition to $70,000 from the Plaintiff's superannuation. The Terms of Settlement had been implemented. They included an agreement that the parties settle all property matters between them on a final basis. There was no evidence of a continuing relationship after separation.

5.4. The position in New South Wales is contrasted with the position in other states and territories:

a. In the Northern Territory, a former spouse is eligible if he or she was being maintained (as defined) by the deceased person immediately before his or her death (s 7(1)(a); 7(2); 7(7) *Family Provision Act* 1970 (NT));

b. In Queensland, a "dependent former husband, wife or civil partner" is eligible. A "dependent former wife, husband or civil partner" is defined as a person who was married to or in a civil partnership with a deceased person, but divorced or terminated the partnership before death, has not remarried or entered into a civil partnership with another person before the deceased's death, and who was at the time of death receiving or entitled to receive maintenance ((ss 5AA(4), 41(1) *Succession Act 1981* (Qld));

c. In South Australia, a person who has been divorced from a deceased person is entitled to claim provision or additional provision without the need to show factors warranting (s6(b) *Inheritance (Family Provision) Act* 1972 (SA));

d. In Western Australia, a former spouse may make an application if he or she was receiving maintenance, or was entitled to receive maintenance, from the deceased person at the date of death (s 7(1)(b) *Family Provision Act* 1972 (WA)).

6. DEPENDENT GRANDCHILD OR MEMBER OF THE HOUSEHOLD (FACTORS WARRANTING REQUIRED)

Dependency

6.1. The meaning of dependency was considered in *Tobin v Ezekiel* (2012) 83 NSWLR 757 at 787-787 [2012] NSWCA 285; *Spata v Tumino* (2018) 95 NSWLR 706; [2018] NSWCA 17 at [68] – [81]; *Purnell v Tindale* [2020] NSWSC 746 at [153] – [156]; *Doshen v Pedisich* [2013] NSWSC 1507 at [39] – [48]; *Bowditch v NSW Trustee and Guardian* [2012] NSWSC 275 at [52] – [59]**.**

6.2. In *Purnell v Tindale* [2020] NSWSC 746 Henry J at [154] – [156] said the following in relation to dependency:

> "[156]. In its ordinary sense, dependency means the condition of depending on something or someone for what is needed. The whole relationship must be considered to determine whether there is dependency, considering past events and future possibilities: *Ball v Newey* (1988) 13 NSWLR 489 at 491, cited with approval in *Spata v Tumino* [2018] NSWCA 17 at [68] and [78] (Payne JA).
>
> [157]. Dependency is not limited to purely financial or material matters, although it does involve one person being beholden to another for some material or physical help or succour, emotional dependency is not enough: *Petrohilos v Hunter* (1991) 25 NSWLR 343 at 346-347*; Skinner v Frappell* [2008] NSWCA 296 at [85].
>
> [158]. Reliance on someone for accommodation may amount to dependence, but the mere fact of lodging in another's property without paying rent does not necessarily amount to dependence: *Spata v Tumino* [2018] NSWCA 17 at [82]; *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [109]-[111]."

6.3. Recently, in *Chisak v Presot* [2022] NSWCA 100 at [47]–[57], White JA with whom Macfarlan JA and Gleeson JA agreed said:

> "[46] …it is not correct that dependency is limited to dependency on the provision of financial or other material assistance (*Petrohilos v Hunter* (1991) 25 NSWLR 343 at 346-347). As Hope AJA, with the

concurrence of Clarke and Sheller JJ, said in that case, a young child is properly and commonly said to be dependent on his or her mother as well as his or her father, regardless of where the money comes from.

[47] The phrase "partly dependent" means at least "more than minimally" and perhaps "significantly", although not "substantially" (*McKenzie v Baddeley* [1991] NSWCA 197 at [4]). In *Alexander v Jansson* [2010] NSWCA 176 Brereton J (as his Honour then was), with whose reasons Basten JA and Handley AJA agreed, accepted that "partly dependent" involved more than "minimal" dependence (at [13]).

[48] In *Simons v Permanent Trustee Co Ltd*, Palmer J did not regard the fact that the deceased took his grandson on holidays as establishing that, for the period of the holidays, the grandson was dependent upon his grandfather (at [33] and [44]). In *Sherborne Estate: Vanvalen & Anor v Neaves & Anor* [2005] NSWSC 593, Palmer J did not accept that a granddaughter was "for a particular time" dependent on her grandmother when she stayed, with her mother, with the deceased on the deceased's farm when she was 7 and spent school holidays at the deceased's farm when she was aged between 12 and 16. In relation to the latter period, Palmer J said (at [47]) that if the deceased provided the granddaughter with free board and lodging during her school holidays, her actions were more properly to be seen as offering hospitality, rather than undertaking responsibility towards her maintenance and support akin to that of parental responsibility.

[49] With respect, that approach conflates the question of dependency with the questions as to whether there are factors that would warrant the making of the application for a family provision order and whether the deceased had an obligation to make provision for the grandchild.

…

[52] The issue was later addressed by this court in *Spata v Turino* (2018) 95 NSWLR 706; [2018] NSWCA 17. Payne JA, with whom Macfarlan JA agreed, held (at [71]-[72]) that a restrictive meaning of "dependent" in s 57(1)(e) should not be adopted, given that it is a remedial and beneficial provision. A narrow meaning was not warranted, given the provision provides for dependence to be assessed "at any particular time" and the applicant need show only that he or she was partly dependent on the deceased.

[53] Payne JA rejected the approach of earlier decisions of Young J (as his Honour then was) in *Clinch v Swift* (Supreme Court, Young J, 13 October 1986, unreported) and *Shaw v Lambert* (Supreme Court, Young J, 9 October 1987, unreported) that where dependence is assessed based on the provision of accommodation, the accommodation must be provided directly to the applicant, because of the relationship between the applicant and the deceased, and not indirectly as where the accommodation is provided to a child and the child's spouse or child (at [73]-[78]).

[55] Ivy deposed that she stayed with the deceased for about one month when she was 5 years of age (in 2000) and stayed with her for periods of about three weeks up to about a month at a time on three or four occasions between 2000 and 2003. She deposed that the deceased took care of her when she lived with her during those periods. The primary judge accepted that there were at least two or three such visits. During those visits, it can be inferred that the deceased assumed parental responsibility for Ivy who was then a young girl. It can be inferred that, for those particular periods of time, she was dependent on her grandmother.

[56] It could be said that a baby left in the care of grandparents for a few hours or overnight, who needs to be fed and changed, is dependent for

> that particular period of time on his or her grandparents. But such periods of dependence would be minimal. I do not think that dependence for a few weeks or a month on two, three or four occasions could be regarded as minimal. The question under s 57(1)(e) is whether "at any particular time" Ivy was partly dependent on the deceased. No doubt Ivy remained dependent on her father but that does not mean that she was not partly dependent for the particular periods of time in which she stayed with the deceased on her.
>
> [57] I respectfully doubt that it is legitimate to read into s 59(1)(e) a requirement that partial dependency be "significant" rather than "more than minimal". Section 57(1)(e) is merely a gateway for the court to consider whether there are factors that warrant the making of an application for provision by a grandchild out of his or her grandparent's estate (s 59(1)(b)), and if so, whether provision ought to be ordered (s 59(1)(c)). The degree of dependence for a particular period of time will no doubt be relevant to those issues. With due deference to the reasons of Palmer J in *Simons v Permanent Trustee* and *Re: Sherborne Estate* and Basten JA in *Page v Page*, I do not think it appropriate to conflate questions relevant to those issues, such as whether the degree of dependence was such that the grandparent assumed parental responsibility for the grandchild, with the factual question of whether the grandchild did depend on the deceased for particular periods of time. I do not accept the primary judge's reasons on this issue at J [329] quoted above."

6.4. The Court of Appeal's judgment needs to be considered in context. Factors warranting were found to exist at first instance; and because the applicant grandchild had received provision of 20% of the estate under the Will, the claim was dismissed at first instance. The Court of Appeal did not have to consider the question of factors warranting; and the Court of Appeal did not allow the appeal with respect to the dismissal of the family provision claim.

6.5. *Re Estate Bohar; Bockos v Bohar* [2021] NSWSC 1177 was a dismissal of a claim by a grandchild. Lindsay J found that the applicant was not partially dependent on the deceased. His Honour said that the context in which the plaintiff's relationship with the deceased was to be assessed included the following facts:

"(a) at the time the plaintiff lived with the deceased at her property she was an adult, not a minor.

(b) the relationship between the plaintiff and the deceased was not one in which the deceased occupied the position of a parent *vis-à-vis* the plaintiff.

(c) the plaintiff lived with the deceased in circumstances in which the deceased was under no obligation to provide for the plaintiff and the plaintiff was under no obligation to stay with her;

(d) the plaintiff lived with the deceased as and when it was convenient for her to do so;

(e) the relationship between the plaintiff and the deceased was more one of convenience than of necessity; and

(f) viewed in the perspective of what preceded and followed the times when the plaintiff lived with the deceased, those times were transient. The plaintiff did not live with the deceased as a child. Nor did she live with the deceased or maintain a close relationship in after years. She got on with her life, independently of the deceased".

6.6. It was submitted on behalf of the plaintiff that inclusion of the plaintiff as a beneficiary in some of the earlier wills, and as one of the substitute beneficiaries, were sufficient factors warranting. His Honour found at [76] that it was clear from the history of willmaking that the deceased viewed her two daughters as the most natural objects of testamentary recognition. At [84] his Honour said:

> "In my opinion, the fact that some provision had been made for the plaintiff in some of the deceased's earlier wills provides no firm foundation for a conclusion that there were "factors warranting" for the plaintiff's making of an application for a family provision order. The fact that the plaintiff was a grandchild (even the deceased's first grandchild) does not, of itself, bestow upon her the status of a natural object of the deceased's testamentary recognition. The relationship between the plaintiff and the deceased was real enough but there was not the "something more" to warrant a family provision application".

Membership of the household

6.7. In *Churchill v Roach* [2002] EWHC 3230; [2003] WTLR 779 (cited in *Doshen v Pedisich* [2013] NSWSC 1507 at [66]), Judge Norris QC, said:

> "It is, of course, dangerous to try and define what 'living in the same household' means. It seems to me to have elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources. None of these factors of itself is sufficient, but each may provide an indicator. ...It is perfectly possible to have one household and two properties. But what does seem to me to be the case is that there were two separate establishments with two separate domestic economies. There was, of course, a degree of sharing when the two met at weekends and some of those weekends were long. But that does not mean that they lived in one household."

6.8. The concept of a household was considered in *Kingsland v McIndoe* (1989) VR 273 (cited in *Doshen v Pedisich* [2013] NSWSC 1507 at [56]) and *Lester v Lester;*

estate Dulcie Brown [2020] NSWSC 958 at [148] – [152]; and *Russell v NSW Trustee & Guardian* [2013] NSWSC 370 at [24]-[51].

6.9. Where membership of the household must be proven, attention should be given to establishing how the household functioned:

a. how responsibility for laundry, cooking, cleaning and maintenance was divided between the household members;

b. how responsibility for groceries, bill-paying, and capital purchases, was divided;

c. the extent to which household members ate meals together; celebrated special events together; attended social events together; and travelled together;

d. other facts demonstrating frequent, intimate contact; or restraint on personal freedom, such as assumption of responsibility for young children, or elderly parents, within the household.

6.10. Recent applications by dependent members of the household include:

a. *Mallitt v Gow* [2022] NSWSC 1012 (provision of $80,000);

b. *Rakovich v Marszalek* [2020] NSWSC 589 (provision of 45% of the net estate estimated to have a value of $1,412,606).

7. CLOSE PERSONAL RELATIONSHIP (FACTORS WARRANTING REQUIRED)

7.1. Section 3(3) of the *Succession Act* 2006 (NSW) defines “a close personal relationship” as a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

7.2. Authorities on a close personal relationship were referred to in *Sadiq v NSW Trustee and Guardian* [2015] NSWSC 716 at [238] to [249]. The relationship must exist “at the time of the deceased person’s death”. The word “domestic” carries connotations of matters relating to a household: “of all relating to the home, the household, or household affairs”. Some of the primary meanings of “personal” include affecting the individual person or self, or of pertaining to one’s personal body or figure, in broad terms it requires one person caring, in a

personal way, for the needs of another, such as assistance with mobility, personal hygiene, physical comfort and emotional support.

7.3. In *Khadarou v Antarakis* [2021] NSWSC 743 Emmett AJA dismissed an application by a person claiming to have lived in a close personal relationship with the deceased. His Honour said:

> "[45] The concept of "living together", in the context of the Succession Act, entails the sharing of a home, such that it can be said that the plaintiff and the Deceased were cohabiting together. The test for determining that question is an objective one and requires an assessment of the nature and extent of the living together. Two adult persons will not be regarded as living together unless there is a place or there are places in which both of them live as a home. It is not necessary for each of them to spend the whole of their respective times in that place or those places. Nevertheless, it is necessary to establish that each of the persons can be seen to regard the place or places in question as his or her home and to be doing so on a rational basis.
>
> [46] That will involve a consideration of such matters as:
>
> - whether the plaintiff and the Deceased had a common residential address;
> - whether and how often the plaintiff and the Deceased slept in the same premises;
> - whether the plaintiff and the Deceased kept clothing, domestic and personal effects at the same premises;
> - whether the plaintiff and the Deceased were simultaneously present in the same residence;
> - whether the plaintiff and the Deceased shared the facilities of day-to-day living on a regular and recurrent basis such that it can be said that they shared a household;
> - whether the plaintiff and the Deceased decided household questions together and shared the burden of maintaining a household; and
> - whether there was a place that each of the plaintiff and the Deceased regarded as "home""

7.4. An appeal was dismissed: *Khadarou v Antarakis* [2022] NSWCA 99 (first instance).

8. FACTORS WARRANTING

8.1. Factors warranting are factors which, when added to the facts that make an applicant an eligible person, give him or her the status of someone who would generally be regarded as a natural object of testamentary recognition: *Re Fulop Deceased* (1987) 8 NSWLR 679 at 681; *Churton v Christian* (1988) 13 NSWLR 241 [1988] NSWCA 23 at 252.

8.2. That is not to say that the facts establishing membership of the household, or dependency, are irrelevant to determination of factors warranting:

(a) The nature of the relationship between the applicant and the deceased will be important as the features of their relationship might be said to create a moral obligation on the deceased to make provision for him: *Lodin v Lodin* [2017] NSWCA 327 at [114]; [129].

(b) It is also necessary to look at the quality of the relationship and the circumstances in which it arose: *Grazini v Grazini* (NSWSC, 20 February 1987, unreported) per Cohen J at 8-11.

8.3. In *Chapple v Wilcox* [2014] NSWCA 392, Basten JA said at [4] – [6] that s 59(1)(b) of the *Succession Act* 2006 (NSW) requires those categories of eligible persons needing to "establish factors which warrant the making of the application" as needing to justify the assumption that provision should have been made for him or her. At para [6] his Honour said:

> "That approach obtains support from the provisions of Ch 4 of the Succession Act dealing with intestacy. Those primarily entitled to a distribution from the estate of an intestate are a surviving spouse (ss 110-113) and the deceased's children (s 127). A grandchild has an entitlement, but only a presumptive share of a child of the intestate who predeceased his or her parent: s 127(4)."

8.4. In *Miller v Ryan; Payne v Ryan* [2015] NSWSC 1713 at para 41, Young AJA posed the question as follows (in the context of a grandchild claim):

> "The question then is whether the plaintiffs are sufficiently close to the prime source of eligible persons that members of the community would consider that the testator owed them an obligation to consider their situation when making his will. In other words, are they to be treated in much the same category as children?"

9. RELEVANCE OF CATEGORY OF ELIGIBILITY TO QUANTUM

9.1. A useful tool by which to consider quantum are the principles which have been said to apply to a particular category of eligible person, as set out in judgments of Hallen J (Succession List Judge).

9.2. 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."

9.3. In relation to a claim by an adult child, a statement of principles was in *Georgopoulos v Tsiokanis & Anor* [2022] NSWSC 563 at [309] 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) There is no need for an applicant adult child to show some special need or some special claim …
>
> (e) 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…
>
> (f) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim…"

9.4. 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…

9.5. 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.

9.6. 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.

9.7. The shift back to “moral claims” and “moral duty” (and away from the more fashionable “community standards” (*Steinmetz v Shannon* [2019] NSWCA 114 per White JA at [44] and Brereton JA at [109]), the apparent relaxation of the dependency requirement for grandchildren (*Chisak v Presot* [2022] NSWCA 100 at [47]–[57] per White JA with whom Macfarlan JA and Gleeson JA agreed) and some of the more generous recent decisions (*Rakovich v Marszalek* [2020] NSWSC 589 per Hallen J; *Cahn v Kosmin* [2022] NSWSC 751 per Meek J) highlight the importance of evidence contextualising each plaintiff.

9.8. The principles are a helpful guide against which quantum for prospective plaintiffs can be assessed. But the diversity of human existence (and variety of human relationships) means that some plaintiffs will do worse, some will do better. The nature of a particular plaintiff’s relationship with the deceased informs the content of the deceased’s moral duty. Other factors likely to play a significant role in assessing the quantum of provision include:

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.

c. The presence or absence of competing financial claims.

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

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