Family Provision Applications: What are you fighting about?

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Introduction

1. Family provision applications are a growing source of work for the courts in Queensland. There are a number of features of this jurisdiction which may need to be considered by practitioners and some are summarised in the bullet points set out below:[1]

- Growth in cases
  - Older clients
  - More blended families
  - Larger estates
  - Expansion of assets including compulsory superannuation and digital assets

- Who gets the assets?
  - Admissibility of extrinsic evidence under the *Succession Act 1981* (Qld)
  - Statutory onus regarding power of attorney transactions
  - Constructive trusts and contracts to make wills (*Barns v Barns*[2])
  - Binding death nominations

- Superannuation
  - Validity of binding death benefit nominations (*Donovan v Donovan*[3]; *Munro v Munro*[4])
  - Validity of amendments to trust instrument and appointment of trustees (*Perry v Nicholson*[5])
  - Taxation implications; SMSFD 2008/3
  - Potential for personal claim against legal personal representative (*McIntosh v McIntosh*[6]; see also *Brine v Carter*[7])

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1 This paper is intended only to provide a summary and general overview on matters of interest in the above area. It is not intended to, nor does it, constitute legal advice.

2 (2003) 214 CLR 169.

3 [2009] QSC 26.

4 [2015] QSC 61.

5 [2017] QSC 163.

6 [2014] QSC 99, a case concerning an administrator as contrasted to a named executor.

7 [2015] SASC 205 particularly the observations at [142] to [146] where Justice Blue considered that a named executor did not come within the authorisation exception in respect of the relevant superannuation interest by virtue of being appointed to that role by the testator

- Range of applicants
    - Spouses
    - Defacto spouses (*Spencer v Burton*[8])
    - Children
    - Stepchildren (*Re John*[9])
    - Dependants

- Changed processes
    - More court supervision
    - Practice directions
    - Seeking judicial advice and directions
    - Mediations

- Entitlement to relief and disentitling conduct

- Extension of time (*Mortimer v Lusink*[10])

- Applicants under a legal disability (*Abrahams (By His Litigation Guardian Public Trustee of Queensland) v Abrahams*[11])

- Sanction orders (*Abrahams (By His Litigation Guardian Public Trustee of Queensland) v Abrahams*[12])

- Executors and estates
    - Distribution of assets

2. Before legislative intervention occurred, a testator was at liberty to dispose of his or her estate in an unconfined manner.[13]
3. *Banks v Goodfellow*[14] discussed the concepts of testamentary freedom and that a will-maker was free to do as he or she wished. However, it was also noted that if a testator had not followed the *"instincts, affections, and common sentiments of mankind*", then that may provide additional evidence of absence of testamentary capacity.[15]

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8 [2016] 2 Qd R 215.
9 [2000] 2 Qd R 322. Note the legislative changes later made.
10 [2016] QSC 119.
11 [2015] 13 ASTLR 406; [2015] QCA 286 at [26] and [45].
12 [2015] 13 ASTLR 406; [2015] QCA 286 at [35].
13 There was an exception in the case of dower, discussed by Rosalind Atkinson *in New Zealand's Testator's Family Maintenance Act of 1900*, Otago Law Review (1990) Vol 7 No 2 at pp 202-3.
14 (1870) LR 5 QB 549.
15 At 570.

4. The public policy interest in legislating arose out of the heartlessness of male testators who were unconcerned to ensure that their widows were provided for out of their estates.[16]

5. The legislation which changed that position did so by giving effect to a moral duty owed by will-makers to their vulnerable dependants, such as spouses and children. New Zealand lead the field with the enactment of the *Testator's Family Maintenance Act 1900* (NZ).

6. In Queensland, the family provision laws were introduced using New Zealand's model, and the *Testator's Family Maintenance Act 1914* (Qld) was assented to on 17 December 1914.

7. The jurisdiction of the Court is predicated upon the failure of the deceased to provide "*for the proper maintenance and support*" of an eligible applicant. In many cases claims represent disappointed expectations and perceptions of being treated "*unfairly*". In a very real sense that is what an applicant for relief and the beneficiaries may be fighting about. This paper focusses on the assets that are amenable to the Court's power to make an order.

8. The identity of the individuals who are eligible to call in aid the courts' jurisdiction[17] is often the subject of fertile disputes as can be seen in litigation involving the status of a de facto, the position of stepchildren, and the position of dependents.[18]

9. In approaching the operation of the statutory jurisdiction it is important to bear in mind that the legislation is "*remedial in character and therefore to be construed so as to give the most complete remedy which its phraseology permitted*" per Rich J in *Holmes v Permanent Trustee Co of NSW Ltd.*[19]

10. The various States' Acts[20] have been interpreted by the High Court so as to assist uniformity of application in *Coates v National Trustees Executors & Agency Co Ltd.*[21] In that case, Dixon CJ said:

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16 *Shaefer v Schuhmann* [1972] A.C. 572, 584-585.

17 See s.40.

18 See, eg. the cases noted in paragraph 1 of this paper.

19 (1932) 47 CLR 113 at 119 (Evatt and McTiernan JJ concurring). Cited by Gummow and Hayne JJ in *Barns v Barns* (2003) 214 CLR 169 at [44]; see also Kirby J at [124]; See also Bell J in *Whitehead v State Trustees Ltd* [2011] VSC 424 at [33] (decision affirmed sub nom *State Trustees Ltd v Bedford* [2012] VSCA 274).

20 The *Testator's Family Maintenance Act 1912* (Tas), *Administration and Probate Act 1915* (Vic), *Testator's Maintenance and Guardianship of Infants Act 1916* (NSW), *Testator's Family Management Act 1918* (SA), *Guardianship of Infants Act 1920* (WA), *Administration and Probate Ordinance 1929* (Act), *Testator's Family Maintenance Order 1929* (NT).

21 (1956) 95 CLR 494.

> "The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided."[22]

11. There are differences in wording between the Acts of some of the States and it is not altogether clear that ordinary canons of statutory construction would lead to the result that "*refined distinctions*" can be avoided.

The *Succession Act 1981* (Qld)

12. In Queensland, the Court's power is in ss 40 to 44 of the *Succession Act 1981*.

13. Section 41(1) is in the following terms:

> **41 Estate of deceased person liable for maintenance**
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> (1) If any person (the ***deceased person***) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependent.

14. The jurisdiction of the court to order provision can only be exercised over the estate of the testator at the time the order is made: see *Easterbrook v Young*:[23]

> [t]he making of an application does not stay the administration of the estate and, in some cases at least, administration must progress in order to expose the available value of the assets left by the deceased, whether by realization of property or by resolution of disputed debts or claims. The power to make provision out of the estate of the testator is referable to a state of affairs at the time the order is made.

15. In the same case it was held:[24]

> "…The evident purpose of the [legislation] is to place the assets of the deceased passing to the personal representative at the disposal of the court in the provision of maintenance for the nominated dependants of the deceased."

16. The way that orders made under s.41 of the Succession Act 1981 operate was described in *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 312-313 as follows:

> Orders made under the statute have the effect "not to change the benefits to be expected from the right to due administration arising pursuant to the will, but to superimpose upon the duty of due administration a judicial order made pursuant to statute. In other words, a new and independent obligation is created which has an impact upon the way in which the executor administers the estate pursuant to his or her existing duty, by compelling him or her to comply with the terms of the court's order. Each beneficiary's right to due administration is made subject to the terms of the order in the sense that the order

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22 Ibid at 507.
23 (1977) 136 CLR 308 at 317.
24 *Easterbrook v Young* (1977) 136 CLR 308 at 315.

> governs the executor's actions to the exclusion of any inconsistent direction contained in or derived from the will."

17. The expression "*proper maintenance and support*" used in s 41 of the Queensland Act differs from the expression which is used in the current New South Wales analogue.[25] There the "*family provision order*" that the Court is empowered to make is intended to provide "*for the maintenance, education or advancement in life*" of an eligible applicant.[26] Given the extensive case law which has developed in New South Wales and elsewhere as to the extent of the concept "*advancement in life*",[27] it seems unlikely that the two provisions have exactly the same meaning. Having noted that, conventionally at least, the urging of Dixon CJ set out above has generally been applied.[28]

The UK Position

18. In England, the legislative response came in 1975 in the *Inheritance (Provision for Family Independents) Act 1975*.

19. Interestingly, in the UK Act, a distinction is made as to the financial provision which can be ordered in favour of a child, as compared to a spouse or civil partner. A child is limited to receiving such financial provision as it would be reasonable to receive "*for his maintenance*".[29]

20. In the case of a spouse or civil partner, the provision which can be made is such amount as would be "*reasonable in all the circumstances of the case for a husband or wife [or civil partner] to receive, whether or not that provision is required for his or her maintenance*".[30]

21. That legislation was recently considered by the UK Court of Appeal in *Ilott v Mitson.*[31] Lady Justice Arden delivered the leading judgment in which Ryder LJ and Sir Colin Rimer each agreed. One point which emerges is that the standard of living which an applicant had earlier experienced is not a significant consideration.

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25 *Succession Act* 2006 (NSW).
26 Sections 3 and 59.
27 See the cases and texts collected by Hellen J in *Baird v Harris* [2015] NSWSC 803 at [70]-[102].
28 See e.g. *Darveniza (dec'd)* [2014] QSC 37 at [14]-[16].
29 *Inheritance (Provision for Family Independents) Act 1975* (UK) s 1(2)(b).
30 Ibid s 1(2)(a), (aa).
31 [2015] EWCA Civ 797.

22. This same consideration emerges very clearly in the approach to s 41(1) of the *Succession Act* (Qld).[32]

Disentitling Conduct

23. Section 41(2) of the Act provides as follows:

> **41 Estate of deceased person liable for maintenance**
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> …
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> (2) The court may –
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> (a) attach such conditions to the order as it thinks fit; or
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> (b) if it thinks fit – by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or
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> (c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

24. Attention must be given to the conduct which may be regarded as disentitling a person to the benefit of an order. The principles as to such conduct have been considered in a number of contexts. It is clear that the onus of proving disentitling conduct rests upon the person alleging it.[33]

25. In *Delacour v Waddington*[34] it was held by Dixon CJ, Kitto and Taylor JJ:

> No doubt the wife's conduct in such a case may well constitute a material factor in considering whether an order should be made, but her conduct should not be regarded as disentitling her to an order unless it has been of such a character as to induce a court to hold that, in the circumstances, there was no moral obligation upon the deceased to make any testamentary provision for her. Indeed unless this be so, it is difficult to understand the basis upon which a husband or adult child may claim relief on the ground that they have been left, in the words of s 3, without adequate provision for their proper maintenance or advancement in life.

26. In *Lathwell As Executrix of the Estate of Gilbert Thorley Lathwell (Dec) v Lathwell*,[35] Pullin J, with whose reasons Buss JA and Le Miere AJA agreed, held:

> Conduct amounting to disentitling conduct must refer to character or conduct of such a nature as to entitle the court to say that the applicant has forfeited or abandoned his or her moral claims on the testator.

27. In *Daniels v Hall (as administrator of the estate of Daniels)*[36] E M Heenan J did not regard wasteful conduct as amounting to disentitling conduct.

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32 See *Darveniza (dec'd)* [2014] QSC 37 at [74].
33 See e.g. *In Re Paulin* [1950] VLR 462 at 473.
34 (1953) 89 CLR 117 at 127.
35 [2008] WASCA 256.
36 [2014] WASC 152.

28. While a number of older decisions have held that chronic drunkenness, desertion and adultery amount to disentitling conduct, the current position is quite different.

29. Hallen J in *Baird v Harris*[37] discussed the nature of the Court's jurisdiction in a manner which gives some content to the concept of disentitling conduct, as follows:

> **[102]** Bryson J noted, in *Gorton v Parks* (1989) 17 NSWLR 1, at 6, that it is not appropriate to endeavour to achieve "an overall fair" disposition of the deceased's estate. It is not part of the court's function to achieve some kind of equity between the various claimants. The court's role is not to reward an applicant, or to distribute the deceased's estate according to notions of fairness or equity. Nor is the purpose of the jurisdiction conferred by the Act to correct the hurt feelings, or sense of wrong, felt by an applicant. Rather, the court's role is of a specific type and goes no further than the making of "adequate" provision in all the circumstances for the "proper" maintenance, education and advancement in life of an applicant.
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> **[103]** The court's discretion is not untrammelled, or to be exercised according to idiosyncratic notions of what is thought to be fair, or in such a way as to transgress, unnecessarily, upon the deceased's freedom of testation: *Pontifical Society for the Propagation of the Faith v Scales* [1962] HCA 19 ; (1962) 107 CLR 9 ; (1962) ALR 775 ; (1962) 36 ALJR 1, at 19 (Dixon CJ); *McKenzie v Topp* [2004] VSC 90, at [63].
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> **[104]** As Pembroke J said in *Wilcox v Wilcox* [2012] NSWSC 1138 at [23]:
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> "The court does not simply ride roughshod over the testator's intentions. The court's power to make an award is limited. The purpose of the discretionary power under Section 59(1) is to redress circumstances where "adequate provision" has not been made for the "proper maintenance, education or advancement in life" of the claimant. The adjectives "adequate" and "proper" are words of circumspection. They imply no more than is necessary. I should ensure that "adequate provision", rather than generous provision, is made, having regard to the burden on the defendant.

30. The decisions referred to above approach this question in terms of conduct entitling the Court to conclude that the applicant has abandoned or forfeited a moral claim on the testator. The concept of a moral claim harks back to the essential underpinning of the legislation discussed earlier in this paper. At the same time, there is some tension with the rather more prosaic formulation of the entitlement of an applicant for "*proper maintenance and support*". Thus, a gambler or drug-addict who has repeatedly approached a parent for support and receives such support may be thought to be in the category of a person who might exhaust parental goodwill or moral responsibility by repeatedly breaching promises not to gamble or take drugs of addiction again.

31. However, the difficulty with that is that these activities are conventionally now regarded as a manifestation of the underlying addiction, being part of the congenital

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[37] [2015] NSWSC 803.

weakness of the applicant. An illustration can be seen in *Pizzino v Pizzino*[38] where an applicant with gambling and substance-abuse problems was awarded a very substantial part of his mother's estate. It is also difficult to obtain a court imposed protective trust over such awards where such applicants are involved.[39]

32. Where business decisions go bad, or an applicant is simply hopeless at conducting business, and at the date of the testator's death, is impecunious, *prima facie*, that person will be likely to make a successful application. However, if that person has made false representations to the testator which the testator has acted on to his or her detriment and to the detriment of third parties, before becoming impecunious, then it is at least arguable that the representations may amount to disentitling conduct.

33. Where a testator is faced with competing moral claims and, while alive, reaches an accommodation with one of those claimants and then proceeds to deal with his or her estate on the basis of that agreement on the express representation of the claimant that that is what should happen, then there would appear to be a great deal of force for the view that the testator has discharged all moral obligations to that claimant. The position may occur in the context of the death of one of two parents where there isn't enough to go around for all of the children and, by a family agreement, one child is to receive the majority component of the deceased parent's estate, and the others are to receive the estate of the remaining spouse on his or her death.

Compromises

34. It is also important to note that the right of an applicant to seek provision out of a deceased's estate cannot be contracted away in advance of the death of the deceased, or after the death of the deceased, unless the court gives its permission. That emerges from s 41(11) of the *Succession Act 1981* which provides as follows:

> **41 Estate of deceased person liable for maintenance**
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> …
>
> (11) No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the court.

35. The precursor of that section, s 3(1) of the 1914 Act, which was in identical terms, was construed by the Full Court of the Supreme Court of Queensland in 1943 in the

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38 [2010] QSC 35.

39 See e.g. *Stewart v Stewart* [2015] QSC 38 at [43] – [46].

decision of *Re Hatte*.[40] In that case, which concerned inter alia, an issue as to the making of a compromise of a claim for provision, each of the members of the Full Court delivered separate reasons. Macrossan SPJ held that:

> Whatever the agreement was, it cannot preclude the respondent from applying to the court to make an order in his favour under the *Testator's Family Maintenance Act 1914*, nor can it oust the jurisdiction of the court to make such an order.[41]

His Honour then went on to discuss s 3(10) of that Act.

36. E.A. Douglas J held:[42]

> The appellants first relied on the compromise of the applicant's claim. I think, however, that as an assignment of the applicant's right made before an order is granted is of no force, validity or effect (s 3(10), the executors could not purchase such right and obtain an assignment thereof. By the compromise this is what they have in effect done. In my opinion, such an agreement cannot be enforced. I agree with the decision in *Hooker v Guardian Trust and Executors Company of New Zealand* ([1927] N.Z. Gaz. L.R. 536).

37. Philp J discussed the point as follows:[43]

> I have said nothing as to the evidence regarding the settlement alleged to have been arrived at. I think we should follow and extend the principles set out in *Parish v Parish* ([1923] N.Z. Gaz. L.R. 712) and *Hooker v Guardian Trust and Executors Company of New Zealand* ([1927] N.Z. Gaz. L.R. 536), and having come to the conclusion that the policy of the law is to secure to an applicant the abitrament of the court despite any settlement he may attempt to make, I think we should hold that the judge in this case was entitled to give little weight as against Frederick to the *quantum* for which he was prepared to settle.

38. It is clear, that a compromise was considered to be within the section as it then stood and, the Court of Appeal has since confirmed the requirement for court involvement.[44]

39. The view of the plurality in *Lieberman v Morris*[45] as to the underlying public policy was that proper maintenance, education or advancement of the family should not become a charge on the community where a deceased was able to provide for such persons. Consistently with that policy private arrangements with eligible applicants are not enforceable and executors' duties mandate, for practical purposes that compromises be approved.

Contracts to Make a Will, Estoppel, Unconscionable Conduct and Constructive Trusts

40. The courts have not acted consistently in considering the application of the law relating to a contract to make a will and the operation of family provision legislation. Initially,

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40 (1943) St R Qd 1.
41 At p 13.
42 At p 21.
43 At p 25.
44 See *Abrahams (By His Litigation Guardian Public Trustee of Queensland) v Abrahams* [2015] 13 ASTLR 406; [2015] QCA 286 at [30].
45 (1994) 69 CLR 69.

in *Dillon v Public Trustee of New Zealand*[46] the Privy Council held, in a case on appeal from New Zealand, that the circumstance that the provisions in a will were in fulfilment of a contract did not restrict the power of the court to redistribute the estate of a testator under statute. Viscount Simon held that the existence of such a contract might be taken into account in considering what, if any, redistribution of the estate was just but it could not override the court's discretionary power to make such a redistribution. He held that the contract took effect subject to the potential operation of the *Family Protection Act*. In an appeal to the Privy Council from New South Wales of *Schaefer v Schuhmann*[47] the Privy Council declined to follow *Dillon* and held that the contract should be enforced in a manner which took those assets outside the ambit of the family provision Act. Lord Simon of Glaisdale dissented.

41. The issue was further considered by the High Court in *Barns v Barns*.[48] In that case Gleeson CJ and Gummow, Kirby and Hayne JJ applied the dissenting judgment of Lord Simon of Glaisdale in *Schaefer v Schuhmann* and refused to follow the majority decision thereby reinstating the authority of *Dillon*.

42. Gleeson CJ observed:[49]

> [18] Reference has already been made to an inherent weakness in the scheme of the Act, and its earlier legislative counterparts, as an instrument to deal with the mischief at which it is aimed. Provision under the Act can only be made out of the assets of which a person dies possessed. If property is not beneficially owned by a deceased, then (subject to later legislative amendments in some jurisdictions) it does not form part of the deceased's estate, and cannot be made a source of provision for a claimant under the Act. Furthermore, contractual obligations undertaken by a person prior to death, which bind the legal personal representative in the administration of the estate, may diminish the available estate out of which provision may be made. These considerations give rise to an issue which has divided judicial opinion from the earliest days of such legislation. It has never been the subject of authoritative decision by this court, but it has been the subject of inconsistent decisions of other courts, including inconsistent decisions of the Privy Council. The issue is this: when a testamentary provision is made pursuant to a legal obligation on the part of the testator, is the property the subject of that provision available as part of the estate which may be redistributed under the Act? The cases to which reference will be made below illustrate the variety of circumstances in which such an issue might arise.

43. His Honour went on to hold:[50]

> [32] Ultimately, it is the meaning and effect of the Act that must determine the outcome. Whether the question is approached on a purely textual basis, or by

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46 [1941] AC 294.
47 [1972] AC 572.
48 (2003) 214 CLR 169.
49 At [18].
50 At [32].

reference to a purposive construction, the result appears to me to be the same. In terms of s 7 of the Act, there is no justification for a conclusion that the deceased left no estate out of which provision could be made for the appellant if a court saw fit. At the time of his death the deceased was the legal and beneficial owner of his assets. They passed to his legal personal representative, the first respondent, and in the course of due administration of the estate they will, in accordance with the intention expressed in the deed, devolve by will upon the second respondent. Furthermore, the estate is under no liability to the second respondent; the deceased performed his obligations under the deed and, in consequence of that performance, his estate devolves upon the second respondent.

[33] The answer to the argument that this takes no account of the rights of the second respondent under the deed, and treats her as a mere beneficiary, is that the nature of the rights she obtained under the deed was such that they were always liable to be affected by the potential operation of the Act. Because the Act imposed a restriction on freedom of testamentary disposition, a promise to make a testamentary disposition was subject to the potential operation of that legislative restriction. The effect of the legislation could have been avoided by a disposition inter vivos so that the deceased died with no estate; that is inherent in the scheme of the legislation. But the effect of the legislative restriction on freedom of testamentary disposition cannot be avoided by a promise to make a certain disposition.

44. Gummow and Hayne JJ, in a joint judgment, endorsed[51] the remarks of Dixon CJ in *Coates v National Trustees, Executors and Agency Co Ltd* cited earlier in this paper. They went on as follows:

[44] Earlier, in Holmes v Permanent Trustee Co of New South Wales Ltd, Rich J (with the concurrence of Evatt J and McTiernan J) observed of the Testator's Family Maintenance Ordinance 1929 (NT) that this legislation was remedial in character and therefore to be construed so as to give the most complete remedy which its phraseology permitted; the court should not be alert in placing a restricted construction upon the terms of such a law. Thereafter, in Worladge v Doddridge, a case under the Tasmanian statute, Williams and Fullagar JJ referred to what had been said by Rich J in Holmes and added:

The provision can be made out of any part of the testamentary estate so that the whole of the estate corpus or income is available for the purposes of the Act. The jurisdiction is conferred in very wide terms and no court or judge would be justified in attempting to define it otherwise than in accordance with the ordinary natural meaning of the words of the section.

These statements in this court provide the starting point for consideration of the issues of statutory construction upon which these appeals turn.

45. Their Honours went on as follows:

[69] Undoubtedly the terms of the particular extra-testamentary obligation are vital to its legal character and operation. The effect of an undertaking such as that by Mr Barns in the deed was considered in Palmer v Bank of New South Wales. There, Barwick CJ (with whose judgment Gibbs J, Stephen J and Mason J agreed) emphasised that a covenant in this form imposes no obligation to keep until death the assets owned at the time of the exhibition of the will or to keep any particular assets during the remainder of life. A line of

[51] At [43].

cases commencing in 1798 with Jones v Martin was accepted in Palmer as supplying a caveat to these propositions. Of these cases, Barwick CJ said:

> A transaction by which the promisor has placed his property in the name of another and for the benefit of that other on his death, whilst really retaining it for himself in his lifetime, is for the purpose in hand a testamentary transaction which would be in breach of a promise to leave by will.

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[75] Undoubtedly numerous issues of law still arise in cases where parties seek a remedy in respect of failure to perform an obligation to make a will in a particular form and leave it unrevoked, whether with a specific bequest or devise or otherwise. That which is propounded as a "contract" may, on consideration of the evidence, be no more than a family understanding or representation of intention which lacks binding effect. Wells v Matthews is an example. If there otherwise be a contract, nevertheless its terms may be too uncertain. In Horton v Jones, Starke J and Evatt and McTiernan JJ held too indefinite an oral promise by a testator that "if you will promise to make a home for me and look after me for the rest of my life, I will leave you my fortune". In the same case, Rich and Dixon JJ and Starke J held that, in any event, given its subject-matter when made, the oral contract was unenforceable being a contract for sale or other disposition of land to which the Statute of Frauds applied. Further issues may arise respecting the doctrine of part-performance and proprietary estoppel.[52] (emphasis added)

46. Their Honours then addressed the concept of trust as follows:

[77] It was submitted to the Full Court (and repeated in argument before this court) that "the obligations" into which Mr Barns, Mrs Barns and Mr Malcolm Barns entered on 2 May 1996 (the date of the deed and the wills) "gave rise to a trust" in favour of Mrs Barns and Mr Malcolm Barns and that, as a consequence, there was no property in the estate of Mr Barns which might be the subject of an order under the Inheritance Act.

[78] Undoubtedly whilst the nature and content of trust and contract are distinct, there is no dichotomy between them. Thus, as Mason and Deane JJ pointed out in *Gosper v Sawyer*:

> … the trust, particularly the resulting and constructive trust, represents one of the most important means of protecting parties in a contractual relationship and of vindicating contractual rights.

That statement has an added significance as an illustration of a fundamental point made by Viscount Radcliffe in Commissioner of Stamp Duties (Qld) v Livingston when he said:

> Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.

[79] The submission of the first respondent appears to involve alternative possibilities. The first is that the deed on its proper construction was an immediate declaration of trust binding the assets of the two testators. The second assumes that there was no immediately effective declaration of trust

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[52] Emphasis added by authors.

but posits subsequent equitable intervention by reason of unconscientious conduct. Neither proposition should be accepted.

[80] There is no substance in a submission by which the relations between the parties to the deed were translated from the level of contract to that of trust so as to bind the property of Mr Barns forthwith and in advance of his death. In *Central Trust and Safe Deposit Co v Snider*, Lord Parker of Waddington, for the judicial committee, said:

> A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust.

[81] The answer to the second alternative depends upon somewhat different considerations. One concern of the doctrines of equity was to "enlighten and control the common law", as Deane J put it in *Muschinski v Dodds*; his Honour added:

> The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights.

[82] However, in the present case, the essential obligation imposed upon Mr Barns was the negative stipulation in cl 3.3 of the deed not to revoke his will without the written consent of Mrs Barns and Mr Malcolm Barns. There was no use or apprehended use of Mr Barns' statutory right or power conferred by s 22 of the Wills Act to revoke his will. There was no unconscientious conduct which might enliven equitable intervention to enforce by any doctrine or remedy of equity the contractual negative stipulation found in the deed. What happened was that Mr Barns observed his obligations under the deed and his will took effect according to its terms.

47. Then reference was made (somewhat equivocally) to the decision of McPherson J in *Bigg v Queensland Trustees Ltd*[53] and more positively to *Lim v Permanent Trustee Co Ltd*[54] in relation to a fully secret trust and its impact as not diverting property away from the estate.[55]

48. In conclusion their Honours referred to the manifest purpose of the legislation and went on:

> [115] At first instance in Schaefer, Street J had referred as follows to the position of a promisee under a contract binding a testator to make a will in a certain form:
>
> > Where that which is promised is the making of a will in a stated form (irrespective of whether the promise is in some such terms as "I will leave you Blackacre in my will" or "I will insert in my will a clause leaving you Blackacre") there is no unqualified warranty by the promisor that the gift will take effect. In particular the promisee does

53 [1990] 2 Qd R 11 at [86] – [87].
54 At [93] – [94].
55 See at [108].

> not, upon such promise being made to him, thereby acquire such an equity or interest in the property as to render the will a mere further assurance to him. His rights to the property are to be drawn through the will and hence are subject to certain laws affecting testamentary succession. A promisee's rights under a contract to leave property by will may, without any breach on the part of the testator, be subject to an inroad upon the property being made without thereby giving any consequential right, either to damages or otherwise, to the promisee under that contract. An order under the [NSW Act] is an instance of such an inroad.
>
> That reasoning, together with that of McLelland J in Lim in the passage set out earlier in these reasons, should be accepted and applied in the construction of the Inheritance Act.

49. Kirby J agreed with the reasons given by Gleeson CJ and emphasised the position that private contractual arrangements which were otherwise valid and binding between the parties must be understood and applied subject to the operation of any legislative provisions which override them.

50. Callinan J in dissent thought that success in the appeal would be inconsistent with the reasoning of Dixon J in *Birmingham v Renfrew*.[56] His Honour held:[57]

> [167] Fifthly, the fact that the estate of a deceased vests in his or her executor or administrator on death does not, in my opinion, require any different result. The estate that vests is the estate as it was held by the testator, with all of its current liabilities and obligations. Nor does the fact that any entitlement might, under the wills in this case, be postponed for 30 days after the date of death, make any difference. The obligations continue to exist during this period.

51. Susan Thomas in the article '*Proprietary Estoppel and Family Provision: Competing moral obligations*'[58] noted that the currently accepted position in most Australian jurisdictions was that estoppel claims were subject to the family provision legislation by analogy with the contract to make a will claims. She argued that estoppel claims should not be subjected to family provision legislation and suggests that the question is one that was left open in *Barns v Barns*.[59] She also argues that if family provision legislation applies to estoppel claims the legislation should require explicit consideration of the moral duty owed to the promisee.

52. The article commences by noting that recent High Court authority indicates that a plaintiff who has made out a proprietary estoppel is usually to be awarded the expected interest.[60] The article notes that at the time of publication there were two cases where

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56 (1937) 55 CLR 656.
57 At [167].
58 (2017) 26 Australian Property Law Journal 24.
59 (2003) 214 CLR 169, the observations at the end of [75] in the reasons of Gummow and Hayne JJ.
60 Citing *Sidhu v Van Dyke* (2014) 251 CLR 505.

Barns had been applied to estoppel by analogy. They are *Kulczycki v Public Trustee (ACT)*[61] and *Eestin Nominees Pty Ltd v Rosenberg.*[62] The article also notes that in *Delaforce v Simpson-Cooke*[63] Handley AJA concluded that a proprietary estoppel by encouragement based on similar promises (to leave specific property by will) must be subject to the same contingency of an order for provision under the *Family Provision Act*.

53. In addition to the cases referred to in the article reference should also be made to *Dalton v Ellis; State of Bristow*[64] where Young CJ held that the second plaintiff, who was the illegitimate child of the deceased, was a beneficiary of a chose in action which was right to sue on a contract requiring the deceased to have named her in his will, and could sue to enforce the deed in her own name or in the name of the trustee who made the agreement for her benefit. The reasons then addressed the "*beneficiary theory*" and the "*creditor theory*" described by Professor Ian Hardingham in his article *Schaefer v Schuhmann: Promisee v dependent*.[65] The difference between the two theories was that under the "*beneficiary theory*" the claimant must take her place with all other beneficiaries and applicants under the *Family Provision Act*. Under the "*creditor theory*" the relevant asset was removed from the assets available for beneficiaries and the claim of the promisee was dealt with as a debt. His Honour dealt with the submission that *Barns* was distinguishable because it concerned a case of performance rather than breach of a contract and held that there was no reason in principle for distinguishing between such cases. His Honour went on to conclude that there were no ancillary equitable claims associated with the deed, holding that an attempt to say the deceased person did not fulfil his obligations under a deed of this nature constituted unconscionable conduct were effectively ruled out by the High Court in *Barns*. In addressing the defendant's claim for provision under the *Family Provision Act* his Honour applied the usual principles to a widow of a long marriage and ordered that the defendant receive the whole of the deceased's estate.

54. There is a distinction between the types of case where property of the deceased the subject of a constructive trust can be subjected to the operation of a family provision application. The essential distinction is between a remedial constructive trust and an

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61 [2013] ACTSC 230.
62 (2009) 24 VR 155.
63 (2010) 78 NSWLR 483.
64 (2005) 65 NSWLR 134.
65 University of Western Australia Law Review 115.

institutional constructive trust.[66] There are also distinctions between estoppels by representation, and equitable or promissory estoppel and proprietary estoppel. Superimposed over these concepts can be the characterisation of the conduct of the legal owner of property as acquiescence.[67]

55. It is also suggested that there are two strands of proprietary estoppel consisting of acquiescence and representation based strands. A further overlay is the "*promise – detriment*" principle that forms a part of the law promissory estoppel.[68]

56. If this excursion into estoppel is apt to complicate then that will not be the first occasion where such principles have been considered at length.[69]

57. It is simple enough to understand the premise that a remedial constructive trust will be "*trumped*" by operation of the statute such as s.41 of the *Succession Act 1981* (Qld). Because of its nature, it must allow for the intervention of third party rights and the legislation is directed to addressing the claims of those who have claims upon the deceased's bounty.

58. In contrast an institutional constructive trust essentially involves a declaration of right without the involvement of judicial discretion. A resulting trust which is imposed in equity over property where the purchase moneys were provided to the deceased to acquire property in his or her name could hardly be bypassed by the operation of the Act. Where the relationship is such as to give rise to what can be described effectively as equitable ownership of the property in question while the legal title remains in the testator and it is not a case where matters rest upon the last will of the deceased it is difficult to see why the logic of Callinan J's dissent should not apply. Otherwise the accident of timing which occurs in the case where relief in equity is obtained before the death of the deceased, as opposed to after the death of the deceased appears even more incongruous.

59. The distinctions between claims seeking equitable intervention in personam and claims as to proprietary rights are all important in that context, in the same way as creditors in insolvency seek to be characterised as holding security over assets.

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66 See eg. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 741 per Lord Browne-Wilkinson with whose reasons Lords Glynn and Lloyd agreed. See *also Black v S Freedman & Co* (1910) 12 CLR 105 and *Sze Tu v Lowe* [2014] NSWCA 462 (Gleeson JA, Meagher and Barrett JJA agreeing) at [147]–[150].

67 *Fischer v Brooker* [2009] 1 WLR 1764 at [62] per Lord Neuberger.

68 See *Thorner v Major* [2009] 1 WLR 776; See the article – *The Limits to Estoppels* by Professor McFarlane (2013) 7 Journal of Equity 250.

69 See e.g. the reasons of Drummond AJA in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at [1735] – [1768].

60. In *McNab (in their capacity as executors and trustees of the will of Turner (decd)) v Graham,*[70] a case concerning a limitation point, Tate JA, with whose reasons Santamaria JJA and Keogh AJA agreed, concluded that where a proprietary estoppel is established on the evidence, that gives rise to an institutional constructive trust. Her Honour referred to the leading cases in this area in coming to that conclusion.[71] By application of the reasoning in that case a claim of that kind will be exempt from the operation of s 41 of the Act. That conclusion is contrary to the obiter observations of Handley JA in *Delaforce v Simpson-Cooke*[72] previously referred to.

61. Where the trust to which a party is entitled is a remedial constructive trust, in general, it seems to us that the circumstances relevant to that enquiry are equally relevant as circumstances to be considered as to what is "*proper maintenance and support*" as part of the consideration of the moral duty owed by the deceased.[73] From a practical perspective, that enquiry can be agitated within the scope of the application by affidavit. In a case where those issues are extensive, pleadings may be usefully ordered, together with concomitant disclosure as part of the directions for the case. Where declarations of right concerning an institutional constructive trust are sought that should proceed by way of counterclaim and, again, directions can be sought.

Early Distribution by Personal Representatives

62. The starting point is sections 41(1), 41(8) and 44 of the *Succession Act 1981* (Qld):

> (1) If any person (the "deceased person") dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall **be made out of the estate of the deceased person** for such spouse, child or dependant.
>
> …
>
> (8) **Unless the court otherwise directs**, no application shall be heard by the court at the instance of a party claiming the benefit of this part **unless the proceedings for such application be instituted within 9 months after the death of the deceased**; but the court may at its discretion hear and determine an application under this part although a grant has not been made. (emphasis added)

63. Section 44 relevantly states:

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70 [2017] VSCA 352 (decided 30 November 2017).

71 *Muschinski v Dodds* (1985) 160 CLR 583, *Commonwealth v Verwayen* (1990) 170 CLR 394, *Giumelli v Giumelli* (1999) 196 CLR 101, *Sidhu v Van Dyke* (2014) 251 CLR 505, *Donis v Donis* (2007) 19 VR 577, and *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400, distinguishing *Nolan v Nolan* [2004] VSCA 109.

72 (2010) 78 NSWLR 483 at [35].

73 See *Vigolo v Bostin* (2005) 221 CLR 191 per Callinan and Heydon JJ at [113] - [122].

…

(3) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative—

(a) not earlier than 6 months after the deceased's death and without notice of any application or intended application under section 41 (1) or 42 in relation to the estate; or

(b) if notice under section 41 (1) or 42 has been received—not earlier than 9 months after the deceased's death, unless the personal representative receives written notice that the application has been commenced in the court or is served with a copy of the application.

(4) For the purposes of this section notice to a personal representative of an application or intention to make any application under this part shall be in writing signed by the applicant or the applicant's solicitor.

(5) However, nothing in subsection (4) shall prevent the subsequent making of an application within any other period allowed by or pursuant to this part. (emphasis added)

64. The power to order provision in section 41(1) was referred to by McGill DCJ in *Vickers v Pickering*[74]. In that case, His Honour noted that the words in subsection (1) for provision to "be made out of the estate of the deceased person" have long been recognised as meaning that the power to make provision under the Act can be exercised only in respect of property that belonged to the testator and has not yet passed absolutely to any other person (at [9]).

65. In that respect, His Honour referred to various decisions including the decision of de Jersey CJ in *Baker v Williams*.[75]

66. In that case:

(a) Shortly after the death of the deceased, the son of the deceased, by his solicitors, notified the executors of his intention to bring an application for provision; that notice was given by letter dated 17 September 2003, being within six months of the death of the deceased;

(b) It appears that no further step was taken until December 2005 when the son instructed new solicitors who filed an application seeking provision on 13 April 2005; the application was filed some 2 years and 8 months after the death;

[74] [2016] QDC 58.
[75] [2007] QSC 226.

(c) The executors applied to dismiss the application on the grounds that it was brought at a time when the estate had been fully administered and the assets distributed; and

(d) His Honour considered authorities such as *Re Donkin, deceased; Riechelmann v Donkin*[76] and the subsequent decision of the High Court in *Easterbrook v Young*.[77]

67. His Honour allowed the executor's application and dismissed the son's provision application; essentially, as stated at [22], "*Where there is no estate left, there is nothing from which provision may be made*".

68. That is, of course, a simple proposition – where the estate has been distributed, there is no estate from which an order for provision can be made.

69. His Honour also referred to "*the common-sensical desirability of preserving the certainty and integrity of an executorial administration regularly completed a long time before the current issues may have been raised*" (at [30]).

70. While the above is relatively straight forward when an executor distributes estate assets to a third party beneficiary of the estate, the position may be more complex in the following circumstances:

(a) Where a will provides for certain property to be held by an executor on trust, once the executor ceases to hold that property as executor and begins to hold it as trustee, it similarly ceases to form part of the estate that is amenable to an order for provision;[78] and

(b) Where a will confers a benefit upon the executor who effects a transfer of that asset to themselves in their personal capacity.[79]

71. The first scenario gives rise to the vexed question of the identification of the point in time where there is a transition from executorship to trusteeship. That is a question of fact; see *Pagels v MacDonald*[80]; *FCT v Whiting*[81]; *The Estate of Just (No 2)*.[82]

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76 [1966] Qd R 96.

77 (1977) 136 CLR 308.

78 See, for example, *Vickers v Pickering* [2016] QDC 58 at [10] referring to *Re Donkin* [1966] Qd R 96 at 117.

79 See, for example, the analysis in *Holdway v Arcuri Lawyers (a firm)* [2009] 2 Qd R 18 at [72] to [77] per Keane JA and the cases referred therein.

80 (1936) 54 CLR 519 at 526 per Latham CJ.

81 (1942) 68 CLR 199 at 206.

72. In the latter case, the Supreme Court of South Australia state at 523:

> When persons are appointed by a testator to be his executors and trustees, the courts (and academic writers) have long been vexed by the problem of determining when they assume the mantle of trustees. Kekewich J thought there were few things more difficult to determine (*In re Timmis; Nixon v. Smith* [1902] 1 Ch 176; *In re Mackay; Mackay v. Gould* [1906] 1 Ch 25). The oftquoted statement, that the late Sir John Wickens is reputed to have been in the habit of telling his pupils that the transition invariably took place in the dead hours of the night, merely heightens the mystery. The question is, which night?

73. The second scenario, a distribution of an asset to an executor in their personal capacity, was considered by Keane JA (with whom the other members of the Court agreed) in *Holdway v Arcuri Lawyers (a firm)*.[83]

74. In that case:

(a) The deceased had appointed his son as his executor and left his estate to him by will;

(b) The applicant, a de facto partner of 10 years standing, had given prompt notice of an intention to seek provision; a settlement conference was held within the nine-month limitation period which did not resolve the then foreshadowed application;

(c) After that conference, an application for provision was filed but not served (the delay in service being attributed to the ongoing preparation of the supporting affidavit);

(d) A few months later, the executor's solicitor registered a transfer of land in the estate (being the bulk of the estate) to the executor as devisee;

(e) Soon after, the new solicitors for the applicant contacted the executor's solicitors and were told that the estate had been largely distributed; and

(f) The claim for provision was compromised, but the applicant then alleged that her first solicitors had been negligent and that as a result she had lost the prospect of obtaining further provision out of the estate.

75. A live issue in the proceeding was whether the effect of the transfer of the land by the executor to himself personally had the effect that it ceased to be part of the estate. The trial judge had concluded on the evidence that it did not cease to form part of the estate

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82 (1974) 7 SASR 515 at 523-524.

83 [2009] 2 Qd R 18.

because the estate had not been fully administered such that it was premature; that conclusion was, however, rejected on the basis of an admission to the contrary in the pleading.

76. The Court of Appeal held that he should have given effect to the finding that he made (which was not challenged on appeal) with the consequence that the estate had not been properly distributed such that the executor continued to hold the land in his representative capacity; accordingly, the application for provision could have succeeded.

77. The issue was considered by Keane JA at [72] to [77]:

> [72] A transfer of real property of a deceased by an executor to himself as a beneficiary under the will, will usually be regarded as effecting a distribution of the asset to the beneficiary. That is because the asset transferred is to be held beneficially by the transferee in his own right and not for the purposes of administering the estate. ….
>
> [73] The question whether there has been an assent by the executor such as will effect a distribution of beneficial title to an asset is, as Lawrence LJ said in IRC v Smith, "a question of fact to be determined on the special circumstances of the particular case". …
>
> …
>
> [75] It seems to me, with respect, that this view accords with the general principle that it must be presumed, in the absence of proof to the contrary, that a trustee or personal representative intends to deal with assets held in a representative capacity in accordance with his or her obligations as such before asserting his own beneficial interest in respect of those assets. This general principle was stated in *Re Hallett's Estate; Knatchbull v Hallett* by Baggallay LJ who said:
>
> …
>
> [76] In this case, the two pieces of real property, and particularly the house property, were transferred, as his Honour found, on the footing that they remained available to meet the debts of the estate. That being the case, there was not the assent to a distribution which is essential to a distribution of the beneficial interest in the asset to the devisee under the will. (emphasis added)
>
> [77] The view taken by the learned trial judge in this regard accords with that taken in de Groot and Nickel, *Family Provision in Australia*, where the following is said:
>
> > "In Re Lago ([1984] VR 706) it was held that, once the transmission documents have been lodged in the Titles Office and if the beneficiary and personal representative are one and the same person, the estate has been effectively distributed and an extension of time will, at that point, be refused.
>
> It would seem that, if a transmission application but no memorandum of transfer has been lodged, and the personal representative and ultimate transferee are one and the same person, then the estate is no longer in existence and an application for extension will be refused (Re Heberley [1971] NZLR 325 at 333-4, 345-6). T**he position is likely to be different if the transmission was lodged to enable the personal representative and**

> **sole beneficiary to sell the property to pay debts of the estate. In these circumstances, the administration of the estate is clearly continuing**."
>
> (emphasis added)

78. What, then, of a distribution of property by a personal representative made:

    (a) within six months of the date of the Deceased's death; or

    (b) in the face of an application properly made within time and notified?

79. As McGill DCJ observed in *Vickers v Pickering*:[84]

> [16] On the face of the statute there is not even a provision dealing with property distributed by a personal representative prior to the time when an order is made on an application properly made within time. The courts, however, have to some extent filled the gap, by characterising such a distribution as a wrongful distribution which gives rise to a claim for damages against the personal representative, at least in circumstances where the personal representative does not obtain protection in relation to the distribution from s 44 of the Act.

80. His Honour later addressed this issue in his reasons:

> [21] The problem of the absence of what might be described as anti-avoidance provisions of such a fundamental nature as a statutory capacity for the court to interfere in a premature distribution from an estate has long been recognised. In 1997 the Queensland Law Reform Commission prepared a report to the Standing Committee of Attorneys-General on family provision which considered this point in Chapter 6, where it was pointed out that in 1982 the *Family Provision Act* of New South Wales contained provisions for a "notional estate" which could include, for example, property distributed from the estate prior to the hearing and determination of the family provision application. …
>
> [22] The Commission recommended the inclusion of anti-avoidance provisions in a uniform law based on the New South Wales provisions: p 93. … As far as I am aware, however, these legislative reforms have not been progressed in Queensland at all. The omission of even the most basic anti-avoidance provisions from the family provision legislation in this state remains, in my opinion, a continuing serious deficiency in the legislation.
>
> [23] In these circumstances, it is unsurprising the courts have been willing to attempt to deal with situations where property has been distributed from the estate so as to defeat an application for family provision, by granting relief against the executor personally.

81. In *Re Hill* (Supreme Court, Carter J, OS 1079/1987, unreported, BC 8802419) Justice Carter held that (in respect of a distribution made by an executor within six months of death and within three months of knowledge of an intended application):

> By s52(1) the personal representative of a deceased is under a duty "to collect and get in the real and personal estate of the deceased and administer it according to law". I**t is obvious that s44 is a legislative constraint upon an executor who seeks to administer an estate with indecent haste and in order to render nugatory the**

[84] [2016] QDC 58 at [16].

> **rights given to an applicant under s41 of the Act**. I am satisfied that in this case the respondent effected distribution of the only assets in the estate well within the six months of death and within three months of his having knowledge of an intended application. He was in my view in breach of s52(1)(a) of the Act and the applicant is entitled to relief under s52. I am empowered to make such order as I think fit. **If it were held that s52 was the inappropriate procedure and that the applicant ought to have commenced an action it appears to me that having regard to the way in which the proceedings have been conducted it is proper for me to make such order as I would consider making under s52 of the Act.**
>
> (emphasis added)

82. As McGill DCJ observed in *Vickers* at [16], that was a remedy against the personal representative rather than an exercise of bringing the property distributed back into the estate to make it available for an order.

83. The above position is to be contrasted to the decision of Justice Moynihan in *Re Faulkner*[85] where distributions made after an application for provision had been filed within time and notified were set aside.

84. In that case:

    (a) The respondent executors distributed estate assets after the applicant had made application for provision under section 41(1) of the Act within time and after the court had made directions for the conduct of the proceeding;

    (b) The applicant applied, pursuant to section 8(1) of the *Trusts Act 1973* (Qld) for an order that the transfers of the relevant properties be set aside;

    (c) Justice Moynihan held that:

        (i) it was impossible to avoid the conclusion that the respondents had made the distribution for the purpose of defeating the applicants' claim; and

        (ii) the applicant had, at least, a contingent interest in the trust property and a right of due administration in respect of the trust property sufficient to give her standing to make the application;

    (d) Orders were made setting aside the transfers of the relevant properties.

85. Having set out the terms of section 8 of the *Trusts Act 1973* (Qld), and in particular, the requirement that an applicant show either that:

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85 [1999] 2 Qd R 49.

(a) he or she has, directly or indirectly an interest, whether vested or contingent in trust property; or

(b) he or she has a right of due administration in respect of the trust,

His Honour stated (at 52-53):

> At the time of the distribution of the trust the applicant had a current application for further provision out of the estate of which the respondents had notice. That provision was contingent on a judge being satisfied in accordance with s41(1) of the *Succession Act* that adequate provision had not been made for the proper maintenance and support of the applicant by her father's will so that the court might order "such provision as it thought fit".
>
> **The right had not accrued since it was dependent on the exercise of a discretion; … The applicant had however taken appropriate steps to enable her to take advantage of the right conferred by the statute … In my view therefore she had an "equitable right vested by statute"; … At least she had "directly or indirectly" an interest "… vested or contingent" within the meaning of s. 8.** The applicant has more than "a mere hope or contingency" *Sugden v Sugden*. In that case a mere hope or contingency did not constitute a cause of action but the mere fact that a cause of action was discretionary "did not automatically mean there was no cause of action" to survive death and injured party. …
>
> In my view therefore the first of the requirements referred to has been satisfied.
>
> **The applicant also has a right of due administration in respect of the trust constituted by the will.** A trustee who has received notice that a fund in his possession is or may be claimed is liable to the claimant for dealing with the property in disregard of the notice should the claim prove well founded. *Guardian Trust and Executors Company of New Zealand Ltd v. Public Trustee of New Zealand*. The obligation is to preserve the estate until the claim is resolved; R*e Simson*; *Re Crowley*. **Distribution with notice of claim under similar legislation was held to be a failure by the executors to provide for contingent liabilities so as to constitute a breach of trust in *Re Winwood (deceased)*.**
>
> (emphasis added; authorities and footnotes omitted)

86. Justice Moynihan also considered that there was merit in the contention that the distribution constituted an interference in the administration of justice (at 53).

87. What, then, of a distribution made by a legal personal representative with knowledge of an asserted application for provision made nine months after death where that application has not been commenced?

88. This was the situation considered in *Vickers v Pickering*.[86]

89. In that case:

[86] [2016] QDC 58.

(a) The deceased had died on 27 December 2014; he was survived by four adult children; he left his estate to two of his children (one of whom was the respondent executor) and excluded the other two children (who had a different mother);

(b) On 8 April 2015, being within six months of the date of death, the excluded children gave notice of an intention to make application for provision to the respondent (all parties were represented by their respective solicitors);

(c) The parties entered an exchange of correspondence as to the foreshadowed applications and a preference to reach an early resolution if possible; an offer to compromise was made by the applicant's and rejected; there was further correspondence as to the foreshadowed applications;

(d) The period of nine months from the date of death referred to in s 41(8) expired on 28 September 2015. The following day the estate was substantially distributed including by registration of a transfer of property to the respondent executor personally and her sister as tenants in common, shares were appropriated, and the proceeds of a bank account distributed;

(e) The above distributions were made without notice to the applicants who subsequently corresponded with the respondent executor on 19 October 2015 with further information in support of their foreshadowed applications;

(f) Two days later, the respondent executor responded to the effect that the estate had been distributed, and that there were therefore no assets from which any order for provision could be made; and

(g) The applicants subsequently filed their applications for provision on 23 November 2015; the respondent executor cross-applied seeking summary dismissal being the application that is the subject of the judgment.

90. Some important features to note about this case:

(a) The application heard was for summary dismissal as contrasted to a final determination on the merits;

(b) The Applicants contended that in the event that the Applicants would have been successful in their applications for provision but for the distribution by the

Executor, the Applicants had an arguable claim against the respondent executor personally pursuant to s.52(2) of the Act which could be added to the proceeding such that it ought not be summarily dismissed.

91. Ultimately His Honour was not satisfied to with the necessary degree of confidence that the applicants' claims would be unsuccessful.

92. His Honour considered that (relevantly):

(a) With respect to a potential personal claim against the respondent executor:

> [31] When considering the application of s 44(3), it is significant to note that it applies only to a distribution "properly made by the personal representative". I am not aware, of any authority which establishes just what is meant by a distribution "properly made", or which, more importantly, shows that a distribution will be properly made once the nine month period has expired even if there is every indication that an application under s 41 is to be made. **In the light of the authorities referred to earlier, and the strong statements against distributing assets from an estate where there has been notice of a claim against the estate, it must be at least fairly arguable that a distribution as soon as the nine month period has expired is not one "properly made", so as to protect an executor from personal liability**. (emphasis added)

(b) With respect to His Honour's characterisation of the settlement negotiations,

> [32] Even apart from that consideration, however, in my opinion there is another factor which may at least serve to strengthen an argument that the distribution was not in the present case "properly made". That arises because, in response to the notice of the claim, the executor invited the applicants to attempt to negotiate a settlement of the claim without resort to litigation. At the least, this amounted to an acknowledgement that the applicants are persons entitled to claim. In those circumstances, it seems to me that there is some analogy to the cases in relation to claims for damages for personal injuries, where an insurer, having been given notice of the claim, has admitted liability and has invited the lawyers for the claimant to attempt to resolve the claim by negotiation.
>
> [36] …
>
> In my opinion the effect of these decisions is t**hat an invitation to attempt to resolve a claim by negotiation without resort to litigation implies a representation that the party issuing the invitation will not, without reasonable notice to the claimant, act so as to prejudice the position of the claimant in the foreshadowed litigation if the attempt to negotiate proves to be unsuccessful**. (emphasis added)

93. His Honour went on (at [38]):

> **The significance of an implied representation along the lines indicated may be to give rise to an estoppel against the first respondent, for example preventing her from relying on the distribution of the estate for the purpose of defeating the application.**

> **Alternatively, it may justify an order such as was made in *Re Faulkner* (supra), which would have the effect of reconstituting the estate so as to enable an order to be made under s 41.**
>
> **Or it may mean that an application could be successfully made against the executor personally**, on the basis that the estate had been distributed in the face of notice of an impending claim, where there was no ground for thinking that no application would be made under s 41, bearing in mind that an application can be made out of time and the court has a discretion to extend time, where the executor did not have the protection of s 44(3) because in such circumstances the distribution was not "properly made".
>
> Any of those outcomes is at least fairly arguable.
>
> (emphasis added)

94. It was those features which took the case outside of the orthodox position in, for example, *Baker v Williams*.[87]

95. It is for that reason that it is common to see the following disclaimer in correspondence sent on behalf of an executor to an eligible applicant for provision in the period prior to an application being filed:

> Nothing in this correspondence is to be construed to limit my client's rights under section 44(3) of the *Succession Act 1981* (Qld) and I reserve my client's right to distribute the estate under section 44(3) if your client has not filed an application and notified of or served on my client that application by 9 months from the date of the death of the Deceased.

[87] [2007] QSC 226.