

Is There a Statutory Share under Australian Law?

1. Introduction

Succession law is not uniform throughout Australia because different legislation applies in each state and territory. Nevertheless, succession law regimes throughout Australia are largely similar, and the law in New South Wales and the other states and territories is generally uniform. Accordingly, any reference in this article to Australian succession law means the law in NSW as at June 2011.

Unlike Germany, which is a civil law country, the Australian legal system is based on common law. In the case of an application for provision out of an estate by family members and other eligible persons who have not been provided for or have not been adequately provided for by the deceased person, a number of discretions and powers are vested in the courts. Under German law, these matters would be mainly dealt with by legislation, namely the German Civil Code (Bürgerliches Gesetzbuch).

2. Claims for Family Provision Orders

Amendments to the *Succession Act 2006* (NSW) (“Succession Act”), which came into force on 1 March 2009, make provision in relation to claims by persons for whom the deceased did not make any, or did not make adequate provision. These amendments replaced the *Family Provision Act 1982* (“FPA”) which was the applicable legislation from 1 September 1983 until 1 March 2009. The *Testator’s Family Maintenance and Guardianship of Infants Act 1916* (“TFMA”) applied to all earlier cases.

Because of the changes in the legislation since 1983, the first question is: “When did the deceased person die?” If the person died on or after 1 March 2009, the Succession Act applies. If the person died earlier, then the FPA or even the TFMA may apply. However, the Succession Act is largely in the same terms, and to the same effect as the FPA and the TFMA.

Unlike under the German Civil Code, Australian succession law does not recognise fixed statutory shares. Rather, it is a matter for the court’s discretion whether, and to what extent provisions are to be made out of an estate, and the manner in which this should be done. Accordingly, any reference in this article to a “statutory share” must not be considered the same as, or even similar to statutory shares under German law. Rather, for the purposes of this article, a statutory share means that the court may 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 (section 59(i)(c) Succession Act).

On the one hand, the approach adopted under Australian succession law allows for wider flexibility, but also imposes greater uncertainty than under the German system which provides for fixed shares or proportions. On the other hand, the distribution of fixed

statutory shares as under German law may be considered inflexible and, in certain circumstances, may lead to inadequate and possibly inequitable distributions of estates.

3. Time Limit

Under section 58 of the Succession Act, a claim for a family provision order must generally be filed within 12 months of the date of the deceased person's death. However, the court has discretion to extend the time limit "on sufficient cause being shown". This is similar to "Wiedereinsetzung in den vorigen Stand" under German law. The applicant's interest to have the time limit extended must be balanced against the reliance of the beneficiaries named in the will on the fact that no claim will be made against the estate after the expiration of the statutory time limit. It is therefore difficult to obtain an extension of the time limit.

If an application for extension of the time limit is made, the court considers all the circumstances of the case. The time limit might be extended if, for example, the applicant obtained incorrect legal advice or the value of the estate was estimated wrongly.

4. Eligible Persons

The range of people who may make an application for a family provision order under NSW law is very wide in comparison to Germany. Section 57 of the Succession Act sets out who are "eligible persons" who may make a claim. They are:

- 4.1. the wife or husband of the deceased person at the time of his or her death;
- 4.2. a person who was living in a de facto relationship with the deceased person at the time of his or her death;
- 4.3. children of the deceased person, regardless of age (see *Gordon v Parks* (1989) 17 NSWLR 1). For the purpose of the section, children comprise:
 - 4.3.1. children of a marriage;
 - 4.3.2. children who have been declared children of a marriage in accordance with the *Marriage Act 1961* (Cth);
 - 4.3.3. children of a domestic relationship if the deceased person was in the domestic relationship at the time of his or her death (*Property (Relationships) Act 1984* (NSW));
 - 4.3.4. adopted children (*Adoption Act 2000* (NSW)); and
 - 4.3.5. children born out of wedlock (*Children (Equality of Status) Act 1976* (NSW)),
but not step-children or foster children (although a step-child or foster child may be an eligible person under category 4.6 below);
- 4.4. a former husband or wife of the deceased person if the marriage was ended by divorce or declared invalid (it is irrelevant whether the former spouse has remarried);

- 4.5. a grandchild of the deceased who was, at any particular time, wholly or partly dependent upon the deceased person and a member of the household of the deceased person;
- 4.6. a person who was:
 - 4.6.1. at any particular time, wholly or partly dependent upon the deceased person; and
 - 4.6.2. at that time or at any other time, a member of the household of the deceased person; and
- 4.7. other people who were living in a close personal relationship with the deceased person at the time of his or her death.

A close personal relationship for the purposes of category 4.7 above, is a relationship between two adult persons who are living together and where one of them provides the other with domestic support and personal care. Such a relationship will not exist if the domestic support or personal care is provided for fee or reward or by or on behalf of an organisation such as a government agency or a charity.

Dependency for the purposes of categories 4.5 and 4.6 above normally 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 and step-children as well as de facto (including same sex) partners and friends of the deceased person may, in certain circumstances, bring a claim under Australian law. In addition, former spouses may also have a claim without the need to prove dependency.

5. **Claims under the Succession Act**

5.1. Inadequate provision by the deceased person

The court will only allow a claim under the Succession Act if it is of the view that the deceased person made inadequate provision for the applicant's proper maintenance, education and advancement in life (section 59(1)(c) Succession Act). In doing so, the court looks at the applicant's needs as well as the deceased's duty, if any, to make testamentary provision in favour of the applicant. The court will consider all the circumstances of the case and make its decision based upon the facts of the case.

The Succession Act provides that the court should consider the following factors in deciding whether adequate or inadequate provision has been made and whether to make a family provision order:

- 5.1.1. Any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship.

While the court does not explicitly recognise a moral obligation on the deceased person's part to make provision for certain family members, this factor allows the court to give effect to what are generally regarded as moral obligations to provide for surviving spouses, children and other members of a deceased person's household;

- 5.1.2. The nature and extent of any obligations or responsibilities owed by the deceased person to the applicant.

The court also looks at the nature and extent of any responsibilities owed by the deceased person to any other person who has made an application for a family provision order or to any beneficiary of the deceased person;

- 5.1.3. The nature and extent of the deceased person's estate and any charges or liabilities on the estate.

The nature of the deceased person's estate is a critical matter. If the estate has a significant net value then substantial provision may be made for the applicant. On the other hand, even though an estate may have little value, an applicant may not automatically be excluded. In some cases, if no provision has been made for a surviving spouse, the spouse may be entitled to the whole or a significant portion of a small estate.

Additionally, in determining what is the deceased person's estate, the court looks at any property that is, or could be designated as "notional estate" of the deceased person (see section 8 of this article below);

- 5.1.4. The financial resources and financial needs of the applicant.

The court examines the financial resources (including earning capacity) of the applicant, both at the time that the application comes before the court and the likely needs and resources of the applicant in the future. In addition, the court considers the financial resources and financial needs of any other person who has made an application for a family provision order as well as those of the beneficiaries of the estate;

- 5.1.5. If the applicant is cohabiting with another person, the financial circumstances of the other person.

Not only does the court consider the applicant's financial position but also that of any other person or people with whom the applicant is living. If, for example, the applicant has few financial resources but his or her partner (e.g. spouse) is well off then this will be taken into account in determining the applicant's position;

- 5.1.6. Any physical, intellectual or mental disability of the applicant.

A physical or mental disability may cause an inability to work and/or loss of income. This will increase the applicant's need and therefore bolster his or her claim. If the applicant was already disabled during the deceased's lifetime, the deceased's moral obligation towards the person would also

increase. The court may consider it proper to make adequate provision out of the estate to allow for comfortable accommodation for the disabled person;

5.1.7. The applicant's age.

Young children clearly have greater need for education and maintenance in life than older people. Accordingly, their claims will be considered more favourably;

5.1.8. Any contribution made by the applicant to the acquisition, conservation or improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family.

The court not only looks at financial contributions but also non-financial ones. The types of non-financial contribution which the court considers includes care and housekeeping for the deceased person;

5.1.9. Any provision made by the deceased person for the applicant, either during the deceased person's lifetime or from the estate;

5.1.10. Any evidence of testamentary intentions including statements by the deceased.

If the deceased person expressed an intention to make provision for the applicant but failed to do so in his or her Will then some weight will be given to that expression and may even lead to a finding that the estate or part of the estate is held on constructive trust for the applicant;

5.1.11. Whether the applicant was being wholly or partly maintained by the deceased person.

The court may also consider the extent to which the deceased person maintained the applicant and the basis on which he or she did so;

5.1.12. Whether any other person is liable to support the applicant.

5.1.13. The conduct of any other person before or after the death of the deceased person; and

5.1.14. Any other matter which the court considers relevant in the circumstances.

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.

5.2. Manner of provision

If the court is of the view that the applicant has a claim, the court has various options about how provision should be made (section 65 (2) Succession Act). Any one of the following orders or a combination of any of them may be made:

- 5.2.1. payment of a lump sum;
- 5.2.2. periodic payments;
- 5.2.3. application of specified existing or future property;
- 5.2.4. declaration of an absolute or only limited interest in property;
- 5.2.5. setting aside property for the benefit of two or more persons; and
- 5.2.6. in any other manner the court thinks fit.

Accordingly, family provision orders in Australia may be far narrower or wider and, indeed, far more varied than under German law where a claim for a “Pflichtteil” is restricted to payment of a lump sum which is a fixed portion of the estate according to the applicable statutory formula.

6. **Interim Orders**

The court may also make interim orders. It may do this if the applicant’s financial needs are urgent. Such an order may be compared with an “einstweilige Verfügung” under German law. In these circumstances, the court will determine the minimum amount the applicant is likely to receive and then make an interim order so as to secure the applicant’s present need. An interim order can, however, also be revoked or varied by the court at a later date (e.g. the final hearing).

7. **Additional Provision**

Even though the court may have previously made an order for provision in favour of an applicant, the court may also make further orders or additional provision out of the estate (section 59(3) Succession Act). For this to occur, however, the court must be satisfied that there has been a substantial detrimental change in the applicant’s situation since the order for provision was last made by the court.

8. **Notional Estate**

Section 63 of the Succession Act makes provision for cases where the deceased person attempted to avoid claims under the Succession Act or to avoid meeting any claims out of the estate. This may be compared with a “Pflichtteilsergänzungsanspruch” under German law. The property used to satisfy these cases is called “notional estate”.

Notional estate includes assets disposed of by the deceased person in order to prevent or frustrate family provision claims of eligible persons after the deceased person’s death, by transferring assets or part of assets to a third person. It is irrelevant whether or not the third person holds the property as trustee (section 76(c) Succession Act). 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.

Notional estate can also arise if the deceased person failed to do something that, either immediately or at some later time, resulted in property being held by another person or

being held subject to a trust. Again, full valuable consideration must not have been given for the deceased person not doing the relevant thing. A common example is where the deceased person and another person (e.g. a de facto spouse) held property as joint tenant and the deceased person failed to sever the joint tenancy (i.e. converting the joint tenancy to tenancy in common in equal shares) before his or her death. This results in the property passing to the surviving joint tenant by right of survivorship (irrespective of what is contained in the deceased person's Will) and therefore not forming part of the deceased person's estate. The property or the deceased person's interest in the property would then ordinarily not be available to satisfy a family provision claim by any other person. The court can, however, designate the property or the deceased person's interest in the property as notional estate and make a family provision order in relation to that property or interest in the property.

Generally, in order for a transaction by the deceased person to result in relevant property being designated as notional estate, the transaction must have taken effect within three years before the deceased person's date of death. In certain circumstances, this time period is reduced to one year.

In order to determine whether property transferred by the deceased to a third person, or property in respect of which the deceased person failed to do something, should be designated as notional estate, the court's discretion is also limited. Generally the court must consider the following factors (section 87 Succession Act):

- 8.1. the importance of not interfering with reasonable expectations in relation to 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 88 Succession Act). This means that the actual estate is primarily liable.

If the court designates property as notional estate then the court may order that provisions be made out of the notional estate for the applicant similar to the provisions that would be made out of the estate itself.

9. **General Principles**

If a claim for a family provision order is made against an estate, the court must, in summary, determine the following matters:

- 9.1. whether the applicant is an eligible person entitled to bring the claim;
- 9.2. whether in the case of an application by a former husband or wife, a grandchild or member of the deceased person's household who was wholly or partly dependent on the deceased person or a person who was living in a close personal relationship with the deceased person at the time of his or her death, the court is satisfied that

there are factors which warrant the making of the application having regard to all the circumstances of the case; and

- 9.3. that adequate provision for the proper maintenance, education or advancement in life of the applicant has not been made in the deceased person's will.

If each of the above conditions is satisfied then the court may make a family provision order in relation to the estate for the benefit of the applicant. In making that decision, the court must take into account the matters set out in section 5.1 of this article.

10. Two Stage Approach

When considering an application for a family provision order, the court takes a two stage approach (see *Singer v Berghouse* (1994) 181 CLR 201). This procedure involves the consideration of two questions, namely:

- 10.1. "was the provision (if any) made for the applicant inadequate for his or her proper maintenance, education and advancement in life?" In determining this question, the court has regard, among other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and the other persons who have legitimate claims upon the deceased person's estate. In considering the first stage, the court must, in most circumstances, also make a decision about what should be regarded as the proper level of maintenance, support, education or advancement in life in the case of the particular applicant, and what would be considered adequate provision to achieve that level.

If the court considers that adequate provision has not been made then the court will consider the second question, namely:

- 10.2. "what order should be made in favour of the applicant so that adequate provision for the proper level of maintenance of the applicant is made?"

Even if the court finds that the applicant has been left without adequate provision for proper maintenance, the court may nevertheless refuse to make an order where, for example, there are no assets in the estate from which an order could reasonably be made or where the making of an order would disturb the testator's arrangements to pay creditors.

11. Conclusion

Under Australian law there is no statutory share that is the same as or comparable to a fixed statutory share under German law. However, the aim of court orders for provisions under the Succession Act is to allow provisions to be made in favour of a limited group of people. The court's powers under the legislation limits the deceased's freedom to make provisions concerning his or her assets. The Succession Act also allows the court to order the making of provisions to eligible persons contrary to the deceased's will.

Even though a person would be entitled to a fixed statutory share under German law, he or she may not receive any provision 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 predict the likely outcome of a claim under the Succession Act and, particularly, the amount that may be paid.

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