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THE MARK OF EXPERTISE

**IT AIN'T OVER
'TIL ITS OVER**

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- Challenging a will - PROBATE
 - forgery
 - testamentary capacity
 - undue influence
 - suspicious circumstances
 - knowledge and approval

- Challenging the estate – FAMILY PROVISION

- Challenging the deceased – EQUITY / PROBATE
 - Proprietary estoppel
 - Loan

challenging the will



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- Forgery
- Testamentary capacity
 - aware of and appreciated the significance of the act, namely, making her will;
 - at least in general terms, aware of the nature and extent of her assets;
 - able to comprehend and appreciate the claims to which she ought to give effect, that is, the ability to evaluate those claims and discriminate the respective strengths of the claims, so that no disorder of mind should prevent the exercise of her “natural faculties” which would influence her in making her will
 - *d’Apice v Gutkovich* (No. 2) [2010] NSWSC 1333

challenging the will /2



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- Undue influence
 - testator's will overborne, testator did not intend and desire the disposition, but was coerced into making it
 - *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18
 - *Petrovski v Nasev* [\[2011\] NSWSC 1275](#)
- suspicious circumstances / knowledge and approval
 - person who is instrumental in the framing of a will, and who obtains a bounty by that will, onus of showing the righteousness of the transaction and removing the suspicion
- Knowledge and approval
 - *Scarpuzza v Scarpuzza* [2011] WASC 65

challenging the estate



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- Family Provision, Chapter 3, Succession Act, 2006
 - adequate provision for the applicant's proper maintenance, education or advancement in life has not been made by the will or intestacy
 - provision ought to be made

- *Ford v Simes* [2009] NSWCA 351
- Multi-faceted evaluative judgment

- *Poletti v Jones* [2015] NSWCA 107
- The amount of any order required a balancing of incommensurable elements.

Eligible persons



- Spouse
 - security of accommodation, income stream, buffer against contingencies
 - [Luciano v Rosenblum](#) (1985) 2 NSWLR 65
- Child
 - Taylor v Farrugia [2009] NSWSC 801
- ex-spouse
 - Glynne v NSW Public Trustee [2011] NSWSC 535
- Member of household + dependant
- Grandchild + dependant
 - Sammut v Kleeman [2012] NSWSC 1030
 - Chapple v Wilcox [2014] NSWCA 392
- Close personal relationship + living with at death

Factors- section 60(2)



- Family or other relationship
- Nature and extent of deceased's responsibilities to applicant
- Nature and extent of estate and notional estate
- Applicant's financial resources including earning capacity and financial needs
- Financial circumstances of person cohabiting with
- Physical, mental or intellectual disability
- Applicant's age
- Applicant's contribution to deceased's assets and welfare
- Provision made during lifetime and from estate
- Evidence of testamentary intentions
- Whether being maintained at time of death
- Whether any other person liable to support applicant
- Applicant's character and conduct before and after death
- Character and conduct of any other person
- Aboriginal or Torres Strait customary law
- Any other matters court considers relevant

before you go – divest assets



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- Inter-vivos transfers
- Joint ownership
- Discretionary trust
- Superannuation binding death benefit nomination

- Transferee risk
 - Personal relationship
 - Marital relationship
 - Credit risk
 - Death – *Alexander v Jansson* [2010] NSWCA 176
- Family Provision notional estate

Act

- “relevant property transaction” – property held by another person and full valuable consideration not given – s75
- Takes effect on death
 - superannuation / life insurance
 - Jointly owned property (house, bank account, shares)
- Within 12 months of testator’s death
- Within 3 years of testator’s death with intention to defeat family provision claim
- directly or indirectly, acts or omission
- discretionary trust – settlor, trustee, trustee shareholder
- *Wardy v Salier* [2014] NSWSC 473

before you go – inter-vivos release



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- inter-generational transfer
- advance against inheritance
- settlement of claim against related estate
- divorce (*incl* s90D / s90UD BFA)
- pre-nuptial agreement (*incl* s90B/ s90UB BDA)
- Settling other proceedings – *Oxley v Oxley* [2014] NSWSC 1606
- Family agreeing terms of will

- not effective unless approved
- *even if* part of BFA

BFA – Pt VIIIA, Family Law Act



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-
- signed by all parties
 - before signing each spouse provided with independent legal advice from a legal practitioner about
 - effect of agreement on party's rights
 - advantages and disadvantages of making agreement

OR court satisfied unjust and inequitable if not binding

- signed statement by legal practitioner that advice provided
- agreement not terminated or set aside by court
 - Section 90G Family Law Act
- set aside *incl*
 - fraud incl non-disclosure of material matter
 - material change of circumstances involving child so spouse suffer hardship
 - unconscionable conduct
 - Section 90K Family Law Act

release family provision rights



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- Only effective if approved by court – section 95
- If no approval, court may consider during FP claim
- *Neil v Jacovou* [2011] NSWSC 87
- it is or was, at the time any agreement to make the release was made, to the *advantage, financially or otherwise*, of the releasing party to make the release
- it is or was, at that time, *prudent* for the releasing party to make the release
- the provisions of any agreement to make the release are or were, at that time, *fair and reasonable*
- releasing party has taken *independent advice* in relation to the release and given due consideration to that advice

approving a release



- Fair and reasonable
 - fact that the agreement was made may itself show that parties thought terms fair at the time of signing: *Mulcahy v Weldon* [\[2001\] NSWSC 474](#) at [\[10\]](#).
- Prudent
 - someone who acts with care and thought for the future, in particular in exercising care and good judgment in relation to their interests: *Russell v Quinton* [\[2000\] NSWSC 322](#)
- When
 - not limited to circumstances at the time of agreement, widest range of circumstances may be examined
- not a rubber stamp / court not automatically approve
 - *Oxley v Oxley* [\[2014\] NSWSC 1606](#)



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