

**IS THERE A STATUTORY SHARE
UNDER AUSTRALIAN LAW?**

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1. Introduction

Succession law is not uniform throughout Australia because different legislation applies in each state and territory. Accordingly, any reference in this article to Australian succession law means the law in New South Wales as at October 2005. However, there are many basic similarities among succession laws throughout Australia. Unlike Germany, which is a civil law country, the Australian legal system is based on common law. In the area of applications for provision out of an estate by family members and other eligible persons who have not, or have not adequately been provided for by the deceased, a number of discretions and powers are vested in the courts and in the judges which, under German Law, would be mainly dealt with by legislation, namely the German Civil Code (Bürgerlicher Gesetzbuch).

2. Claims under the Family Provision Act 1982

The Family Provision Act 1982 ("FPA"), which came into force on 1 September 1983, makes provision in relation to claims by persons for whom the deceased did not make any or did not make adequate provision. The Testator's Family Maintenance and Guardianship of Infants Act 1916 applies to all earlier cases.

Unlike under the German Civil Code, Australian succession law does not recognise fixed statutory shares. Rather, it remains within the court's discretion whether, to what extent and the manner in which provisions are to be made out of an estate. Accordingly, any reference in this article to a "statutory share" must not be considered as the same as, or even similar to statutory shares under German law. Rather, a statutory shares means that the court will make provisions in favour of an eligible person which are, in the court's view, adequate for the person's maintenance, education and advancement in life.

In the writer's view, this approach allows for wider flexibility than imposing fixed shares or proportions. The distribution of fixed statutory shares, as under German law, is considered to be inflexible and, in certain circumstances, inadequate and therefore inequitable.

3. Time Limit

Pursuant to section 16(1) FPA, a claim must generally be filed within 18 months of the date of the deceased's death. However, the court has discretion to extend or to shorten the time limit. In order to obtain an extension, the applicant must provide "sufficient reasons which reveal that it was impossible to make a statutory claim within the time limit of 18 months or that it is appropriate in the circumstances of the case to extend the time limit". This is similar to "Wiedereinsetzung in den vorigen Stand" under German law. The plaintiff's interest to have the time limit extended is to be balanced against the beneficiaries' reliance that no claim will be made against the estate after the expiration of the time limit. It is therefore difficult to obtain an extension of the time limit.

Section 17 FPA allows for a shortening of the time limit to make a claim. If there is an application for extension or shortening of the time limit, the court considers all the circumstances of the case. The time limit might be extended if, for example, the plaintiff obtained incorrect legal advice or the value of the estate was estimated wrongly.

4. **Eligible Persons**

Under section 6(1) FPA, the following persons are eligible persons to make a claim:

- 4.1. spouses, provided that there was a valid marriage at the time of death;
- 4.2. de facto husband or wife with whom the deceased person was living in a domestic relationship at the time of his or her death;
- 4.3. children, regardless of age (see *Gordon v Parks 1989, 17 NSWLR*). Children comprise:
 - 4.3.1. marital children;
 - 4.3.2. children who have been declared marital in accordance with the Marriage Act 1961 (Cth);
 - 4.3.3. adopted children (Adoption of Children Act 1965); and
 - 4.3.4. children born out of wedlock (Children Equality of Status Act 1976) but not step-children (a stepchild may be an eligible person under category 4.6.);
- 4.4 former spouses if the marriage was ended by divorce or declared invalid (it is irrelevant whether the former spouse has remarried);
- 4.5 grandchildren of the deceased who were, at any particular time, wholly or partly dependant upon the deceased; and
- 4.6 other persons who:
 - 4.6.1. at any particular time were a member of a household of which the deceased's person was a member; and
 - 4.6.2. who were, at any particular time, wholly or partly dependant upon the deceased.

Dependency for the purposes of categories 4.5. and 4.6. requires some form of financial support from the deceased. However, in certain circumstances, the court considers a purely emotional dependency as sufficient.

The group of eligible persons able to make a claim under Australian law is much wider than under German law. For example grandchildren, nephews, nieces, foster children, stepchildren and former spouses as well as de-facto (including same sex) partners and friends of the deceased, may have a claim under Australian law.

5. **The Two Stage Process**

The process to determine whether a valid FPA claim exists is a two stage process. The second stage will only be examined if the requirements of the first stage are fulfilled. However, the factors considered by the court in each of the two stages may overlap.

5.1 First Stage: Inadequate provision by the deceased

The court will only allow a FPA claim if it is of the view that the deceased made inadequate provision for the plaintiff's proper maintenance, education and advancement in life (section 9(2) FPA). In doing so, the law looks at the plaintiff's needs as well as the deceased's duty to make testamentary provisions in favour of the plaintiff. The court will consider all the circumstances of the case and make its decision based upon the facts of the case. The following factors will be considered by the court in deciding whether adequate provision has been made:

5.1.1. The financial situation of the plaintiff, other eligible persons and testamentary beneficiaries. This factor allows the court to obtain an overview of all claims against the estate. This factor is crucial for the plaintiff. He or she must provide sufficient evidence to the Court that he or she has financial need and that it is therefore necessary to make provisions for his or her proper maintenance, education and advancement in life. Otherwise, the court can dismiss the claim without examination of any further factors of the first stage and without any examination of the second stage;

5.1.2. Moral obligations and responsibilities of the deceased

This comprises, for example, the obligations of parents for their children and the obligations which exist between spouses. A moral obligation between spouses as well as between a deceased parent and his or her children is generally taken for granted. In order to determine whether the deceased had a moral obligation to the plaintiff, the Court will consider the plaintiff's conduct towards the deceased, their relationship with one another, the financial ability of the deceased, the financial relationship of the various plaintiffs and the urgency of the respective claims. Under Australian case law, a moral obligation of the deceased will not necessarily be denied by negative conduct of any kind of the plaintiff. Rather, a moral obligation of the deceased depends on all of the above factors. The stronger the plaintiff's need for provision out of the estate, the more reprehensible the plaintiff's conduct must be in order to disentitle him or her from making a claim.

5.1.3. Nature and value of the estate

As it is in the plaintiff's interest to obtain property in good condition, the court will also consider what the estate consists of.

The value of the estate is also crucial. If the estate has a high value, the provision payable to the plaintiff might be higher. This does not mean that, if the estate is small, the claimant would automatically receive nothing. Rather, if no provision has been made by the deceased for his or her spouse, the spouse may be entitled to the whole of the estate. This again is a question to be examined in each individual case.

5.1.4. Disability of the plaintiff

A physical or mental disability may cause an inability to work and/or loss of income. This will increase the plaintiff's need and therefore aid his or her FPA claim. If the plaintiff had already been disabled during the deceased's lifetime, the deceased's moral obligation would also increase. It might also be advisable to make adequate provisions in favour of a disable person to allow for comfortable accommodation.

5.1.5 Character and manner of the plaintiff before and after the deceased's death.

How the plaintiff's character and manner is assessed, will again depend on the circumstances of each individual case as well as current social and moral values. The claim of a person who behaved badly towards the deceased, may be partly or fully dismissed (section 93 FPA).

5.1.6. Further factors

This category comprises any further facts which the court considers relevant in the circumstances.

5.2. Second Stage: Amount payable

In order to determine the amount payable to the plaintiff out of the estate, the courts consider the following factors (Section 9(3) FPA):

- 5.2.1 Any contribution made by the plaintiff, whether of a financial nature or not (for example, care and housekeeping), being a contribution directly or indirectly to the acquisition, conservation or improvement of property of the deceased person;
- 5.2.2 The character and manner of the plaintiff in relation to the deceased before and after his or her death;
- 5.2.3 any other matter which the court considers relevant in the circumstances.

Unlike the courts' determination of the first stage which is based on facts, the decision of the second stage vests solely in the court's discretion.

5.3. Manner of Provision

If the court is of the view that the plaintiff has a claim, there are various options how provision should be made (Section 11(1a) FPA). The court may make any one of the following orders or a combination of any of them:

- 5.3.1. payment of a lump sum;
- 5.3.2. payment of a periodic sum;
- 5.3.3. transfer of certain asset(s) of the estate;

5.3.4. setting aside property as a class fund for the benefit of two or more persons; or

5.3.5. in any other manner which the court thinks fit.

The question whether the “non provision” by the deceased was justified is irrelevant for the decision. Rather, the court recognises that the testator is free to make provisions concerning all or some of his or her assets.

6. **Interim Orders**

The court may also make interim orders. The court may do this if the plaintiff’s financial need is an urgent one. Such an order may be compared with an “einstweilige Verfügung” under German law. In these circumstances, the court will estimate the probable outcome of the proceedings and then make an interim order in order to secure the plaintiff’s present need.

7. **Additional Provision**

Even though the court may have made an order for provision to the plaintiff, the court may also make further orders of additional provision out of the estate (section 8 FPA). For this to occur, however, the court must be satisfied that there has been a substantial detrimental change in the plaintiff’s situation since an order for provision was last made by the court. In addition, all of the above requirements must be fulfilled.

8. **Notional Estate**

Part 2 of FPA makes provision for cases where the deceased attempted to avoid claims under the FPA or to avoid meeting any claims out of the estate. This may be compared with a “Pflichtteilsergänzungsanspruch” under German law.

“Notional Estate” are assets disposed of by the deceased in order to prevent or frustrate FPA claims of eligible persons after his or her death, by transferring his or her assets or part of his or her assets to a third person. It is irrelevant whether or not the third person holds the property as trustee (section 22 FPA). However, notional estate requires that full valuable consideration in money or money’s worth has not been given by the third person for the relevant assets.

The court designates the following “deferred” assets as notional estate:

- transactions which took effect within 3 years before the deceased’s death which were entered into with the intention of denying or limiting FPA claims of eligible persons;
- a transaction which took effect within 1 year before the deceased’s death and was entered into at a time when the deceased had a moral obligation to make adequate provision for the maintenance, education or advancement in life of any eligible person; or
- transactions which took effect on or after the death of the deceased person.

If the court designates property as notional estate, the court may order that provisions be made out of the notional estate for the plaintiff in the same manner as if the provision would be made out of the estate itself.

In order to determine whether property transferred by the deceased to a third person should be designated as notional estate, the court discretion is limited. Generally the court must consider the following (section 27 FPA):

- 8.1. the reasonable expectations of a third person not to interfere with property;
- 8.2. the substantial justice and merits involved in making or refusing to make the order; and
- 8.3. any other matter which the court considers relevant in the circumstances.

Further, the court should only designate property as notional estate when it is satisfied that the deceased's estate is insufficient to allow the making of any provision which, in the court's view, should be made (section 28 FPA). This means that the actual estate is primarily liable.

9. **Summary**

Under Australian law there is no statutory share as under German law. However, the aim of court orders for provisions under the FPA is to allow provisions to be made in favour of a limited group of people and thereby limit the deceased's freedom to make provisions concerning his or her assets. The FPA also allows the court to order the making of provisions to eligible persons against the deceased's will. Even though a person would be entitled to a statutory share under German law, he or she may not receive any provisions out of the estate under Australian law if the court is of the view that the provision already made for him or her under the Will is adequate in the circumstances of the case. In relation to such claims, the price for greater flexibility is great uncertainty. As the discretion of Australian courts is very wide, it is often difficult to advise a client about the outcome of a claim under the FPA and, particularly, as to the amount payable.

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