Review of the *Inheritance (Family Provision) Act 1972* (SA)

Fact Sheet 6 – Timing of claims and costs

Time Frames

Time frames for making family provision claims

Under section 8 of the *Inheritance (Family Provision) Act 1972* (SA), the general rule is that claims for family provision must be made within six months from the date of the grant of probate.

Different time frames apply in other States and Territories in Australia. For example, the Australian Capital Territory, Northern Territory and New South Wales provide twelve months to make a claim, whereas only three months is provided in Tasmania.

Most States and Territories measure the time period for family provision applications as starting from the date of the grant of probate, except New South Wales and Queensland, where time begins to run at the date of the death of the testator.

The court has the power to extend the time limit for making an application in all Australian jurisdictions, and will consider each individual case on its merits, having regard to matters including the strength of the claim, the length of the time delay, the amount of estate which remains undistributed and the motives of the applicant in applying for an extension of time.

However, seeking an extension of time may be of limited practical benefit in South Australia. This is because once the deceased's estate has been fully distributed (that is, allocated to each of the beneficiaries in the will) a person is precluded from making a family provision claim. Typically, distribution of a deceased's estate will occur relatively soon after the grant of probate. This type of restriction does not apply in New South Wales or Western Australia.

SALRI is interested in your views on whether the rules governing the time frames for making a family provision claim in South Australia are appropriate.

Discussion Questions

1. Is the current six-month time frame appropriate for making family provision claims in South Australia?

2. Is the date of grant of probate an appropriate date from which to commence time limits for making family provision claims, or would the date of death be more appropriate?

3. Is it appropriate for a family provision claim to be precluded by the full distribution of the deceased estate, or should a claim still be able to be made within a reasonable time after death or the grant of probate?

Costs

Why are costs relevant to law reform in this area?

There is a strong public interest in promoting access to justice and addressing high legal costs, especially in succession disputes.

SALRI has been widely informed in its initial consultation that, whatever case law, rules or practice directions might strictly provide, the general rule is that costs will come out of the estate in relation to succession disputes. When the costs associated with a person making a claim for family provision come out of the estate (which they generally do in practice), there is encouragement for eligible family members to make a claim, even if they do not have strong grounds (or could be described as a 'speculative claim').

Claims brought or treated this way disrupt the administration of the deceased's estate, and have the potential to cause family disharmony and high legal costs, particularly if the claim does end up in court. All too often, the stress and large costs of a case going to court, and the uncertain outcome, are such that the claim will be settled out of court, even if the claim may seem greedy or unfounded. The professional role of lawyers involved in succession disputes and advising clients is important in both promoting access to justice and addressing legal costs.

While costs may not be an issue in every case, succession lawyers have confirmed that these issues can arise in South Australia, and may have an impact on whether a person decides to bring, pursue or defend a family provision claim.

Another cost related issue has been described as 'disproportionate costs'. That is, circumstances where a successful claim for family provision is made, and a proportion of the estate ordered to the eligible family member along with a large costs order which also comes out of the estate. This can leave very little left in the estate for those family members or other beneficiaries originally provided for by the testator.

Mediation and Conciliation

One possible option to address these concerns builds upon existing alternative legal dispute resolution practices, such as mediation and conciliation, which encourage parties to family provision disputes to avoid costly litigation.

Both Judges and Masters in South Australia are already actively involved in mediation and seeking to resolve succession disputes, especially in small estates. The Supreme Court encourages settlement of claims under the *Inheritance (Family Provision) Act 1972* (SA) and assists parties to achieve settlement. The Court conducts many mediations in succession estates disputes and such mediation is swiftly available and has a very high success rate. Building on this theme, there may be procedural and other changes which might further facilitate the cost effective and timely resolution of succession law disputes. For example, mediation could be made mandatory in family provision disputes and/or if mediation is not successful, it could be possible to refer the matter to conciliation rather than to revert to more expensive, traditional litigation processes.

SALRI is interested in your thoughts on the role of judicial mediation and conciliation in alleviating costs related concerns in family provision claims.

Other options to address costs related concerns

A range of other law reform options have been identified as ways to help alleviate the above concerns relating to costs in family provision claims.

One approach is to adopt a simple 'loser pays' rule, which would mean that an unsuccessful claimant would bear the costs of both parties to the proceedings. This would provide a disincentive to those otherwise considering speculative claims, but it may be too harsh for those claimants who may genuinely consider that they have a dependency on the deceased, such as adult children with disabilities, but to whom the court ultimately declines to exercise its discretion in favour.

A hybrid approach has been pursued in Victoria, which has a specific provision to protect 'personal representatives' of the estate (eg: executors or administrators) from costs orders in family provision claims (see section 99A of the *Administration and Probate Act 1958* (Vic)). This provision goes some way towards protecting the deceased estate from speculative claims and would allow personal representatives to resist settlement offers in favour of a final outcome in court. A similar practice is understood to be common in South Australia, although not prescribed by the *Inheritance (Family Provision) Act 1972* (SA).

Discussion Questions

4. Is there a need for any changes to the provisions governing costs in family provision claims and, if so, is it preferable that such changes are made by statute, Court Rules or Practice Direction?

5. Should there be a legislative presumption that, in family provision proceedings, an unsuccessful applicant will not receive their costs out of the estate?

6. Could judicial mediation and/or conciliation help to resolve these disputes and avoid costly litigation? If so, what reforms should be made to facilitate this?

7. What further measures might be taken to support the Court in encouraging resolution, discouraging opportunistic claims and addressing legal costs?

***Please note*: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service or the South Australian Legal Services Commission's Legal Advice Helpline on 1300 366 424.**

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