

# Succession Amendment (Family Provision) Act 2008 No 75

[2008-75]



New South Wales

## Status Information

### Currency of version

Repealed version for 28 October 2008 to 1 March 2009 (accessed 25 November 2024 at 13:59)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Repeal**

The Act was repealed by sec 6 (1) of this Act with effect from 2.3.2009.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Succession Amendment (Family Provision) Act 2008 No 75



New South Wales

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# Succession Amendment (Family Provision) Act 2008 No 75



New South Wales

An Act to amend the *Succession Act 2006* to ensure that adequate provision is made for members of the family of a deceased person, and certain other persons, from the estate of the deceased person; to repeal the *Family Provision Act 1982*; and for other purposes.

## 1 Name of Act

This Act is the *Succession Amendment (Family Provision) Act 2008*.

## 2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedule 2.1 is taken to have commenced on 1 March 2008.

## 3 Amendment of *Succession Act 2006 No 80*

The *Succession Act 2006* is amended as set out in Schedule 1.

## 4 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

## 5 Repeal of *Family Provision Act 1982 No 160*

The *Family Provision Act 1982* is repealed.

## 6 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

## Schedule 1 Amendment of [Succession Act 2006](#)

(Section 3)

### [1] Long title

Insert “to ensure that adequate provision is made for the members of the family of a deceased person, and certain other persons, from the estate of the deceased person;” after “Wales;”.

### [2] Section 3 Definitions

Omit the definition of **Court** from section 3 (1). Insert instead:

**Court** means:

- (a) the Supreme Court, in relation to any matter (including a matter referred to in paragraph (b)), or
- (b) the District Court, in relation to a matter under Chapter 3 for which it has jurisdiction under section 134 of the [District Court Act 1973](#).

### [3] Section 3 (1)

Insert in alphabetical order:

**administration** of the estate of a deceased person is defined in section 55.

**close personal relationship** is defined in subsection (3).

**costs**, in relation to proceedings under this Act, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration.

**deceased person** includes any person in respect of whose estate administration has been granted.

**deceased transferee** means a deceased transferee referred to in section 81 or 82.

**de facto relationship** has the same meaning as it has in the [Property \(Relationships\) Act 1984](#).

**domestic relationship** has the same meaning as it has in the [Property \(Relationships\) Act 1984](#).

**eligible person** means a person who may make an application for a family provision order under section 57.

**family provision order** means an order made by the Court under Chapter 3 in relation

to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of an eligible person.

**legal representative** of an estate is defined in section 55 (2).

**notional estate** of a deceased person means property designated by a notional estate order as notional estate of the deceased person.

**notional estate order** means an order made by the Court under Chapter 3 designating property specified in the order as notional estate of a deceased person.

**property** includes any valuable benefit.

**[4] Section 3 (3) and (4)**

Insert after section 3 (2) and renumber section 3 (3) as section 3 (5):

(3) For the purposes of this Act, a **close personal relationship** is 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.

(4) For the purposes of subsection (3), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:

(a) for fee and reward, or

(b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

**[5] Section 3, note**

Insert "References in headings to sections of this Act to "FPA" are references to the *Family Provision Act 1982* as in force immediately before it was repealed by the *Succession Amendment (Family Provision) Act 2008*." after "this Act."

**[6] Section 13 What is the effect of divorce or an annulment on a will?**

Omit "the *Family Provision Act 1982*" from section 13 (5) (a).

Insert instead "Chapter 3 of this Act".

**[7] Section 19 Information required in support of application for leave**

Omit "the *Family Provision Act 1982*" from section 19 (2) (i).

Insert instead "Chapter 3 of this Act".

**[8] Section 27 Court may rectify a will**

Omit section 27 (2). Insert instead:

- (2) A person who wishes to make an application for an order under this section must apply to the Court within 12 months after the date of the death of the testator.

**[9] Section 28 Protection of personal representatives who distribute as if will had not been rectified**

Omit “under the *Family Provision Act 1982*” from section 28 (2) (b).

Insert instead “under Chapter 3”.

**[10] Chapter 3**

Insert after section 54 and renumber Chapter 3 as Chapter 4 and sections 55–60 as sections 101–106, respectively:

## **Chapter 3 Family provision**

### **Part 3.1 Application of Chapter**

#### **55 Interpretation**

- (1) For the purposes of this Chapter, **administration** is granted in respect of the estate of a deceased person if:
- (a) probate of the will of the deceased person is granted in New South Wales or granted outside New South Wales but sealed in accordance with section 107 (1) of the *Probate and Administration Act 1898*, or
  - (b) letters of administration of the estate of the deceased person are granted in New South Wales or granted outside New South Wales but sealed in accordance with section 107 (1) of the *Probate and Administration Act 1898*, whether the letters were granted with or without a will annexed and whether for general, special or limited purposes, or
  - (c) an order is made under section 18 (2) or 23 (1) of the *Public Trustee Act 1913* in respect of the estate of the deceased person, or
  - (d) an election is made by the Public Trustee under section 18A of the *Public Trustee Act 1913* in respect of the estate of the deceased person, or
  - (e) an election is made by a trustee company under section 15A of the *Trustee Companies Act 1964* in respect of the estate of the deceased person.

- (2) For the purposes of this Chapter, the **legal representative** of the estate is the person to whom administration is granted.
- (3) A reference in this Chapter to a **person entitled to exercise a power** means a person entitled to exercise a power, whether or not the power:
  - (a) is absolute or conditional, or
  - (b) arises under a trust or in some other manner, or
  - (c) is to be exercised solely by the person or by the person together with one or more other persons (whether jointly or severally).
- (4) A reference in this Chapter to **property held by a person** includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

## **56 Chapter to bind Crown** (cf FPA 5)

This Chapter binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

## **Part 3.2 Family provision orders**

### **Division 1 Applications for family provision orders**

#### **57 Eligible persons** (cf FPA 6 (1), definition of “eligible person”)

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 wife or husband 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 or, if the deceased person was, at the time of his or her death, a party to a domestic relationship, a person who is, for the purposes of the [Property \(Relationships\) Act 1984](#), a child of that relationship,

**Note—**

A stepchild or foster child is not a child of a domestic relationship—see section 5 (3) of the [Property \(Relationships\) Act 1984](#).

- (d) a former wife or husband 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.

**Note—**

Section 60 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order. An application may be made by a tutor (within the meaning of the [Civil Procedure Act 2005](#)) for an eligible person who is under legal incapacity.

**58 When an application may be made** (cf FPA 16 (1) (b) and 17)

- (1) An application for a family provision order may be made whether or not administration of the estate of the deceased person has been granted.

**Note—**

Administration may be granted for the purposes of an application for a family provision order (see section 91).

- (2) An application for a family provision order must be made not later than 12 months after the date of the death of the deceased person, unless the Court otherwise orders on sufficient cause being shown.
- (3) An application is taken to be made on the day it is filed in the Court's registry.

## **Division 2 Determination of applications**

**59 When family provision order may be made** (cf FPA 7-9)

- (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.

- (2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.

**Note—**

Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 73). Part 3.3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order.

- (3) The Court may make a family provision order in favour of an eligible person in whose favour a family provision order has previously been made in relation to the same estate only if:
- (a) the Court is satisfied that there has been a substantial detrimental change in the eligible person's circumstances since a family provision order was last made in favour of the person, or
  - (b) at the time that a family provision order was last made in favour of the eligible person:
    - (i) the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (***the undisclosed property***), and
    - (ii) the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property, and
    - (iii) the Court would not have made the previous family provision order if the evidence had revealed the existence of the undisclosed property.
- (4) The Court may make a family provision order in favour of an eligible person whose application for a family provision order in relation to the same estate was previously refused only if, at the time of refusal, there existed all the circumstances regarding undisclosed property described in subsection (3) (b).

**60 Matters to be considered by Court** (cf FPA 7-9)

- (1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:
- (a) whether the person in whose favour the order is sought to be made (the

**applicant**) is an eligible person, and

(b) whether to make a family provision order and the nature of any such order.

(2) The following matters may be considered by the Court:

- (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,
- (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
- (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
- (d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
- (e) if the applicant is cohabiting with another person—the financial circumstances of the other person,
- (f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
- (g) the age of the applicant when the application is being considered,
- (h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,
- (i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,
- (j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,

- (k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,
- (l) whether any other person is liable to support the applicant,
- (m) the character and conduct of the applicant before and after the date of the death of the deceased person,
- (n) the conduct of any other person before and after the date of the death of the deceased person,
- (o) any relevant Aboriginal or Torres Strait Islander customary law,
- (p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

**61 Other possible applicants** (cf FPA 20)

- (1) In determining an application for a family provision order, the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (other than a beneficiary of the deceased person's estate) but who has not made an application.
- (2) However, the Court may disregard any such interests only if:
  - (a) notice of the application, and of the Court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations or rules of court, or
  - (b) the Court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case.

**62 Interim family provision orders and orders restraining distribution of the estate** (cf FPA 9 (5) and (6))

- (1) The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order.
- (2) After making an interim family provision order, the Court must proceed to finally determine the application for a family provision order by confirming, revoking or varying the interim order.
- (3) The Court may make an order restraining the final or partial distribution of an

estate (other than a distribution under section 94 (1) of this Act or section 92A of the *Probate and Administration Act 1898*) pending its determination of an application for a family provision order.

### **Division 3 Property that may be used for family provision orders**

#### **63 Property that may be used for family provision orders** (cf FPA 6 (1), definition of “estate”, 6 (4) and (5))

- (1) A family provision order may be made in relation to the estate of a deceased person.
- (2) If the deceased person died leaving a will, the estate of the deceased person includes property that would, on a grant of probate of the will, vest in the executor of the will, or would on a grant of administration with the will annexed, vest in the legal representative appointed under that grant.
- (3) A family provision order may not be made in relation to property of the estate that has been distributed by the legal representative of the estate in compliance with the requirements of section 93, except as provided by subsection (5).
- (4) Where property of the estate of a deceased person is held by the legal representative of that estate as trustee for a person or for a charitable or other purpose, the property is to be treated, for the purposes of this Chapter, as not having been distributed unless it is vested in interest in that person or for that purpose.
- (5) A family provision order may be made in relation to property that is not part of the estate of a deceased person, or that has been distributed, if it is designated as notional estate of the deceased person by an order under Part 3.3.

#### **64 Orders may affect property in or outside jurisdiction** (cf FPA 11 (1) (b))

A family provision order may be made in respect of property situated in or outside New South Wales when, or at any time after, the order is made, whether or not the deceased person was, at the time of death, domiciled in New South Wales.

### **Division 4 General provisions relating to family provision orders**

#### **65 Nature of orders** (cf FPA 11 (1) (a) and (d))

- (1) A family provision order must specify:
  - (a) the person or persons for whom provision is to be made, and

- (b) the amount and nature of the provision, and
  - (c) the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided, and
  - (d) any conditions, restrictions or limitations imposed by the Court.
- (2) A family provision order may require the provision to be made in one or more of the following ways:
- (a) by payment of a lump sum of money,
  - (b) by periodic payments of money,
  - (c) by application of specified existing or future property,
  - (d) by way of an absolute interest, or a limited interest only, in property,
  - (e) by way of property set aside as a class fund for the benefit of 2 or more persons,
  - (f) in any other manner the Court thinks fit.
- (3) If provision is to be made by payment of an amount of money, the family provision order may specify whether interest is payable on the whole or any part of the amount payable for the period, and, if so, the period during which interest is payable and the rate of the interest.

**66 Consequential and ancillary orders** (cf FPA 15 (1), 34)

- (1) The Court may, in addition to, or as part of, a family provision order, make orders for or with respect to all or any of the following matters for the purpose of giving effect to the family provision order:
- (a) the transfer of property of the estate directly to the eligible person in whose favour the order is made, or to any other person as trustee for that person,
  - (b) where property is to be held on trust, the purpose of the trust and the way in which it is to be constituted,
  - (c) the appointment of a trustee of property of the estate,
  - (d) the powers and duties of a trustee of property of the estate, including any trustee constituted or appointed under this section,
  - (e) the vesting in any person of property of the estate,
  - (f) the exercise of a right or power to obtain property for the estate,
  - (g) the sale of or dealing with property of the estate,

- (h) the disposal of the proceeds of any sale or other realising of property of the estate,
  - (i) the securing, either wholly or partially, of the due performance of an order under this Part,
  - (j) the management of the property of the estate,
  - (k) the execution of any necessary conveyance, document or instrument, the production of documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of the family provision order,
  - (l) any other matter the Court thinks necessary.
- (2) The Court may make such additional orders as it considers necessary to adjust the interests of any person affected by a family provision order and to be just and equitable to all persons affected by the order.
- (3) The execution of an instrument relating to property in the notional estate of a deceased person pursuant to an order under this section is not liable to duty under the *Duties Act 1997*.

#### **67 Undertakings to restore property** (cf FPA 18)

- (1) The Court may make a family provision order subject to a condition that the eligible person in whose favour the order is made is to enter into an undertaking, or give security, that, if the order is revoked because the deceased person was not deceased when the order was made, the person will restore any property received under the order, or otherwise make restitution, in accordance with any order of the Court made on the revocation.
- (2) In this section:
- deceased person** means the person (whether or not deceased) from whose estate a family provision order is made.

#### **68 Payment for exoneration from liability for orders**

- (1) The Court may, as part of a family provision order, or at any time, on the application of a beneficiary of the estate of a deceased person, by order:
- (a) fix a periodic payment or lump sum payable by a beneficiary of an estate affected by a family provision order to represent the proportion of the property in the estate affected by the family provision order that is borne by the beneficiary's portion of the estate, and
  - (b) exonerate the beneficiary's portion of the estate from any further liability

under the family provision order, on condition that payment is made as directed by the Court.

- (2) Without limiting subsection (1), in making any order under this section, the Court may do any of the following:
- (a) specify the person to whom the payment or lump sum is to be paid,
  - (b) specify how any periodic payment is to be secured,
  - (c) specify how any lump sum is to be invested for the benefit of any proposed beneficiary.

**Note—**

Section 92 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

**69 Effect of order vesting property in estate** (cf FPA 15 (2))

The provisions of sections 78 (except subsection (1)) and 79 of the *Trustee Act 1925* apply to and in relation to an order under section 66 for the vesting of property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, in the case of section 78 (2) of that Act, as if the provisions of section 66 and the other provisions of this Act relating to the making of orders under this Act were contained in Part 3 of that Act.

**70 Variation and revocation of family provision orders** (cf FPA 19 (1)–(3) and 20 (4))

- (1) A family provision order may be varied or revoked by the Court only in accordance with this Chapter.
- (2) The Court may, by order, vary or revoke a family provision order so as to allow provision to be made in favour of another eligible person wholly or partly from all or any property affected by the order.
- (3) The Court must not vary or revoke a family provision order so as to allow provision to be made in favour of another eligible person unless that person shows sufficient cause for not having applied for a family provision order before the order sought to be varied or revoked was made.
- (4) A family provision order is revoked if the grant of administration in respect of the estate of the deceased person is revoked or rescinded, unless the Court otherwise provides when revoking or rescinding the grant.

**Note—**

The Court may also vary a family provision order under sections 62 and 92.

**71 Variation and revocation of other orders** (cf FPA 19 (4))

If a family provision order is varied or revoked, the Court may:

- (a) vary or revoke any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the variation or revocation, and
- (b) make such additional orders as may be so necessary.

**72 Effect of family provision order** (cf FPA 14 (1))

- (1) A family provision order takes effect, unless the Court otherwise orders, as if the provision was made:
  - (a) in a codicil to the will of the deceased person, if the deceased person made a will, or
  - (b) in a will of the deceased person, if the deceased person died intestate.
- (2) Without limiting subsection (1), the Court may at the time of distribution of an estate that is insufficient to give effect to a family provision order make such orders concerning the abatement or adjustment of distributions from the estate as between the person in whose favour the family provision order is made and the other beneficiaries of the estate as it considers to be just and equitable among the persons affected.

**73 Application**

- (1) This Part applies to interim family provision orders in the same way as it applies to family provision orders.
- (2) This Part (other than section 63) applies to property designated as part of the notional estate of a deceased person in the same way as it applies to property that is part of the estate of a deceased person.

**Part 3.3 Notional estate orders**

**Note—**

This Part applies where, as a result of certain property transactions, property is not included in the estate of a deceased person or where property has been distributed from the estate of a deceased person. This Part enables the Court in limited circumstances to make an order designating property that is not included in the estate, or has been distributed from the estate, as “notional estate” of the deceased person for the purpose of making a family provision order under Part 3.2 in respect of the estate of the deceased person (or for the purpose of ordering that costs in the proceedings be paid from the notional estate).

Property may be designated as notional estate if it is property held by, or on trust for, a person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on



trust:

- (a) as a result of a distribution from the estate of a deceased person (see section 79), whether or not the property was the subject of the distribution, or
- (b) as a result of a relevant property transaction, whether or not the property was the subject of the transaction (see section 80), or
- (c) as a result of a relevant property transaction entered into by a person by whom property became held, or for whom property became held on trust, as a result of a relevant property transaction or a distribution from the estate of a deceased person (see section 81), whether or not the property was the subject of the relevant property transaction.

Property may also be designated as notional estate if it is property:

- (a) held by the legal representative of the estate of a person by whom property became held as a result of a relevant property transaction or distribution referred to in paragraphs (a)–(c) above and who has since died (known as the **deceased transferee**), or
- (b) held by, or on trust for, a person by whom property became held, or for the object of a trust for which property became held on trust, as a result of a distribution from the estate of a deceased transferee,

whether or not the property was the subject of the relevant property transaction or the distribution from the estate of the deceased person or the deceased transferee (see section 82).

Section 92 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

## Division 1 Relevant property transactions

### 74 Definition

In this Part:

**relevant property transaction** means a transaction or circumstance affecting property and described in section 75 or 76.

### 75 Transactions that are relevant property transactions (cf FPA 22 (1), (3) and (7))

- (1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:

- (a) held by another person (whether or not as trustee), or
- (b) subject to a trust,

and full valuable consideration is not given to the person for doing or not doing the act.

- (2) The fact that a person has entered into a relevant property transaction affecting

property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.

- (3) The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property that is not in the person's estate.

## **76 Examples of relevant property transactions** (cf FPA 22 (4))

- (1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 75.
- (2) The circumstances are as follows:
- (a) if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time) becomes, or continues to be, entitled to exercise the power,
  - (b) if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,
  - (c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish the other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,
  - (d) if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death or if some other event occurs to a person other than the legal representative of the person's estate, to exercise a power:
    - (i) to substitute a person or a trust for the person to whom, or trust subject

to which, money is payable under the policy, or

(ii) to surrender or otherwise deal with the policy,

and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,

- (e) if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,
- (f) if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.

- (3) Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 75.
- (4) For the purposes of this Chapter, in the circumstances described in subsection (2) (b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.

**77 When relevant property transactions take effect** (cf FPA 22 (2), (5) and (6))

- (1) For the purposes of this Chapter, a relevant property transaction is taken to have effect when the property concerned becomes held by another person or subject to a trust or as otherwise provided by this section.
- (2) A relevant property transaction consisting of circumstances described in section 76 (2) (a), (c) or (d) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event resulting in the person no longer being entitled to exercise the relevant power.
- (3) A relevant property transaction consisting of circumstances described in section 76 (2) (b) or (e) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event referred to in those paragraphs.
- (4) A relevant property transaction that involves any kind of contract for which valuable consideration, though not full valuable consideration, is given for the person to enter into the transaction is taken to be entered into and take effect when the contract is entered into.

## **Division 2 When notional estate orders may be made**

### **78 Notional estate order may be made only if family provision order or certain costs orders to be made**

- (1) The Court may make an order designating property as notional estate only:
- (a) for the purposes of a family provision order to be made under Part 3.2, or
  - (b) for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.

**Note—**

Section 63 (5) enables a family provision order to be made in relation to property designated as notional estate of a deceased person.

Section 99 enables the Court to order that costs be paid out of the notional estate of a deceased person.

- (2) The Court must not make an order under subsection (1) (b) for the purposes of an order that the whole or part of an applicant's costs be paid from the notional estate of the deceased person unless the Court makes or has made a family provision order in favour of the applicant.

### **79 Notional estate order may be made where property of estate distributed** (cf FPA 24)

The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that on, or as a result of, a distribution of the deceased person's estate, property (whether or not the subject of the distribution) became held by a person (whether or not as trustee) or subject to a trust.

### **80 Notional estate order may be made where estate affected by relevant property transaction** (cf FPA 23)

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that the deceased person entered into a relevant property transaction before his or her death and that the transaction is a transaction to which this section applies.

**Note—**

The kinds of transactions that constitute relevant property transactions are set out in sections 75 and 76.

- (2) This section applies to the following relevant property transactions:
- (a) a transaction that took effect within 3 years before the date of the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,
  - (b) a transaction that took effect within one year before the date of the death of the deceased person and was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction,
  - (c) a transaction that took effect or is to take effect on or after the deceased person's death.
- (3) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
- (a) a person by whom property became held (whether or not as trustee) as the result of a relevant property transaction, or
  - (b) the object of a trust for which property became held on trust as the result of a relevant property transaction,
- whether or not the property was the subject of the relevant property transaction.

**81 Notional estate order may be made where estate affected by subsequent relevant property transaction** (cf FPA 25)

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:
- (a) it:
    - (i) has power, under this or any other section of this Chapter, to make a notional estate order designating property held by, or on trust for, a person (***the transferee***) as notional estate of the deceased person, or
    - (ii) immediately before the date of the death of a person (***the deceased transferee***), had power, under this or any other section of this Chapter, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and

- (b) since the relevant property transaction or distribution that gave rise to the power to make the order was entered into or made, the transferee, or the deceased transferee, entered into a relevant property transaction, and
  - (c) there are special circumstances that warrant the making of the order.
- (2) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
- (a) a person by whom property became held (whether or not as trustee) as the result of the relevant property transaction entered into by the transferee or the deceased transferee, or
  - (b) the object of a trust for which property became held on trust as the result of the relevant property transaction entered into by the transferee or the deceased transferee,
- whether or not the property was the subject of the relevant property transaction.
- (3) A notional estate order may be made under this section instead of or in addition to an order under section 79, 80 or 82.

## **82 Notional estate order may be made where property of deceased transferee's estate held by legal representative or distributed**

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:
- (a) immediately before the date of the death of a person (***the deceased transferee***), it had power, under this or any other section of this Chapter, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and
  - (b) the power did not arise because property became held by the deceased transferee as trustee only, and
  - (c) in the case of property referred to in subsection (2) (b), there are special circumstances that warrant the making of the order.
- (2) The following property may be designated as notional estate by a notional estate order under this section, whether or not it was the property the subject of the relevant property transaction or distribution from which the Court's power to make such an order arose:
- (a) if administration has been granted in respect of the estate of the deceased transferee—property that is held by the legal representative of the estate of the deceased transferee in his or her capacity as legal representative of the

estate of the deceased transferee,

- (b) if all or part of the estate of the deceased transferee has been distributed—property that is held by, or on trust for:
  - (i) a person by whom property became held (whether or not as trustee) as the result of the distribution of the deceased transferee's estate, or
  - (ii) the object of a trust for which property became held on trust as the result of the distribution of the deceased transferee's estate.

(3) A notional estate order may be made under this section instead of or in addition to an order under section 79, 80 or 81.

**Note—**

Administration of the estate of a deceased transferee may be granted for the purposes of being able to designate property as notional estate under this section (see section 91).

**83 Disadvantage and other matters required before order can be made** (cf FPA 26)

- (1) The Court must not, merely because a relevant property transaction has been entered into, make an order under section 80, 81 or 82 unless the Court is satisfied that the relevant property transaction or the holding of property resulting from the relevant property transaction:
  - (a) directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
  - (b) involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that, if not exercised, could have resulted in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
  - (c) involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was

not the principal party to the transaction, the deceased person (whether before, on or after death), or

- (d) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).

(2) In this section:

***principal party to the transaction***, in relation to a relevant property transaction, means the person who, under section 75 or 76, enters into the relevant property transaction.

#### **84 Effect of notional estate order** (cf FPA 29)

A person's rights are extinguished to the extent that they are affected by a notional estate order.

#### **85 More than one notional estate order may be made** (cf FPA 28 (3))

The Court may make one or more notional estate orders in connection with the same proceedings for a family provision order, or any subsequent proceedings relating to the estate of the same deceased person.

#### **86 Power subject to Division 3**

The Court's power to make a notional estate order under this Division is subject to Division 3.

### **Division 3 Restrictions and protections relating to notional estate orders**

#### **87 General matters that must be considered by Court** (cf FPA 27 (1))

The Court must not make a notional estate order unless it has considered the following:

- (a) the importance of not interfering with reasonable expectations in relation to property,
- (b) the substantial justice and merits involved in making or refusing to make the order,



(c) any other matter it considers relevant in the circumstances.

**88 Estate must not be sufficient for provision or order as to costs** (cf FPA 28 (1))

The Court must not make a notional estate order unless it is satisfied that:

- (a) the deceased person left no estate, or
- (b) the deceased person's estate is insufficient for the making of the family provision order, or any order as to costs, that the Court is of the opinion should be made, or
- (c) provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances.

**89 Determination of property to be subject to notional estate order** (cf FPA 27 (2), 28 (2) and (4))

(1) In determining what property should be designated as notional estate of a deceased person, the Court must have regard to the following:

- (a) the value and nature of any property:
  - (i) the subject of a relevant property transaction, or
  - (ii) the subject of a distribution from the estate of the deceased person or from the estate of a deceased transferee, or
  - (iii) held by the legal representative of the estate of any deceased transferee in his or her capacity as legal representative of the estate of the deceased transferee,
- (b) the value and nature of any consideration given in a relevant property transaction,
- (c) any changes in the value of property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the legal representative of the estate of the deceased transferee or the consideration was given,
- (d) whether property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), could have been used to obtain income in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the legal representative of the estate of the deceased

transferee or the consideration was given,

(e) any other matter it considers relevant in the circumstances.

- (2) The Court must not designate as notional estate property that exceeds that 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 under section 99, to allow costs to be paid as ordered, or both.
- (3) If, as a result of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, property becomes held by a person as a trustee only, the Court must not designate as notional estate any property held by the person other than the property held by the person as a trustee as a consequence of any such relevant property transaction or distribution.

#### **90 Restrictions on out of time or additional applications** (cf FPA 28 (5))

- (1) This section applies to proceedings where:
- (a) an application for a family provision order is made later than 12 months after the date of the death of the deceased person, or
  - (b) an application for a family provision order is made in relation to an estate that has been previously the subject of a family provision order.
- (2) The Court must not make a notional estate order in the proceedings unless:
- (a) it is satisfied that:
    - (i) the property to be designated as notional estate is property that was the subject of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, and
    - (ii) the person who holds the property holds it as a result of the relevant property transaction or distribution as trustee only, and
    - (iii) the property is not vested in interest in any beneficiary under the trust, or
  - (b) it is satisfied that there are other special circumstances that justify the making of the notional estate order.

### **Part 3.4 Miscellaneous**

#### **91 Grant of probate or administration to enable application to be dealt**

**with** (cf WPA 41A)

- (1) This section applies if an application is made by a person for a family provision order, or notional estate order, in respect of the estate of a deceased person, or deceased transferee, respectively, in relation to which administration has not been granted.
- (2) The Court may, if it is satisfied that it is proper to do so, grant administration in respect of the estate of the deceased person or deceased transferee to the applicant for the purposes only of permitting the application concerned to be dealt with, whether or not the deceased person or deceased transferee left property in New South Wales.
- (3) The granting of administration under the *Probate and Administration Act 1898* does not:
  - (a) prevent the Court from granting administration under this section, or
  - (b) unless the Court otherwise orders, affect any previous grant of administration under this section.
- (4) The provisions of the *Probate and Administration Act 1898* apply to a grant of administration under this section, and to the legal representative of the estate, in the same way as they apply to a grant of administration under that Act and the legal representative of any estate for which such a grant has been made.

**92 Substitution of property affected by orders or proposed orders** (cf FPA 30)

- (1) If the Court has made, or proposes to make, a family provision order affecting certain property in the estate of a deceased person or a deceased transferee, the Court may, on application by a person who offers other property in substitution (***the replacement property***):
  - (a) vary the family provision order by substituting the replacement property for the property affected by the order, or
  - (b) make a family provision order in respect of the replacement property instead of the property proposed to be affected by such an order,as appropriate.
- (2) If the Court has made, or proposes to make, a notional estate order designating certain property as notional estate, the Court may, on application by a person who offers other property in substitution (***the replacement property***):
  - (a) vary the notional estate order by substituting the replacement property for the property designated as notional estate by the order, or

(b) make a notional estate order designating the replacement property as notional estate instead of the property proposed to be designated as notional estate by such an order,

as appropriate.

(3) The Court may vary or make an order under this section only if it is satisfied that the replacement property can properly be substituted for the property affected or proposed to be affected by the family provision order, or the property designated or proposed to be designated as notional estate, as appropriate.

(4) An order varied or made under this section is taken to be an order in respect of property of the estate or notional estate of the deceased person for the purposes of this Chapter (except section 72 (Effect of family provision order)).

**93 Protection of legal representative who distributes after giving notice** (cf FPA 35 (1))

(1) The legal representative of the estate of a deceased person may distribute the property in the estate if:

(a) the property is distributed at least 6 months after the deceased person's death, and

(b) the legal representative has given notice in the form approved under section 17 of the *Civil Procedure Act 2005* that the legal representative intends to distribute the property in the estate after the expiration of a specified time, and

**Note—**

Section 101 of this Act provides for the service of notices.

(c) the time specified in the notice is not less than 30 days after the notice is given, and

(d) the time specified in the notice has expired, and

(e) at the time of distribution, the legal representative does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.

(2) A legal representative who distributes property of the estate of a deceased person is not liable in respect of that distribution to any person who was an applicant for a family provision order affecting the estate if the legal representative did not have notice at the time of the distribution of the application and if:

(a) the distribution was made in accordance with this section, and

- (b) the distribution was properly made by the legal representative.
- (3) For the purposes of this section, notice to the legal representative of an application or intention to make any application under this Chapter must be in writing signed in accordance with rules for the signing of documents by a party in proceedings under the *Uniform Civil Procedure Rules 2005*.

**Note—**

On the enactment of this subsection, rules for the signing of documents by a party in proceedings were contained in Rule 4.4 of the *Uniform Civil Procedure Rules 2005*.

**94 Protection of legal representative in other circumstances**

- (1) A legal representative of the estate of a deceased person who distributes property in the estate for the purpose of providing those things immediately necessary for the maintenance or education of an eligible person who was wholly or substantially dependent on the deceased person immediately before his or her death is not liable for any such distribution that is properly made.
- (2) Subsection (1) applies whether or not the legal representative had notice at the time of the distribution of any application or intended application for a family provision order affecting property in the estate.
- (3) No person who may have made or may be entitled to make an application under this Chapter is entitled to bring an action against the legal representative of the estate of a deceased person because the legal representative has distributed any part of the estate if the distribution was properly made by the legal representative after the person (being of full legal capacity) has notified the legal representative in writing that the person either:
- (a) consents to the distribution, or
  - (b) does not intend to make any application under this Chapter that would affect the proposed distribution.
- (4) A legal representative of the estate of a deceased person who receives notice of an intended application under this Chapter is not liable in respect of a distribution of any part of the estate if the distribution was made in compliance with section 93 (1) by the legal representative not earlier than 12 months after the deceased person's death.
- (5) Subsection (4) does not apply if the legal representative receives written notice that the application has been commenced in the Court or is served with a copy of the application before making the distribution.
- (6) For the purposes of this section, notice to the legal representative of an application or intention to make any application under this Chapter must be in writing signed in accordance with rules for the signing of documents by a party

in proceedings under the *Uniform Civil Procedure Rules 2005*.

**Note—**

On the enactment of this subsection, rules for the signing of documents by a party in proceedings were contained in Rule 4.4 of the *Uniform Civil Procedure Rules 2005*.

**95 Release of rights under Chapter** (cf FPA 31 (1)–(6))

- (1) A release by a person of the person's rights to apply for a family provision order has effect only if it has been approved by the Court and to the extent that the approval has not been revoked by the Court.
- (2) Proceedings for the approval by the Court of a release of a person's rights to apply for a family provision order may be commenced before or after the date of the death of the person whose estate may be the subject of the order.
- (3) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a person.
- (4) In determining an application for approval of a release, the Court is to take into account all the circumstances of the case, including whether:
  - (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and
  - (b) it is or was, at that time, prudent for the releasing party to make the release, and
  - (c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and
  - (d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.
- (5) In this section:

***release of rights to apply for a family provision order*** means a release of such rights, if any, as a person has to apply for a family provision order, and includes a reference to:

- (a) an instrument executed by the person that would be effective as a release of those rights if approved by the Court under this section, and
- (b) an agreement to execute such an instrument.

**96 Revocation of approval of release** (cf FPA 31 (7)–(9))

- (1) The Court may not revoke an approval of a release given by it under section 95,

except as provided by this section.

(2) The Court may revoke an approval if it is satisfied:

- (a) that its approval was obtained by fraud, or
- (b) that the release was obtained by fraud or undue influence.

(3) The Court may also revoke an approval, either wholly or partially in respect of specified property, if it is satisfied that all persons who would be, in the Court's opinion, sufficiently affected by the revocation consent to the revocation.

**97 Court may determine date of death** (cf FPA 6 (8))

The Court may, if the date or time of death of a person is uncertain, determine, for the purpose of giving effect to any provision of this Chapter, a date or time of death that the Court thinks is reasonable for the purposes of the provision.

**98 Mediation, orders with consent and costs** (cf FPA 33 (1))

- (1) The object of this section is to encourage the settlement by affected parties of disputes concerning the estate of a deceased person.
- (2) Unless the Court, for special reasons, otherwise orders, it must refer an application for a family provision order for mediation before it considers the application.
- (3) The Court may make a family provision order in terms of a written agreement (a **consent order**) that:
  - (a) is produced to the Court by the affected parties in relation to an application after mediation, or on the advice of a legal practitioner, and
  - (b) indicates the parties' consent to the making of the family provision order in those terms.
- (4) The regulations may make provision for or with respect to the following:
  - (a) mediations and consent orders under this section,
  - (b) regulating or prohibiting advertising concerning the provision of legal services in connection with mediations and other proceedings under this Chapter in relation to the estate or notional estate of a deceased person.
- (5) In this section, **legal services** has the same meaning as in the [Legal Profession Act 2004](#).

**99 Costs** (cf FPA 33 (1))

- (1) The Court may order that the costs of proceedings under this Chapter in relation

to the estate or notional estate of a deceased person (including costs in connection with mediation) be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

**Note—**

Section 78 sets out the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person.

- (2) The regulations may make provision for or with respect to the costs in connection with proceedings under this Chapter, including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person.
- (3) This section and any regulations under this section prevail to the extent of any inconsistency with the *Legal Profession Act 2004* and the regulations under that Act. An assessment under that Act of any costs in respect of which provision is made by a regulation under this section is to be made so as to give effect to that regulation.
- (4) In this section, **legal services** has the same meaning as in the *Legal Profession Act 2004*.

**100 Evidence** (cf FPA 32)

- (1) In this section:

**statement** includes any representation of fact whether or not in writing.

- (2) In any proceedings under this Chapter, evidence of a statement made by a deceased person is, subject to this section, admissible as evidence of any fact stated in it of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.
- (3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during the person's lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made is admissible for the purpose of proving it.
- (4) Where a statement was made by a deceased person during the person's lifetime while giving oral evidence in a legal proceeding (being a civil or criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the statement may be approved in any manner authorised by the Court.
- (5) Where a statement made by a deceased person during the person's lifetime was contained in a document, the statement may be proved by the production of the



document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.

- (6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.
- (7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances, including, in the case of a statement contained in a document, the form or content of the document.
- (8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard must be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including:
  - (a) the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement, and
  - (b) the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.
- (9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.
- (10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.
- (11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.
- (12) This section applies notwithstanding the rules against hearsay and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.
- (13) The exceptions to the rules against hearsay set out in this section are in addition to the exceptions to the hearsay rule set out in the [Evidence Act 1995](#).

**[11] Section 102 (as renumbered by item [10]) Rules of Court**

Insert “(including the costs payable out of small estates and other estates)” after “costs” in section 102 (2) (d).

**[12] Section 102 (2) (e)-(g)**

Insert after section 102 (2) (d) (as renumbered by item [10]):

- (e) dispensing with the rules of evidence for proving any matter that is not bona fide in dispute or in which formal proof may give rise to expense or delay,
- (f) without limiting the generality of paragraph (e), permitting informal evidence to be given of property valuations or the medical condition of the deceased or any other persons concerned with proceedings under Chapter 3,
- (g) the circumstances in which proceedings under Chapter 3 in respect of small estates may be dealt with in the absence of the parties.

**[13] Section 102 (4)**

Insert after section 102 (3) (as renumbered by item [10]):

(4) In this section:

***small estate*** means an estate the value of which is less than \$750,000 or such other amount as may be prescribed by the regulations.

**[14] Section 105 (as renumbered by item [10]) Amendment of other Acts and regulation**

Omit the section.

**[15] Schedule 1 Savings, transitional and other provisions**

Omit “(Section 58)”. Insert instead “(Section 104)”.

**[16] Schedule 1**

Insert at the end of clause 1 (1):

*Succession Amendment (Family Provision) Act 2008*

**[17] Schedule 1, Part 3**

Insert after clause 8:

**Part 3 Provisions consequent on enactment of [Succession](#)**

## Amendment (Family Provision) Act 2008

### 9 Definitions

In this Part:

**amending Act** means the *Succession Amendment (Family Provision) Act 2008*.

**the 1982 Act** means the *Family Provision Act 1982*.

### 10 General savings

- (1) Without limiting section 30 of the *Interpretation Act 1987*, any act, matter or thing done or omitted to be done under a provision of the 1982 Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted under the relevant provision of this Act.
- (2) This clause does not apply:
  - (a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation under clause 1, or
  - (b) to the extent that its application would be inappropriate in a particular case.

### 11 Transitional provisions

- (1) Chapter 3, as inserted by the amending Act, applies in relation to the estate of a person who dies on or after the commencement of this clause.
- (2) The provisions of the 1982 Act, as in force before the commencement of this clause, continue to apply in relation to the estate of a person who dies before the commencement of this clause, in so far as they are not affected by the operation of this Part.
- (3) Without limiting subclause (2), the provisions of the 1982 Act, as in force immediately before the commencement of this clause, continue to have effect in relation to the determination of an application made before that commencement.
- (4) Section 59 (3) (b) and (4) (relating to undisclosed property) extend to an order for provision out of the estate or notional estate of a deceased person made before the commencement of this clause.

### [18] Schedules 2 and 3

Omit the Schedules.

## Schedule 2 Amendment of other Acts

(Section 4)

### 2.1 Conveyancing Act 1919 No 6

#### [1] Section 36B

Insert after section 36A:

#### **36B Contingent and future interests to carry the intermediate income**

Where under an instrument other than a will coming into operation after the commencement of the *Conveyancing (Amendment) Act 1930* property stands limited to a person for a contingent or future interest, or stands limited to trustees upon trust for a person whose interest is contingent or executory, such interest shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the time when the instrument comes into operation, except so far as such income or any part thereof may be otherwise expressly disposed of.

#### [2] Schedule 9 Savings, transitional and other provisions

Omit Part 7. Insert instead:

### **Part 7 Provision consequent on enactment of Succession Act 2006**

#### **13 Contingent and future testamentary gifts**

Section 36B (1) of this Act, as in force immediately before its repeal by the *Succession Act 2006*, continues to apply (in so far as it is not affected by the operation of Schedule 1 to the *Succession Act 2006*) to a will made before that repeal as if that section had not been repealed.

**Note—**

Section 36B was repealed on the commencement of the *Succession Act 2006* on 1.3.2008. Schedule 1 to the *Succession Act 2006* provides for section 34 of that Act to apply to a will whenever made if the testator dies on or after 1.3.2008.

### 2.2 District Court Act 1973 No 9

#### [1] Section 134 Jurisdiction in equity proceedings

Omit “an order under section 7 of the *Family Provision Act 1982*” from section 134 (1) (c).

Insert instead “a family provision order under Chapter 3 of the *Succession Act 2006*”.

## [2] Section 134 (2)

Omit “the *Family Provision Act 1982*”.

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.3 Duties Act 1997 No 123

### Section 163ZB Exempt transactions

Omit “the *Family Provision Act 1982*” from section 163ZB (1) (d).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.4 Forfeiture Act 1995 No 65

### Section 3 Definitions

Omit “the *Family Provision Act 1982*” from the definition of **benefit**.

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.5 Judges’ Pensions Act 1953 No 41

### Section 16 Payment of pension to legal personal representative in certain cases

Omit “the *Family Provision Act 1982*”.

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.6 Legal Aid Commission Act 1979 No 78

### Section 35 Means test

Omit “the *Family Provision Act 1982*” from section 35 (4) (e).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.7 Local Government and Other Authorities (Superannuation) Act 1927 No 35

### Section 17BA Payment without grant of probate etc

Omit “the *Family Provision Act 1982*” wherever occurring from section 17BA (2) (a) and (3).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.8 Police Regulation (Superannuation) Act 1906 No 28

### Section 18B Payment without grant of probate etc

Omit “the *Family Provision Act 1982*” wherever occurring from section 18B (2) and (3).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## 2.9 Probate and Administration Act 1898 No 13

### [1] Section 40A Evidence or presumption of death

Omit “the *Family Provision Act 1982*” from section 40A (2).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

### [2] Section 41A Probate or administration for purpose of Family Provision Act 1982

Omit the section.

### [3] Section 42, note

Insert at the end of section 42:

**Note—**

On grant of administration in respect of a deceased person to permit an application to be made for a family provision order, see section 91 of the *Succession Act 2006*.

### [4] Section 92 Distribution of assets after notice given by executor or administrator

Omit section 92 (1). Insert instead:

- (1) The executor or administrator of the estate of a testator or an intestate may distribute the assets, or any part of the assets, of that estate among the persons entitled having regard to the claims of beneficiaries (including children conceived but not yet born at the date of the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of which the executor or administrator has notice at the time of distribution if:
  - (a) the assets are distributed at least 6 months after the testator’s or intestate’s death, and
  - (b) the executor or administrator has given notice in the form approved under section 17 of the *Civil Procedure Act 2005* that the executor or administrator intends to distribute the assets in the estate after the expiration of a specified time, and
  - (c) the time specified in the notice is not less than 30 days after the notice is given,

and

(d) the time specified in the notice has expired.

**[5] Fifth Schedule Savings and transitional provisions arising from amendments to this Act**

Insert after Part 1:

**Part 2 Provisions consequent on enactment of [Succession Amendment \(Family Provision\) Act 2008](#)**

**8 Distribution of assets after notice given by executor or administrator**

Section 92 (1), as in force immediately before the commencement of Schedule 2.9 [4] to the [Succession Amendment \(Family Provision\) Act 2008](#), continues to apply to and in respect of the estate of testator or intestate who died before that commencement.

**2.10 Public Authorities Superannuation Act 1985 No 41**

**Section 58 Payment without grant of probate etc**

Omit “the [Family Provision Act 1982](#)” wherever occurring from section 58 (2) (a) and (3).

Insert instead “Chapter 3 of the [Succession Act 2006](#)”.

**2.11 State Authorities Non-contributory Superannuation Act 1987 No 212**

**Section 31 Payment without grant of probate etc**

Omit “the [Family Provision Act 1982](#)” wherever occurring from section 31 (2) (a) and (3).

Insert instead “Chapter 3 of the [Succession Act 2006](#)”.

**2.12 State Authorities Superannuation Act 1987 No 211**

**Section 51 Payment without grant of probate etc**

Omit “the [Family Provision Act 1982](#)” wherever occurring from section 51 (2) (a) and (3).

Insert instead “Chapter 3 of the [Succession Act 2006](#)”.

## **2.13 State Public Service Superannuation Act 1985 No 45**

### **Section 57 Payment without grant of probate etc**

Omit “the *Family Provision Act 1982*” wherever occurring from section 57 (2) (a) and (3).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## **2.14 Superannuation Act 1916 No 28**

### **Section 88A Payment without grant of probate etc**

Omit “the *Family Provision Act 1982*” wherever occurring from section 88A (2) (a) and (3).

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## **2.15 Testator’s Family Maintenance and Guardianship of Infants Act 1916 No 41**

### **Section 1A Application of Act**

Omit “the *Family Provision Act 1982*”.

Insert instead “Chapter 3 of the *Succession Act 2006*”.

## **2.16 Transport Employees Retirement Benefits Act 1967 No 96**

### **Section 58 Payment without grant of probate etc**

Omit “the *Family Provision Act 1982*” wherever occurring from section 58 (2) (a) and (3).

Insert instead “Chapter 3 of the *Succession Act 2006*”.