Fortifying Family Protection:
The Need for Anti-Avoidance Provisions in the Family Protection Act 1955

Josie Te Rata

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Introduction

In New Zealand there is an expectation that people will provide for their immediate families, both during their lifetimes and upon death. When a person dies, the Family Protection Act 1955 enforces that obligation by enabling family members who have not been adequately provided for to bring a claim against the deceased's estate. It is social legislation that aims to protect the economically vulnerable. As such, it cannot be contracted out of.

However, it is not difficult to avoid family protection obligations by using alternative methods of transmitting property upon death. These methods, known as 'will-substitutes', allow property to change hands without ever passing into the estate. Alternatively, a person can simply dispose of their property before they die. Either way, the goal is to decrease the size of the estate, so that there is little property available with which to satisfy a family protection claim.

This paper seeks to demonstrate why legislative intervention is warranted in order to prevent people from avoiding their family protection obligations. Chapter 1 sets out the background and context of the Family Protection Act, in an attempt to show why it is desirable to uphold the Act and ensure that it is complied with. It sets out the different methods of avoiding the Act and provides examples of this happening in New Zealand.

Having established that New Zealand should implement anti-avoidance measures, the next question is how to ensure such measures are effective without being overly invasive. The measures must balance the obligation to provide for family against the freedom to deal with property. Chapter 2 looks to international examples and examines how this has been achieved in England and in New South Wales.

Chapter 3 draws on the international examples in an attempt to find solutions that can be adapted to the New Zealand situation. The paper culminates in a series of proposals that together provide the framework for a practicable, balanced and effective anti-avoidance scheme under the Family Protection Act.

Chapter I: The Need for Reform

The Origins of Family Protection Legislation

New Zealand is the birthplace of family protection legislation. The first statute of its kind was the Testator's Family Maintenance Act 1900.[1] Prior to this, a testator was free to devolve their property in whichever way they wished. New Zealand inherited this principle of absolute testamentary freedom from England.[2] Throughout the nineteenth century there was a strong resistance against encroaching on testamentary freedom, particularly due to the broadly liberal social policy of the time, which emphasised the importance of self-reliance and protecting private property.[3]

However, there were other, conflicting ideals at play. The idea that 'charity begins at home', rather in than in the community, was influential. Testamentary freedom was not perceived as an unfettered discretion, but rather it was burdened by a moral obligation to provide for family:[4]

> "Yet it is clear that, though the law leaves to the owner of property absolute freedom in his ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given… Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law."

Towards the late 1800s, there was a shift towards converting this moral obligation into a legal one.

It was the combined weight of the women's movement and 'new liberalism' that eventually led to the enactment of the Testator's Family Maintenance Act 1900.[5] While the new liberalism allowed for greater state intervention into social and economic affairs, it was really the women's movement that brought the issue of family provision before Parliament as an area in need of reform.[6] Concern for economically vulnerable women and children was the primary motivator.[7] In this context,

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[1] Testator's Family Maintenance Act 1900.

[2] Upon the enactment of the English Laws Act 1858, New Zealand inherited absolute testamentary freedom from the Wills Act 1837 (UK) 7 Will 4 & 1 Vict c 26, s 3.

[3] Grant Duncan *Society and Politics: New Zealand Social Policy* (2nd ed, Pearson Education New Zealand, Auckland, 2004) at 70-73.

[4] *Banks v Goodfellow* (1870) 5 LR QB 549 at 563.

[5] Rosalind Artherton "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202 at 202.

[6] Artherton, above n 5 at 202-206.

[7] Mary Foley "The Right of Independent Adult Children to Receive Testamentary Provision: A Statutory Interpretation and Philosophical Analysis of the New Zealand Position" (PhD Thesis, University of Otago, 2011) at 32.

absolute testamentary freedom was reconceptualised as a weapon which could be used to leave women and children destitute.[8]

Despite this growing concern, it took several attempts to get the legislation through Parliament. Robert Stout's bills, which attempted to reintroduce the civil law system of forced inheritance, were quickly rejected as too great a fetter on testamentary freedom.[9] It was Robert McNab that introduced the novel idea of discretionary provision, premised on meeting the basic needs of the applicant and nothing more.[10] This was a significantly lesser incursion on testamentary freedom and was therefore much more positively received. But it was probably the 'state vs estate' debate that eventually got the Bill over the line.[11] This is the idea that because testators are obliged to provide for their families, they should not instead be able to cast their dependants upon the charity of the state. Thus, it was the desire to protect vulnerable women and children, together with the desire to reduce public spending that led to the birth of family protection legislation.

A Century of Change

The Testator's Family Maintenance Act 1900 gave the courts a discretion to make an order for provision out the estate of a deceased, where the will failed to make 'adequate provision' for the 'proper maintenance and support'[12] of a spouse or child.[13] In 1908 the Act was renamed the Family Protection Act and the version that stands today, the Family Protection Act 1955, remains substantially unchanged.[14] However, judicial approaches towards family protection claims have shifted significantly over the last century, expanding far beyond the original aim of providing modest orders for the economically dependent.

At first, the courts were conservative in exercising of their jurisdiction under the Act. The early view was that the Act merely extended the reach *inter vivos* maintenance obligations, rather than imposing a more onerous duty of support.[15] Thus, orders were made solely on the basis of financial need. However, it was not long before the courts adopted a more generous approach founded upon

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[8] Artherton, above n 5 at 206.

[9] Limitation of Power of Disposition Bill 1986 and Limitation of Power of Disposition by Will Bill 1987.

[10] McNab's first bill, the Testator's Family Provision Out of Estate Bill 1898, was sold to Parliament as an extension of the Destitute Persons Act 1894 which imposed an *inter vivos* obligation to provide for destitute family members. However, the obligation was limited to bare maintenance only. See Foley, above n 7 at 21-29.

[11] See Hutcheson (10 August 1898) 102 NZPD 424; Symes 422; McKenzie 422; Hogg 422; Meredith 427.

[12] The term 'proper' was a last minute change proposed by McNab when the Bill was being considered by the Committee of the whole Council.

[13] Testator's Family Maintenance Act, s 2.

[14] Key differences: the class of claimants was widened to include step children and parents who were being maintained immediately before death, the disentitling conduct proviso was removed, the jurisdiction of the Act was expanded to include intestate as well as testate estates.

[15] *Re Rush* (1901) 20 NZLR 249 at 253-254.

the recognition of a 'moral duty'.[16] This paved the way for orders that went beyond bare maintenance, allowing for a degree of luxury that accorded with the claimant's station in life.[17]

In modern times, the courts have extended the meaning of 'proper' support to the extent that adult children can now claim solely on the basis of a 'family bond', without evidence of financial need or contribution to the estate.[18] This approach has received widespread criticism for being inconsistent with the original justifications behind the Testator's Family Maintenance Act and out of step with modern views.[19] In its review of the law of succession in the late 1990s, the Law Commission said:[20]

> The legislation, as it affects adult children, is not being applied with consistent principles and defined objects in mind. Rather, it depends upon judicial views of what is fair in the context of the particular case. This makes it difficult, at least in the view of some of those we have consulted, to advise will-makers on what provisions they might make which will clearly comply with their "moral duty".

The Courts have responded to this criticism by adopting a more conservative approach towards the quantum of orders for adult children.[21] However, the courts continue to recognise the 'family bond' as a sufficient reason to make a family provision order.

The result is that the scope of a deceased's support obligation is now uncertain and difficult to predict. This is an important point to note for the purposes of this paper, as the uncertainty in this area is likely to prompt attempts to avoid the reach of the Act altogether. The enthusiasm of the courts to do what essentially amounts to rewriting wills also begs the question of whether it is wise to arm them with even broader powers to redistribute property under the Act.

Mechanisms for Avoiding the Family Protection Act

Because family protection orders are made out the deceased's estate,[22] the Family Protection Act can be easily sidestepped through careful estate planning which ensures that there is nothing in the estate from which to make a claim. There are a variety of devices that can be used for this purpose,

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[16] *Allardice v Allardice* (1910) 29 NZLR 959 at 972-973.

[17] *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 (PC).

[18] *Re Adams* HC Wanganui A 34/84, 1 April 1986; *Williams v Aucutt* [2000] NZLR 479.

[19] For example, see J Caldwell "Where There's A Will... Family Protection Claims and the Court of Appeal" (2003) 4 BFLJ 155; J Caldwell "Family Protection Claims by Adult Children, What is Going on?" (2008) 6 NZFLJ 4; Nicola Peart "New Zealand's Succession Law: Subverting Reasonable Expectations" (2008) 37 C.L.W.R 356; Richard Sutton and Nicola Peart "Testamentary Claims by Adult Children - The Agony of the "Wise and Just Testator"" (2003) 10 Otago LR 385.

[20] Law Commission *Succession Law: Testamentary Claims* (NZLC PP24, 1996) at [222].

[21] *Williams v Aucutt*, above n 18; *Henry v Henry* [2007] NZFLR 640; *Auckland City Mission v Brown* [2002] 2 NZLR 650.

[22] Family Protection Act 1955, s 4.

including joint tenancies, *inter vivos* trusts, contracts to leave property by will and straightforward gifting.

Joint tenancies

Property that is held by joint tenancy passes by survivorship rather than falling into the deceased's estate. Ordinarily, there is no way to access joint tenancies for the purposes of making a family protection order. However, in New Zealand it is possible to gain access to some joint tenancies by applying for the division of relationship property under the Property (Relationships) Act 1976.[23] This will work if the joint tenant was the spouse or partner of the deceased. The division of relationship property will have the effect of severing the joint tenancies and bringing the property back into the estate. However, the personal representative of the deceased must obtain the leave of the court to bring an application, which will only be granted if 'serious injustice' would otherwise result.[24]

In *Public Trust v Whyman,* the deceased had structured his property so that he held his major assets as a joint tenant with his de facto partner, leaving insufficient property in his estate to provide for his dependent children from a previous marriage.[25] The surviving de facto partner was the executor of the estate. The Public Trust applied for a grant of administration, so that it could then apply for the division of relationship property under s 88(2). This would then enable the children to apply for provision out of the reclaimed relationship property. In light of the finding that leave under s 88(2) was likely to be granted because of the strength of the children's claim, the Court of Appeal removed the *de facto* partner as executor and appointed the Public Trust. The matter then settled out of court.

In *Horne v Public Trustee* the deceased's major asset, a villa, passed to his wife by survivorship. His estate was not significant. His adult children applied for leave to divide relationship property, but were denied because their family protection claim was not held to be 'seriously arguable.[26]

These cases demonstrate how the Act can be avoided by using joint tenancies. Although there is some prospect of clawing property back under the Property (Relationships) Act, there is no analogous remedy where the joint tenant is not a partner or spouse of the deceased. Furthermore, the requirement that 'serious injustice' would otherwise result sets a higher bar than is required for provision under the Family Protection Act.

[23] Property (Relationships) Act 1976, s 88(2).

[24] Section 88(2).

[25] *Public Trust v Whyman* [2005] 2 NZLR 696.

[26] *Horne v Public Trustee (in its capacity as representative of the estate of Webster)* HC Nelson CIV 2010-442-44, 4 May 2010.

Family trusts

Trusts are a popular way of protecting assets against a number of different risks, including family protection obligations. They are particularly prevalent in New Zealand, which is considered to be the 'trust capital of the world'.[27] Trusts have featured prominently in estate planning since the 1950s, when they became a popular method of avoiding onerous estate duties.[28] Although estate duty was effectively abolished in 1993, the number of family trusts continues to grow.[29] While they are generally established to provide for family members both during the settlor's lifetime and beyond, the flexibility of the discretionary trust structure means that they can be used to achieve the very opposite effect.

In *Re Henderson*, the testator transferred the majority of her assets into a trust settled in favour of her son but not her daughter.[30] The intention was to ensure that her daughter would not be able to bring a claim under the Family Protection Act, as her estate would be empty. However, the testator died before completing a debt forgiveness programme whereby she would forgive the debt owed by the trust at a rate of $27,000 per year in order to avoid attracting gift duty.[31] Thus the daughter was able to make a claim against the remaining balance of the debt.

Re Henderson illustrates how the recent removal of gift duty will make it easier to avoid the Family Protection Act.[32] Where gift duty used to control the rate at which dispositions could be made into a trust, it is now possible to dispose of large amounts of property in one transaction. Thus, the Act could now be avoided at quite short notice. One example of this is in *Penson v Forbes*, where the testator had transferred her house into trust in 2006 and begun a debt forgiveness program.[33] Once gift duty was repealed, the testator forgave the remaining debt in one transaction. Around that time, she also removed one of her daughters as a discretionary beneficiary of the trust. When she died the year after, there was very little left in her estate as everything had been transferred to the trust. Thus, her daughter had no recourse under the Family Protection Act and instead brought an unsuccessful claim for breach of trust. As she was on legal aid, it seems likely her claim for support and maintenance would have been meritorious.

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[27] Law Commission *Some Issues with the Law of Trusts in New Zealand: Review of the Law of Trusts Second Paper* (NZLC IP20, 2010) at [2.1]-[2.8]. Tax return data shows that New Zealand has at least twice as many trusts per capita as Australia, and thirteen times as many as the United Kingdom.

[28] Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2009) at [2.37]; L McKay "Historical Aspects of the Estate Tax" (1978) 8 NZULR 1 at 21-24.

[29] Estate Duty Abolition Act 1993.

[30] *Re Henderson* HC Wellington CP 433/92, 6 April 1993.

[31] The combined effect of s 62 and Schedule 3 of the Estate and Gift Duties Act 1968 meant that a donor could gift $27,000 per year to a particular donee without attracting gift duty.

[32] Taxation (Tax Administration and Remedial Matters) Act 2011, s 245.

[33] *Penson v Forbes* [2014] NZHC 2160.

Beaven v Beaven was a case brought under the Property (Relationships) Act, in relation to a family farm that had been transferred into trust.[34] The wife claimed that a proportion of the farm would otherwise have been relationship property, and that its transfer into trust had therefore defeated her rights under the Property (Relationships) Act. In the judgement it is clearly outlined that the trust was established by the husband's parents in order to ensure the husband acquired the whole of the family farm upon their death, to the exclusion of his brothers and sisters.[35] While this worked against the wife in this case, it is a clear example of how trusts can be set up in order to prevent a family protection claim.

Straightforward gifting

Another effective method of defeating a family protection claim is simply to dispose of assets before death. When a disposition is made for less than full value, it decreases the total size of the potential estate. Such a disposition can be made outright or into a trust. Now that gift duty has been repealed, there is no impediment to how quickly a person can divest themselves of assets. Currently, the only way to access such a disposition under the Family Protection Act is if it is a *donatio mortis causa,* which is a gift made in contemplation of death.[36] However, the gift must also be conditional on death, meaning property is not intended to pass until the donor dies. Thus, this provision can be sidestepped if the disposition is intended to take effect before death, even where it is made in contemplation of it.

Conclusions: The Case for Reform

Although there is not a significant amount of case law that shows a trend towards avoiding the Family Protection Act, the potential for abuse is self-evident and has been compounded by the repeal of gift duty. Furthermore, it is unlikely that cases of avoidance would be litigated as there is no reasonable prospect of succeeding under the current law. The cases discussed above are examples in which an alternative claim was available, either in equity or under another piece of legislation. It seems likely that there would be many cases where a disinherited family member may not have been so fortunate.

I therefore argue that New Zealand should adopt anti-avoidance provisions in order to uphold the integrity of the Family Protection Act. It is social legislation designed to protect the financially dependent and cannot be contracted out of.[37] Yet the obligation to provide for family upon death can be easily avoided, as demonstrated above. That obligation remains important and should be upheld. Although the extent of the duty has expanded and is now uncertain, the original rationale behind family protection remains as relevant now as it was in 1900; people are obliged to provide for those of their close family members that cannot provide for themselves. In 1996, the Law

[34] *Beaven v Beaven* [2015] NZFC 611.

[35] At [25]-[48].

[36] Family Protection Act 1955, s 2(5).

[37] *Gardiner v Boag* [1923] NZLR 739; *Re Churchill* [1978] 1 NZLR 744.

Commission said that "any attempt to evade that responsibility should not be viewed favourably".[38] I agree and consider that New Zealand needs to implement a set of anti-avoidance provisions to prevent any such attempts.

In order to be effective, any anti-avoidance measures should provide a mechanism for returning assets that passed by will-substitute or were disposed of during the deceased's lifetime. Essentially, the provisions will limit how a person can deal with their property while they are alive, in order to ensure that their family responsibilities will be met upon death. Because of this, they have the potential to undermine certainty of title and impede the making of everyday transactions. Therefore, care must be taken to ensure that the appropriate balance is struck between the right to family provision and the freedom to deal with property. In attempting to remedy one injustice, it is important to be wary of creating new ones. By drawing on international examples, the remainder of this dissertation will aim to find a practicable and equitable solution that is workable in the New Zealand context.

[38] Law Commission, above n 20 at 342.

Chapter II

Both England and New South Wales have enacted anti-avoidance measures to protect family provision claimants. This chapter will explore why those provisions were enacted, identify the considerations that were taken into account when formulating the provisions, and outline how they operate to circumvent various avoidance mechanisms.

England

In England, the Inheritance (Provision for Family and Dependants) Act 1975 (UK) governs the law of family provision. The grounds for provision are needs based and are therefore much narrower than in New Zealand, although there is a dual standard under which spouses and civil partners are treated more generously than other classes of claimants. This is because matrimonial property legislation in England does not apply upon death, and the legislature wanted to ensure that a surviving spouse had at least the same rights as a divorcee.[39] Thus, spouses and civil partners are entitled to provision that goes beyond 'bare maintenance', whereas other claimants are not.[40]

The case law to date shows that spouses and civil partners tend to receive relatively generous awards.[41] This is in contrast to all other classes of claimants, including children, cohabitants and dependants,[42] who are entitled to 'such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance'.[43] Maintenance is not defined in the Act, but is generally accepted to amount to "payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him".[44] The quantum of awards for these claimants tends to be far lower, and financial need remains a necessary precondition.[45]

The Net Estate: How it Came to Be

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[39] England and Wales Law Commission *Family Property Law* (EWLC WP42, 1972) at [0.21] [*The 1972 Working Paper*].

[40] Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1(2).

[41] *Fielden v Cunliffe* [2006] W.T.L.R; [2006] 1 F.L.R and *P v G, P and P (Family Provision: Relevance of Divorce Provision)* [2006] 1 F.L.R. 431; [2007] W.T.L.R. 691 establish that the overriding inquiry is what amounts to reasonable provision for a surviving spouse. It is inappropriate to simply replicate the ancillary relief process for divorce proceedings as this distracts from the essential task at hand. In *Moore v Holdsworth* [2010] 2 F.L.R. 1501; [2010] W.T.L.R. 1213, *McNulty v McNulty* [2002] W.T.L.R. 357, *Adams v Lewis* [2001] W.T.L.R. 493 and *Baker v Baker* [2008] 2 F.L.R. 1956 the surviving spouses received around half of the estate, which was more than what they would have received upon divorce.

[42] The Law Reform (Succession) Act 1995 (UK) extended to class of claimants to include adult children, cohabitants and dependants.

[43] Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1(2)(b).

[44] *Re Dennis* [1981] 2 All E.R. 140 at 145, per Browne-Wilkinson J.

[45] See Nazreen Pearce *Inheritance Claims and Challenges* (Callow Publishing, London, 2004) at 64-67.

The Law Commission's proposals

The Law Commission first recommended that anti-avoidance provisions be adopted into family protection legislation when it reviewed the law of family property in the early 1970s. While there was no evidence that avoidance was a particularly common practice, the 1938 Act had been widely criticised for failing to cover non-testamentary means of passing property, for subordinating the rights of dependants to those of creditors, and for being easy to avoid by disposing of property *inter vivos*.[46]

Consistency with matrimonial property legislation was another justification for adopting anti-avoidance provisions.[47] The Commission noted that, because the Court had the power to avoid transactions made with intent to defeat a claim for financial provision in matrimonial property proceedings,[48] it would make sense to have a similar power in family protection proceedings.[49] This is a particularly persuasive argument in England because, as mentioned earlier, their matrimonial property legislation does not apply upon death. While the Commission acknowledged that the anti-avoidance provisions would have certain disadvantages, such as creating uncertainty in *inter vivos* transactions, it considered that "the overriding consideration is to ensure that family provision laws are effective".[50]

Thus, the Commission recommended that the court should have the power to reopen *inter vivos* transactions, where it could be proven that it was made with the intention of defeating a claim for family provision.[51] However, because the Commission was 'disturbed by the prospect of litigation in which it is necessary to examine a man's intentions at remote periods of time' it recommended that the power to reopen *inter vivos* dispositions should be limited to those dispositions made within six years of death.[52]

The Commission also considered that the net estate out of which family provision orders can be made should be extended to apply to *donationes mortis causa,* general powers of appointment and statutory nominations.[53] These classes of assets are property to which a person is entitled

[46] R.D. Oughton *Tyler's Family Provision* (2nd ed, Professional Books Ltd, Abingdon, 1984) at 210, citing E.L.G Tyler *Family Provision* (Butterworths, London, 1971) at pp 22-28 and Anthony R. Mellows *The Law of Succession* (2nd ed, Butterworths, London, 1973) at Ch. 14.

[47] The 1972 Working Paper, above n 39 at [3.70].

[48] Matrimonial Proceedings and Property Act 1970 (UK), s 16.

[49] The 1972 Working Paper, above n 39 at 205.

[50] The 1972 Working Paper, above n 39 at 204.

[51] England and Wales Law Commission *Second Report on Family Property: Family Provision on Death* (EWLC R61, 1974) at [197] [*The 1974 Report*].

[52] The 1974 Report, above n 51 at [211].

[53] The 1972 Working Paper, above n 39 at [3.71] and The 1974 Report, above n 51 at [134]-[136].

immediately before death, but which pass otherwise than by will or intestacy. Thus, the Commission considered that they should be automatically available for family provision orders.

However, it considered that joint tenancies deserved an additional layer of protection because a joint tenant already has settled rights in the property that might be affected by a family provision claim.[54] To this end, the Commission recommended that the Court have a discretion to sever joint tenancies 'where just in all the circumstances' and subject to a strict time limit of six months from the grant of administration.[55]

Parliamentary proceedings

The Inheritance (Provision for Family and Dependants) Bill of 1975 was well received in both houses and not considered to be particularly controversial.[56] The anti-avoidance provisions received little attention but appear to have been implicitly accepted by most members of Parliament. Lord Wilberforce was one of the few to express his concerns. He warned against the dangers of over legislating and asked whether the anti-avoidance provisions were really necessary.[57] The Lord Chancellor responded, saying:[58]

> I am very willing to look at whether Clauses 10, 11, and 12 are really necessary, because we certainly do not want to clutter up the Statute Book with the unnecessary. But it is the case that an element of malice and spite, alas, too often enters into testamentary dispositions, with most elaborate and diverse methods, if there is no provision against it for dodging the law's provisions.

Presumably Parliament did consider that the anti-avoidance provisions were necessary, as they were passed into law without amendment, almost exactly as recommended by the Law Commission.

Subsequent reform

The Inheritance (Provision for Family and Dependants) Act 1975 was subsequently reviewed in 2011, but the only change to the anti-avoidance provisions was to extend the time limit within which to bring an application to sever a joint tenancy.[59] Because the Law Commission did not consider that the remaining anti-avoidance provisions were in need of review, it can be inferred that they are working reasonably well.

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[54] The 1974 Report, above n 51 at [140].

[55] The 1974 Report, above n 51 at [141].

[56] Awdry (16 July 1975) 895 GBPD HC 1691.

[57] Lord Wilberforce (20 March 1975) 358 GBPD HL 934.

[58] Lord Chancellor (20 March 1975) 358 GBPD HL 937.

[59] The strict six month time limit was omitted from section 9(1) of the Inheritance (Provision for Family and Dependants) Act 1975 by virtue of the Inheritance and Trustees' Powers Act 2014 (UK), s 12(2).

The Net Estate: How it Works

The following is a summary of the anti-avoidance provisions in the Inheritance (Provision for Family and Dependants) Act 1975, as amended, including the relevant case law on these sections. The provisions can be found in full in Appendix 1.

Orders for financial provision can be made out the **net estate** of the deceased, which is comprised of five different classes of property:

a. all property which the deceased had the power to dispose by will, less debts; and
b. general powers of appointment exercisable by the deceased during their lifetime;[60]
c. *donatio mortis causa* and statutory nominations;
d. joint tenancies; and
e. *inter vivos* dispositions and contracts to pass property by will.

The former four categories are all assets not traditionally part of a deceased's estate. Categories (b), (c) and (d) deal with property to which a deceased was entitled immediately prior to death, but which pass otherwise than by will or intestacy. Category (e) enables a court to reopen transactions made during the deceased's lifetime. As different considerations apply in respect of each category, there are different processes by which they can be made available for financial provision.

Donatio mortis causa and statutory nominations

Donatio mortis causa and statutory nominations automatically fall into the net estate by the operation of ss 8(1) and 8(2). Statutory nominations are generally small sums held in accounts of friendly societies and trade unions.[61] Some public pension schemes also qualify as statutory nominations, provided that the deceased had the power to nominate a particular beneficiary. However, private sector pension schemes fall outside the ambit of s 8.[62]

Joint tenancies

Section 9 gives the court a discretion to treat joint tenancies as part of the net estate, to the extent that the court considers it to be just in all the circumstances of the case. It is a generous discretion. In *Kourgky v Lusher*, the court stressed that although an order can only be made for the purpose of facilitating financial provision, that does not unduly limit their broad powers under this provision.[63] In *Re Crawford* the court declined to endorse any particular approach to the exercise of its discretion, rather, it considered that s 9 itself provided adequate guidance.[64] The courts generally take into account factors such as the financial needs and resources of the parties and the function of the property in question, for instance, if it serves as a family home or as financial security for the

[60] Note that this provision has never been litigated.

[61] Sidney Ross *Inheritance Act Claims* (3rd ed, Sweet & Maxwell, London, 2011) at [3-007].

[62] See *Cairnes v Howard* (1983) 4 F.L.R. 225.

[63] *Kourgky v Lusher* [1983] 4 F.L.R. 65, (1982) 12 Fam Law 86 as per Wood J.

[64] *Re Crawford (Deceased)* [1983] 4 FLR 273.

deceased's family.[65] Despite this wide discretion, there is no evidence to suggest that the power is being used too liberally or is undermining certainty of title. To the contrary, the general thrust of the Law Commission's 2011 Consultation Paper was that the joint tenancy provisions were too restrictive, leading to the amendments discussed above.[66]

Inter vivos dispositions

Under these provisions, a person who has received property from the deceased during their lifetime, can be ordered to provide money or property for the purpose of making financial provision. However, the court must not make an order against the donee of such property unless satisfied that:[67]

a. the disposition was made less than six years before the date of the deceased's death;
b. the disposition was made with the intention of defeating a claim for financial provision;
c. full valuable consideration for the disposition was not given by the recipient; and
d. the order would facilitate the making of financial provision.

The test for whether a disposition was made with the requisite intention is set out in s 12(2):

> that condition shall be fulfilled if the court is of the opinion that, on the balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition was to prevent an order for financial provision or to reduce the amount of provision which might otherwise be granted.

When it first proposed these provisions in 1974, the Law Commission expressed concern that it might be difficult to prove the intention of a deceased person. However, it is now clear that such intention can be inferred from the circumstances of the disposition, including the value of the property in issue, the amount of consideration provided, and the relationship between the deceased and the donee.[68] For example, in *Dawkins v Judd* the deceased sold the family home to his daughter for £100 and subsequently willed her his entire estate, leaving his second wife with nothing.[69] Given these circumstances, the judge had no problem inferring that the disposition was made with the requisite intent.

In England, a test of intention also applies to contracts to pass property by will. If some consideration has been given under the contract, the test for intention is the same as discussed above. However, in cases where no valuable consideration has been given, intention is presumed.[70] However, to date there have not been any anti-avoidance cases on contracts to dispose of property by will.

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[65] Pearce, above n 45 at 118.

[66] England and Wales Law Commission *Intestacy and Family Provision Claims on Death* (EWLC CP191, 2011)

[67] Inheritance (Provision for Family and Dependants) Act 1975, s 10(2).

[68] See Pearce, above n 45 at 122.

[69] *Dawkins v Judd* [1986] 2 FLR 360.

[70] Inheritance (Provision for Family and Dependants) Act 1975, s 12(2).

Limitations and protections

One of the notable features of the English provisions is the lack of protection afforded to donees. While the amount that a donee can be ordered to pay is limited by reference to the value of the property they received,[71] there is no change of position or good faith defence available. Instead, this appears to be something that a court will take into consideration as a part of its overall discretion.

Conclusions

The English anti-avoidance provisions are simply drafted and enable recovery of *donationes*, statutory nominations, joint tenancies, *inter vivos* dispositions made within six years before the deceased's death and contracts to leave property by will. The mechanism of recovery is a personal order against the donee or recipient of the property. The various devices for transmitting property are separated into four categories in respect of which different jurisdictional requirements apply. Stricter requirements attach to joint tenancies and *inter vivos* dispositions because expectations and rights in respect of such property tend to be more well-settled. The provisions have not attracted criticism for undermining certainty of title, perhaps because the primary jurisdiction to make family provision orders is so narrow. Although the anti-avoidance provisions are not heavily utilised, they appear to be operating effectively.

[71] Inheritance (Provision for Family and Dependants) Act 1975, ss 10(3) and 10(4).

New South Wales

Australia is a federation of states and territories, each of which is a separate jurisdiction with its own succession laws. In New South Wales, the Succession Act 2006 (NSW) governs the law of wills, intestacy and testamentary claims.[72] The statutory formula for family provision is the 'proper maintenance, education and advancement in life' of eligible applicants.[73] In determining whether such provision has been made, the Australian courts generally have regard to both need and moral claim *in globo*.[74] Although there have been statements to the effect that the focus on a moral claim puts an unacceptable gloss on the words of the statute,[75] recent cases have confirmed that it remains directly relevant to the court's jurisdiction under the Act.[76] The result is that the basis of family provision claims in New South Wales is wider than it is in England, but narrower than in New Zealand as Australia does not consider the existence of a 'family bond' to be sufficient grounds for a family provision claim. Although the courts have taken an expansive view of what constitutes 'need' in cases concerning large estates, it is need, rather than the existence of a family bond that is the basis of claim.[77]

The Notional Estate: How it Came to Be

By the early 1950s, practitioners were beginning to notice an increase in the incidence of *inter vivos* avoidance in New South Wales.[78] Nevertheless, it was not until the 1970s, when the New South Wales Law Reform Commission reviewed the law of family protection, that the issue was considered seriously or in any detail. The product of that undertaking was the Family Provision Act 1982 (NSW), which contained the first iteration of anti-avoidance provisions, known as 'notional estate' provisions. These were then reviewed as a part of the Uniform Succession Project in the late 1990s, which was a joint effort by all Australian jurisdictions to consolidate the law of succession. New South Wales then incorporated an amended version of the 1982 provisions into the Succession Act 2006 (NSW). To date, no other Australian jurisdictions have enacted anti-avoidance measures,

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[72] Succession Act 2006 (NSW).

[73] Section 59(1)(c).

[74] John de Groot and Bruce Nickel *Family Provision in Australia* (Lexis Nexis Butterworths, Australia, 2007) at [2.4].

[75] *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134 at [158]; *Singer v Berghouse (No 2)* [1994] HCA 40, (1994) 123 ALR 481 at [487] per Mason CJ, Dean and McHugh JJ.

[76] See *Permanent Trustee Co Ltd v Fraser* (1995) 35 NSWLR 24 at [36] per Handley JA; *Vigolo v Bostin* [2005] HCA 11, (2005) 221 CLR 191.

[77] The leading case on large estates is *Re Buckland (No 2)* [1967] VR 3. See also *Re Anderson* (SC(Qld) Civil Div, Kelly J, OS No 414/81, 30 May 1984, unreported); *Mayfield v Lloyd-Williams* [2005] NSWCA 189; *Gregory v Hudson (No 2)* (1997) ACL Rep 395 NSW 34; *Picone v Kirkby* [2002] NSWSC 1233.

[78] Charles McLelland "Fifty Years of Equity in New South Wales - a Short Survey" (1951) 25 ALJ 344 at 355 McLelland suggests that the incidence of avoidance warrants legislative intervention.

despite the National Committee's recommendation that they should follow New South Wales' example in this respect.[79]

The Law Commission's proposals

When the New South Wales Law Reform Commission reviewed the law of family provision in the 1970s, one of their major goals was to ensure that the new legislation would be effective. It noted that the Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW) was easy to avoid, that most solicitors were well versed in estate planning to this effect and that sophisticated property dealings were much more common than they were in 1916.[80] The Commission focused on two main categories of property that were not then available for family provision: property that is disposed of *inter vivos* and property that passes by will substitute. Like in England, these categories were discussed separately as they have different policy implications.

The Commission was cautious about reopening *inter vivos* transactions, for fear of diminishing the utility and value of property and discouraging owners from developing or making improvements to their property.[81] It recognised that a delicate balancing act would be necessary. The Commission decided that the appropriate compromise between these two competing considerations was to limit the court's jurisdiction by imposing both a time limit and a requirement to prove that the disposition was made with the intention of defeating a claim. The Commission considered that a time limit of three years prior to the deceased's death would be sufficient.[82]

The Commission also turned its attention to property that passes by will substitute, meaning any property which the deceased could have withdrawn or reclaimed before they died. The Commission recommended that where inadequate consideration has been given for such property, it should be available to be designated as notional estate, irrespective of when the arrangement was made or whether it was designed to defeat a claim for family provision. The rationale was that because the property does not vest absolutely in another until the point of death, no well settled expectations will be disturbed if the property goes instead into the deceased's notional estate.[83] The Commission paid particular attention to joint tenancies, life insurance policies and superannuation schemes, all of which it considered should become a part of the notional estate. Although not all superannuation schemes technically operate as will-substitutes, the Commission recommended that they form a

[79] National Committee for Uniform Succession Laws *Family Provision* (QLRC MP28, 1997) at 93 [*The 1997 Miscellaneous Paper*].

[80] New South Wales Law Reform Commission *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSWLRC WP86, 1974) at [11.2] [*The 1974 Working Paper*].

[81] NSWLRC, *The 1974 Working Paper,* above n 80 at [11.3].

[82] NSWLRC, *The 1977 Miscellaneous Paper*, above n 79 at [2.22.9].

[83] NSWLRC, *The 1974 Working Paper*, above n 80 at [11.40].

part of the notional estate because Australia's compulsory superannuation schemes mean that the funds are often a major asset.[84]

The Commission wanted to implement its recommendations by automatically imposing a statutory trust over the notional estate, thereby relying on equitable tracing remedies to bring property back into the pool from which family provision orders could be made.[85] However, this proposal was highly unpopular with the Parliamentary Counsel drafters, who considered that approach to be cumbersome and overcomplicated.[86] They preferred to follow the structure of the Inheritance (Provision for Family and Dependants) Act 1975 (UK), which instead allowed the court to make orders against donees personally. This structure also provided greater discretion in designating which property will form a part of the notional estate, rather than having to identify the relevant property through the process of tracing. The Parliamentary Counsel's framework was preferred and remains intact in the Succession Act 2006 (NSW).[87]

Parliamentary proceedings

The Family Provision Bill of 1982 was not rigorously debated in Parliament, instead it was largely accepted as *fait accompli,* generating little discussion and essentially 'walking through' Parliament in one short month.[88] Thus, the Family Provision Act 1982 (NSW) was passed into law without controversy, despite the new notional estate provisions which significantly extended the reach of the Act by making further inroads into testamentary freedom.

Subsequent reform

The notional estate provisions in the Family Provision Act 1982 (NSW) were reviewed by the National Committee for Uniform Succession Laws in the late 1990s and early 2000s as part of the Uniform Succession Laws Project. The general consensus was that although the framework was complicated, it was comprehensive and effective, "like a full orchestral equity symphony – as such I would not complain that there are 'too many notes'".[89] There was anecdotal evidence that the notional estate was working well and the Committee recommended that a plain language version

[84] NSWLRC, *The 1977 Miscellaneous Paper,* above n 79 at [2.23.19]. See also Nicola Peart and Prue Vines "Will-Substitutes in New Zealand and Australia" in A Braun and A Rothel (eds) *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Hart Publishing, Oxford, 2016) at 14-15.

[85] NWSLRC, *The 1974 Working Paper*, above n 80 at [11.46]-[11.47].

[86] See Rosalind Croucher "Law Reform as Personalities, Politics and Pragmatics - *The Family Provision Act* 1982 (NSW): A Case Study" (2007) 11 Aust J Leg Hist 1 at 23-24.

[87] Sections 80(3) provides that a notional estate order can be made against property that is held by or on trust for the recipient or beneficiary of a relevant property transaction, whether or not the property was the subject of that transaction.

[88] See Croucher, above n 86 at 24-25.

[89] National Committee, *The 1997 Miscellaneous Paper,* above n 79 at 80, quoting WA Lee, consultant to the Queensland Law Reform Commission on the Uniform Succession Laws Project, by correspondence dated 2 September 1997.

of the provisions be incorporated into its model legislation, subject to a handful of technical amendments which will be discussed later in this paper.[90]

The Notional Estate: How it Works

The following is a summary of the notional estate provisions in the Succession Act 2006 (NSW), including the relevant case law on these sections. The provisions can be found in full in Appendix 2.

A court has the discretion to make a **notional estate order** designating certain property as part of the notional estate of a deceased.[91] That property may be then be used to satisfy a family provision order.[92] A notional estate order can be made in four different situations:

1. where the deceased's estate has been distributed;[93] or
2. where the deceased's estate has been affected by a **relevant property transaction;**[94] or
3. where the deceased's estate has been affected by a **subsequent relevant property transaction;**[95] or
4. where a **deceased's transferee's** estate has been distributed.[96]

A person enters into a **relevant property transaction** if the person does, directly or indirectly, or does not do, any act that results in property being:

a. held by another person; or
b. subject to a trust,

and full valuable consideration is not given to the person for doing or not doing the act.[97] This is a very broad definition designed to catch not only traditional distributions, but also nominations, contracts and omissions to bring property into the estate where such a power existed. It is to be given a large and liberal construction in line with the policy underpinning the Act; restrictions and limitations apply at later stages in the analysis.[98]

A court can make a notional estate order when a relevant property transaction took effect:[99]

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[90] National Committee, *The 1997 Miscellaneous Paper,* above n 79 at 87. The notional estate provisions (Part 3) of the model legislation in the National Committee for Uniform Succession Laws *Family Provision* (QLRC R58, 2004) [*The 2004 Report*] are very similar to the notional estate provisions in The Family Provision Act 1982 (NSW).

[91] Sections 79 and 80.

[92] Section 63(5).

[93] Section 79.

[94] Section 80.

[95] Section 81.

[96] Section 82.

[97] Section 75.

[98] *Kavalee v Burbridge* (1998) 43 NSWLR 42.

[99] Section 80(2).

a. within **three years** before the deceased death, provided it was entered into with the intention of denying or limiting a claim for family provision;
b. within **one year** before the deceased death, provided it was entered into at a time when the deceased had a moral obligation to make adequate provision for the applicant; and
c. **upon or after** the deceased's death.

The first category covers classical situations of avoidance, the second covers dispositions made shortly before death and the third covers both property that passes by will substitute as well as a range of omissions to bring property back into the estate, which are 'transactions' deemed to take effect on the deceased's death.[100] The bulk of the notional estate litigation is in relation to the third category and in particular the failure to sever joint tenancies, the failure to exercise a power of appointment in relation to a trust, and the nomination of superannuation recipients. The first two categories, relating to *inter vivos* transactions, have been surprisingly under-utilised.

General approach

There appears to be no consensus on whether to consider the validity of a family provision claim before deciding if there is property available to designate as notional estate. Many cases determine the outcome of the family provision claim first,[101] but others prefer to determine the possible size of the notional estate first, as the total size of the estate will have a bearing on whether or not a family provision order will be granted.[102]

Powers of appointment

Assets that were subject to an unexercised power of appointment can be brought into the notional estate by virtue of s 76(2)(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 to be entitled to do so, with the result that the property becomes held by another person or subject to a trust, or another person becomes, or continues to be, entitled to exercise the power [then that omission is a relevant property transaction].

The main point of contention is usually whether the deceased's 'power' was extensive enough to enable them to legitimately compel the disposition of property in a way that would have benefitted their estate.

The major case in this area is *Kavalee v Burbridge*, which concerned a Foundation established under the law of Liechtenstein.[103] The court found that prior to his death, the deceased had the legal ability to compel the Founder of the Foundation to distribute the Foundation's property to any beneficiary, including the deceased. Although the power of appointment belonged to the Founder,

[100] Section 77.

[101] For example, see *Chu v Ngar* [2015] NSWSC 1505 and *Woodleigh v Williams* [2016] NSWSC 979.

[102] This approach was taken in *Wardy v Salier* [2014] NSWSC 473 and *Carr v Douglas* [2016] NSWSC 854.

[103] *Kavalee v Burbridge*, above n 98.

the deceased had control over the power at law, which amounted to a 'power to appoint or dispose of property' within the meaning of the Family Provision Act 1982. Mason J said that 'power' in this context is not a 'technical term of law' and must be interpreted as 'something more than a traditional power of appointment'.[104] Thus, the omission to exercise the power was held to be a relevant property transaction which disadvantaged the deceased's estate and as such, the assets of the Foundation were liable to be designated as notional estate.

In *Finn v Fearne* the deceased was the settlor of a discretionary family trust and had the power to appoint and remove trustees.[105] However, this did not amount to a 'power to appoint or dispose of property' because unlike in *Kavalee*, the trustees were not under a legal duty to act in accordance with the deceased's instructions. Thus, because the deceased did not have the legal ability to reclaim the corpus of the trust, it was not able to designated as notional estate even though the deceased may have been able to reclaim the assets in practice.

Wardy v Salier was another case involving a discretionary family trust. The deceased was one of two directors of Linfield, which was the sole corporate trustee of the trust.[106] It was held that the deceased had the legal ability to appoint the corpus of the trust to himself, either with the consent of the other director or by removing the other director, which he was entitled to do as the major shareholder of Linfield.[107] In interpreting the provisions, the judge had regard to their purpose, which was to make provision for dependants in situations where property had been transferred into asset holding structures:[108]

> The placing of assets in a family discretionary trust with a corporate trustee controlled by the deceased is a paradigm case for the intended application of the notional estate provisions.

The judge then went on to designate $3.76M out of the total trust property of $11M as notional estate in order to make provision for the deceased's widow and two of his adult sons.

In New Zealand, the existence of such a power of appointment would be of no benefit to a family protection claimant. A deceased person cannot exercise such a power; it is worthless in their hands. Thus, in the absence of anti-avoidance provisions such a power could not conceivably be an asset of the deceased's estate.

Joint tenancies

The approach towards joint tenancies is relatively straightforward. The failure to sever a joint tenancy is a relevant property transaction that takes effect upon death. It is therefore available to be

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[104] At 451, per Mason J. This point was also emphasised in *Stern v Sekers; Sekers v Sekers* [2010] NSWSC 59.

[105] *Finn v Fearne* [1999] NSWSC 1041.

[106] *Wardy v Salier*, above n 102.

[107] At [117].

[108] At [141].

designated as notional estate provided that the surviving owner did not give full valuable consideration for the deceased's share.

The majority of cases involving joint tenancies are applications by children to recover assets that passed by survivorship to their deceased parent's spouse or *de facto* partner.[109] For example, in *Carr v Douglas* the deceased's daughter applied for provision out of her father's estate.[110] Her father's net estate was worth $51,615, but his most significant asset, a property valued at $1.2M had passed by survivorship to his de facto partner. The court designated the deceased's share in the house as notional estate, from which a legacy of $275,000 was awarded to his daughter.

In New Zealand, these kinds of claims could be satisfied if the personal representative of the deceased brings a claim for the division of relationship property under s 88(2) of the Property (Relationships) Act 1976. However, leave is granted only if 'serious injustice' would otherwise result and this remedy is not available in respect of joint tenants who are not the partner or spouse of the deceased. In New South Wales, matrimonial property legislation does not apply on death, so this is not an option.

Inter vivos dispositions

As mentioned earlier, these provisions have not received much attention. Possible reasons for this might be that outright gifts are much less common than gifts into trusts, which are primarily dealt with through the 'omission to exercise a power' route. Another reason might be that the three-year time limit is too restrictive. For example, in *Ramsay v Schiller* the deceased had transferred his house to his new wife for consideration of $1, but because the transaction took effect three years and 10 months prior to his death, it could not be used to make provision for his three daughters.[111] The only reason that case was litigated was because there was uncertainty as to when exactly the transaction took effect, so it is possible that there are more cases like it where litigation was not attempted because there was no prospect of success.

Wilson v Wright was a claim by two brothers for provision out of both their mother and their father's estates.[112] Their father, who died first, left all his assets to his wife, which then passed to their daughter in accordance with the mother's will. There was only about $22,000 in the mother's estate. However, the parents had also during their lifetime gifted to their daughter a property worth $300,000, which the sons argued should be designated as notional estate. The transaction had occurred within the three year time limit and after some deliberation the judge held that it had been made with the intention of defeating a claim for family provision. This was inferred from the

[109] See *Barker v Magee* [2001] NSWSC 563; *Kennedy v Jvancich* [2003] NSWSC 441; *Cameron v Hills* NSWSC BC8901539, 26 October 1989 and *Cetojevic v Cetojevic* [2007] NSWCA 33.

[110] *Carr v Douglas*, above n 102.

[111] *Ramsay v Schiller* [2012] NSWSC 596.

[112] *Wilson v Wright* NSWSC BC9202062, 25 February 1992.

deterioration of the relationship between the mother and her sons. In the Supreme Court Windeyer J dismissed the brothers' claim to their father's estate but this was reversed on appeal; the entire property was designated as notional estate, from which $92,000 was paid out to each son to satisfy their family provision claims.

In New Zealand, there is no way to access property that was disposed of during the deceased's lifetime. Thus the sons in *Wilson v Wright* would only have been able to claim against the $22,000 left in their mother's estate.

Subsequent transferees

Notional estate orders apply in respect of property that is held by, or on trust for, the recipient or beneficiary of a relevant property transaction, whether or not the property was the subject of that transaction.[113] This is the same as the position in England. However, in New South Wales, the concept of a 'subsequent' relevant property transaction casts the net even wider. It allows the court to follow multiple donees or transferees through a chain of subsequent relevant property transactions.[114] For example, if the deceased gifted some money to a transferee and the transferee then gifted any of their property to a second transferee, the court has the ability to make a notional estate order against the property of the second transferee. The provision is drafted in a way that allows the court to order against an infinite number of subsequent transferees, so long as there is a chain of relevant property transactions to follow. However, an order against subsequent transferees must be warranted by the existence of 'special circumstances'.[115]

Limitations and protections

In making a notional estate order, the court is required to consider both the importance of not interfering with reasonable expectations in relation to property and the substantial justice and merits involved in making the order. In *Petschelt v Petschelt* McLaughlin M noted that it is not clear as to whose reasonable expectations the provisions refer, but considered that it included not only the reasonable expectations of the current owner of the property, but also those of the deceased and possibly of the applicant.[116] This approach was affirmed in *Carr v Douglas*, where the deceased's expectations that his wife would only receive a one third share in his half of the property was taken into account.[117]

In determining what property should be designated as notional estate, the court must consider factors such as the nature and value of the property that was the subject of the relevant property transaction, the nature and value of any consideration given for the transaction, changes in the value

[113] Sections 80(2).

[114] Section 81.

[115] Section 81(1)(c).

[116] *Petschelt v Petschelt* [2002] NSWSC 706 at [68].

[117] *Carr v Douglas*, above n 102 at [77]-[78].

of the property and whether the property is the kind from which income could be derived.[118] In *Charnock v Handley* the court emphasised that the property that becomes notional estate does not have to be related in any way to the property that was originally the subject of the relevant property transaction. Hallen AsJ explained that the reason for this is because the provisions are designed to do 'practical justice' as between the persons entitled to benefit from the deceased's estate.[119]

However, it is important to note that donees and transferees do not have any protections that operate independently of the court's discretion; they have nothing beyond the right to have their reasonable expectations and the substantial justice and merits of the case taken into account. While such an assessment may well entail a change of circumstances defence, that is not necessarily so. Thus, recipients in New South Wales are in a potentially vulnerable situation and are completely at the mercy of what the courts consider to be just. It is possible that limiting the operation of the *inter vivos* provisions to those dispositions occurring within three years of the deceased's death was considered to be an adequate safeguard for recipients.

Conclusions

The New South Wales anti-avoidance provisions are more comprehensive than the English ones. As a result, they are also more complicated and have attracted criticism for being difficult to decipher. They are widely drafted, with a catch-all definition of 'relevant property transaction' which enables the provisions to apply to a greater variety of situations. Property is split into two broad classes: property that passes upon or after death and property that is disposed of *inter vivos*. Like in England, stricter jurisdictional requirements apply in respect of *inter vivos* transactions. It is perhaps for that reason that they have not generated much litigation. Most cases in New South Wales are claims in relation to powers of appointment, joint tenancies and superannuation.

Both jurisdictions provide good examples of how New Zealand might strengthen its own Family Protection Act. Many of the provisions discussed would help to prevent avoidance from occurring in New Zealand. The New South Wales example in particular would be useful for gaining access to trust property, which is a common will-substitute in both New Zealand and Australia. However, because no two jurisdictions are alike, it is not simply a matter of importing one set of provisions or another. Chapter 3 will focus on how to adapt the international examples to the New Zealand climate.

[118] Section 89.

[119] At [193], citing *Richardson v Rearden* [2006] NSWSC 1252.

Chapter III: Suggestions for Reform

After examining the landscapes in England and New South Wales, it is now even clearer that New Zealand's Family Protection Act is in need of fortification. Because our approach towards family protection orders is comparatively more generous than England or New South Wales, there is a stronger incentive to attempt to avoid the broad reach of the Act. Furthermore, our avoidance mechanisms are more attractive and easier to use than in England or New South Wales.

As the 'trust capital of the world', New Zealand has twice as many trusts per capita than Australia and thirteen times as many as the United Kingdom.[120] The removal of gift duty in 2011 has now made trusts an even more attractive option as they can be set up quickly, easily and cheaply. In contrast, trusts in New South Wales and England are subject to Capital Gains Tax, making them a less lucrative asset holding structure.[121] The same considerations apply in respect of outright gifts.

In New Zealand, the concern that trusts can be easily abused is clearly reflected in the trend towards trust busting. The Property (Relationships) Act 1976 and the Property Law Act 2007 contain trust busting provisions, and trust assets can be taken into account when assessing eligibility for residential care subsidies or liability for child support.[122] The courts have attacked trusts by invalidating 'alter ego' trusts,[123] by imposing constructive trusts upon express trusts[124] and by finding that a power of appointment amounts to 'property' for the purposes of the Property (Relationships) Act 1976.[125] The core of this attack is that because the settlor has failed to properly alienate the property, it should be treated as theirs for certain purposes, and particularly for the purpose of fulfilling social obligations. Given these developments, it is strange that no solution has yet been developed in the context of family protection obligations, beyond applying for the division of relationship property under s 88(2) of the Property (Relationships) Act 1976.

Yet in England and New South Wales, where family provision obligations are less onerous, trusts are less numerous, and property is more difficult to alienate, there are anti-avoidance measures in place. But in New Zealand, calls for reform have fallen on deaf ears.[126] Now, with the repeal of gift duty, the need to fortify the Family Protection Act is more pressing than ever.

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[120] Law Commission, above n 27 at [2.1]-[2.8].

[121] Peart and Vines, above n 84.

[122] Property (Relationships) Act 1976, s 44; Property Law Act 2007, ss 344-350; Child Support Act 1991; Social Security Act 1964, s 147A.

[123] W M Patterson "When is a Trust a Trust?" (paper presented at the Legal Research Foundation Seminar "A Modern Law of Trusts", Auckland, 28 August 2009) at 5.

[124] See *Clark v Clark* HC Auckland CIV-2009-404-005931, 26 November 2012 and *Murell v Hamilton* [2014] NZCA 377.

[125] *Clayton v Clayton* [2016] 1 NZLR 551; [2016] NZSC 29.

[126] See Hon D A M Graham "The Minister of Justice's opening speech" (1995) 25 VUWLR 3 at 7-8; Law Commission, above n 20 at 34.

Legislative intervention is warranted in order to uphold the integrity of the Act and to protect the interests of vulnerable family members. On the other hand, over-zealous interference may create more problems than it solves. Care must be taken to ensure that the appropriate balance is struck. But while it may be incredibly difficult to find a practicable and equitable answer to this problem, this is no reason to permit continued avoidance of the Act. England and New South Wales have managed to accomplish it without any overly dramatic consequences. The remainder of this chapter will draw on the international examples in an attempt to find a solution that is workable in the New Zealand climate. Particular attention will be paid to trusts, joint tenancies and *inter vivos* dispositions, as these are the most commonly utilised tools for avoidance in New Zealand.

The Law Commission's Proposal

In the late 1990s the Law Commission undertook the Succession Project, which was an attempt to amend and consolidate the law of testamentary claims in New Zealand into one Succession Act.[127] As noted in Chapter 1, the Commission was highly critical of the court's liberal approach towards the making of family provision claims, particularly in relation to adult children. It proposed that the court's jurisdiction to make family protection orders should be drastically narrowed. That approach was generally considered to be too harsh; this was likely the reason why Parliament did not consider any of the Commission's proposals for reform of the Family Protection Act. It is a shame that the anti-avoidance measures were overlooked by virtue of their inclusion in this poorly received bundle of proposals for reform. However, it is useful to outline the Commission's preferred approach to anti-avoidance, as it was not rejected for its lack of merit but merely because there was no agreement on the central issues up for reform.

The Law Commission recommended that the following 'non probate' assets be available to satisfy family provision claims:

- contracts to make or not revoke a will;
- superannuation and life insurance nominations;
- *donationes mortis causa;*
- revocable trusts settled by the deceased earlier in their lifetime;
- beneficial powers of appointment that were exercisable by the deceased in their lifetime; and
- joint tenancies.

The Commission also recommended that the court have powers in relation to *inter vivos* dispositions, where:

- at any point in their lifetime, the deceased made the disposition with the intention of prejudicing the interests of claimants; or

[127] See Law Commission, above n 20 and Law Commission *Succession Law: A Succcession (Adjustment) Act* (NZLC R39, 1997) .

- the deceased made the disposition within three years before their death and full valuable consideration was not given by the recipient or by any other person.

The Commission also recommended that the court should not be able to make orders against good faith purchasers for value without notice and should have the discretion to decline or reduce any order made against a person who received property in good faith and has subsequently altered their position.

General Features of the Anti-Avoidance Scheme

Having established that an anti-avoidance scheme should be implemented in New Zealand, it is first necessary to discern what its general features should be. This raises the following questions:

- On what grounds should anti-avoidance measures be available to a claimant?
- What mechanism should be used to identify the property that can be brought back into the estate?
- Is it possible to ensure that the anti-avoidance scheme is consistent with the death provisions under the Property (Relationships) Act?

Grounds for invoking anti-avoidance measures

I propose that the grounds for invoking anti-avoidance measures should be narrower than the grounds for making a family protection order. When the Law Commission suggested adding anti-avoidance provisions into our family protection legislation, it envisioned that they would attach to a much reduced discretion. It mentioned that if those suggestions were not implemented and the jurisdiction in respect of claims by adult children was preserved, their proposals in relation to avoidance would need to be revised as "there would not then seem to be the same compelling reasons to interfere with settled arrangements and transactions".[128] There is some logic in this; considering the risk of undermining certainty of title and diminishing the utility of property, interference should be as limited as is reasonably possible. The idea of interfering with settled property rights simply to provide emotional comfort to disinherited children is unlikely to sit well. On the other hand, if the principles expressed in *Banks v Goodfellow* remain relevant and disinheriting children still "shocks the common sentiments of mankind", then interference may indeed be justified on wider grounds.[129]

The wiser option would be to err on the side of caution. Although there have been no adverse consequences in England or New South Wales, that may be because both jurisdictions have considerably narrower grounds for provision claims. New Zealand should adopt similar grounds for invoking anti-avoidance measures, so that interfering with settled property rights does not become commonplace. Furthermore, this approach is in line with the Law Commission's proposals

[128] Law Commission, above n 20 at [345].

[129] *Banks v Goodfellow,* above n 4 at 563.

and with the original justifications behind the enactment of family protection legislation in New Zealand, which was to protect the economically vulnerable.

Although a dual standard for provision may be unwieldy and will take some time to fully develop, there are some precedents that could be adopted for this purpose. Firstly, the new standard could be modelled on the approach in *Re Hilton*, where the court had to consider what amounted to 'proper maintenance and support' for a widow who had already received property pursuant to a matrimonial property settlement.[130] In these circumstances, the threshold for provision was higher. Another option would be to borrow jurisprudence from the 'reasonable needs' assessment for spousal maintenance. Either of these possibilities provide a starting point for a narrower, needs based approach that is better suited to the application of anti-avoidance measures.

Property available for reclamation

The other matter of general application is deciding how to identify property that can be brought into the enlarged estate. New South Wales followed the English approach, which makes available any property held by the donee, recipient or beneficiary of a relevant disposition or omission. Although the New South Wales Law Reform Commission had originally proposed tracing as the appropriate method of identification, it was considered to be an overly complicated yet inadequate approach, as there would be no prospect of recovery once the relevant property had been dissipated. This is not a problem under the current approach, as property against which an order can be made need not be related in any way to the property that was originally disposed of by the deceased.[131] As explained in *Richardson v Rearden,* this broad discretion exists to ensure that 'practical justice' can be done as between the various claimants and beneficiaries of the deceased's estate.[132]

New Zealand should adopt the same approach to identifying property against which an order can be made, but subject to a change in position defence for recipients. Whereas in England and New South Wales there are protections available, they are wholly at the discretion of the court. I consider that more substantive protection is warranted in New Zealand, both because the New Zealand circumstances demand that there be no time limit on how far back the court can look into *inter vivos* transactions, which will be discussed below, and for consistency with similar powers in other areas of law. For example, there is a change in position defence available for recipients of dispositions made with the intent of defrauding creditors under the Property Law Act 2007 and for recipients of a distributed estate under the Administration Act 1969.[133] This prevents, or reduces, the liability of a person who received the property in good faith and has altered their position in the belief that the transaction was valid.

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[130] *Re Hilton* [1997] 2 NZLR 734.

[131] *Charnock v Handley* [2011] NSWSC 1408

[132] *Richardson v Rearden*, above n 119 at [23].

[133] Property Law Act 2007, s 349; Administration Act 1969, s 51.

I also recommend that property should be able to be reclaimed from a subsequent transferee, where they did not give full valuable consideration for the property. Like in New South Wales, this would enable the court to follow a 'chain' of transactions. Otherwise, it would still be relatively easy to structure dispositions in a way that avoids the reach of the Act, for example by passing property to a donee through a company, a trust, or a willing third party. Although this increases the potentially unsettling effect of these provisions, subsequent transferees would be protected by the change of position defence. Ultimately, the court has the discretion to decline to make an order in the circumstances of any particular case, which would likely include considering how closely a transferee is associated with the original transaction.

Interrelationship with the Property (Relationships) Act 1976

Unlike in England or New South Wales, matrimonial property legislation in New Zealand applies upon death. It is therefore important to consider how the Property (Relationships) Act 1976 will interact with anti-avoidance measures under the Family Protection Act, in order to prevent any inconsistencies.

At present, a surviving spouse or partner is entitled to apply for the division of relationship property upon death.[134] Should they elect this option, they forfeit their right to inherit in accordance with the deceased's will, unless the will makes specific provision for that eventuality.[135] On the other hand, there is no automatic right to apply for the division of relationship property on behalf of the estate. Instead, leave will only be granted under s 88(2) of the Property (Relationships) Act if 'serious injustice' would otherwise result. These claims are generally brought on behalf of children who wish to reclaim property that passed to their deceased's parent's spouse or partner by survivorship. In *Public Trust v Whyman*, the Public Trust was appointed administrator of the deceased's estate on the grounds that it was likely an application under s 88(2) would be successful considering the strength of the children's family provision claim.[136] However, in *Horne v Public Trustee* leave was refused because the claimants, as independent adult children of the deceased, had 'little or no chance of success'.[137]

In *Re Williams*, Hammond J held that the claimant daughter was entitled to provision amounting to $40,000, which could not be satisfied out of the estate as it stood.[138] However, he refused to grant leave under s 88(2) because he did not consider that serious injustice would result. It is possible that one of the factors operating in the background of this case was the injustice that would be caused to the surviving spouse if relationship property was divided. The deceased's half share in the relationship property was $410,000, ten times the amount of property required to satisfy the

[134] Property (Relationships) Act 1976, s 61.

[135] Section 76.

[136] *Public Trust v Whyman*, above n 25.

[137] *Horne v Public Trustee*, above n 26 at [28].

[138] *Re Williams* [2004] 2 NZLR 132.

daughter's provision claim. However, under s 88(2) there is no discretion to order against only a part of the relationship property. The deceased's half share would have been brought back into the estate and the wife would lose her entitlement to inherit in accordance with the will. The only way she could reclaim any of that property would have been to bring her own family provision claim. From this point of view, the outcome of *Re Williams* is more understandable.

However, the result was criticised by the Court of Appeal in *Public Trust v Whyman*, which considered that the daughter's inability to recover an award of $40,000 did amount to 'serious injustice':[139]

> In this context it is important to recognise that the 'serious injustice' contemplated by s 88(2) will always (or perhaps almost always) be to a person other than the surviving spouse or partner, as a surviving spouse or partner can issue proceedings without leave.

Thus, any adverse effects for the surviving spouse or partner are not a relevant consideration under s 88(2).

Because anti-avoidance provisions under the Family Protection Act would only permit recovery of assets to the extent that they are required to satisfy a family provision claim, it is easy to see how a surviving spouse or partner might be comparatively disadvantaged by the operation of s 88(2). Whereas other donees or recipients of property would be ordered to provide only such property as is required to satisfy a family provision claim, a spouse or partner might be required to provide the deceased's share of the relationship property, which as demonstrated in *Re Williams* is likely to be significantly more. If the whole share is not required to satisfy a claim, the remainder will not return to the spouse or partner, but will fall into the estate and be distributed in accordance with the will, under which the spouse or partner is no longer entitled to inherit.

Thus, there will clearly be an inconsistency between the proposed anti-avoidance provisions and s 88(2). In my view, the problem does not lie with the anti-avoidance provisions, but rather in the way that the Property (Relationships) Act applies upon death. It forces a surviving spouse or partner to choose between their relationship property rights and their right to inherit. However, these are two very different systems of entitlements which need not operate to the exclusion of each other. The inconsistency arises here when a surviving spouse or partner loses their right to inherit anything but their own property upon a successful application under s 88(2). However, when the anti-avoidance measures are invoked against another kinds of gratuitous transferees, we recognise that although their rights are subordinate to a family provision claim, their underlying right to inherit remains intact.

One option would be to abolish s 88(2) altogether so that the only way to reclaim relationship property would be through the anti-avoidance provisions. That way, a spouse or partner could not

[139] At [48].

be forced into completely surrendering their right to inherit. However, this option leaves those who are unable to claim under the Family Protection Act without a remedy.

The crux of the issue appears to be that, when it comes to the deceased's relationship property, there is no way to hear and determine claims as *between* a surviving spouse or partner versus family protection claimants versus other interested parties. This is because, in relation to the surviving spouse, section 88(2) operates in an 'all or nothing' manner. Thus, I believe the best solution would be to make the deceased's share of relationship property potentially available for division as between all claimants, including the surviving spouse or partner. Possibly, the surviving spouse or partner should even have the 'paramount' claim, as they do under the Family Protection Act. Section 88(2) could then be removed. This would mean that there would be consistency with the anti-avoidance scheme, as a surviving spouse or partner would be no worse off than other gratuitous transferees of the deceased's property.

This proposal does involve quite a major reform of the Property (Relationships) Act. Many of the issues involved are outside the scope of this paper and would require much more careful attention than I have given them here. However, these larger questions could be considered by the Law Commission in its current, wide ranging review of the Property (Relationships) Act.

How to Deal with Different Methods of Passing Property

It is a common theme that assets that were available to the deceased immediately before death should be treated differently from those which were disposed of during the deceased's lifetime. In both England and New South Wales, there are minimal jurisdictional limitations in respect of property passing upon or after the deceased's death. The fact that the property does not vest absolutely in another person until after the deceased's death means that the operation of these provisions will not undermine certainty of title. On the other hand, reopening transactions that occurred during the deceased's lifetime might have much greater ramifications and therefore the discretion should be more limited by a requirement to prove intent to defeat a claim and possibly by a time limit.

I agree and consider New Zealand should adopt a similar split approach, as was also suggested by the Law Commission. However, I consider that property not brought into the estate as the result of an omission should form a third category. In New South Wales, it is parcelled in with property that passes upon death. I believe that there are good reasons why this category should be treated differently. This will be explained in greater detail below.

A: Property that passes upon or after the death of the deceased

This category will include *donationes mortis causa*, superannuation schemes, life insurance policies and contracts to leave property by will. Property passing by these methods should be available for provision at the discretion of the court, without any further jurisdictional requirements.

Donationes mortis causa

A *donatio mortis causa* is a conditional gift made in contemplation of death. Property in the gift passes upon the death of the deceased, so it does not form part of the deceased's estate. Nor is it an *inter vivos* transaction. *Donationes* in New Zealand are already deemed to be part of the deceased's estate for the purposes of the Family Protection Act.[140] If anti-avoidance measures are inserted, this provision should be abolished and *donationes* should be dealt with in the same way as all other property that passes upon the death of the deceased.

Superannuation schemes and life insurance policies

Most life insurance policies and some superannuation schemes permit the holder to nominate a person to receive the fund upon their death. The money 'passes' upon the deceased's death, but is not a part of the estate because the deceased did not own the property. In New Zealand, KiwiSaver does not operate in this way because it directs the funds to be paid into the contributor's estate upon their death.[141] Nevertheless, there are numerous private superannuation schemes that operate in the traditional way and could therefore be used as an avoidance mechanism. Although superannuation entitlements are not as significant an asset as they are in Australia, there is no reason to exclude them from the ambit of the anti-avoidance provisions.

In New South Wales, both nominating and failing to nominate a beneficiary constitutes a 'relevant property transaction'. In contrast, the English provisions only catch 'statutory nominations', which has the curious result of making public superannuation schemes available for provision but not private ones. Money paid out under a life insurance policy is also not available to meet family provision claims. I propose that, in line with the New South Wales approach, both money paid out under a life insurance policy or a superannuation scheme should be available to meet family provision claims, provided the deceased had the power to nominate a beneficiary.

Contracts to leave property by will

Contracts to leave property by will are rare in New Zealand, probably because their efficacy as a will substitute is uncertain. It is a complicated issue involving priority disputes as between family protection claimants, testamentary promise claimants and those with a contractual claim.[142] The current position appears to be that where a contract has not been fulfilled, the contracting party has a legal claim for breach of contract which then supersedes the moral claim for family protection.[143] The contracting party is a creditor of the estate, but family protection orders are paid out only after the estate's liabilities have been discharged. However, where the contract is performed and property is left by will, the contracting party is merely another beneficiary of the estate and their entitlement

[140] Family Protection Act 1955, s 2(5).

[141] KiwiSaver Act 2006, Schedule 1, cl 9.

[142] The Law Reform (Testamentary Promises) Act 1949 enforces a deceased's promise to make testamentary provision in reward for services provided to them during their lifetime.

[143] *Schaefer v Schuhmann* [1972] AC 572; *McCormack v Foley* [1983] NZLR 57.

is susceptible to a family protection claim.[144] Further complicating the matter is recent case law that suggests that testamentary promises enjoy priority over a contractual claim, regardless of whether or not the contract was performed.[145] But family protection claims are on at least equal footing with testamentary promises.[146] The result is a paradoxical hierarchy of uncertainty.

I think there is a strong argument that even where a contract to leave property by will is unperformed and constitutes a liability of the estate, it should not automatically override the Family Protection Act. Where the contract was made for less than full valuable consideration, it is clear that the debt on the estate does not correspond to a benefit that was received. Thus, there is an element of 'unjustifiable bounty'.[147] I consider that property subject to a such a contract, whether performed or not, should be available for provision at the discretion of the court, so that the court can choose between the competing claims, taking into account any consideration provided under the contract. This is in line with the New South Wales approach and the Law Commission's recommendations.

B: Property not brought into the estate as a result of an omission

Property that was not brought into the estate because of an omission to exercise a power of appointment or to sever a joint tenancy is different from other property that passes upon or after the deceased's death. This is because such an omission does not tend change how property is held upon the death of the deceased, rather, the beneficiary of such an arrangement retains the same entitlement as they always had, albeit with the added benefit that the property can no longer be removed in favour of the deceased. Thus, expectations in relation to the property are likely to be stronger and longer standing.

Correspondingly, the justification for interfering with such arrangements is weaker. A higher standard should apply. This was recognised by the England and Wales Law Commission when they formulated their approach towards joint tenancies, which unlike other property passing upon or after the death of the deceased, is not automatically a part of the estate. While it would be too onerous to prove intent in respect of an omission, perhaps an obligation to consider the reasonable expectations of the parties, the relative claims of the donees or recipients, the nature of the property and whether it might have to be sold in order to realise a claim, would suffice.

Joint tenancies

Many family homes and bank accounts in New Zealand are held by joint tenancy. At this point in the paper it is well established that joint tenancies pass by survivorship and are therefore not

[144] *Re Gubbins* [1997] NZFLR 883; *Breur v Wright* [1982] 2 NZLR 77; W M Patterson *Law of Family Protection and Testamentary Promises* (LexisNexis NZ Wellington, 2013) at 97.
[145] *Bristow v Smith* [2013] NZHC 2866.
[146] *Dillon v Public Trustee* [1941] NZLR 557; *Hamilton v Hamilton* [2003] NZFLR 883.
[147] *McCormack v Foley* at 73.

available to meet family provision claims. At present, applying for the division of relationship property is the only way to access joint tenancies for the purpose of making family provision orders. We have seen how this works in both *Public Trust v Whyman* and *Horne v Public Trustee*. However, this remedy is only available if the joint tenant was a spouse or partner of the deceased. While the Australian cases demonstrate that most claims regarding joint tenancies are brought by children against a surviving spouse or partner, joint tenancies as between other family members or friends are not unheard of. Thus, anti-avoidance provisions are necessary to extend the remedy to all joint tenants, regardless of their relationship to the deceased. As discussed above, it is also beneficial to limit the order against a joint tenant to the amount required to satisfy a claim. Under this approach, the daughter's family provision entitlement in *Re Williams* could have been satisfied out of the property held on joint tenancy by her deceased father's wife, without needing to prove 'serious injustice'.

In New South Wales and in England, the deceased's share in property held by joint tenancy is available for provision. This approach has not generated any points of difficulty. I propose that, in line with both the international positions and the Law Commission's suggestions, the same approach to joint tenancies be adopted in New Zealand.

Powers of appointment

Reclaiming property that was the subject of an unexercised power of appointment is one possible way of recovering assets from a family trust. This method has the advantage of not being subject to a test of intention. It is also easy to identify the property against which an order could be made. The simplicity of this approach is probably why it has become the surest route for accessing trust assets in order to satisfy family provision claims in New South Wales.

In New Zealand, there is currently no way to access property that is the subject of a power of appointment for the purposes of the Family Protection Act. In *Clayton v Clayton*, a power of appointment was held to amount to 'property' within the meaning of the Property (Relationships) Act.[148] However, it unlikely that a similar argument would be successful under the Family Protection Act because the fact that Mr Clayton could still exercise the power was crucial to its characterisation as 'property'. A deceased person cannot exercise a power of appointment, thus there is little chance of success.

I propose that we adopt the New South Wales approach towards powers of appointment. The case law shows that the term has been generously interpreted and has expanded beyond traditional conceptions of what a power of appointment is. In New South Wales, any legal ability to compel an appointment is sufficient, even if it operates indirectly or requires multiple acts.[149] For example, in *Wardy v Salier* the deceased was one of two directors of the sole corporate trustee of a

[148] *Clayton v Clayton*, above n 125.

[149] *Kavalee v Burbridge*, above n 98 at 451; *Stern v Sekers; Sekers v Sekers* above n 104 at 59.

discretionary trust, which held a power of appointment over trust assets.[150] Because the deceased was also the major shareholder of the corporate trustee, he had the power to remove the other director, thus enabling him to appoint the whole of the property to himself without objection. The court held that this amounted to a 'power of appointment' within the meaning of the Act.

Compare the New Zealand case of *Penson v Forbes,* where the deceased settled most of her assets on trust in favour of all her five children, but later removed one of her daughters as a beneficiary.[151] The disinherited daughter was not well off and there was little in her mother's estate against which to make a claim. Her claim for breach of trust also failed. However, if the court could have ordered against property which was subject of the deceased's power of appointment, the daughter would have had a remedy. The deceased, Mrs Jack, was both settlor and trustee and had wide ranging powers to appoint trust property, to appoint and remove beneficiaries, including herself. There was also a clause permitting self-dealing. In totality, it is likely that this would amount to a power of appointment for the purpose of reclaiming property for family provision.

The New South Wales approach towards powers of appointment is consistent with the New Zealand trend towards trust busting, which prioritises substance over form and does not permit the façade of a trust to obscure where '*de facto* control' lies.[152] A wide formulation will be effective in bringing many family trusts within the ambit of the Family Protection Act, as often the settlor of these trusts is either a trustee or retains the power to appoint trust property or the power to appoint and remove trustees. However, it would not be difficult to work around this provision by requiring a minimum number of trustees. As the power would have to be exercised jointly, the deceased would not have the legal ability to reclaim the trust property, as in *Finn v Fearne.*[153] Therefore, while this approach is the simplest way to recover trust property, it is important to also adopt alternative methods, such as reopening *inter vivos* dispositions into a trust. Multiple lines of attack will provide the best protection for claimants.

C: Inter vivos dispositions

As already discussed, the abolition of gift duty has made it easier, faster and less expensive to dispose of property *inter vivos,* either outright or into a trust. Thus, this particular loophole needs to be closed with urgency. Of the three categories discussed in this paper, reopening *inter vivos* transactions will have the greatest impact on settled property rights and certainty of title. In an attempt to limit this impact, both England and New South Wales have strict jurisdictional requirements in respect of *inter vivos* transactions. Both require that the disposition was made with the intention of defeating a family provision claim. In England, the jurisdiction is limited to

[150] *Wardy v Salier*, above n 102.

[151] *Penson v Forbes*, above n 33.

[152] *Clayton v Clayton*, above n 125 at [75], [86] and [125].

[153] *Finn v Fearne*, above n 105.

dispositions made within six years before the deceased's death. In New South Wales, the limit is three years.

However, considering the prevalence of trusts in New Zealand and the fact that those trusts are often established early in life, imposing a jurisdictional time limit would severely handicap the efficacy of the anti-avoidance provisions in New Zealand. The low volume of litigation in respect to *inter vivos* dispositions in New South Wales and England also indicates that the time limits are too restrictive.[154] I propose that in New Zealand, the jurisdiction to reopen *inter vivos* dispositions should not be temporally limited. This is in line with s 44 and s 47 of the Property (Relationships) Act, which do not impose time limits in respect of transactions that can be set aside because they were made for the purpose of defeating a creditor's claim or a spouse or partner's rights to relationship property. The Law Commission in its proposed Succession (Amendment) Act also recognised this as being the appropriate option in the New Zealand climate.

The onus of proving that the deceased disposed of the property with the intention of defeating a family provision claim will serve as an adequate safeguard. The question is what such an 'intention' should entail. Because the international examples have not been widely litigated, no particular meaning or test for intention has emerged. Fortunately, there is existing jurisprudence in New Zealand that could be adopted for this purpose.

Under s 44 of the Property (Relationships) Act, the court can set aside any disposition of property that was made 'in order to' defeat a person's claim or rights in respect of relationship property. Similarly, under the Property Law Act 2007 the court can set aside dispositions made by a debtor 'with the intent' of prejudicing a creditor.[155] Although these powers appear in different contexts, the courts have adopted the same approach towards what amounts to 'intent' in both situations. There is therefore a strong argument that the same test should apply in a family protection context. The leading case is *Regal Castings v Lightbody*, which equates intention with foresight of consequences or foresight of risk.[156] Defeating a claim need not be the primary motivator, so long as it is foreseen and "the risk of cheating someone else is accepted, perhaps regretfully, as a necessary incident".[157]

The other option is to adopt a motive based test for intention, under which the deceased must have conscious desire to defeat a claim. That desire must be the aim or object of the relevant transaction. Pursuant to *Coles v Coles*, this was previously the prevailing test for intention under s 44 of the

[154] In *Ramsay v Schiller,* above n 111, the property was disposed 3 years and 10 months prior to the deceased's death, so was not available for provision.
[155] Section 348.
[156] *Regal Castings v Lightbody* [2009] 2 NZLR 433; [2008] NZSC 87.
[157] At [53], citing with approval *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 at 147.

Property (Relationships) Act.[158] However, it was later rejected for being too difficult to prove and superseded by the *Regal Castings* formulation.[159]

I consider that the lesser standard for intention should be adopted, particularly given the difficulties involved in proving the intention of a deceased person. It will also bring the new anti-avoidance provisions in line with the anti-avoidance measures already in place in other areas of New Zealand law.

Consider the case of *Beaven v Beaven*, where George and Ann Beaven transferred the family farm into trust in order to prevent any family protection claim in respect of the farm:[160]

> The evidence of all five is that the focus of these meetings was to devise a method by which the acquisition of the remaining two thirds of the land and farming business could be acquired by Ross [George and Ann's son], secure from challenge by his two brothers and two sisters after George and Ann died.

Although the case was actually about the division of relationship property, it is a useful example to use for the purposes of this paper. At present, there is no prospect that the farm could be used to satisfy a family protection claim. However, this transaction would be easily caught under the proposed provisions, as an *inter vivos* disposition made with the intention of defeating a provision claim. It seems that both a motive and knowledge based test for intention would be satisfied on these facts. The trust property could then be used to satisfy a family protection claim. Considering that the transaction occurred in 2000, and George and Ann were still alive at the time of proceedings in October 2014, it also illustrates the importance of not imposing a time limit in respect of these provisions.

It is also helpful to demonstrate how the situation in *Re Henderson* could have been resolved using the proposed provisions.[161] In that case, a deceased had settled a trust in favour of her son but not her daughter. Heron J stated:[162]

> I have not seen a family trust used in circumstances such as these. The only satisfactory inference to be drawn is that it was designed, if it could, to defeat family protection claims.

It is therefore probable that had the option been available, Heron J would have made a family provision order out of the trust assets, because they were disposed of with the intention of defeating a claim. In this case, because the deceased had not yet completed a debt forgiveness program, the debt owed by the trust was an asset of her estate which could be used to provide for the daughter. Heron J cancelled the deed of forgiveness in the deceased's will, but it was still not enough to fully satisfy the daughter's family provision entitlement.

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[158] *Coles v Coles* (1987) 4 NZFLR 621.

[159] *Ryan v Unkovich* [2010] 1 NZLR 434 at [33].

[160] *Beaven v Beaven,* above n 34 at [27].

[161] *Re Henderson*, above n 30.

[162] At 10.

Thus, allowing the court to order against the recipient of an *inter vivos* disposition will prevent many instances of avoidance under the Family Protection Act. Both dispositions into trust and outright gifts will be covered. Where the recipient of a disposition was a trustee, the claim will be limited to whatever assets remain held on trust, as it would not be equitable to order as against the trustee personally. If the trust assets have been distributed or resettled, it may still be possible to claim against the new trust assets or a beneficiary, if it can be proven that the distribution or resettlement was made with the intent of defeating a family protection claim. This is the benefit of including the subsequent transferee within the anti-avoidance scheme.

Conclusions: A balanced solution

This Chapter outlines the main features of what is hoped will be an effective, practicable and balanced anti-avoidance scheme for New Zealand. These proposals have drawn heavily on the international examples and in particular on the Succession Act 2006 (NSW) as a template for change. Certain features have been adapted to suit New Zealand's unique demands. In particular, the prevalence of trusts and joint tenancies, the death provisions in the Property (Relationships) Act and the repeal of gift duty have all influenced the overall shape of the scheme.

Under the proposed provisions, different mechanisms of passing property will be treated according to how invasive it would be to reclaim property in that category. It is hoped that in implementing different levels of sensitivity, the provisions will be effective but not overly unsettling. The scheme provides options for accessing trust property, severing joint tenancies and reclaiming *inter vivos* gifts and dispositions. In targeting these popular methods of conveying property, the scheme should be able to prevent most instances of avoidance in New Zealand. However, setting a higher jurisdictional bar for invoking the anti-avoidance measures should also ensure that interference does not become too commonplace. Finally, providing defences for donees and recipients of property should prevent fresh injustices from being created.

Conclusion

The Family Protection Act is in need of fortification. Significant gaps have begun to appear in its protective framework, leaving vulnerable family members with nowhere to go. This paper has set out to draw attention to these legislative loopholes by illustrating how will substitutes can be used to bypass the operation of the Act. It has also set out to establish that these loopholes ought to be closed in order to uphold the integrity of the Act and to protect vulnerable family members.

Drawing on international examples, this paper has endeavoured to find a practicable and balanced solution to avoidance. In doing so, care has been taken to ensure consistency with other areas of succession law. However, these proposals would be better considered as part of a comprehensive reform so that consistent and well thought-out solutions can be crafted. Short of a comprehensive consideration, in the interim, strengthening measures to better give effect to familial obligations should be a priority.

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(4) For the avoidance of doubt it is hereby declared that for the purposes of this section there may be a joint tenancy of a chose in action.

Powers of court in relation to transactions intended to defeat applications for financial provision

10 Dispositions intended to defeat applications for financial provision.

(1) Where an application is made to the court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2) below.

(2) Where on an application under subsection (1) above the court is satisfied—

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as "the donee") or by any other person, and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

(3) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any capital transfer tax borne by the donee in respect of that payment.

(4) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal thereof) after deducting therefrom any capital transfer tax borne by the donee in respect of the transfer of that property by the deceased.

(5) Where an application (in this subsection referred to as "the original application") is made for an order under subsection (2) above in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 2 of this Act the court is satisfied—

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition other than the disposition which is the subject of the original application, and

(b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person,

the court may exercise in relation to the person to whom or for the benefit of whom that other disposition was made the powers which the court would have had under subsection (2) above if the original application had been made in respect of that other disposition and the court had been satisifed as to the matters set out in paragraphs (a), (b) and (c) of that subsection; and where any application is made under this subsection, any reference in this section (except in subsection (2)(b)) to the donee shall include a reference to the person to whom or for the benefit of whom that other disposition was made.

(6) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(7) In this section "disposition" does not include—

(a) any provision in a will, any such nomination as is mentioned in section 8(1) of this Act or any donatio mortis causa, or

(b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

but, subject to these exceptions, includes any payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument or otherwise.

(8) The provisions of this section do not apply to any disposition made before the commencement of this Act.

11 Contracts to leave property by will.

(1) Where an application is made to a court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under this section.

(2) Where on an application under subsection (1) above the court is satisfied—

(a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and

(b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and

(c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as "the donee") or by any other person, and

(d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may make any one or more of the following orders, that is to say—

(i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order;

(ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, as the case may be, in accordance therewith or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.

(3) Notwithstanding anything in subsection (2) above, the court may exercise its powers thereunder in relation to any contract made by the deceased only to the extent that the court considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that contract, and for this purpose the court shall have regard to the value of property at the date of the hearing.

(4) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which the contract was made, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(5) Where an order has been made under subsection (2) above in relation to any contract, the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any adjustment made by the court under section 12(3) of this Act and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) The provisions of this section do not apply to a contract made before the commencement of this Act.

12 Provisions supplementary to ss. 10 and 11.

(1) Where the exercise of any of the powers conferred by section 10 or 11 of this Act is conditional on the court being satisfied that a disposition or contract was made by a deceased person with the intention of defeating an application for financial provision under this Act, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Act or to reduce the amount of the provision which might otherwise be granted by an order thereunder.

(2) Where an application is made under section 11 of this Act with respect to any contract made by the deceased and no valuable consideration was given or promised by any person for that contract then, notwithstanding anything in subsection (1) above, it shall be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision under this Act.

(3) Where the court makes an order under section 10 or 11 of this Act it may give such consequential directions as it thinks fit (including directions requiring the making

of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.

(4) Any power conferred on the court by the said section 10 or 11 to order the donee, in relation to any disposition or contract, to provide any sum of money or other property shall be exercisable in like manner in relation to the personal representative of the donee, and—

(a) any reference in section 10(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee, and

(b) any reference in section 10(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee;

but the court shall not have power under the said section 10 or 11 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative; and the personal representative shall not be liable for having distributed any such property before he has notice of the making of an application under the said section 10 or 11 on the ground that he ought to have taken into account the possibility that such an application would be made.

13 Provisions as to trustees in relation to ss. 10 and 11.

(1) Where an application is made for—

(a) an order under section 10 of this Act in respect of a disposition made by the deceased to any person as a trustee, or

(b) an order under section 11 of this Act in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

the powers of the court under the said section 10 or 11 to order that trustee to provide a sum of money or other property shall be subject to the following limitation (in addition, in a case of an application under section 10, to any provision regarding the deduction of capital transfer tax) namely, that the amount of any sum of money or the value of any property ordered to be provided—

(i) in the case of an application in respect of a disposition which consisted of the payment of money or an application in respect of the payment of money in accordance with a contract, shall not exceed the aggregate of so much of that money as is at the date of the order in the hands of the trustee and the value at that date of any property which represents that money or is derived therefrom and is at that date in the hands of the trustee;

(ii) in the case of an application in respect of a disposition which consisted of the transfer of property (other than a sum of money) or an application in respect of the transfer of property (other than a sum of money) in accordance with a contract, shall not exceed the aggregate of the value at the date of the order of so much of that property as is at that date in the hands of the trustee and the value at that date of any property which represents the first-mentioned property or is derived therefrom and is at that date in the hands of the trustee.

(2) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in pursuance of a contract to any person as a trustee, the trustee shall not be liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that such an application would be made.

(3) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in accordance with a contract to any person as a trustee, any reference in the said section 10 or 11 to the donee shall be construed as including a reference to the trustee or trustees for the time being of the trust in question and any reference in subsection (1) or (2) above to a trustee shall be construed in the same way.

Special provisions relating to cases of divorce, separation etc.

14 Provision as to cases where no financial relief was granted in divorce proceedings etc.

(1) Where, within twelve months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and—

(a) an application for a financial provision order under section 23 of the [M1]Matrimonial Causes Act 1973 or a property adjustment order under section 24 of that Act has not been made by the other party to that marriage, or

(b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased,

then, if an application for an order under section 2 of this Act is made by that other party, the court shall, notwithstanding anything in section 1 or section 3 of this Act, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be.

(2) This section shall not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing.

Annotations:

Marginal Citations

M1 1973 c. 18.

[F16 14A Provision as to cases where no financial relief was granted in proceedings for the dissolution etc. of a civil partnership

(1) Subsection (2) below applies where—

(a) a dissolution order, nullity order, separation order or presumption of death order has been made under Chapter 2 of Part 2 of the Civil Partnership Act 2004 in relation to a civil partnership,

(b) one of the civil partners dies within twelve months from the date on which the order is made, and

(c) either—

(i) an application for a financial provision order under Part 1 of Schedule 5 to that Act or a property adjustment order under Part 2 of that Schedule has not been made by the other civil partner, or

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