Foreign-Domiciled Testators: Jurisdiction over Family Maintenance Claims

In each of the Australian states, legislation exists to recognise that testators have a moral duty to make provision in their wills for certain kinds of dependents and other claimants, and to empower such claimants to make claims upon the estate of testators who failed to make appropriate provision in their wills. The relevant NSW legislation is now ch 3 of the *Succession Act 2006* (NSW) (but the *Family Provision Act 1982* (NSW) continues to apply to the estates of testators dying before 1 March 2009),which is similar to its interstate equivalents, although the precise details and the width of the category of eligible claimants vary from state to state. Complicated jurisdictional and choice of law questions can arise depending on the domicile of the testator and the location of the relevant property.

A recent case before Brereton J in the NSW Supreme Court concerned the application of Family Provision Act to the estate of a couple who died domiciled in Malta, leaving real and personal property in Malta and in NSW. The couple's adult children made a claim under the Family Provision Act to real property situated in NSW. In his Honour's usual style, the judgment contains a helpfully concise summary of the applicable law (at [26]):

> *"In those circumstances the relevant law is, as stated by Scholl J in Re Paulin [1950] VLR 462 at 465, that in connection with the application of testator's family maintenance legislation, first, the Courts of the domicile alone can exercise jurisdiction under the testator's family maintenance legislation of the domicile in respect of movable and immovable property in the place of domicile; secondly, the Court's of the domicile alone can exercise such jurisdiction in respect of movable property of the deceased outside the place domicile; but thirdly, Courts of the situs alone can exercise such jurisdiction in respect of immovable property of the deceased out of the place of domicile, and Courts of the place of domicile cannot exercise such jurisdiction [see also Pain v Holt (1919) 19 SR (NSW) 105; Re Sellar (1925) 25 SR (NSW) 540; Re Donnelly (1927) 28 SR (NSW) 34; Re Osborne [1928] St R Qd 129; Re Butchart [1932]*

NZLR 125, 131; Ostrander v Houston (1915) 8 WWR 367; Heuston v Barber (1990) 19 NSWLR 354; Balajan v Nikitin (1994) 35 NSWLR 51]. It follows that any order made by this Court can affect only immovable property of the deceased in New South Wales; it cannot affect movable property in New South Wales, nor any property outside the State. However, in deciding what order should be made affecting immovable property in New South Wales, the Court is entitled nonetheless to take into account assets beyond the reach of its jurisdiction which inform the extent to which eligible persons and beneficiaries and others having claims on the deceased's testamentary bounty have and will receive provision. The Court can also take into account assets beyond the reach of the jurisdiction in deciding what order to make in respect of costs relating to the assets in the jurisdiction [see Re Paulin and Re Donnelly]."

Taylor v Farrugia [2009] NSWSC 801 (5 June 2009)