



## **NOTIONAL ESTATE: GENERAL PRINCIPLES AND SPECIFIC INSTANCES**

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### **GENERAL PRINCIPLES**

#### **Introduction**

1. The purpose of this paper is to consider the application of the notional estate provisions contained in Division 2 of Part II of the *Family Provision Act 1982* ("the *FPA*") both in relation to their general application and more common specific instances. For ease of reference, whilst portions of the *FPA* are set out herein, the text of Division 2 is annexed at the end of this paper.
2. Changes, which appear unlikely to be fundamental, in relation to the law regarding notional estate which may flow as a result of repeal the *FPA* and re-enactment of its replacement as part of the *Succession Act 2006* by reason of the *Succession Amendment (Family Provision) Bill 2008*, apart from one matter, are not dealt with in this paper as that is the subject of another paper in this series.

3. The notional estate provisions permit the Court, upon proof of certain matters, to designate property no longer owned by the deceased after his/her death, or by his/her estate, to be the notional estate of that deceased person for the purpose of making provision in favour of an applicant for relief under the *FPA*. They represent an advancement of the position of applicants to that which existed under the previous legislation, the *Testator's Family Maintenance and Guardianship of Infants Act 1916*, and take effect where the deceased died on or after 1 September 1983<sup>1</sup> and:
  - (a) left no actual estate at the time of his or her death; or
  - (b) the estate left is insufficient for the making of an order for provision in favour of the plaintiff in proceedings under the *FPA*; or
  - (c) there has been distribution of the estate of a deceased such that no estate remains, or that which does is insufficient from which to make an order for provision.
  
4. The notional estate provisions (broadly speaking) work by the following mechanism:
  - (a) determining whether or not a "prescribed transaction" has occurred;
  - (b) if a prescribed transaction has occurred, determining whether it has taken place within defined periods prior to the death of the relevant deceased; and
  - (c) if those determinations are made favourably towards a plaintiff, consideration of the further factors set out in sections 26, 27 and 28 of the *FPA* in order for the Court to determine whether or not an order should be made designating property as notional estate.

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<sup>1</sup> The *Testator's Family Maintenance and Guardianship of Infants Act 1916* applies to claims in relation to estates where the deceased died before 1 September 1983 (which still, rarely, arise.)

5. Additionally, rather than, or in addition to, there being an enquiry as to whether or not there was a prescribed transaction within the defined periods, the Court may enquire as to whether or not there has been a distribution of the estate and, if so, may under section 24 of the *FPA* proceed, subject to the considerations raised by sections 27 and 28 of the *FPA*, to designate property as notional estate.
6. The power of the Court under Division 2 of the *FPA* is significant. The width of those powers is underlined by section 29 of the *FPA* which simply states that *"To the extent that a person's rights are affected by an order made under section 23, 24 or 25, those rights are extinguished"*.
7. Section 21 of the *FPA* defines, for the purpose of Division 2 of the *FPA*, the terms "disponee" and "disponer" in relation to a prescribed transaction. The definition of disponee not only includes, where property becomes held by a person (whether or not as a trustee), that person, but also, where property becomes held subject to a trust, the object of the trust.
8. The property designated as notional estate does not need to be the property the subject of the prescribed transaction<sup>2</sup>, but it must be property held by, or held on trust for, the relevant disponee/s. However, the Court cannot make a designating order by reason of a prescribed transaction or a distribution in respect of any property (other than "the" trust property) held by, or on trust for, a person where it is as a result of a prescribed transaction or a distribution made from the estate of a deceased person as a result of which "the" property became held by that person only as a trustee<sup>3</sup>.

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<sup>2</sup> Section 23 of the *FPA*.

<sup>3</sup> Subsection 28(4) of the *FPA*.

## Prescribed Transactions

9. A liberal, rather than a narrow or pedantic, approach to construction is taken in determining whether a prescribed transaction has occurred.<sup>4</sup>
10. In ***Kavalee v. Burbidge*** (1998) 43 NSWLR 422, Mason P (with whom Meagher JA agreed) observed, at 441:

*" 'Prescribed transaction' is defined in s.22. It is obvious that the legislature has cast the net very wide, in pursuit of its goal of providing adequate provision in favour of eligible persons. As beneficial legislation, a liberal approach to construction is called for, notwithstanding the obvious impact of a designating order upon existing property rights ... However, the ability to choose a construction which promotes the purpose of extending the powers of the Court to the full range of benefits and advantages controlled by testators exists only 'in so far as any question of construction presents a choice' "*

His Honour continued, at 443:

*"Several of the prescribed transactions detailed in s.22 required a specified consequence 'as a result of' the specified act or omission: see s.22(1)(a), (4)(a), (c), (e). This poses a question of fact ... It should not be overlooked that the expression is 'as **a** result' [of which] and not 'as **the** result' [of which]; and that the link may be 'directly or indirectly'. "*

His Honour then said, at 446-7:

*"... I do not see s.22(1)(a) as confined to acts or omissions that are the operative cause of property becoming held by the deceased's intended donee. To do so would ignore the thrust of this liberal enactment which emphasises its scope with the words 'directly or indirectly', 'as **a** result of which' (emphasis added) and 'whether or not the property becomes ... so held immediately' ... The legislation is clearly intended to operate in a context of human agents where several may have to act in concert and where there is the possibility that one may not co-operate. To paraphrase Mason J in Fagan v. Crimes Compensation Tribunal (at 673) - 'the fact that other unconnected events may also have had some relationship to the occurrence is not material if the ... act was a cause, even if not the sole cause' ...*

11. Section 22(1) of the FPA provides:

*"(1) A person shall be deemed to enter into a prescribed transaction if:*

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<sup>4</sup> See ***Schaeffer v. Schaeffer*** (1994) 36 NSWLR 315 and ***Kavalee v. Burbidge*** (1998) 43 NSWLR 422.

(a) on or after the appointed day<sup>5</sup> the person does, directly or indirectly, or omits to do, any act, as a result of which:

- (i) property becomes held by another person (whether or not as trustee), or
- (ii) property becomes subject to a trust,

whether or not the property becomes in either case so held immediately, and

(b) full valuable consideration in money or money's worth for the firstmentioned person's doing, or omitting to do, that act is not given."

12. A number of matters should be noted in relation to subsection 22(1). First, it captures not only positive acts, but also omissions - in either case where the act or omission directly or indirectly is a cause of the defined result – see ***Kavalee v. Burbidge*** (supra). For example in relation to companies, the decision of a deceased not to exercise rights can effect his/her shareholding in the company just as much as his/her positive acts – compare a failure to exercise rights to a share issue, or to vote against the issue of new shares at nominal prices to other persons, whereby the percentage equity of a deceased in a company is disproportionately reduced, with positive steps to “gift” shares to others, or to grant increased rights to the shares held by others.
13. Secondly, the concept of “property” in section 22 of the *FPA* picks up the definition in section 6(1) of the *FPA* which is in very broad terms.<sup>6</sup> It includes a “valuable benefit” – for example, an increase in the value of shares already owned has been held to be a valuable benefit.<sup>7</sup> Moreover, an increase in the value of shares is capable of being “held” by a shareholder for the purposes of section 22(1).<sup>8</sup>

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<sup>5</sup> 1 September 1983.

<sup>6</sup> "property" includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property, and any valuable benefit.

<sup>7</sup> See ***Schaeffer v. Schaeffer*** at 318-320 and ***Kavalee v. Burbidge*** at 443 - "(the) definition of 'property' and s.22(1)(a)(i) means that there may be a prescribed transaction even though there has been no change in the ownership of any property. It is sufficient that 'any valuable benefit' becomes held by a person other than the deceased. Accordingly, an increase in the value of shares held by

14. Thirdly, full valuable consideration in money or money's worth must not have been given in compensation for the doing or omitting to do the act. Consideration was given in ***Wade v. Harding*** (1987) 11 NSWLR 551 at 554-555 to what constituted "full valuable consideration"<sup>9</sup> where it was said:

*"It is clear from the structure of s22, that something which is deemed to be an omission only operates to fulfil par (a) of the definition of the prescribed transaction and it is still necessary to find whether that omission was one other than for full valuable consideration in money or money's worth.*

*As Mr Hill said in his book **Stamp, Death and Gift Duties**, 1<sup>st</sup> ed (1970) at 599, the exact extent of these words does not yet appear to have been decided although they have appeared in various taxing Acts for over 100 years.*

*One usually commences consideration of these words by looking to the view of Hamilton J in **Attorney-General v. Boden** [1912] 1 KB 539 at 561 where his Lordship said:*

*'...Whether the consideration for this property was full or not is a question of fact...Furthermore, the question whether full consideration was given or not may no doubt be solved by putting a value on the property which passed on the one side, and weighing against it the money value of the obligations assumed on the other; but that is not the only method of solving the question. Another method is by looking at the nature of the transaction and considering whether what is given is a fair equivalent for what is received...'*

*In **Attorney-General v. Earl of Sandwich** [1922] 2 KB 500 at 517, Lord Sterndale MR said:*

*'...That it was very valuable consideration, is, I think, clear, and the first question is whether it is money's worth. It is clearly not money. I am not sure what is the accurate definition of money's worth. It was an expression originally introduced to exclude marriage as a consideration, and the learned counsel for the appellants defined it as any valuable consideration not being marriage. I do not intend to decide whether this is an accurate and complete definition, but I think that at any rate money's worth includes the kind of benefit accruing to the defendant in this case from the possession of the estates and freeing of it from the claims and powers of the Earl and the Admiral. This is in accordance with*

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*existing shareholders as a result of the conversion on death of the deceased's ordinary shares into preference shares falls within the scope of the Act."*

<sup>8</sup> See ***Schaeffer v. Schaeffer*** at 318-319.

<sup>9</sup> Whilst ***Wade v. Harding*** was disapproved by the New South Wales Court of Appeal in ***Cetojevic v. Cetojevic*** [2007] NSWCA 33 (albeit in obiter comments) that disapproval related to the conclusions reached in ***Wade v. Harding*** regarding whether or not in particular circumstances there was full valuable consideration for the failure to sever a joint tenancy and the discussion set out above of what constitutes full valuable consideration is not tainted by that disapproval.

the view of Hamilton J in **Attorney-General v. Boden** [1912] 1 KB 539 at 563, where that learned judge held that covenants to attend to a business constituted a consideration in money's worth.

The only remaining question is whether this consideration for money's worth was full consideration.'

His Lordship then approved of the test in **Attorney-General v. Boden** set out above and said:

'...I think this is correct, and looked at in that way, I think what the defendant received was a fair equivalent for what he gave, and that he received full consideration according to the terms of the section.'

This line of authority was followed by the Court of Appeal in **Perpetual Trustee Co Ltd v. Commissioner of Stamp Duties (Horderns' case)** (1970) 72 SR (NSW) 453; 92 WN 163. Jacobs JA said (at 458; 168):

'...There must be full consideration for the disposition, but this is to be distinguished from a requirement that there be an exact equivalent in value between the property disposed of and the property received. Consideration is the price paid for a bargain. Full consideration is a full price. For a disposition to be characterised as consideration there must be present the element of bargain, but provided that this element is present then the best bargain, the best price<sup>10</sup>, will be a full consideration; and when a disposition of property is the consideration, as in the present case, there will be money's worth.'

The same line of case has been followed in New Zealand. A good illustration is **Commissioner of Inland Revenue v. Van Doorne**. This is reported at first instance in (1982) 13 ATR 21 and on appeal, the appellate court affirming Bisson J in [1983] NZLR 495. The facts were that a husband and wife had entered into an agreement that he would transfer 40 per cent of his interest in a farm to her. The farm was the main asset of their marriage partnership. They had been married for a long time, there was no dispute between them but the husband was dying. Bisson J held that by agreeing to contract out of the provisions of the **Matrimonial Property Act** 1976 (NZ) which gave wives the right to approach a court for an order that they be allotted part of their husband's property, the wife had given fully adequate consideration in money's worth for the transfer of the 40 per cent of the farm to her, accordingly no gift duty was payable.

The legislature in the **Family Provision Act** having employed a phrase that is commonly used in the law, it seems to me that I should interpret it in its familiar sense. ..."

15. For an example of where full valuable consideration (agreement to cease a profitable architectural practice and undertaking to work full time with the deceased in a business) defeated a claim for a

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<sup>10</sup> There seems to be some tension between this definition and the "fair equivalent" definition in **Boden**.

designating order, where there otherwise was a prescribed transaction, see **Vaughan v. Duncan; Vogt v. Duncan** [2005] NSWSC 670 – Macready AsJ.

16. Subject to subsections 22(5) and (6), a prescribed transaction is deemed to take effect at the time the relevant property becomes held by a person or subject to a trust as referred to in subsection 22(1)(a).<sup>11</sup>
17. The fact that a person has previously caused property to become held by another person, or subject to a trust, does not prevent a later act or omission by that same person, causing a further change in ownership of that property, to constitute a prescribed transaction.<sup>12</sup>
18. Subsection 22(4) of the *FPA* sets out a detailed, but not exclusionary, list of types of transactions whereby a person is, for the purposes of subsection (1)(a), to be deemed to have done or omitted to have done an act as a result of which property becomes held by another person or subject to a trust – for example, in relation powers to extinguish the interests of others in property, jointly owned property passing by survivorship, superannuation funds and contracts which effect a disposition of property after death. This subsection, which does present some tortuous reading, warrants careful examination and I deal with some instances where it is invoked in more detail below.
19. Subsections 22(5) and (6) of the *FPA* deal with the timing of prescribed transactions and provide that:

*"(5) Except as provided in subsection (6), a prescribed transaction involving the doing of, or omitting to do, an act as referred to in subsection (4) (paragraph (f) excepted) shall be deemed to be entered into immediately before, and to take*

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<sup>11</sup> Subsection 22(2) of the *FPA*.

<sup>12</sup> Subsection 22(3) of the *FPA*.



effect on, the death or the occurrence of the other event referred to in that subsection in relation to that act or omission.

(6) Where:

(a) a prescribed transaction involves any kind of contract, and

(b) valuable consideration, although not full valuable consideration, in money or money's worth is given for the disponent's becoming a party to the contract,

*the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into."*

[emphasis added]

20. The particular significance of subsection 22(5) is that, at least in relation to conduct by omission, it has the potential to cause conduct more than 3 years before the date of death of the deceased to be the subject of designating orders.
21. Subsection 22(6) has the effect of removing transactions taking effect on or after death where there is (merely) valuable, though not full valuable, consideration from subsection 23(b)(iii) of the *FPA* so that if there is to be a prescribed transaction the criteria in one or more of subsections 23(b)(i)&(ii) must be met.
22. The making, or not making, of a will cannot be a prescribed transaction unless it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in the person's estate<sup>13</sup>.
23. Before a designating order can be made in relation to a prescribed transaction, and subject to sections 26, 27 and 28 of the *FPA*, the Court must be satisfied that an order for provision ought to be made on the application by the plaintiff.<sup>14</sup> The Court must also be satisfied that the relevant time prescriptions have been met.

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<sup>13</sup> Subsection 22(7) of the *FPA*.

<sup>14</sup> Subsection 23(a) of the *FPA*.

24. The requirement in subsection 23 of the *FPA* that the relevant property to be designated as notional estate be held by, or on trust for, the donee has been held to mean that if the donee has also died (where she died before proceedings were commenced) a designating order cannot be made because the property is then no longer held in either of those ways – see ***Prince v. Argue*** [2002] NSWSC 1217 – Macready AJ at [87]-[88]. This lacuna appears to have been remedied by section 82 proposed by the *Succession Amendment (Family Provision) Bill 2008*.

### Time Limits

25. For a designating order to be made the prescribed transaction must have taken effect:
- (a) no more than 3 years before the death of the relevant deceased and have been “*entered into with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of the deceased person’s estate or otherwise*”;<sup>15</sup>
  - (b) no more than 1 year before the death of the deceased where it “*was entered into at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the deceased person to enter into the prescribed transaction*”;<sup>16</sup> or
  - (c) which took effect, or is to take effect, on or after the date of death of the deceased person.<sup>17</sup>
26. Significantly, where an application is made for a designating order it is crucial, when relevant, that evidence be addressed to the italicised issues set out above. Further, it should not be forgotten that that evidence needs to deal with the position as at the date of the prescribed transaction so that, it may be necessary (depending upon

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<sup>15</sup> Subsection 23(b)(i) of the *FPA*.

<sup>16</sup> Subsection 23(b)(ii) of the *FPA*.

<sup>17</sup> Subsection 23(b)(iii) of the *FPA*.

whether you act for the plaintiff or the defendant) to put on evidence regarding the financial circumstances of the plaintiff, or other eligible persons, at some point prior to the death of the deceased as well as evidence, in the ordinary way, of the current circumstances of the plaintiff or the defendant and/or beneficiaries.

27. In the case of a prescribed transaction taking effect more than 1 year, but less than 3 years, before the death of the deceased person there needs to be evidence sufficient for the Court to form a view as to the intention of the deceased in entering into the prescribed transaction. There may, perhaps unusually, be direct evidence by way of evidence of statements made by the deceased or the donee<sup>18</sup> but otherwise the evidence will have to be evidence from which the appropriate inference can be drawn (as opposed to mere conjecture). The nature of the particular transaction may be sufficient in the circumstances, or more may be required.
28. In ***Kwan v. Kwan*** [2008] NSWSC 465, Macready AsJ, the transfer of real estate for \$1.00 plus statements by the deceased to the effect that she did not want assets of hers going to the plaintiff, her son, because they might then go to his wife, who she disliked, was sufficient to satisfy subsection 23(b)(i) of the *FPA*.
29. Where the deceased, diagnosed with cancer, took steps in the last 3½ months of his life to convert a tenancy in common regarding real estate to a joint tenancy, and to cause other assets to pass, either before or after his death, to the defendant so that gifts of residue to the children of his failed marriage failed from a practical point of view, McLaughlin AsJ held that, amongst other things, 23(b)(i) of the *FPA* had been satisfied – ***Gill v. Smith*** [2007] NSWSC 832.

## **Distributed Estate**

30. The Court must be satisfied that an order for provision ought to be made on the application before the Court before it may make an

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<sup>18</sup> See for example ***Fletcher v. Fletcher*** [2007] NSWSC 728, Macready AsJ at [4] & [71].

order designating notional estate<sup>19</sup> where there has been a distribution from the estate of the deceased person. Again, this is subject to sections 27 and 28 (but not section 26) of the *FPA*,

31. Depending on the circumstances in relation to the distribution, for example the timing of it and whether or not there has been a distribution of the entirety of the estate of the deceased, a decision may need to be made regarding who should be joined as defendants<sup>20</sup>.
32. Whilst consideration of this issue goes beyond the scope of this paper, the following statement of Young CJinEq in ***Ernst v Mowbray*** [2004] NSWSC 1140 should be borne in mind in the case of early distribution of estates:

*"57 Before dealing with the question of costs, I must consider the question of the appropriation by the defendants of the monies in the estate. Mr Livingstone has defended this on the basis that small estates are to be settled quickly and when no actual claim is made, estates may be distributed.*

*58. I cannot see any evidence where any notice was given under s35 of the **Family Provision Act** of intention to distribute. Mr Livingstone says that it was up to the plaintiff to swear that there was no such notice, otherwise the Court should assume it was given. I reject this submission. The knowledge of the fact that the notice was or was not given was purely in the defendants' camp and they chose not to give any evidence of it. They knew in May 2001 that a claim was contemplated, yet notwithstanding this, distributed the estate.*

*59. Section 35 seems to contemplate that there are personal claims against an administrator who distributes property in an estate where the notice has not been given. Master Macready in **D'Albora v. D'Albora** [1999] NSWSC 468; BC 9902597, considered what this liability was. The learned master referred to the Privy Council's decision in **Guardian Trust and Executors Company of New Zealand Ltd v. The Public Trustee of New Zealand** [1942] AC 115 where Lord Romer, giving the decision of the Board said at 127 that there were well established principles of equity, 'One of those principles is that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded.'*

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<sup>19</sup> Subsection 24(a) of the *FPA*, and again note subsection 28(4) of the *FPA*.

<sup>20</sup> For example, see the discussion in ***Spencer v. Blyth*** [2006] NSWCA 181 at [10]-[13].

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61. In **Re Gimblett** [1960] NZLR 664, 666, McGregor J in New Zealand said it was quite improper for administrators to administrate the estate before the expiration of the period in which claims could be made under the Act, at least without notice to the widow with full particulars of the assets.

62. In **Re Faulkner** [1999] 2 Qd R 49, Moynihan J in the Supreme Court of Queensland held that an executor who distributed an estate despite notice of a claim under the **Family Provision Act** committed a breach of trust. His Honour considered that there should be a setting aside of the distribution.

63. Dickie **Family Provision after Death** (Law Book Co, 1992) p179 sets out a series of authorities for the proposition that a personal representative who distributes estate assets during a period in which an application for Family Provision can be made, may be personally liable to a successful applicant who suffers loss as a result.

64. It would seem to me that where the executors have distributed to themselves prematurely, they would ordinarily be ordered to restore the monies to the estate with interest and that for the purpose of working out the value of the estate left by the testator as at the date of the hearing that interest should be taken into account. This is because had the executors done their duty the estate monies would have been invested the interest so that the fund available for the Court to consider would have been increased by the relevant amount of interest."

[emphasis added]

**Family Provision after Death** states at 178-179 :

"Unless statute provides otherwise, an executor or administrator must ordinarily refrain from distributing any part of a deceased's estate to beneficiaries during the period in which an application for family provision can be made either without leave of the court or, *semble*, pursuant to leave granted by the court. Although there is scant Australian authority on point, it would appear that this rule is subject to reasonable exceptions. For example, it seems probable that an executor (and *mutatis mutandis* an administrator) may distribute a legacy:

- if it is trifling in comparison with the size of the estate residue;
- if a beneficiary has a strong moral claim to provision from the deceased's estate and his or her need for the legacy is urgent;
- if all persons who are eligible to apply for family provision have effectively disclaimed their right to do so;
- if it is clear that there is no person who is eligible to apply for family provision from the deceased's estate.

Be that as it may, however, it seems accurate to say that if a personal representative does distribute estate assets during the period in which an application for family provision can be made either without leave of the court or pursuant to leave granted by the court, he or she may be personally liable to a successful applicant who suffers a loss as a result. (See **Re Simson (Deceased)**; **Simson v. National Provincial Bank Ltd.** [1950] Ch. 38 at 42-43; **Re Lerwill (Deceased)**; **Lankshear v. Public Trustee** [1955] N.Z.L.R. 858 at 862; **Re Winwood (Deceased)**; **Winwood v.**

**Winwood** [1959] N.Z.L.R. 246 at 249; **In the Estate of Gough (Deceased); Gough v. Fletcher** (1973) 5 S.A.S.R. 567 at 566; **Re Whitta** [1984] 2 Qd. R. 356 at 364-365; **Re McPherson** [1987] 2 Qd. R. 394 at 399.) *In appropriate circumstances, an injunction will lie to prevent a personal representative from acting in contravention of the general prohibition on the premature distribution of estate assets. (In the Estate of Gough (Deceased); Gough v. Fletcher* (1973) 5 S.A.S.R. 675 esp at 565-566. Note also **Packo v. Packo** (1989) 17 N.S.W.L.R. 316 (injunction will lie to restrain distribution of estate pending determination of application to extend time to apply for family provision)).

*There is a suggestion that if an executor (or, semble, an administrator) distributes estate assets during the period when an application for provision can be made either without leave of the court or pursuant to leave granted by the court, these assets may not be rightly received by the beneficiaries, with the result that they remain estate assets. (Re Lowe (Deceased)* [1964] Q.W.N. 37.)

*If a personal representative proposes to distribute estate assets during the period in which an application for family provision can be made either without leave of the court or pursuant to leave granted by the court, it has been said to be advisable that he or she inform each person who is eligible to apply for family provision of the proposed action, and also that he or she provide every such person with notice of the estate's assets. (Re Gimblett; Gimblett v. Gimblett* [1960] N.Z.L.R. 664 at 666.)"

[Some footnotes omitted]

33. At the very least, at a practical level, where there has been an early distribution of the estate the threshold for a plaintiff to obtain a designating order should be low.

### **Subsequent prescribed transactions**

34. Section 25 of the *FPA* permits the court to catch the situation where there is a "subsequent prescribed transaction", that is where there has been a second prescribed transaction (here by the person who received the property, or on whose behalf the property was held on trust) in relation to property which was already available to be designated as notional estate of the deceased person. However, the power to designate such further property as notional estate is, again, to be exercised subject to sections 26, 27 and 28 of the *FPA*. Additionally, the Court is not to make such an order unless it is of the opinion that there are special circumstances which warrant the making of the order.

## **Restrictions upon the Court making an order designating notional estate**

35. Section 26 of the *FPA* provides:

*"26. On an application in relation to a deceased person, the Court shall not, by reason of a prescribed transaction having been entered into, make an order under section 23 or 25 designating property as notional estate unless the prescribed transaction or the holding of property as a result of the prescribed transaction:*

- (a) directly or indirectly disadvantaged the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after death),*
- (b) involved the exercise by the disponent or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction which:*
  - (i) if not exercised, could have resulted in a benefit to the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after death), or*
  - (ii) could, at the time the prescribed transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after death), or*
- (c) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction which could, at the time the prescribed transaction was entered into or at a later time, have been exercised by the disponent or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after death)."*

36. Section 27(1) of the *FPA* requires the Court to consider:

- (a) the importance of not interfering with reasonable expectations in relation to property,

- (b) the substantial justice and merits involved in making or refusing to make the order; and
- (c) any other matter which it considers relevant in the circumstances.

37. Again these are matters to which evidence should be addressed.

Here the perspective is *"as at the date of the hearing, and people with reasonable expectations include people who have benefited under the will, a fortiori, those persons who have not only benefited under the will, but have received their benefaction"*.<sup>21</sup>

38. Section 27(2) sets forth various matters to which the Court is required to consider in determining what property should be designated as notional estate of a deceased person. As noted above, that property need not be the property which is the subject of the prescribed transaction or the distribution. The considerations include the nature and value of the property the subject of the prescribed transaction or distribution, whether consideration was given, and if so the value and nature of the consideration for the prescribed transaction, changes over relevant times in the value of the property/property of that nature, whether income might have been derived from property of that nature and any other matter which it considers relevant in the circumstances.

39. Section 28 of the *FPA* includes further restrictions on the power of the Court to designate property as notional estate. Pursuant to subsection 28(1) of the *FPA* the Court is required not to make an order designating property as notional estate unless the deceased left no estate or the Court is satisfied of one of two conditions – first, that the estate of the deceased person is insufficient to allow for the

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<sup>21</sup> See *Carstrom v. Boesen* [2004] NSWSC 1109 at [22] per Campbell J.



making of the provision that, in the Court's opinion, should be made, or, secondly, that by reason of the existence of other eligible persons or the existence of special circumstances, provision should not be made wholly out of the estate.

40. The Court is not to designate property as notional estate in excess of that necessary to allow the making of the order for provision that, in the Court's opinion, ought to be made<sup>22</sup> but the Court's powers are not restricted by reason of its previous exercise of its powers to designate notional estate<sup>23</sup>.

### **Restrictions on Notional Estate for plaintiffs seeking an extension of time or applying for further provision**

41. Where the application is made pursuant to an order extending time to bring an application under section 16 of the *FPA*, or where it is an application for additional provision pursuant to section 8 of the *FPA*, subsections 28(5)(c) and (d) set out further matters which the plaintiff must satisfy the Court of before the Court can make an order designating property as notional estate. These are:

"(5) ...

(c) *that:*

- (i) *the property was the subject of the prescribed transaction or distribution,*
- (ii) *the person by whom it is held holds the property as a result of the prescribed transaction or distribution as trustee only, and*
- (iii) *the property is not vested in interest in any beneficiary under the trust, or*

(d) *that there are other special circumstances (including, in the case of an application made as referred to in paragraph (a), the incapacity, during any relevant period, of the person by or on whose behalf the application is made) which justify the making of an order so designating the property."*

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<sup>22</sup> Subsection 28(2) of the *FPA*.

<sup>23</sup> Subsection 28(3) of the *FPA*.

42. There is little guide as to what matters (when assessed with other facts in the case) would constitute special circumstances, other than the lack of capacity of the plaintiff, strength of a claim and lack of fault for a delay<sup>24</sup>. Subsection 28(5)(c) gives an indication of a type of circumstances that may count as a special circumstance, for example property not finally vesting in interest in any beneficiary. However, special circumstances are not limited to the types of circumstances suggested by section 28 itself or circumstances closely analogous to them.<sup>25</sup> It, however, seems clear that special circumstances require something more than the matters set out in section 27 or, at least, that it requires that those matters being in some way "special", because section 27 applies both when a claim is made before and when it is made after the time limited by section 16 of the *FPA*.
43. One circumstance which may count as a special circumstance under subsection 28(5)(d) is the infancy of the plaintiff, although this factor is not necessarily determinative<sup>26</sup>.
44. Examples of situations which might qualify as "special circumstances" include the situation where a plaintiff's circumstances have changed significantly and detrimentally<sup>27</sup> or where proceedings have been commenced within time by other plaintiffs. The absence of prejudice to beneficiaries of the estate is not, without more, a special circumstance here<sup>28</sup>.

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<sup>24</sup> See the detailed discussion by Campbell J in ***Cetojevic v. Cetojevic*** [2006] NSWSC 431 at [76]-[80].

<sup>25</sup> ***Lewis v. Lewis*** [2001] NSWSC 321 at [85].

<sup>26</sup> See ***Dare v. Furness*** (1998) 44 NSWLR 493 at 503-504.

<sup>27</sup> ***Lewis v. Lewis*** [2001] NSWSC 321 at [85].

<sup>28</sup> ***Spencer v. Blyth*** [2006] NSWCA 181 at [17].

## **SPECIFIC INSTANCES**

### **Life insurance and superannuation of a deceased**

45. In relation to the designation of the proceeds of life insurance or superannuation of a deceased, subsection 22(4)(d)-(f) of the FPA should be noted:

“(4) In particular and without limiting the generality of subsection (1), a person shall, for the purposes of subsection (1)(a), be deemed to do, or omit to do, an act, as a result of which property becomes held by another person or subject to a trust if –

.....

(d) the person is entitled, on or after the appointed day, in relation to a policy of assurance on the person’s life under which money is payable in consequence of the person’s death or, as the case may require, in consequence of the occurrence of any other event to a person other than the executor or administrator of the person’s estate, to exercise a power –

- (i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy of assurance; or
- (ii) to surrender or otherwise deal with such a policy of assurance on the person’s life,

but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled;

(e) being, on or after the appointed day, a member of, or participant in, a body (corporate or unincorporate), association, scheme, fund or plan, the person dies and, as a result of the person’s being such a member or participant and of the person’s death or the occurrence of any other event, property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or

(f) on or after the appointed day, the person enters into a contract providing for a disposition of property out of the person’s estate (whether the disposition is to take effect before, or on or after the person’s death and whether in pursuance of the person’s will or otherwise).<sup>29</sup>

46. In ***Ormsby v. Ormsby*** (NSWSC, unreported, 28 February, 1991 – Bryson J) the deceased had a survivor benefit payable to certain

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<sup>29</sup> Again, the “appointed day” is 1 September 1983.

categories of persons and the right to nominate which of those persons should receive the benefit. Where there was no such nomination, or the nomination was determined to be invalid, it fell to his employer to determine who were the eligible survivors. However, in the event that there were no survivors, the benefit did not pass to the estate of the deceased. There was also a group life benefit payable to "the beneficiary" and if there was no "beneficiary" payable to the estate of the deceased. Shortly before his death, the deceased nominated the first defendant as the beneficiary.

47. His Honour applied subsection 22(1) of the *FPA* and made an order designated notional estate in relation to the group life insurance benefit payment:

*"... When the testator on 24 January 1984 nominated the first defendant as beneficiary for the purposes of his superannuation, he did an act as a result of which property, that is the right to the proceeds of the Group Life Insurance Benefit became held by other persons. The proceeds in money became held by the second defendants as trustees when IBM decided that the first defendant was entitled to the money and set it aside. At the same time the money became held by the first defendant in that she became the beneficial owner of the money held by the second defendants.*

*No valuable consideration in money or money's worth for the testator's making the nomination was given. If he had not made the nomination the Group Life Insurance Benefit would have belonged to his estate."*

48. His Honour then concluded that subsection 22(4)(e) of the *FPA* provided "*additional circumstances in which the testator is deemed to have acted under subs22(1)(a) in that the testator was a member or participant in the IBM Superannuation Scheme, and died, and as a result of his being a member and of his death and of the nomination property became held by the second defendants and subject to a trust for the first defendant in the manner which I have already indicated*".
49. In ***Ormsby*** the deceased took an active step before his death to direct the proceeds of the superannuation fund. However, that is not

always the case and subsection 22(4)(e) of the *FPA* applies in broader circumstances, perhaps as evidenced by his Honour's need to only rely upon it as an alternative basis for finding a prescribed transaction to have occurred.

50. In ***Pope v. Christie*** (1998) 144 FLR 380 there was no relevant nomination by the deceased and the trustees of the superannuation scheme determined, on his death, that the monies would be paid to his widow, who was his second wife. As is the way of things in this area of the law, proceedings were brought under the *FPA* by a daughter of the first marriage of the deceased.

51. Here Young J (as his Honour then was) said at 389-390:

"Accordingly, I need to turn to the question of notional estate. This requires consideration of s22 of the Family Provision Act. Section 22(4)(e), when read with s24(4)(f), means that if the testator is a member of a superannuation scheme and, on the occurrence of a decision made by the trustees of that scheme, monies are payable to a person, then immediately before the person's death the person is deemed to have entered into a prescribed transaction. If a person has entered into a prescribed transaction within three years of his or her death then the court can designate the property as notional estate.

There has been some argument before me as to whether this provision applies to this superannuation fund. Some argument was put as to the fact that in the present case there was no nomination of a beneficiary. I recognise that that is so, but it does not seem to me that that affects the operation of par (e).

It may be that there is a stronger case if there is an act of nomination, but I cannot see why the paragraph does not apply generally.

Mr Barry earnestly submitted that there must be something which the deceased did or something which he failed to do before he can be said to have taken part in a prescribed transaction. I do not consider that that is so and, indeed, in this day and age more and more courts are coming to grips with transactions that take place between two computers or by options exercised by silence, and I cannot see any warrant at all for reading down the wide words in s22(4)(e) in the circumstances where the deceased did or failed to do some actual act."

His Honour then made reference to **Ormsby v. Ormsby** and the decision of Master McLaughlin in **Weekes v. Weekes** (unreported, Supreme Court of New South Wales, 10 December 1992) saying that both tended in the direction of holding that this is case where there is a prescribed transaction.

52. In **Weekes v. Weekes** McLaughlin M, as his Honour then was, considered a case where the deceased was a member of a superannuation fund. On his death the defendant became entitled to his pension, which she had commuted, so that she received payment of a substantial lump sum shortly thereafter.
53. After noting that, by reason of subsection 23(b)(iii) of the *FPA* the intention of the deceased was not relevant (i.e. this was a prescribed transaction which took effect after the death of the deceased), the Master referred to subsection 22(4)(e) of the *FPA* which he had no difficulty applying on the facts before him, simply saying:

*"The Rules of the Union Australasian Superannuation Fund are annexure C to the affidavit of the defendant of 5 June 1991. The defendant acquired the right to receive a pension under clB(9) of those Rules, and under clB(17)(d) the defendant acquired the right to commute that pension for a lump sum payment.*

*I am satisfied that the entitlement of the defendant to the pension under the deceased's superannuation scheme, and the subsequent commutation of that pension by the defendant constitute a prescribed transaction consequent upon s22(4)(e).*

...

*It seems to me that each of the foregoing prescribed transactions either directly (in the case of the transfers from the joint accounts) or indirectly (in the case of the commutation of the pension) disadvantaged the estate of the disponer (the deceased) and disadvantaged an eligible person (the plaintiff). Further, by the omission on the part of the deceased during his lifetime to commute his pension for a lump sum (which he was entitled to do by virtue of clB(17)(d) of the Rules of the Fund), the defendant became entitled to*

*that pension, and subsequently became entitled to commute the pension. Accordingly, the omission by the deceased to exercise that right of commutation resulted in his estate not receiving the benefit of the lump sum payment. In consequence, the estate did not receive an*

*amount which would have been no less than the commutation of \$144,348 which, eventually, was received directly by the defendant."*

### **Discretionary trusts**

54. In ***Kavalee v. Burbidge*** (1998) 43 NSWLR 422 the Court of Appeal held that assets held by a "stiftung" created under the law of Liechtenstein were available to be designated as notional estate. Instructions could be given, from time to time, by the deceased to the "Founder", who effectively controlled the stiftung and who, it was found, was legally obliged to implement the instructions given by the deceased during his lifetime.

55. Mason P (with whom Meagher JA agreed) said, at 446-7:

*"... I do not see s.22(1)(a) as confined to acts or omissions that are the operative cause of property becoming held by the deceased's intended donee. To do so would ignore the thrust of this liberal enactment which emphasises its scope with the words 'directly or indirectly', 'as a result of which' (emphasis added) and 'whether or not the property becomes ... so held immediately' ... The legislation is clearly intended to operate in a context of human agents where several may have to act in concert and where there is the possibility that one may not co-operate. To paraphrase Mason J in *Fagan v. Crimes Compensation Tribunal* (at 673) - 'the fact that other unconnected events may also have had some relationship to the occurrence is not material if the ... act was a cause, even if not the sole cause' ...*

*The respondents dispute that it is correct to approach the issue of causation in this way. They support Windeyer J in his conclusion that the relevant act or omission must be the effective cause. We were reminded that the Act interferes with property rights. But the critical issue is the extent of that potential interference. In my view, the choice of a looser test of causation is open. For the reasons given, s.22(1) suggests, and certainly permits, the looser approach to the factual issue of causation that I have adopted. *Schaeffer* (at 317) citing *Wentworth v. Wentworth* (Bryson J, 14 June, 1991 unreported) identifies:*

*'... a purpose of the Legislature that the notional property provisions should extend the powers of the Court to the full range of benefits and advantages controlled by testators. In so far as any question of construction presents a choice, a construction which would promote this purpose is to be preferred: see s.33 of the Interpretation Act, 1987.'*

*I have anxiously considered the contrary view of Handley JA in his draft judgment which I have had the benefit of reading. However, my view remains. With respect to the examples he gives (the compliant wife, the accommodating grandparent, the superannuation trustees that respond to*

*an employee's wishes, and the trustees of a discretionary trust who choose to meet the settler's wishes) none of those involve situations in which the deceased has the capacity (in law) to compel the required disposition. I respectfully agree with Handley JA<sup>30</sup> that the transactions which he mentions do not involve prescribed transactions. But I would distinguish a situation like the present, where 'if push came to shove' the deceased has the legal capacity to compel a particular disposition to be made by a third party. If that capacity exists a finding of causation is open even if the third party responds to a non-directive request.*

*In any event, s22(1)(a) extends to omissions. And since, as I have held, the deceased had the legal power to direct the Founder to do his bidding, the failure to exercise this power before death must surely be seen as an operative cause of the by-law remaining in its final form. That by-law 'designate[d] as beneficiaries' of the Foundation those persons referred to in the 'bequests' section of the memorandum. By omitting to exercise his entitlement to direct the Founder to revoke the by-law, the deceased omitted to do an act as a result of which the bequests stipulated in the by-law came to be paid by the Foundation, which was obliged to obey its terms."*

56. His Honour then considered, at pages 450-454 whether or not there might be a prescribed transaction due to the omission to exercise the power to appoint or to dispose of the property of the Gartner Foundation (the Foundation being an entity established under the law of Liechtenstein, somewhat akin to a trust) where his Honour said:

*"The appellants submit that, during his lifetime, the deceased could have caused the assets of the Gartner Foundation to be dealt with as he pleased. They rely upon the trial judge's finding that the deceased had control of Mr. Defago who in turn had control of the Foundation through a capacity to compel the exercise of the full gamut of Founder's rights that were vested in DFC at the time of the deceased's death. I have already indicated that I accept that such control existed.*

*Windeyer J held that s 22(4)(a) did not apply because:*

- (a) the deceased had no power to appoint or dispose of property in the Foundation; and*
- (b) the property of the Foundation did not become held by another person as a result of the deceased's omission to exercise the power before his death in terms of s.22(4)(a)(i).*

*The respondents support these propositions. The appellants dispute them and also invoke s.22(4)(a)(ii) ...*

**(a) Did the deceased have the power to appoint or dispose of property of the Foundation during his lifetime?**

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<sup>30</sup> See p460-1.



Windeyer J answered 'no'. He did not find it necessary to consider (as I have) whether the deceased had legal rights to compel Mr. Defago, and through him the Founder, to do his bidding. And he distinguished between the power of the deceased over the Founder on the one hand, and the power of the Founder over the Foundation on the other ...

...

In my opinion, the distinction drawn by the learned trial judge (between a power to dispose of property that was directly exercisable, and one which depended upon compelling Mr. Defago to execute various documents) finds no support in this legislative scheme. What I have described as the deceased's legal power to compel Mr. Defago, through DFC, to cause the Foundation to deal with its assets as the deceased might stipulate was in effect an entitlement to exercise a power to dispose of the property in the Gartner Foundation. That power existed (albeit indirectly) through the agency of Mr. Defago and his firms, SCF and DFC. A 'power to ... dispose of property' is not a technical term of law. In context it must mean something more than a traditional power of appointment, assuming that the latter concept were limited in any presently relevant way.

...

Returning, as I must, to construing s22(4)(a) in context, and faithful to the purpose of Pt 2, Div 2 of the Act as expounded in Schaeffer (at 318-319). I am satisfied that the deceased had until his death an entitlement to exercise a power to dispose of property which was not in his estate, being the property vested in the Foundation.

I accept that there is a vital distinction between de facto control and legal entitlement ... Section 22(4)(a) requires entitlement. However, entitlement and immediate enjoyment are different. Here the powers of DFC as Founder were at the deceased's disposal as a matter of right, through the rights which the deceased had over Mr. Defago. And, if he chose, the deceased was, as a matter of right, able to have the Founder replaced by a Founder that would do the deceased's bidding. Indeed, the deceased could have required DFC to appoint the deceased himself as the Founder. All steps to effect an appointment or disposal of assets as the deceased chose were really administrative once the deceased determined to act.

I have no difficulty in conceding that the power to appoint or dispose of the assets of Gartner (through art 6) was vested in the Founder for the time being. Absent a contrary direction from the deceased, the Founder immediately before and after the deceased's death (DFC) was entitled to exercise that power of disposition. But more than one person may have concurrent powers to deal with or dispose of the same item of property ...

...

**(b) Did the omission to exercise the power before death cause either of the events in s22(4)(a)(i) or (ii)?**

...

I agree generally with Windeyer J on s22(4)(a)(i). The property of the Foundation remained vested in it before and after the deceased's death. It

did not 'become held by another person' as a result of the omission to exercise the relevant power and the deceased's death.

However, s22(4)(a)(ii) must also be considered. The death of the deceased either led to the transmission of the deceased's rights over the Founder according to the law of the deceased's domicile, or it terminated those rights ... If the former, there was obviously 'another person' (cf s22(4)(a)(ii)) who became entitled to exercise the deceased's power of disposition, and this occurred as a result of the deceased's omission to do so and his death.

If the latter, the expiry of the deceased's rights left the Founder's powers intact. Can it be said that as a result of the deceased's omission to exercise his power and of his death, the Founder 'continue[d] to be, entitled to exercise the power' (to which it was previously entitled) to dispose of the assets of the Foundation?

The respondents are correct in their submission that 'the power' referred to in subpar (ii) must be the same power as that which was enjoyed by a deceased before he or she ceased to be entitled to exercise it. But the very fact that the subparagraph contemplates that 'another person' may **continue** to be entitled to exercise the power shows that the provision embraces the situation of two or more persons having a concurrent power to dispose of property with one of those persons (being the deceased) ceasing to exercise it as a result of the prior omission to exercise it and death. ... The Founder's entitlement to exercise the power preceded the deceased's death and continued after it. This satisfied subpar (ii) if it were the case that the deceased's entitlement was non-transmissible.

This alone is not sufficient to satisfy s22(4)(a)(ii). It must also be shown that the continuation of the Founder's power came about 'as a result of' the deceased's omission to exercise his concurrent power and of his death. The respondents submit that it is at this point that the appellant's argument breaks down. They submit that there is no link or connection between the **continuation** of the Founder's powers under the articles of the Foundation and the deceased's omission to dispose of the Foundation's assets (as he could have, through his power over the Founder that I have found to exist) before his death. And the respondents emphasise (correctly) that the same 'power' is involved wherever it is mentioned in the paragraph.

... I would reject the respondents' argument for the following reasons. If the deceased had exercised the power which he held yet omitted to exercise, then the assets of the Foundation would have been effectively disposed of. For example, the deceased could have directed the Founder to make a by-law whereby the corpus of the Founder's assets (after payment of the 'bequests') were paid to one or more of the appellants. That by-law could have been made irrevocable ... The deceased did not procure this during his lifetime. It can therefore be said that his omission to do so before his death was a cause of the assets remaining in the Foundation. The Founder's concurrent powers of disposition (through making by-laws) remained as it stood under the articles. It continued after the deceased's death. The provision does not require that the concurrent powers of disposition should be exercisable in identical ways. That continuation was causally linked to the deceased's omission in that the omission contributed to the continuation of the Founder's power of

*disposition under the (unamended) articles, and left the Founder with assets at its disposition in the Foundation."*

57. The situation considered in the passages cited above from pages 450-454 of the judgment of Mason P appears to bear a significant similarity to that applicable in relation to the omission of a deceased, if he/she had control of, or power to control, a discretionary trust such that he/she could cause the assets held in trust under the trust to be transferred as he/she saw fit. Nevertheless, the distinction between de facto control which falls short of a capacity (in law) to compel compliance and a legal entitlement should not be forgotten.
58. The applicability of the decision in **Kavalee v. Burbidge** to a discretionary trust was considered in **Flinn v. Fearne** [1999] NSWSC 1041 by Master McLaughlin, as his Honour then was, who distinguished **Kavalee v. Burbidge** in the circumstances of the trust under consideration by him. The Master said:-

"23. *It must, however, be recognised that the decision in Kavalee v. Burbidge was essentially a decision upon its own facts, dealing with the legal rights of a testator in the context of the law of Liechtenstein, and the specific legal powers vested in the testator in that case (see the judgment of Mason P at 451E), which are to be distinguished from the powers vested in the deceased in the instant case. Whereas, in Kavalee v. Burbidge there was a legal duty imposed upon Mr Defago, the trustee, to act in accordance with the directions of the testator, in the instant case there was no such legal duty imposed upon the trustee to act in accordance with the directions of the deceased.*

24. *There is no doubt, in the instant case, that the deceased during his lifetime, in his capacity as the Nominator, had the power, to remove the trustee named in the deed and to appoint another trustee of the G & A Fearne Family Trust. It seems to me, however, that that power is very different from the power of de facto control of the trust asserted by the plaintiffs to have reposed in the deceased. Indeed, the entire basis of that assertion of de facto control appears to depend upon assumptions, firstly, that the deceased would be able to find another potential trustee who would be amenable to the dictates of the deceased, and, secondly, that any such entity or person, when appointed trustee, would disregard his duties as a trustee (see *Jacobs' Law of Trusts in Australia*, 6th Ed (1997), 51, para 265; 409, paras 1609 ff).*

25. *It was submitted on behalf of the defendant that the deceased held his power in a fiduciary capacity and that he could exercise it only in such a fiduciary capacity. Whether or not that was so, it is abundantly clear that the deceased could not have properly given, and the trustee could not have properly received, a direction that the trustee dispose of the trust property. The most that the deceased could have done was to remove the nominated trustee and to appoint as a new trustee a person or entity whom the deceased might have expected would act in accordance with his direction. (It was suggested on behalf of the plaintiffs that the deceased could even have appointed as such new trustee a company controlled by the plaintiff.)*
26. *Nevertheless, there could be no certainty that either the original trustee or any replacement thereof appointed by the deceased would necessarily have acted in accordance with such a direction by the deceased, since the conduct of the trustee, were he merely to have acted as directed by the deceased, without independently carrying out his duties and exercising his discretion (in the manner described in the foregoing passages from Jacobs), would have constituted on the part of the trustee a clear breach of trust. (If the deceased had appointed as a replacement trustee a company which he himself controlled, it is possible that any disposition of trust property to the deceased by such a trustee would have been in contravention of clause 18(a) (ii) of the deed.)*
27. *It seems to me that a clear distinction must be drawn between, on the one hand, the conduct of the deceased in failing to exercise his powers as the Nominator, and, on the other hand, the conduct of the trustee. It is all very well for the plaintiffs to say that the deceased could have dismissed the trustee and could have appointed a fresh trustee who would be malleable and would act in accordance with the wishes of the deceased. Nevertheless, the essential question is whether the deceased himself entered into a prescribed transaction, not whether the trustee, by his failure to do anything, allowed the property to remain subject to a trust."*
59. So far as I am aware the decision in ***Flinn v. Fearne*** has not subsequently received subsequent judicial consideration. That decision appears to have turned to some degree upon the particular terms of the particular trust in question (it appears that there was some limitation upon who the deceased could appoint as a replacement trustee – in particular see paragraph 26 of the judgment) and the particular factual circumstances involved and may not apply universally to all discretionary trusts. In my opinion, its general applicability is open to challenge.

## Property held as joint tenants

60. In relation to assets held by a deceased as a joint tenant, the issue which arises is whether or not, in failing to sever the joint tenancy before his or her death, the deceased is to be deemed to have entered into a prescribed transaction.
61. Primarily relevant to this issue are subsections 22(4)(b) and (5) of the FPA. In **Wade v. Harding** (1987) 11 NSWLR 551 Young J (as his Honour then was) in circumstances where the husband of the relevant deceased only survived his wife by a period of 20 days, held that the failure of the deceased to sever the joint tenancy with her husband prior to her death did not create a prescribed transaction. The particular facts of that case appear to have had some bearing upon the ultimate result – see pages 555-556. However, in **Cameron v. Hills** (NSWSC unreported, 26 October, 1989) – Needham J. said at 9-10:-

*"The first question to be determined, it seems to me, is whether "full valuable consideration in money or money's worth" was given for the omission of the deceased to sever the joint tenancy (s. 22 (1)(b)). That omission, as a prescribed transaction, is "deemed to be entered into immediately before, and to take effect, on the death" of the deceased (s. 22(5)).*

*Young J., in **Wade v. Harding**, held that such consideration had not been given in that case because "on the facts of this case what was foregone in not severing the joint tenancy was received by continuing to be a joint tenant" (at 556). As I understand his Honour's reasoning, that result followed because the deceased at the relevant time (that is, immediately before her death) had an equal chance with the joint tenant of benefiting by the *ius accrescendi*. With great respect to his Honour, I find it difficult to see how a joint tenant, about to die immediately, can be said to have an equal chance of surviving the other joint tenant. The Court must look at the position the moment before death. Whatever may have been the facts in that case just to find the conclusion, there are no such facts in this case. Immediately before the death of this deceased there was no rational prospect of his surviving the defendant. Accordingly, in my opinion, no valuable consideration in*

*money or money's worth was given for the omission of the deceased to sever the joint tenancy."*

62. The **Cameron v. Hills** line has generally been endorsed in first instance decisions
63. As a practical matter the conflict in the authorities has been put to rest, subject to any challenge to the High Court, by the decision of the NSW Court of Appeal in **Cetojevic v. Cetojevic** [2007] NSWCA 33 which, in obiter dicta, endorsed the **Cameron v. Hills** line. After making reference at [49] to **Wade v. Harding** at p.556 and at [50] to the second paragraph cited above from **Cameron v. Hills**, Hodgson JA (with whom Tobias JA (giving additional reasons at [58]-[64]) and McColl JA agreed) said :

*"[51] I find the reasoning of Needham J more persuasive than that of Young J; and it does seem to me that since, subject to subs (6) of s.22 to which I will come, subs.(5) requires the matter to be looked at immediately before the death of the deceased, it cannot be said that the deceased immediately before his death had an equal chance of surviving with the other joint tenants. In any event, what s.22(1)(b) requires is consideration of whether full valuable consideration for the act or omission in question, that is in this case the failure to sever a joint tenancy, is not given. It seems to me difficult to see how it can be said that any consideration was given for the actual omission, immediately before death of the deceased, to sever the joint tenancy."*

## ANNEXURE

### FAMILY PROVISION ACT 1982

#### PART II, DIVISION 2

##### 21 Definitions

In this Division, except in so far as the context or subject-matter otherwise indicates or requires: "**disponee**", in relation to a prescribed transaction, means:

- (a) where, as a result of the prescribed transaction, property becomes held by a person (whether or not as trustee)-the person, or
- (b) where, as a result of the prescribed transaction, property becomes held subject to a trust-the object of the trust.

"**disponer**", in relation to a prescribed transaction, means the person deemed by section 22 to have entered into the prescribed transaction.

##### 22 Prescribed transactions

(1) A person shall be deemed to enter into a prescribed transaction if:

- (a) on or after the appointed day the person does, directly or indirectly, or omits to do, any act, as a result of which:
  - (i) property becomes held by another person (whether or not as trustee), or
  - (ii) property becomes subject to a trust, whether or not the property becomes in either case so held immediately, and
- (b) full valuable consideration in money or money's worth for the firstmentioned person's doing, or omitting to do, that act is not given.

(2) Except as provided in subsections (5) and (6), a prescribed transaction referred to in subsection (1) shall, for the purposes of this Act, be deemed to take effect at the time property becomes held by a person or subject to a trust as referred to in subsection (1) (a).

(3) The fact that a person has done, or omitted to do, an act as a result of which property became held by another person or subject to a trust shall not prevent a later act or omission by the firstmentioned person (as a result of which the same property becomes held by another person or subject to a trust) constituting a prescribed transaction.

(4) In particular and without limiting the generality of subsection (1), a person shall, for the purposes of subsection (1) (a), be deemed to do, or omit to do, an act, as a result of which property becomes held by another person or subject to a trust if:

- (a) the person is entitled, on or after the appointed day, to exercise a power to appoint, or dispose of, property which is not in the person's estate but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of the person's death or the occurrence of the other event:
  - (i) the property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately), or
  - (ii) another person becomes (whether or not immediately) or, if the person was previously entitled, continues to be, entitled to exercise the power,
- (b) holding an interest in property which would, on the person's death, become, by survivorship, held by another person (whether or not as trustee) or subject to a trust, the person is entitled, on or after the appointed day, to exercise a power to prevent the person's interest in the property becoming, on the person's death, so held or subject to that trust but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled,
- (c) holding an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, the person is entitled, on or after the appointed day, to exercise a power to extinguish the other interest in the property but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of the person's death or the occurrence of the other event, the other interest in the property continues to be so held or subject to that trust,
- (d) the person is entitled, on or after the appointed day, in relation to a policy of assurance on the person's life under which money is payable in consequence of the person's death or, as the case may require, in consequence of the occurrence of any other event to a person other than the executor or administrator of the person's estate, to exercise a power:
  - (i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy of assurance, or
  - (ii) to surrender or otherwise deal with such a policy of assurance on the person's life,but the power is not exercised before the person ceases (by reason of death or the occurrence of any other event) to be so entitled,
- (e) being, on or after the appointed day, a member of, or participant in, a body (corporate or unincorporate), association, scheme, fund or plan, the person dies and, as



a result of the person's being such a member or participant and of the person's death or the occurrence of any other event, property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately), or

- (f) on or after the appointed day, the person enters into a contract providing for a disposition of property out of the person's estate (whether the disposition is to take effect before, on or after the person's death and whether in pursuance of the person's will or otherwise).

(5) Except as provided in subsection (6), a prescribed transaction involving the doing of, or omitting to do, an act as referred to in subsection (4) (paragraph (f) excepted) shall be deemed to be entered into immediately before, and to take effect on, the death or the occurrence of the other event referred to in that subsection in relation to that act or omission.

(6) Where:

- (a) a prescribed transaction involves any kind of contract, and
- (b) valuable consideration, although not full valuable consideration, in money or money's worth is given for the disponent's becoming a party to the contract,

the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into.

(7) Notwithstanding subsections (1) and (4), the making by a person of, or the omitting by a person to make, a will is not an act or omission referred to in subsection (1) (a) except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in the person's estate.

### 23 Notional estate-prescribed transactions

On an application in relation to a deceased person made by or on behalf of an eligible person, if the Court is satisfied:

- (a) that an order for provision ought to be made on the application, and
- (b) that, at any time before death, the deceased person entered into a prescribed transaction:
  - (i) which took effect within the period of 3 years before death and was entered into with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of the deceased person's estate or otherwise,
  - (ii) which took effect within the period of 1 year before death, and was entered into at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the

deceased person to enter into the prescribed transaction, or

- (iii) which took effect or is to take effect on or after the death of the deceased person,

the Court may, subject to sections 26, 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for the donee or, where there is more than one donee, any of the donees, whether or not that property was the subject of the prescribed transaction.

#### **24 Notional estate-distributed estate**

On an application in relation to a deceased person, if the Court:

- (a) is satisfied that an order for provision ought to be made on the application, and
- (b) finds that, as a result of a distribution from the estate of the deceased person, property became held by a person (whether or not as trustee) or subject to a trust,

the Court may, subject to sections 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the person or the object of the trust, whether or not that property is the property distributed.

#### **25 Notional estate-subsequent prescribed transactions**

(1) On an application in relation to a deceased person, if the Court:

- (a) is satisfied that an order for provision ought to be made on the application,
- (b) has power, under this or any other provision of this Act, to make an order designating as notional estate of the deceased person property which is held by, or on trust for, a person, and
- (c) is satisfied that, since the prescribed transaction or distribution in respect of which that power arises was entered into or made, the person referred to in paragraph (b) entered into a prescribed transaction,

the Court may, subject to sections 26, 27 and 28, make, instead of or in addition to the order referred to in paragraph (b), an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the donee in relation to the prescribed transaction entered into by the person referred to in paragraph (b), or where there is more than one such donee, any of those donees, whether or not that property was the subject of the prescribed transaction.

(2) The Court shall not make an order under subsection (1) unless it is of the opinion that there are special circumstances which warrant the making of the order.

## **26 Property not to be designated as notional estate by reason of certain prescribed transactions**

On an application in relation to a deceased person, the Court shall not, by reason of a prescribed transaction having been entered into, make an order under section 23 or 25 designating property as notional estate unless the prescribed transaction or the holding of property as a result of the prescribed transaction:

- (a) directly or indirectly disadvantaged the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death),
- (b) involved the exercise by the disponer or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction which:
  - (ii) if not exercised, could have resulted in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death), or
  - (ii) could, at the time the prescribed transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death), or
- (c) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction which could, at the time the prescribed transaction was entered into or at a later time, have been exercised by the disponer or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after death).

## **27 Designation of property as notional estate-matters to be considered**

(1) On an application in relation to a deceased person, the Court shall not make an order designating property as notional estate of the deceased person unless it has considered:

- (a) the importance of not interfering with reasonable expectations in relation to property,
- (b) the substantial justice and merits involved in making or refusing to make the order, and
- (c) any other matter which it considers relevant in the circumstances.

(2) In determining what property should be designated as notional estate of a deceased person, the Court shall have regard to:

- (a) the value and nature of property the subject of any relevant prescribed transaction or distribution from the estate of the deceased person,
- (b) where, in relation to any such prescribed transaction, consideration was given, the value and nature of the consideration,
- (c) any changes over the time which has elapsed since any such prescribed transaction was entered into, any such distribution was made or any such consideration was given in the value of property of the same nature as the property the subject of the prescribed transaction, the distribution or the consideration, as the case may be,
- (d) whether property of the same nature as the property the subject of any such prescribed transaction, any such distribution or any such consideration could, during the time which has elapsed since the prescribed transaction was entered into, the distribution was made or the consideration was given, as the case may be, have been applied so as to produce income, and
- (e) any other matter which it considers relevant in the circumstances.

## **28 Designation of property as notional estate-powers and restrictions**

(1) On an application in relation to a deceased person for an order for provision in favour of an eligible person, the Court shall not make an order designating property as notional estate of the deceased person unless the deceased person left no estate or unless it is satisfied:

- (a) that the estate of the deceased person is insufficient to allow the making of provision that, in its opinion, should be made, or
- (b) that, by reason of the existence of other eligible persons or the existence of special circumstances, provision should not be made wholly out of the estate.

(2) On an application in relation to a deceased person, the Court shall not make an order designating as notional estate of a deceased person property in excess of that necessary to allow the making of provision that, in its opinion, should be made.

(3) The exercise by the Court of its power under section 23, 24 or 25 to make an order designating as notional estate of a deceased person property held by, or on trust for, a person does not limit or restrict any further exercise by the Court of that power.

(4) Where, as a result of a prescribed transaction or a distribution made from the estate of a deceased person, property becomes held by a person as a trustee only, the Court shall not make an order under section 23, 24 or 25 by reason of the prescribed transaction or distribution in respect of any property (other than the trust property) held by, or on trust for, the person.

(5) On an application in relation to a deceased person, being an application:

- (a) made pursuant to an order under section 16 allowing the application to be made, or
- (b) for an order under section 8 for additional provision,

the Court shall not make an order designating property as notional estate of the deceased person by reason of a prescribed transaction or a distribution unless it is satisfied:

- (c) that:
  - (i) the property was the subject of the prescribed transaction or distribution,
  - (ii) the person by whom it is held holds the property as a result of the prescribed transaction or distribution as trustee only, and
  - (iii) the property is not vested in interest in any beneficiary under the trust, or
- (d) that there are other special circumstances (including, in the case of an application made as referred to in paragraph (a), the incapacity, during any relevant period, of the person by or on whose behalf the application is made) which justify the making of an order so designating the property.

## **29 Effect of order designating property as notional estate**

To the extent that a person's rights are affected by an order made under section 23, 24 or 25, those rights are extinguished.