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# Update Summary

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**AUSTRALIAN SUCCESSION LAW**

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## UPDATED COMMENTARY

Authors Keith Francis and Francois Salama have reviewed and updated the following commentary.

### **Failure of wills – Forfeiture rule and the administration of an estate**

*Troja v Troja* (1994) 33 NSWLR 269 is referred to as authority for the common law proposition that a person who unlawfully kills another cannot expect to receive any benefit from the estate of the victim. See [170.110].

### **What is adequate provision for the proper maintenance, education or advancement?**

The authors maintain that it is necessary to bear in mind the comments of Callinan & Heydon JJ in *Vigolo v Bostin* (2005) 221 CLR 191; 79 ALJR 731; [2005] HCA 11, that adequacy of provision is “not to be decided in a vacuum” and “will depend upon all the relevant circumstances”. See [505.210].

### **When does a de facto relationship end?**

It was stated in *H v P* [2011] WASCA 78, that “it can be equally difficult to determine when such a relationship comes to an end ... a de facto relationship is inherently terminable at any time, and continues to exist only insofar as the indicia which give the relationship its ‘marriage-like’ character continue to exist”. See also *Sheen v Hesari* [2023] NSWSC 468. See [510.170].

### **Stepchild**

It should be noted that, the *Succession Act 2006* (NSW) does not define “step-child” and the Act “does not include a stepchild as an eligible person by virtue of the relationship alone” and a “stepchild does not fall within the ordinary meaning of the term ‘child’”: *Plummer v Montgomery* [2023] NSWSC 175. See [510.530].

### **Other applicants**

For an example of a family provision claim launched by the son-in-law of the deceased in circumstances where his wife, the daughter of the deceased, had died before the deceased and where there was a residence and partial support received from the deceased, see *Brewer v Ney* [2023] NSWSC 526. See [510.670].

### **Section 100 statements by the testator**

Statements by the testator may be admissible as evidence in a family provision claim: s 100 of the *Succession Act 2006* (NSW) for deaths before 1 March 2009. However, it was noted in *Plummer v Montgomery* [2023] NSWSC 175 that the court is “not required to accept, unquestioningly, the truth, or accuracy, of the statements, particularly if they

are denied by an applicant, or where there is other evidence that casts doubt upon their accuracy". See [515.150].

### **Whether the applicant was being maintained by deceased at time of death**

The authors note that, dependency, at least insofar as the consideration of who might prove to be dependent, has been defined by Lindsay J in *Re Awad* [2023] NSWSC 765 as "connoting a person who relies upon the support of another, financially or emotionally. The concept is wide enough to cover any person who naturally relied upon, or looked to, the deceased, rather than to others, for anything necessary, or desirable, for his or her maintenance and support in more than a minimal or insignificant way, leaving aside trivialities". See [515.910].

### **Character and conduct of the applicant**

In *Tarbes v Taleb* [2023] NSWSC 565 it was noted that, the court will actively weigh key factors accordingly, whilst maintaining a cognisance that "distant age of the events, the frailty of human memory, the unavailability of the deceased's version (unless documented), and the fact that the deponents' views about one another and the past will often be fixed and strongly held, may operate to make it difficult for a judicial fact finder to be confident in whatever conclusions were reached on the parties' competing versions". See [515.950].

### **Practice and Procedure – Duties of the practitioner**

The court's expectations of legal practitioners in the conduct of family provision matters has been addressed by Meek J in *Jurak v Latham* [2023] NSWSC 1318. As explained by the authors, critical aspects of the conduct of family provision matters were highlighted amidst concerns that the conduct of family provision matters and the understanding and deployment of the court protocols were falling short of the standards the court expects, leading Meek J to highlight: "The Court does not administer justice in a vacuum ... practitioners are officers of the Court and assist in the Court in administering justice."

It was also highlighted by Meek J in *Jurak* that, as part of the duty upon legal practitioners, there is an obligation to advise the court of all material matters that will have bearing upon the orders the court is being asked to make. Compounding that duty is the obligation upon legal practitioners to address, at trial and by cross-examination, the issues of forensic importance. See [520.280].

### **Costs of the legal personal representative**

It is suggested that the legal personal representative to be cognisant of the caution of Lindsay J in *Re Soulos (No 2)* [2023] NSWSC 95: "I am mindful that the professional executors were confronted by a necessity to make difficult forensic decisions in the context of complex relationships, and sometimes shifting alliances." See [522.190].

## Effect of costs on provision from the estate

The authors point out that it is prudent for a claimant to consider the following commentary from *Boatswain v Boatswain* [2023] NSWSC 763, “what follows may be seen as an exhortation to parties engaging in litigation under the Act to consider, in advance, the potentially devastating consequences of the legal dispute and the costs thereof, with the effect of depleting an already modest estate, or notional estate, as well as the futility of pursuing, to the completion of the hearing, claims which the available estate, or notional estate, is, on any view, not large enough to accommodate”. See [522.290].

## Offers of compromise or Calderbank offers

Regarding Calderbank offers it was cautioned in *Edmonds v Barrington Winstanley Group Pty Ltd (No 2)* [2023] NSWCA 197: “Whether or not indemnity costs should be ordered where a party does not accept a Calderbank offer depends upon whether it was a genuine offer of compromise and whether the offeree acted unreasonably in all the circumstances in refusing the offer.” See [522.330].

## Basis for making notional estate orders

It is noted that, the court “must not designate as notional estate, property that exceeds what is necessary, in the court’s opinion, to allow the provision that should be made, or, if the court makes an order that costs be paid from the notional estate ... to allow costs to be paid as ordered, or both”: *Boatswain v Boatswain* [2023] NSWSC 763. See [525.330].

## Particular grounds for extension of time – Merits of substantive application

The authors refer to Hallen J in *Boatswain v Boatswain* [2023] NSWSC 763, where it was said that “good prospects are not, invariably, the trump card. If what was being submitted was intended to mean that regardless of the length of the delay, or the reasons for it, an order extending time must be made, that proposition should be rejected as unduly rigid”. Further, “it is for the plaintiff to show that there is a good reason to expose the defendant to a claim”. See [535.350].