

Review of the *Succession Act 1981*

Public Policy Paper

**Intestacy Entitlements and Family
Provision Applications**

September 2023

Not Government Policy



Attorney-General's Foreword



Prior to the last election, the Government made a commitment to review the *Succession Act 1981* in consultation with experts and stakeholders to identify areas of reform, including to the forfeiture rule.

Queensland's succession laws were enacted over 40 years ago and are in need of review and modernisation to ensure they give effect to modern societal expectations.

The *Succession Act 1981* legislates important matters that affect all Queenslanders such as:

- the formal requirements for wills
- what happens to a person's property when a person dies without a will (called intestacy)
- how to make a court application to interpret a will, fix a will, or request the court make a statutory will
- who may apply and how to apply to court for provision from a deceased person's estate (called family provision)
- the obligations and duties that apply to administering the estate of a deceased person
- the appointment of guardians for a deceased person's child in a will.

The Government is seeking the community's views on this Public Policy Paper to inform the development of new succession laws, specifically in relation to:

- Intestacy entitlements: which deals with who receives a deceased person's property when the deceased person has not made a will, or has made a will that does not dispose of all of their property; and
- Family provision applications: which deals with who may make an application to the court, and how an application may be made, for provision, or greater provision, for them from a deceased person's estate.

These issues are important and will touch the lives of all Queenslanders. I invite everyone to contribute to these important reforms by making a submission and look forward to receiving your feedback.

Yvette D'Ath MP

Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence

September 2023



About the review

The *Succession Act 1981* (the Act) was enacted over 40 years ago and is in need of review and modernisation to ensure it gives effect to modern societal expectations with respect to succession law.

Previous Succession Law Reviews

Substantial reviews have been undertaken in the succession law area over the last 30 years by the Queensland Law Reform Commission (QLRC).

These include:

1. QLRC Report No 42 on Intestacy Rules released in June 1993;
2. QLRC Report No 52 on The Law of Wills released in December 1997;
3. QLRC Report to the Standing Committee of Attorneys General on Family Provision, Miscellaneous Paper 28 released December 1997;
4. QLRC Report No 58 on Family Provision (Supplementary Report to the Standing Committee of Attorneys General) released in July 2004;
5. QLRC Report No 61 on Wills: the anti-lapse rule (Supplementary Report to the Standing Committee of Attorneys General) released March 2006); and
6. QLRC Report No 65 on Administration of Estates of Deceased Persons: report of the National Committee for Uniform Succession Law to the Standing Committee of Attorneys General (Uniform Succession Law Report (USLR)).

Queensland Government Election Commitment

Prior to the 2020 election, the Queensland Government committed to a review of the Act, in consultation with experts and stakeholders, to identify areas of reform, in particular reform to the forfeiture rule.

Consultation

Targeted consultation has been undertaken to assist with identifying key areas of reform. Many areas of reform identified relate to technical reforms and are in addition to a proposed modernisation of the Act generally. However, the proposed reforms in relation to some areas of intestacy entitlements and family provision applications are likely to be of interest to many Queenslanders. Accordingly, **Attachment A** sets out some possible areas for reform in relation to intestacy entitlements and family provision applications, subject to the results of consultation.

How to make a submission

If you would like to make a written submission in relation to these reforms, please email the Succession Act Review team on SuccessionActReview@justice.qld.gov.au by **COB Monday, 16 October 2023**.



Your privacy

The Queensland Government is bound by the *Information Privacy Act 2009*. Find out more by reading about this at: <https://www.justice.qld.gov.au/legals/privacy>. Information provided in your submission may be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of informing the *Succession Act 1981* review consultation. DJAG may contact you for further information on the issues you raise in your submission. Your submission may also be published on DJAG's website. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note, however, that all submissions may be subject to disclosure under the *Right to Information Act 2009*.



ATTACHMENT A

1. Intestacy Entitlements

1.1 What is Intestacy?

A Will is an important legally-binding document which takes effect on your death. It provides who benefits from your estate as beneficiaries of your estate, and who will carry out your wishes as executor of your estate. It may also appoint a guardian for minor children, provide care arrangements for pets and specify arrangements for funeral, burial and/or cremation.

Where a deceased person does not leave a will, they die intestate. The rules of intestacy apply where a deceased person dies intestate, or their will fails to dispose of the entirety of their estate. The rules of intestacy, in the *Succession Act 1981*, Part 3, Division 2 and in Schedule 2, provide how that deceased person's estate (which is not otherwise disposed of by a will) is distributed.

Therefore, it is important for persons over 18 years of age with capacity to make a will, particularly if they do not wish for their estate to pass pursuant to the rules of intestacy on their death. It is also important to think about updating your Will when:

- You get married, enter into a civil partnership, or enter into a de facto relationship
- You separate, divorce, terminate a civil partnership or end a de facto relationship
- Children or grandchildren are born
- Your executor or a beneficiary dies
- You buy or sell property which is specifically gifted under your will;
- Your financial circumstances change significantly.

1.2 The current rules of Intestacy

Currently, if the rules of intestacy apply to an estate, then the estate will be distributed as follows in each of the following circumstances:

1.2.1 If the deceased has no child but has a spouse or spouses

The whole of the estate will pass to the deceased's spouse or spouses (and between them, if more than one pursuant to section 36 of the *Succession Act 1981*).

1.2.2 If the deceased has at least one child and has a spouse or spouses

The estate will pass, as follows:

- (a) The deceased's spouse or spouses (and between them, if more than one pursuant to section 36 of the *Succession Act 1981*) will receive the following from the estate:
 - a. \$150,000; and
 - b. The deceased's household chattels. This includes all furniture, curtains, drapes, linen, china, glassware, ornaments, domestic appliances and utensils, garden appliances, utensils and effects and other chattels of ordinary household use or decoration, liquors, wines, consumable stores and domestic animals owned by the deceased immediately before their death but does not include a motor vehicle, boat, aircraft, racing animal, original painting or other original work of art, trophy, clothing, jewellery or other chattel of a personal nature; and



- c. $\frac{1}{2}$ (if the deceased has only one child) or $\frac{1}{3}$ (if the deceased has two or more children) of the residuary estate; and

(b) The child or children of the deceased will receive the following:

- a. If the deceased has one child, $\frac{1}{2}$ of the residuary estate; or
- b. If the deceased has two or more children, $\frac{2}{3}$ of the residuary estate;

and if a child, or any of the children of the deceased, have failed to survive the deceased leaving a child, then their child shall take their parent's share and, if more than one child, then in equal shares.

1.2.3 If the deceased has at least one child and no spouse

The whole of the estate will pass to the deceased's child, or if more than one, then in equal shares, provided that if any of the deceased's children have failed to survive the deceased leaving a child, then their child shall take their deceased parent's share and, if more than one child, then in equal shares.

1.2.4 If the deceased has no child and no spouse but has next of kin

The whole of the estate will pass:

- (a) if the deceased has a parent, to the parent and if more than one survives the deceased, in equal shares;
- (b) if the deceased has no parents but they have a sibling, to the sibling and if more than one sibling survives the deceased, then in equal shares, provided that if any of the siblings have failed to survive the deceased leaving a child, then their child shall take their deceased parent's share and, if more than one child, in equal shares;
- (c) if the deceased has no parents, no siblings, and no nieces and nephews, but are survived by grandparents, then to those grandparents, and if more than one, then in equal shares;
- (d) if the deceased has no parents, no siblings, no nieces and nephews, and no grandparents, but are survived by aunts and uncles, then to those aunts and uncles, and if more than one, then in equal shares, provided that if any one of them fails to survive the deceased leaving a child, then their child shall take their deceased parent's share and if more than one then in equal shares.

1.2.5 If the deceased has no child, no spouse and no next of kin

The whole of the estate shall pass *bona vacantia* to the State of Queensland, subject to any waiver of these rights under section 20(5) of the *Property Law Act 1974*.

1.2.6 Definitions for the above circumstances

For each of these circumstances:

A child, in relation to the deceased, means, a biological child and an adopted child, but does not include a biological child, whom the deceased adopted out, or a stepchild.

A spouse, in relation to the deceased, means:

- (i) a husband or wife;



- (ii) a de facto partner (as defined under the *Acts Interpretation Act 1954*, section 32DA) who lived together with the deceased as a couple on a genuine domestic basis (within the meaning of section 32DA), for a continuous period of at least 2 years ending on the death of the deceased; or
- (iii) a civil partner being the deceased's partner under a civil partnership registered under the *Civil Partnerships Act 2011*.

Next of kin means any of the following of the deceased: the parents, the brothers and sisters, the children of the brothers and sisters (nieces and nephews), the grandparents, the aunts and uncles, and the children of the aunts and uncles.

1.3 Changes that are under consideration in relation to the beneficiaries eligible to take on intestacy

1.3.1 Child

Consideration is being given to allowing the definition of a child of a deceased person to be expanded by court order to include a person who may be a child of the deceased person under Aboriginal and/or Torres Strait Islander cultural tradition applicable to the deceased person.

1.3.2 Spouse

Consideration is being given to amending the definition of a spouse of a deceased person so that it:

- (a) is extended to include a de facto spouse of the deceased person whose de facto relationship is subsisting at the date of death, irrespective of the length of the relationship, where there is a minor child of the relationship at the date of death;
- (b) may be expanded by court order to include a spouse where they are a spouse of the deceased person under a traditional marriage in Aboriginal and/or Torres Strait Islander cultural tradition;
- (c) excludes a spouse that the deceased person was married to at the date of their death where the deceased person:
 - a. was separated from that spouse at the date of death; and
 - b. had reached a formal final property settlement with that spouse under the *Family Law Act 1975* either by way of a final order of the Family Law Court or a binding Financial Agreement.

1.3.3 Child, spouse and other beneficiaries under Aboriginal and/or Torres Strait Islander cultural traditions

Consideration is being given to, subject to a court order, allowing a deceased person's estate to be distributed pursuant to the Aboriginal and/or Torres Strait Islander cultural tradition of the community or group to which the deceased person belonged rather than pursuant to the intestacy rules.

There are cost implications in requiring a court application to obtain a court order providing for an extension of the definition of a child or spouse to include a person who falls within that definition under Aboriginal and/or Torres Strait Islander tradition, or to allowing a deceased person's estate to be distributed pursuant to the Aboriginal and/or Torres Strait Islander cultural tradition of the community or group to which the deceased person belonged rather than pursuant to the intestacy rules.



Some stakeholders have suggested that this extension to the definition of child or spouse should be available through an alternative less formal means than a court order.

However, given the recognised diversity of Aboriginal and Torres Strait Islander cultures within Australia, it may be difficult in practice to recognise cultural traditions without a court hearing, to ensure appropriate consideration is given to the specific cultural traditions that apply to the deceased person's individual family circumstances. It is noted that similar provisions have been adopted in New South Wales and the Northern Territory. These similarly require a court order to allow distribution of an intestate estate in accordance with the cultural traditions (see, for example, section 133 and 134 of the *Succession Act 2006* (NSW) and section 71B of the *Administration and Probate Act 1969* (NT)).

1.4 Changes under consideration in relation to the entitlements of beneficiaries eligible to take on intestacy

Consideration is being given to a change to entitlements where the deceased has died and has at least one child and has a spouse or spouses, as follows:

The estate would pass:

- (a) if all of the children are children of both the deceased and the spouse (and the deceased has only one spouse at the date of death), then the whole of the estate will pass to the spouse; or
- (b) If the deceased has children who are not children of the spouse or more than one spouse then:
 - a. The spouse will receive (and if more than one spouse, then between them):
 - i. \$500,000 (to be indexed annually to Consumer Price Index);
 - ii. The deceased's household chattels, which will not include photographs (including negatives of and digital stored photographs as well as family videos/movies, whether stored digitally or otherwise, and the like);
 - iii. $\frac{1}{2}$ (if the deceased has only one child) or $\frac{1}{3}$ (if the deceased has two or more children) of the residuary estate; and
 - b. The child or children will receive the following:
 - i. If the deceased has only one child, $\frac{1}{2}$ of the residuary estate; or
 - ii. If the deceased has two or more children, $\frac{2}{3}$ of the residuary estate;

and if a child, or any of the children, have failed to survive the deceased leaving a child, then that child shall take their deceased parent's share and, if more than one child, in equal shares.



Consultation Questions – Intestacy Beneficiaries

1. *Do you agree with the variations to the beneficiaries eligible to take on intestacy (raised above) and should any other variations be considered?*
 2. *Do you agree with allowing a court, by order, to extend eligible beneficiaries to include those under Aboriginal and/or Torres Strait Islander cultural tradition of which the deceased person was part or should a more informal option be considered and, if so, what?*
 3. *Do you agree with the proposed variations to the entitlements of the deceased person's children and spouses on intestacy and, in particular:*
 - *the increase of the spousal legacy to \$500,000?*
 - *the indexation of the spousal legacy to Consumer Price Index (as has been adopted in New South Wales and Victoria) or whether this should instead be linked to the Bank Bill Yield Rate?*
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2. Family Provision Applications

2.1 What is a family provision application?

An eligible applicant may apply to the Supreme or District Court of Queensland for an order for further provision from a deceased person's estate where the deceased person's estate inadequately provides, or fails to provide, for that eligible applicant under part 4 of the *Succession Act 1981*. Traditionally, this was based on the public policy that a deceased person's dependants, such as their spouse and minor children, ought not to be supported by government if there were sufficient assets in the deceased person's estate to provide for them. It has, however, come far from this initial position and is no longer limited to eligible applicants who would otherwise be dependent on the Government.

When a family provision order is made, it alters the distribution of the deceased person's estate under the deceased person's will, or the distribution under rules of intestacy, so that the further provision that is ordered is paid to the eligible applicant as a gift (or further gift) out of the deceased person's estate.

2.2 Who are eligible applicants for family provision applications?

The eligible applicants who may apply for family provision under part 4 of the *Succession Act 1981* against the deceased's estate currently include:

a child - a biological child and an adopted child of the deceased but not a biological child, whom the deceased has adopted out, or a stepchild.

stepchild – any child of the deceased's spouse where the relationship between the deceased and spouse did not stop due to a divorce, a termination of a civil partnership (other than by the deceased's or the spouse's death), or the ending of a de facto relationship prior to the deceased's death. If the spouse died before the deceased, and the marriage, civil partnership or de facto relationship subsisted at the date of the spouse's death, irrespective of whether the deceased has remarried, or entered into a new civil partnership or de facto relationship after the spouse's death and before the deceased's death, their child will still be the deceased's stepchild.

spouse – this means:

- (i) the deceased's husband or wife;
- (ii) the deceased's de facto partner (as defined under the *Acts Interpretation Act 1954*, section 32DA) who lived together with the deceased as a couple on a genuine domestic basis, within the meaning of that section, for a continuous period of at least 2 years ending on the deceased's death; and
- (iii) the deceased's civil partner being a partner under a civil partnership registered under the *Civil Partnerships Act 2011*.

dependant former spouse – means a person who:-

- (i) has divorced from the deceased, or was in a civil partnership with the deceased which has terminated (other than by the deceased's death) before the deceased's death;
- (ii) has not (re)married or entered into another civil partnership before the deceased's death;
- (iii) was, at the date of the deceased's death, receiving, or entitled to receive, maintenance from the deceased.

dependant - means a person who was being wholly or substantially maintained or supported (other than for full valuable consideration e.g. payment for services) by the deceased at the date of the deceased's death and is:



- (i) the deceased's parent or parents;
- (ii) a person under the age of 18 years; or
- (iii) a parent of the deceased's surviving child and that child is under 18 years of age.

2.3 Changes are under consideration in relation to eligible applicants

2.3.1 Child and Stepchild

Consideration is being given to allowing the definition of a child of a deceased to be expanded by the court by order to include a person who may be considered to be a child of the deceased under relevant Aboriginal and/or Torres Strait Islander cultural tradition. As set out above, there are cost implications in requiring a court order for this definition to be expanded.

Consideration is being given to amending the definition of child and stepchild so that it will not include a child or stepchild of the deceased where the deceased's estate is small, for example, having a net value of less than \$250,000 (with this net value to be indexed annually to Consumer Price Index), unless that child or stepchild was, at the date of the deceased's death:

- (a) under 18 years of age; or
- (b) under 25 years of age and financially dependent on the deceased; or
- (c) disabled such that the disability meets that definition in section 11 of the *Disability Services Act 2006*; or
- (d) in receipt of a government pension and the holder of a pensioner concession card under section 23 of the *Social Security Act 1991* (Cth).

This limitation would exclude any adult children or stepchildren from contesting smaller estates unless they are a minor, disabled, in receipt of a government pension, or under 25 years of age and still financially dependent on the deceased at the date of death. This recognizes that, in smaller estates, given the serious impact costs may have in depleting the size of the estate available for distribution, only claims by needy children and stepchildren should be brought and considered.

It has been raised whether instead the court's discretion should remain in smaller estates to allow applications by children or stepchildren who are not 'needy' but who may have a moral claim on the estate due to the deceased's failure to make any or adequate provision for them and/or for contributions made by them (or in the case of stepchildren, by their biological parent) to the deceased's estate. However, this would increase the risk of smaller estates being depleted by costs of family provision applications by adult children and beneficiaries who are not 'needy'.

2.3.2 Spouse

Consideration is being given to amending the definition of a spouse of a deceased so it:

- (a) is extended to include a de facto spouse of the deceased whose de facto relationship is subsisting at the date of death, irrespective of the length of the relationship, where there is a minor child of the relationship at the date of death;
- (b) may be expanded by the court by order to include a spouse of the deceased under a traditional marriage in Aboriginal and Torres Strait Islander cultural tradition. As set out above, there are cost implications in requiring a court order for this definition to be expanded;
- (c) excludes a spouse that the deceased was married to at the date of their death where the deceased:



- a. was separated from that spouse at the date of death; and
- b. had reached a formal final property settlement with that spouse under the *Family Law Act 1975* either by way of a final order of the Family Law Court or a binding Financial Agreement.

2.3.3 Dependant

Consideration is being given to expanding the definition of dependant of the deceased to include any person who, at the date of the deceased's death, is wholly or substantially maintained or supported (otherwise than for full valuable consideration) by the deceased and had a disability of the kind described in section 11 of the *Disability Services Act 2006* (Qld).

2.4 Proposed changes to applications for further provision (also known as "family provision applications")

2.4.1 Notice to beneficiaries or potential applicants

Currently, a personal representative of a deceased's estate does not have a statutory obligation to provide a copy of the will to any person, unless it is requested by an entitled person under section 33Z of the *Succession Act 1981*. This provision allows an entitled person to inspect a copy of the will, or be provided with a certified copy of the will on payment of reasonable expenses of giving the certified copy.

An entitled person under this section includes:

- a person mentioned in the will, whether as beneficiary or not and whether named or not;
- a person mentioned in any earlier will of the will maker as a beneficiary and whether named or not;
- a spouse, parent or issue of the will maker;
- a person who would be entitled to a share of the estate of the will maker if the will maker had died intestate;
- a parent or guardian of a minor mentioned in the will or who would be entitled to a share of the estate if the will maker had died intestate;
- a creditor or other person who has a claim at law or in equity against the will maker's estate; and
- a person who is an eligible applicant to apply for further provision under a family provision application under section 41 of the *Succession Act 1981*.

A person who intends to prove a will often publishes notice of their intention to:

- (a) apply to the Supreme Court for a grant of probate or administration; and/or
- (b) distribute the deceased's estate.

A personal representative is not required to provide notice to any eligible applicant or beneficiary about the beneficiary or eligible applicant's rights to make a family provision application against the estate, unless the eligible applicant has impaired capacity.

Where an eligible applicant has impaired capacity, under section 41(7) of the *Succession Act 1981*, a personal representative may make, or apply to the court for advice or directions on whether to make, a family provision application on behalf of a potential family provision applicant. However, often, a personal representative will have insufficient information available to them about that applicant's affairs to assess the potential family provision applicant's application against the estate.



Therefore, to protect their right to make a family provision application, an eligible applicant must:

- give notice to the personal representative of their intention to make a family provision application against the deceased's estate within six months of the date of death of the deceased, and
- file and serve any family provision application proceedings on the personal representative within nine months of the date of death of the deceased.

If these steps are not taken by the eligible applicant, the personal representative may proceed to distribute the estate. Under section 44 of the *Succession Act 1981*, if a personal representative does not receive written notice from an eligible applicant of an intention to make a family provision application within six months of the date of death, the personal representative is able to distribute the estate without any personal liability to any eligible applicant after six months from the date of death.

If the personal representative receives written notice of an eligible applicant's intention to commence a family provision application, but does not receive notice that the eligible applicant has commenced an application in the court within nine months after the date of death, the personal representative is able to distribute the estate after those nine months from the date of death without any personal liability to any eligible applicant.

Issues will often arise where the personal representative does not provide sufficient information to eligible applicants to properly assess whether to make a family provision application before these six-month and nine-month timeframes, or the eligible applicant is not made aware of the death of the deceased.

Consideration is being given to placing an obligation on a personal representative of a deceased's estate to provide notice to all beneficiaries of the deceased's estate to enable them to make an early assessment of any potential family provision application rights against the deceased's estate. It is proposed that this notice would have to be given within a specified time of the date of death and include:

- a. a notification of the full name and date of death of the deceased;
- b. a copy of the deceased's will (if there is one) or a statement that there is no will of the deceased and the proposed distribution will be under the rules of intestacy; and
- c. a current statement of the assets and liabilities of the estate including a reasonable estimate of the value of each asset and liability; and
- d. a statement of any assets and liabilities of the deceased at the date of death irrespective of whether they are currently assets of the estate (including jointly held assets, superannuation, life insurance, etc.) including a reasonable estimate of the value of each at the date of death; and
- e. the name and address for service of the personal representative.

The proposal under consideration would also place an obligation on a personal representative of the estate to provide notice to any applicants who may be eligible to make a family provision application, who have impaired capacity, via their administrator or attorney, or if they are under 18 years, via their guardian, to enable these parties to make an early assessment of any potential family provision application rights against the estate. This notice would have to be given within a specified time of the date of death of the deceased person and would include prescribed information, as set out above, but also include a statement that the potential applicant may be eligible to make a family provision application against the deceased's estate.

The proposal under consideration would also limit the personal representative's protection from personal liability if they fail to give the required notices to the beneficiary, or to the guardian, administrator or attorney of a potential family provision applicant who has impaired capacity or



is minor. If the notices are not given, then the personal representative will not receive protection for personal liability under section 44 of the *Succession Act 1981* if they distribute the deceased's estate within nine months from the date of death.

However, these notices would only be required to be given if the names and contact details of the beneficiary, or guardian, attorney or administrator of the eligible applicant, who is a minor or has impaired capacity, are known to the personal representative or are able to be reasonably ascertained if reasonable enquiries are undertaken by the personal representative.

These proposed changes would impose an obligation on personal representatives to give certain notices to the beneficiaries and also to potential family provision applicants who have impaired capacity. This will place additional obligations on the personal representative which may incur additional costs for the estate and may, in some cases, delay the administration of the estate. It may be argued that in a straight-forward estate where there is no dispute, these notices are unnecessary. It has been suggested that these additional obligations may lead to persons choosing not to act as personal representatives. However, such obligations are generally in line with a personal representative's existing fiduciary obligations to provide an accounting of the estate to the beneficiaries and also, in light of section 41(7) of the *Succession Act 1981*, to consider whether to make a family provision application on behalf of a family provision applicant who has impaired capacity. In accordance with these existing obligations, it is likely that personal representative will be required to provide written correspondence to these parties as part of the estate administration process. These notices could be included as part of that written correspondence. Therefore, it could be argued that the obligation to provide these notices is unlikely to incur significant additional costs for the estate.

It is recognised that, on occasion, there are delays in ascertaining the assets and liabilities of the estate and the estimated values of these assets and liabilities for a variety of reasons outside of the personal representative's control. However, there is no apparent reason why the personal representative could not provide details of the information that is currently available to them, and where information is not currently available a reason why that information is not currently available, and provide updates as the information becomes available.

Often beneficiaries or potential family provision applicants who have impaired capacity may be unaware of the deceased's death and, accordingly, may not request the necessary information. Requiring the personal representative to provide this information will make beneficiaries or potential family provision applicants who have impaired capacity aware of the death and allow them to consider their rights in a timely manner.

2.4.2 Contracting out of family provision application rights

It is not currently possible to contract out of the right to make a family provision application in Queensland.

Consideration is being given to permitting parties, where approved by the court in appropriate circumstances via court order, to contract out of family provision application rights.

2.4.3 Costs

Costs are at the discretion of the court. There is no general presumption that a successful party, or that all parties, will have their costs paid out of the estate.

Rule 700A of the *Uniform Civil Procedure Rules 1999* provides that for family provision application proceedings under part 4 of the *Succession Act 1981*, the court may take into account the following factors in considering determining any cost orders:



- the value of the property involved in the proceedings or the subject of a disputed entitlement;
- whether costs have increased because of various factors including noncompliance with rules or a practice direction, the litigation of unmeritorious issues, failure to make prompt, or any, appropriate concessions or admissions, or giving too much attention to minor or unimportant issues;
- any settlement offers made by any party to the proceeding.

However, many family provision applications may resolve prior to any involvement by the court, often with the costs falling to the estate.

Escalating costs in family provision application are of concern, particularly in relation to smaller estates. Where the costs of the parties to these applications are payable out of the estate, the estate available for distribution to the beneficiaries may be depleted by these costs.

Consideration is being given to reforms which signal that costs and the likely quantum of any family provision should be considered by eligible applicants before they make a family provision application.

Consideration is being given to capping costs in family provision applications so that, unless the court is of the view that special circumstances apply, the costs ordered to be paid from the estate to any eligible applicant for whom further provision is ordered must not be greater than a portion, for example, 25%, of the further provision ordered for that eligible applicant. This allows the court discretion, in appropriate circumstances, to make an allowance for greater costs where appropriate, but also signals to potential family provision applicants the need to adopt a commercial approach in making a family provision application and assess the likely quantum of the further provision sought against the estate and their likely costs before making an application.

It is noted that, in some cases, family provision applications will be resolved by agreement between all parties without the need for these applications to be heard or approved by the court. In this instance, the discretion of the court to award greater costs will not be available. However, it is anticipated that the proposed cost capping will also be taken into account by the parties in considering whether to bring a family provision application, and to appropriately negotiate a resolution of any family provision application, including any provision for costs for the family provision applicant, as appropriate.

Other reforms are also being considered to minimise costs including a fast-track procedure in smaller estates to bring family provision applications before the court at an earlier stage for directions and determination before costs escalate.

Consideration is also being given to providing for a general rule on costs (possibly subject to the above rule on capping of costs) that applies unless the court determines otherwise in its discretion based on the circumstances of the case. This rule on costs is proposed to be that a successful family provision applicant's costs are paid on a standard basis (which is court-ordered costs which is typically 50-66% of the actual legal costs incurred by a party), and the estate's costs are payable on an indemnity basis (which is solicitor/client costs which is typically 90-100% of the actual legal costs incurred by a party). This will leave the applicant with a shortfall in their costs which they will need to pay, unless the court exercises its discretion to order a different costs order to this general rule on costs.



Consultation Questions – Family Provision Applications

1. *Do you agree with the variations to the eligible applicants for family provision applications (raised above) and should any other variations be considered?*
 2. *With respect to the proposal to limit the ability of adult children and stepchildren to make a family provision application in smaller estates, is a net value of \$250,000 (to be indexed to Consumer Price Index) an appropriate threshold?*
 3. *Do you agree with the proposal to allow parties to contract out of their right to make a family provision application (subject to court approval)?*
 4. *Do you consider requiring a personal representative to give the proposed notice to beneficiaries, and eligible applicants who have impaired capacity, is a reasonable requirement notwithstanding the potential for slightly increased costs and delay in the estate administration?*
 5. *Do you agree with the proposals to reduce costs in family provision matters by:*
 - *capping successful applicant's costs and, if so, what percentage should be adopted;*
 - *providing for general rules for costs for successful applicants and the estate; and*
 - *implementing a fast-track process for smaller estates?*
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