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# Update Summary

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**UPDATE 55**

**JUNE 2025**

**AUSTRALIAN SUCCESSION LAW**

**Material Code 42608569**

**Print Post Approved PP255003/004052**

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## UPDATED COMMENTARY

The following update has been compiled by Keith Francis Barrister and is concerned with wills and family provisions. Matters of particular interest are referred to below.

### **The calling in of the Estate**

It is noted that the first duty of the Executor or Administrator (the Legal Personal Representative) is to “call in” or collect, the assets or state of the deceased and to reduce the assets to possession: see *Re Whelan (deceased)* [1961] VR 706, per Scholl J. See [100.970].

### **Evaluate claims**

It was stated in *Reid v Carnes* [2024] TASSC 42, that the testator is “assumed to have been aware of all the relevant circumstances of those having a claim on his bounty at the date of his death, including all the eventualities that he might reasonably have foreseen if he knew all the facts”. See [135.350]

### **Approach of court to presumption of revocation**

Reference is made to *Sugden v Lord St Leonards (1876) LR 1 P & D 154* where it was said that “It is obvious that where a Will, shewn to have been in the custody of a testator, is missing at the time of his death, the question whether it is probable that he destroyed it must depend largely upon what was contained in the instrument”. This was affirmed by the Victorian Court of Appeal in *Demediuk v Demediuk* [2019] VSCA 79. See [180.360].

### **Presumption of revocation rebutted**

Rebutting the presumption was crystallised in *Re Bourikas* [2024] VSC 96, [20], per Gobbo AsJ. See [180.380].

### **Is it about being fair?**

In circumstances where there is a claim by multiple applicants of the same class (eg children of the deceased), there should be no expectation that any provision provided between them should be fairly arrived at by means of equal sums: *Aveyard v Selwood* [2024] NSWSC 29, [179] per Robb J. See [505.290].

### **Factors which warrant the making of the application**

It was stated in *Frank v Angell* [2024] NSWCA 264, per Stern JA, that, “the inclusion of the requirement to show factors warranting the making of the application was for the purpose of limiting the ambit of eligible persons who were able to make successful claims for family provision”.

It was highlighted in *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639, 653 per Kirby P (as he then was), that the “duty of the court to have regard to ‘all the circumstances’ of the case signifies the potential width of the court’s inquiry”. See [510.570].

## **Grandchild**

In *Bohen v Mitchelmore* [2024] NSWSC 171, [30] per Basten AJ, it was stated, "Grandchildren, unless directly dependent on the deceased, are not eligible persons under s 57 of the Succession Act. A claim by a grandchild may be seen as 'generation skipping', because the primary obligation to maintain a child is generally that of a parent or guardian, and not a grandparent". See [510.590].

## **Dependency**

The author has noted that, interestingly, the concept of a financial arrangement where the inhabitant of the household was benefited by financial advances that were expected to be repaid, was not considered dependency, in *Frank v Angell* [2024] NSWSC 158. See [510.630].

## **New South Wales – s 100 statement**

In *Rada v Smith* [2024] NSWSC 273, Kunc J stated that, "Explanations by the testator for their testamentary choices and any other indications of testamentary intention are relevant but not decisive". See [515.150].

## **Adult children**

Current considerations around adult children's claims are considered in light of *Taylor v Farrugia* [2009] NSWSC 801. However, the author goes on to consider statements in *Aveyard v Selwood* [2024] NSWSC 29, that cases of adult children, with advancing age and infirmity, despite a backdrop of an avenue such as the National Insurance Disability Scheme, in circumstances of an estate of some size "would lead the community to expect the Deceased to have provided a significant buffer ... against contingencies, and to make an appropriate level of provision for their financial circumstances during the last period of each of their lives". See [515.810].

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

In the case of *Francis v Martin* [2024] VSC 340, per Daly AsJ, the claims that the conduct of the Plaintiff as beneficiary included failure to disclose her financial position and that the Plaintiff had failed to engage with the executors, were considered to be decisive factors in dismissing her claim. See [515.950] and [515.990].

## **Estrangement**

In *Bohen v Mitchelmore* [2024] NSWSC 171, obiter of Basten AJ in dealing with the specifics of that case, briefly ventilated a distinction between estrangement and "abandonment". There was also reference to the term "abnormal estrangement". See [515.960].

## **Evidence – Artificial Intelligence**

A summary of the impact of Supreme Court Practice Note SC GEN 23, titled "Use of Generative Artificial Intelligence (Gen AI)" has been added. Similar directions in other States are also canvassed. See [520.310].

### **Compromise of the proceedings**

Compromise of the proceedings is a matter that should be approached with significant circumspection, if it is to truly represent a finalisation of hostilities: see also *McBride v McBride* [2024] NSWSC 45 with respect to a settlement not fulminated but pressed. See [520.390].