

## BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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### TO BE VESTED OR NOT TO BE VESTED ... THAT IS THE DECLARATION

By Denis Barlin

The NSW Court of Appeal's decision in *Chief Commissioner of State Revenue v Platinum Investment Management Ltd* [2011] NSWCA 48 ('**Platinum Investment**') will have considerable impact on practitioners dealing with NSW 'dutable property'.

The court considered that a declaration of trust could be made over 'dutable property' that is not in existence at the time that the declaration is made (i.e. 'future property'). The *Duties Act 1997* (NSW) has been amended to make this clear (ss 12(3) of the Duties Act).

Further, the court considered that the 'apparent purchaser' duty concession contained in section 55 of the Duties Act cannot apply if a declaration of trust is made before one has any rights with respect to the property. For example, if a declaration is made before a contract for sale of land is exchanged, then two lots of ad valorem duty may arise, one on the declaration and the second on the agreement to purchase the property.

Some circumstances which may cause the principles relating to the apparent purchaser concession as enunciated in *Platinum Investments* to give rise to hazards for advisers include:

- arrangements (such as that in *Platinum Investments*) where NSW dutiable property is to be held by a custodian / nominee;
- an acknowledgement / declaration given to a client that a contract to acquire property entered into if the adviser successfully bids at an auction will be for the benefit of the client; and
- bare trust arrangements entered into for the purposes of acquiring an asset by a trustee of a superannuation fund pursuant to sections 67A and 67B of the *Superannuation Industry (Supervision) Act 1993* (Cth).

(A more detailed version of this article appears in *Taxation in Australia*, vol. 45(10), May 2011 at p. 596).

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## **APPEALS – DECEASED ESTATES - Durham v Durham [2011] NSWCA 62**

This case is noteworthy for the warning to practitioners given by the Court of Appeal as to Notices of Appeal which are non-compliant with the UCPR, r 51.18(1), 51.18(2) and Practice Note SC CA 1, clause 10.

The Court bemoaned the increasing trend of practitioners, in appeals under the Family Provision legislation and the Succession Act, to simply allege that the court erred in law or fact. The Court said that this should not happen. Practitioners were reminded that the grounds of appeal must identify the respects in which those errors occurred. The Court made it clear that if this increasingly common practice continues, successful appellants may be denied the costs associated with the drafting of the grounds of appeal.

**By Jennifer D. Beck**

## **SUCCESSION – FAMILY PROVISION – CLAIM BY FOSTER CHILD: Phegan v Hynes [2011] NSWSC 246**

A foster daughter made a claim on her foster parent's estate, worth \$1.43 million. Under the deceased's last will he devised his house to his two children in equal shares. The residue was divided equally between his foster daughter and his two children.

The plaintiff was not adopted but lived with the deceased since age 5. Her eligibility depended on section 57(1)(e) of the Succession Act. The deceased's reasons for giving the plaintiff less included that she was a foster child and only made contact when she needed money.

Macready AsJ was satisfied that the plaintiff was eligible, factors warranting were present and the provision was inadequate. His Honour did not equate her status to a child but found her eligible as a member of the deceased's household who had been dependent upon the deceased from at least the age of 5. He ordered she receive a legacy of \$420,000. The residue of the estate was to pass equally to the two biological children.

**By Despina Christofis**

## **PRACTICE POINTS**

### **Deceased Estates: Notices**

Publication of a valid Notice of Intended

To receive this newsletter by email, or to cease receiving it, please contact [paulwalker@13wentworthselbornechambers.com.au](mailto:paulwalker@13wentworthselbornechambers.com.au) It is also published on the floor's website [www.13wentworthselbornechambers.com.au](http://www.13wentworthselbornechambers.com.au).

Important: This newsletter is not advice. You should not act solely on the basis of the material contained in this newsletter. The contents of this newsletter may have been superseded by changes in the law.

Distribution is crucial if legal personal representatives wish to be afforded protection from claims made after distribution.

There has been much confusion as to the wording of the Notice. In April 2011 the Uniform Rules Committee approved changes to Form 114 (v2). Version 2 is for notices given after March 2011 where the deceased died on or after 1 March 2009. For notices given before April 2011 and where the deceased died before, on or after 1 March 2009, version 1 applied. Version 2 now covers notices under s92 of the PAA and s93 of the SA.

Warning: Version 2 does not incorporate s92(1)(a) PAA or s93(1)(a) SA which limit protection to LPR's who distribute the estate at least 6 months after death. Nor does it extend to notices under s60 Trustee Act 1925 (distribution to persons entitled).

In *McGrath v Troy* [2010] NSWSC 1470, a LPR was not protected from a family provision claim made after distribution, despite publication of a Notice.

**By Ramena Kako**

## **ANNOUNCEMENTS**

### **New members, reader**

**Julian O'Sullivan** and **Denis Barlin** have become members of the floor, and **Frances Lalic** has joined the floor as a reader.

### **Upcoming seminars**

**Denis Barlin** and **Ramena Kako**: "Mistakes by executors, trust distributions and trust splitting", 3 & 4 June 2011. [www.cst.com.au](http://www.cst.com.au)

**Denis Barlin**: "Succession planning – superannuation and trusts", 29 June 2011; "Directors Duties and Taxation", 27 July 2011. [eshop.lawsociety.com.au](http://eshop.lawsociety.com.au)

### **Seminar papers added to the website**

**Therese Catanzariti**: "Powers of Attorney, Financial Management Orders, Enduring Guardianship and Guardianship Orders" and "Tax Departure Prohibition Orders". [www.13wentworthselbornechambers.com.au/catanzariti.html](http://www.13wentworthselbornechambers.com.au/catanzariti.html)

**Edmund Finnane**: "Equitable interest in land created by informal arrangements". [www.13wentworthselbornechambers.com.au/finnane.html](http://www.13wentworthselbornechambers.com.au/finnane.html)