

## Succession Amendment (Family Provision) Bill 2008

### Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

The National Committee for Uniform Succession Laws submitted reports on proposed national uniform laws on family provisions to the Standing Committee of Attorneys-General in December 1997 and July 2004. The New South Wales Law Reform Commission Report 110 *Uniform succession laws: family provision* (May 2005) sets out draft model provisions to implement the earlier reports. These enable

a court to override the terms of a deceased person's will or the distribution of a deceased person's estate on intestacy if it determines it is necessary to do so to ensure that the family and other dependants of a deceased person are adequately provided for. The *Family Provision Act 1982* of New South Wales was used as a basis for the model provisions.

The objects of this Bill are:

- (a) to amend the *Succession Act 2006* (**the 2006 Act**) to enact, with some modifications, the model provisions as a new Chapter 3 of that Act, and (b) to enable the making of regulations to control costs and advertising of legal services in relation to such applications, and
- (c) to repeal the *Family Provision Act 1982* (**the 1982 Act**), and
- (d) to make various provisions of a savings, transitional or consequential nature.

### Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act (with the exception of Schedule 2.1) on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision that gives effect to the amendments to the *Succession Act 2006* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to various other Acts set out in Schedule 2.

**Clause 5** repeals the *Family Provision Act 1982*.

**Clause 6** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

### Schedule 1 Amendment of Succession Act 2006

**Schedule 1 [10]** inserts a new Chapter 3 into the 2006 Act and makes a consequential amendment to existing Chapter 3 to renumber it (and the sections it contains) as Chapter 4 and sections 101–106, respectively. **Schedule 1 [2]–[5]** insert definitions and other interpretation provisions into section 3 of the 2006 Act for the purposes of the new Chapter 3. A **family provision order** is defined as an order made by the Court under proposed Chapter 3 in relation to the estate or notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of an eligible person. **Property** is defined to include a valuable benefit. In *Schaeffer v Schaeffer* (1994) 36 NSWLR 315 an increase in the value of shares held by others as a result of the conversion of a deceased's shares to preference shares on his or her death was found to be a valuable benefit. A definition of **close personal**

*relationship* is also included for the purposes of proposed sections 57 (f) and 59 (1) (b).

**Schedule 1 [1]** makes a consequential amendment to the long title of the 2006 Act and **Schedule 1 [6], [7] and [9]** make consequential amendments to sections 13, 19 and 28 of the 2006 Act.

### **New Chapter 3 Family provision**

The new Chapter contains 4 Parts.

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

**Proposed section 55** is an interpretation provision describing the meaning of *administration* in the proposed Chapter.

**Proposed section 56** provides for the proposed Chapter to bind the Crown.

#### **Part 3.2 Family provision orders**

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

**Proposed section 57** specifies the persons (*the eligible persons*) who may apply to the Supreme Court or District Court (*the Court*) for a family provision order in respect of the estate of a deceased person. The persons specified are the same as those currently eligible to apply for an order under the 1982 Act. However, under the 1982 Act a person who is in a domestic relationship with the deceased person (which is essentially defined as a de facto relationship or close personal relationship (other than marriage or a de facto relationship)) at the time of the deceased person's death is entitled to apply as of right for a family provision order. Under proposed section 59 a person in a de facto relationship will be entitled to apply as of right but a person in a close personal relationship will be able to apply only if the Court is satisfied that

the circumstances warrant the application (see proposed section 59 (1) (b)). However a child of such a relationship will continue to be able to apply as of right.

**Proposed section 58** states when an application for a family provision order may be made. Under section 7 of the 1982 Act, the Court may make a family provision order only on an application in relation to a deceased person in respect of whom administration has been granted. Proposed section 58 (1) provides for the Chapter to cover situations where it is not necessary, in some circumstances, to seek a grant of

administration in order to administer a deceased estate. The time limit for making an application for a family provision order is set by proposed section 58 (2) at not later than 12 months after the date of death of the deceased person. Under section 16 (1) (b) of the 1982 Act, the current time limit is generally 18 months.

##### **Division 2 Determination of applications**

**Proposed section 59** empowers the Court to make a family provision order for the maintenance, education or advancement in life of a person who the Court is satisfied is an eligible person. The Court must also be satisfied that, at the time the order is made, adequate provision is not made by the will of the deceased person or the operation of the rules of intestacy. **Proposed section 59 (3) (a)** allows the Court to

make a further order for family provision in favour of an eligible person who has suffered a detrimental change in circumstances since a previous order for provision was made in the person's favour.

**Proposed section 59 (3) (b)** allows the Court to make a further order for family provision where the existence of certain property in an estate (or notional estate) of the deceased was not known at the time of the earlier order, the undisclosed property would have increased the value of the estate substantially and the Court would not have made the previous family provision order if the evidence had revealed the existence of that undisclosed property.

**Proposed section 59 (4)** allows the Court to make an order in favour of an eligible person whose application for a family provision order was previously refused if at the time of the refusal there was undisclosed property that would, if its existence had been known at the time of the refusal, have increased the value of the estate.

**Proposed section 59** (other than section 59 (3) (b) and (4)) is based on sections 7, 8 and 9 (2) of the 1982 Act.

**Proposed section 60** sets out the matters the Court may have regard to in determining whether a person is an eligible person, whether to make an order and the nature of the order.

**Proposed section 61** permits the Court to disregard the interests of a person who has not made an application for a family provision order. It is based on section 20 of the 1982 Act but differs slightly from that section in that it makes it clear that the interests of existing beneficiaries (either under the will or on intestacy) must be taken into account even if they have not made an application for a family provision order.

**Proposed section 62** enables the Court to make interim family provision orders. It is based on section 9 (5) and (6) of the 1982 Act.

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

**Proposed section 63** identifies the property that may be subject to a family provision order. The property available is the property in the deceased's estate. Property that has ceased to be part of the deceased's estate or has been distributed, either before or after death, may also be subject to an order if it is designated by the Court as notional estate by an order under Part 3.3 of Chapter 3. It is based on the definition of *estate* in section 6 (1), and section 6 (4) and (5), of the 1982 Act.

**Proposed section 64** empowers the making of family provision orders in respect of property situated both in, and outside, New South Wales. It is based on section 11 (1) (b) of the 1982 Act.

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

**Proposed section 65** sets out the matters that the Court must specify in a family provision order and enables the Court to require provision to be made in various ways.

**Proposed section 65 (2) and (3)** are based on section 11 (1) (a) and (d), respectively, of the 1982 Act.

**Proposed section 66** allows the Court to make consequential or ancillary orders to give full effect to a family provision order. It is based on section 15 (1) and 34 of the 1982 Act. It also enables the making of additional consequential orders to make adjustments that are necessary to be just and equitable to all persons affected by the making of a family provision order.

**Proposed section 67** allows the Court to require an undertaking to be entered into, or security given, to restore property received under a family provision order if the order is later revoked because the deceased person was not deceased when it was made. It is based on section 18 of the 1982 Act.

**Proposed section 68** enables a beneficiary of the estate of a deceased person to obtain an order from the Court to make periodic payments to an applicant in whose favour a family provision order has been made.

Sections 78 and 79 of the *Trustee Act 1925* deal with the effect of vesting orders relating to the conveyance or release of property.

**Proposed section 69** applies those sections to the vesting of property under proposed section 66.

**Proposed section 70** specifies the circumstances in which the Court may revoke or vary a family provision order. It is based on sections 19 (1)–(3) and 20 (4) of the 1982 Act.

**Proposed section 71** provides for the variation and revocation of consequential and ancillary orders and making of any necessary additional orders. It is based on section 19 (4) of the 1982 Act.

**Proposed section 72** describes how a family provision order takes effect. It is based on section 14 (1) of the 1982 Act.

**Proposed section 73** clarifies the application of Part 3.2 of Chapter 3 with respect to interim family provision orders (proposed section 62) and property designated as part of the notional estate of a deceased person under Part 3.3 (other than section 63).

### **Part 3.3 Notional estate orders**

Notional estate orders are orders issued by the Court which are intended to make available for family provision orders assets that are no longer part of the estate of a deceased person because they have been distributed either before or after the deceased's death (either with or without the intention of defeating applications for family provision orders). Part 3.3 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). Part 3.3 is based on, and essentially restates with some additions, Division 2 of Part 2 of the 1982 Act.

### **Division 1 Relevant property transactions**

**Proposed section 74** defines **relevant property transaction** for the purposes of the Part as being a transaction described in proposed section 75 or 76.

**Proposed section 75** provides that a person enters into a relevant property transaction if the person does, directly or indirectly, or omits to do, any act as a result of which the property becomes held by another person (whether or not as a trustee), or subject to a trust and where full valuable consideration is not given to the person for doing or not doing the act.

**Proposed section 76** sets out examples of relevant property transactions for the purposes of proposed section 75.

**Proposed section 77** describes when a relevant property transaction is taken to have effect for the purposes of Chapter 3.

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

Division 2 identifies the circumstances in which a notional estate order may be made

Proposed section 78 limits the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person. The Court cannot order that the costs of an applicant be paid from the notional estate of the deceased person unless the Court has made a family provision order in favour of the applicant.

Proposed section 79 allows the Court to designate as notional estate property that has already been distributed. Unlike under proposed section 81, no special circumstances are required before the Court may make an order.

Proposed section 80 allows the Court to designate as notional estate property that has been transferred during the lifetime of the deceased by means of a relevant property transaction. Unlike under proposed section 81, no special circumstances are required before the Court may make an order.

Proposed section 81 allows the Court to designate as notional estate property that it could have designated as such property under other provisions of proposed Chapter 3 but that has been transferred to another person. The making of such an order is warranted only in special circumstances because of the impact of such an order on this third person. Proposed section 81 (1) (a) (ii) makes it clear that such an order can be made in respect of property transferred by a deceased transferee.

Proposed section 82 allows the Court to designate as notional estate property that has been transferred into the hands of a person who has subsequently died where the property has come into the hands of the person's legal representative or has been distributed from their estate. The proposed section is intended to overcome the decision in *Prince v Argue* [2002] NSWSC 1217.

Proposed section 83 restricts the power of the Court to make a notional estate order unless a relevant person or estate is disadvantaged.

Proposed section 84 provides for an order designating property as notional estate to prevail over any other rights or interest in the property concerned.

Proposed section 85 enables the Court to make multiple notional estate orders in connection with the same or subsequent proceedings relating to an estate.

Proposed section 86 draws attention to the restrictions and protections set out in Division 3.

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

**Proposed section 87** specifies general matters that the Court must take into consideration in before

**Proposed section 88** sets out certain powers and restrictions of a Court in relation to the making of a notional estate order. Unlike section 28 (1) of the 1982 Act, it allows a notional estate order to be made when the deceased person's estate is insufficient for any order as to costs that the Court considers should be made.

**Proposed section 89** specifies certain particular matters that the Court must take into consideration in before making a notional estate order.

**Proposed section 90** places restrictions on the Court's ability to make notional estate orders out of time or for further provision.

### **Part 3.4 Miscellaneous**

**Proposed section 91** enables a person to obtain a grant of probate for family provision purposes. It is based on section 41A of the *Probate and Administration Act 1898*. As a consequence, section 41A is repealed by **Schedule 2.9 [2]**.

**Proposed section 92** allows the Court to substitute certain property for property designated or proposed to be designated as notional estate of a deceased person.

**Proposed section 93** protects the legal representative of an estate of a deceased person from liability if the legal representative has distributed the estate at least 6 months after the deceased person's death and after publishing notice of the intention to distribute.

**Proposed section 94** protects the legal representative of an estate of a deceased person from liability if the legal representative has distributed the estate so as to provide things immediately necessary for the maintenance or education of a person entitled to make an application for a family provision order who was wholly or substantially dependent on the deceased person immediately before his or her death.

**Proposed section 95** provides for the Court's approval of any release by a person of his or her rights to make an application under the proposed Act. A release that has not been approved by the Court has no effect.

**Proposed section 96** enables the Court to revoke its approval of a release.

**Proposed section 97** enables the Court to determine the date or time of death of a person.

**Proposed section 98** provides for the mediation of applications and the making of family provision orders with the consent of the affected parties.

**Proposed section 99** enables the Court to order that the costs of proceedings under Chapter 3 in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit and enables regulations to be made with respect to maximum costs.

**Proposed section 100** makes provision with respect to the admission in evidence of statements made by a deceased person during the person's lifetime in proceedings under the proposed Chapter.

**Schedule 1 [8]** substitutes section 27 (2) of the 2006 Act. Proposed section 27 (2) requires a person who wishes to make an application for an order to rectify a will to apply to the Court within 12 months after the death of the testator. At present, application must be made within 18 months after the death of the testator or such lesser period as may be specified by a Court making an order under section 17 of the

*Family Provision Act 1982*. The Court has the power under section 27 (3) to extend the period in certain circumstances.

**Schedule 1 [11]–[13]** amend section 56 of the 2006 Act (as renumbered by Schedule 1 [10] as section 102) to make it clear that rules of court may be made with respect to costs payable out of small estates and other estates and the informal proof of certain matters.

**Schedule 1 [15]** updates a reference in Schedule 1 to a section renumbered by Schedule 1 [10].

**Schedule 1 [16]** amends Schedule 1 to the 2006 Act to enable the making of savings and transitional regulations.

**Schedule 1 [17]** amends Schedule 1 to the 2006 Act to make various savings and transitional provisions.

**Schedule 1 [18]** repeals Schedules 2 and 3. The amendments contained in those Schedules have commenced and are spent. **Schedule 1 [14]** makes a consequential amendment.

## **Schedule 2 Amendment of other Acts**

**Schedule 2.2–2.16** make consequential amendments to various Acts.

**Schedule 2.1** amends the *Conveyancing Act 1919* to restore, with effect from 1 March 2008, a provision (section 36B (2)) that was inadvertently repealed on the date of commencement of the 2006 Act. It also amends Schedule 9 to the *Conveyancing Act 1919* to clarify the effect of a savings provision relating to the repeal of section 36B (1) of that Act on that date.