

NAVIGATING FAMILY MINEFIELDS – WILLS AND ESTATE PLANNING
Therese Catanzariti, 13 Wentworth Chambers

fu bu guo san dai - wealth does not pass three generations

Chinese proverb

“In this muddle of irrelevant evidence and expert reports, the obligations imposed by ss 56(3) and (3A) of the Civil Procedure Act seem to have been left behind in a trail of myopic detail and unnecessary cost. Predictably, some of the most enthusiastic submissions were reserved for the question of the payment of costs on an indemnity basis out of the estate — as if the estate were nothing less than a milch cow.”

Pembroke J, Ireland v Retallack; Estate of Gordon [2011] NSWSC 846

Deceased Estate Administration Risks

- ***Claims against the estate***

Family Provision

Testamentary capacity – contemporaneous geriatrician report *D’Apice v Gutkovich – Estate of Abraham* (No 2) [2010] NSWSC 1333

- ***Claims about existence and amount of debts due to the deceased / debts due from the deceased***

Gift or loan? Presumption of advancement – *Re Public Trustee* [2007] NSWSC 1066;

Loan forgiven in will or during deceased’s lifetime - *Executor Trustee Australia Ltd v Blum* [2007] SASC 329

Is the loan statute barred – *s14 Limitation Act; Re Public Trustee* [2007] NSWSC 1066, or has the loan been affirmed - *s54 Limitation Act; Chidiac v Maatouk* [2010] NSWSC 386

Hotchpot for any advances made to a beneficiary during life or before final distribution (and distribution of income generated after death and before final distribution - *Re Tennant; Mortlock v Hawker* (1942) 65 CLR 473

Potential conflict of interest if executor is debtor / creditor – *Rutter v McCusker* [2008] NSWSC 1289

Are amounts advanced to attorney under deceased’s power of attorney a loan? held on trust? (and potential conflict of interest if executor is attorney) - *Watson v Watson* [2002] NSWSC 919

- ***Disputes between executors***

Due and proper administration of an estate had either been put in jeopardy or had been prevented either by reasons of acts or omissions on the part of the executor or by virtue of matters personal to him, for example, mental infirmity, ill health, or by virtue of the proof of other matters which established that the executor was not a fit and proper person to carry out the duties he had sworn to perform - *Bates v Messner* (1967) 67 SR (NSW) 187; *Mavrideros v Mack* (1998) 45 NSWLR 80; *Schaverien v Jones* [2007] NSWSC 1429

- ***claims relating to distribution of CGT-property***

If executor receives amounts which would have been the deceased’s assessable income if they were alive, then the amount is part of the estate’s assessable income and income to which no beneficiary is presently entitled, so estate is liable for tax – *s101A Income Tax Assessment Act 1936*; and assessable income includes net capital gains - *s 102-5 Income Tax Assessment Act 1997*

Fiduciary duty to act impartially between beneficiaries – *Cowan v Scargill* [1985] Ch 270; *s14B(2)(c) Trustee Act 1925*;

Executors may distribute share holding without responsibility for beneficiary’s CGT outcomes, but should act even handedly and not disadvantage one relative to others by allocating all low cost base shares - *Schaverien v Jones* [2007] NSWSC 1429

- ***no capital gains on transfer to beneficiary but only if pass through will or FP claim***

executor’s capital gain or loss passing an asset to a beneficiary of an estate is disregarded - *s128-15(3) Income Tax Assessment Act 1997*

CGT asset passes to a beneficiary if the asset is appropriated to the beneficiary by executor in satisfaction of a pecuniary legacy or some other interest or share in the estate - *s128-20(1)(c) Income Tax Assessment Act*
Family provision order takes effect as if will or codicil to will – *s72 Succession Act*

- ***no stamp duty but only if pass through will or FP claim***

nominal duty if transfer property pursuant to will or to satisfy beneficiary’s entitlement under will – *s63 Duties Act 1997*

Family provision order takes effect as if will or codicil to will – *s72 Succession Act*

- **mortgage**

any charges for the payment of money on the deceased's property are to be paid out of that property, and any beneficiary entitled to the property take it subject to the charge and are responsible for the charge, unless the will expresses a contrary intention - s145 *Conveyancing Act 1919* (NSW) (Locke King's Act)

- **fiduciary duties**

executor subject to fiduciary duty to act in best interest of all beneficiaries and impartially between beneficiaries and between different classes of beneficiaries - *Cowan v Scargill* [1985] Ch 270; s14B(2) *Trustee Act 1925*

- **length of time for claim to be resolved**

executor not protected if distribute estate after notice of FP claim – s93(2) Succession Act
perishable assets
impecunious beneficiaries eg elderly widow with no other financial support
time sensitive investments – shares
headstones

Financial Abuse Risk During Deceased's Lifetime

- **operation of bank accounts**

- o no bank statements – challenging to order after death – cost, no standing (may need subpoena)
- o cash withdrawals rather than direct debit, transfer to specific accounts
- o incomplete cheque butts
- o incomplete records of loans to beneficiaries

- **testator nominate person as executor**

- o had power of attorney
- o signatory to bank account
- o significant debtor / creditor

- **enduring power of attorney**

- o properly explain attorney and possible consequences – *Szozda v Szozda* [2010] NSWSC 804
- o joint power of attorney
- o consultation or approval before significant transactions such as sale real estate

- **financial management order**

an agreement made by a person lacking mental capacity is voidable against the other party *but only if the other party knew of the lack of capacity*, unless it is *non est factum* such as a lunatic in a frenzy - *Gibbons v Wright* (1954) 91 CLR 423; *Ford bht Watkinson v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42
Supreme Court may make order if satisfied person incapable of managing their affairs – s40 *NSW Trustee and Guardian Act 2009*

Power of person to deal with their estate is suspended – s71 *NSW Trustee and Guardian Act*

Role of Agreements

- involve all potential beneficiaries *and their partners*

- careful about recitals and content of agreement

- o Part IVA *Income Tax Assessment Act 1936*
- o self managed superannuation funds - sole purpose test s62; no lending to member or member's relative s65; no acquisitions from members s66; no borrowing s67 *Superannuation Supervision Industry Act 1993*;

- court approved release – s95 *Succession Act*

- o financial or other advantage to make release
- o prudent make the release, and
- o release provisions fair and reasonable
- o releasing party taken independent advice

- statement of wishes / testator's intentions not binding on trustee of discretionary trust – *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405