"But Wait! There's More!" - Notional Estate and Family Provision
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Chapter 3 "Family Provision" *Succession Act 2006* (NSW) provides that the court may make an order if the court considers that adequate provision for the proper maintenance, education or advancement in life of an eligible person has not been made by a testator's will or by operation of intestacy and the court thinks an order ought to be made.

Part 3.3 "Notional Estate Orders" ensures that the family provision principles are not frustrated by the testator's financial manoeuvring and financial shuffling, the "Part IVA" of the Succession Act.

The purpose of the provisions is to extend the powers of the court to the "full range of benefits and advantages controlled by testators", and not just the assets owned by the testator in the testator's personal name,[1] to allow the courts to make provision where the testator has transferred assets "into a structure over which the testator had a measure of practical control", even though the testator lacked actual ownership of the assets.[2]

The notional estate provisions are a NSW creation, and do not appear in the corresponding family provision legislation in Victoria, ACT, Western Australia or Queensland. This has been the catalyst for some family provision cases to be commenced in NSW rather than more obvious jurisdictions, such as the testator's lex domicile.[3] Importantly, the NSW court may have jurisdiction even if the only assets in NSW *are themselves notional estate*.[4]

Relevant Property Transaction

Property may be designated as notional estate if the testator entered into a "relevant property transaction" before the testator's death.[5] A relevant property transaction is very widely defined - a testator has entered into a "relevant property transaction" if the testator did, directly or indirectly, or omitted to do any act which results in property being held by another person or subject to a trust and the testator did not receive full valuable consideration.[6]

The onus is on the party asserting that full valuable consideration was NOT given, although if the party can show a prima facie case of inadequacy of the valuable consideration given, the evidential burden will pass to the other party to establish that there was, indeed, consideration given, and the extent of that consideration. [7] Full valuable consideration "connotes some elasticity,"[8] and means such valuable consideration as amounts to, approximates, or is broadly commensurate with, or is a fair equivalent of, the value of that for which it is given.[9] The party must provide evidence of the value. Valuable consideration may include companionship and other personal services such as providing care, but it may not be "full" valuable consideration, the value will be limited if the testator has a limited life expectancy and "natural love and affection on its own would not suffice". [10]

Types of Notional Estate

There are four circumstances when property may be designated as notional estate.

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[1] *Wentworth v Wentworth* (unreported, Bryson J, 14 June 1991) at 107 per Bryson J
[2] *Belfield v Belfield* [2012] NSWSC 416
[3] *Hitchcock v Pratt* [2010] NSWSC 1508
[4] *Hitchcock v Pratt* [2010] NSWSC 1508
[5] section 80(1) Succession Act
[6] section 75(1) Succession Act
[7] *Kastrounis v Foundouradakis* [2012] NSWSC 264 at [99]
[8] *Re Marriott, decd* [1968] VR 260 at 269.
[9] *Kastrounis* at [95] per Hallen J
[10] *Kastrounis* at [290] to [292] per Hallen J

First, if the "relevant property transaction" takes effect on the testator's death.[11] This includes property held in joint tenancy which transfers to the joint tenant's sole name by survivorship,[12] life insurance[13] and superannuation.[14]

Second, if the "relevant property transaction" takes effect within one year before testator's death and was entered into when the testator had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of an eligible person which was substantially greater than the testator's moral obligation to enter into the transaction.[15] "Moral obligation" means the testator's obligation to make a wise and just assessment of the interests of any person who is able to ask to be taken into account in determining what adequate provision for proper maintenance, education and advancement in life, should have been made for him or her.[16] The testator's intention is irrelevant.[17] This type of notional estate would include generous cash gifts or transfers of real estate[18] made shortly before the testator died.

Third, if the "relevant property transaction" takes within 3 years before the date of the testator's death and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the testator's estate for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order.[19] This covers deliberate structuring to defeat family provision claims.

Fourth, if the testator's estate has been distributed.[20]

Scope of Notional Estate

The notional estate cannot be used to pay the testator's funeral and testamentary costs expenses, or the testator's liabilities. The testator's real and personal estate is applicable to discharge the testator's funeral, testamentary, and administrative expenses, debts, and liabilities.[21] The notional estate can only be used for a family provision order or the costs of the proceedings.[22]

When the court is determining whether to make a family provision order, the court may consider the nature and extent of the testator's estate, including any property that is, or could be, designated as the testator's notional estate.[23] However, this does not mean that the court considers that the testator's estate is the total of the actual estate and notional estate. For example, if the testator has an $800,000 actual estate and $5 million notional estate, the court will not treat the estate as a $5.8 million estate. The court will only make a notional estate order if the testator has no estate, if the testator's estate is insufficient for the making of the family provision order or costs order that the court considers should be made, or because the court considers that provision should not be made wholly out of the deceased person's estate because there are other eligible persons or "special circumstances."[24] Therefore, if there is sufficient in the actual estate for proper and adequate provision, the court will not increase the order because there is an extensive notional estate. The Court must not designate as notional estate, property that exceeds

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[11] section 80(2)(c) Succession Act
[12] section 76(2)(b) Succession Act
[13] section 76(2)(d) Succession Act
[14] section 76(2) (e); see for example *Peipi v Peipi* [2013] NSWSC 1520
[15] section 80(2)(b) Succession Act
[16] *Kastrounis* at [114]
[17] *Ebert v Ebert* [2008] NSWSC 1206 at 133
[18] *Kastrounis*
[19] section 80(2)(a) Succession Act
[20] section 79 Succession Act
[21] section 46C and Schedule 3, Probate and Administration Act 1898 (NSW)
[22] section 78 Succession Act
[23] section 60(2)(c) Succession Act
[24] section 88 Succession Act

what is necessary, in the Court's opinion, to allow the provision that should be made or the costs to be paid.[25]

In addition, the court must not make a notional estate order unless it has considered the importance of not interfering with reasonable expectations in relation to property, the substantial justice and merits involved in making or refusing to make the order, and "any other matter it considers relevant" in the circumstances.[26]

Out of Time Applications

If the family provision claim is out of time, there is a further hurdle. Family provision cases that are out of time often involve notional estate because the testator's estate has been distributed, and can only be clawed back if there is a notional estate order. The court must not designate property as notional estate unless the property is held on trust or there are "special circumstances"[27]. Circumstances need not be unique but they will be unusual.[28] More is required to establish "special circumstances" than the "sufficient cause"[29] that is required to obtain an extension of time.[30] However, special circumstances may include the same factors that are relied on to extend the time, [31] or the factors warranting an ex-wife's application.[32] Special circumstances may include the complexity of the estate,[33] uncertainty of the value of the gifts under the will,[34] the fact that the testator built up assets in the trust instead of discharging the estate's debts,[35] other intervening legal disputes,[36] no intervening third party interests,[37] no dealing with the property,[38] and the size of the estate and notional estate.[39]

Tracing

The court does not have to trace the property that was distributed to a beneficiary when making an order pursuant to *section 79 Succession Act.* Therefore, if the court is satisfied that someone has received a distribution from the deceased's estate, it is possible to designate any of that person's property as notional estate, even if that property is not something into which it would be possible to trace any specific property of the deceased. There does not need to be a causal connection. [40]

Separate Question

A party affected potentially affected by a notional estate order may apply for the matter to be determined as a separate question before the hearing of the substantive proceedings. In *Flinn v Fearne,* Master McLaughlin decided whether property could be designated as a notional estate as a separate question. In contrast, in *Ramsay v Schiller*,[41] Hallen J dismissed the motion for the issue to be determined as a separate question because a determination on notional estate would not quell the whole of the controversy between the parties and the matter would still go to trial

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[25] *Kastrounis* at [83] and [284] per Hallen J; section 89(2) Succession Act
[26] section 87 Succession Act; see summary of principles in *Charnock v Handley* [2011] NSWSC 1408 at [89] per Hallen J
[27] section 90(2) Succession Act
[28] *Campbell v Chabert-McKay* [2010] NSWSC 859 at [91 per White J; see examples cited in *Cetojevic v Cetojevic* [2006] NSWSC 431 at [77] per Campbell J;
[29] section 58(2) Succession Act
[30] *Campbell v Chabert-McKay* at [86] per White J
[31] *Campbell v Chabert-McKay* at [86] per White J
[32] *Milewski v Holben* [2014] NSWSC 388 at [88] per Lindsay J
[33] *Wardy v Salier* [2014] NSWSC 473 at [222] per White J
[34] ibid
[35] ibid
[36] *Frisoli v Kourea* [2013] NSWSC 1166 at [159] per Slattery J
[37] ibid
[38] *Campbell v Chabert-McKay* at [92] per White J
[39] ibid
[40] *Phillips v James* [2014] NSWCA 4 at [73] to [76] per Beazley P; *Charnock v Handley* at [190] to [196] per Hallen J
[41] *Ramsay v Schiller* [2012] NSWSC 596

because there were still $298,000 in the actual estate, the savings in estimated time and costs would be relatively small, and there was the possibility of an appeal on the issue.

Discretionary Trusts

A "paradigm case" for the intended application of the notional estate provisions is the placing of assets in a family discretionary trust with a corporate trustee controlled by the deceased.[42]

Discretionary trusts are one of the most fraught areas of notional estate because it may capture discretionary trusts created more than 3 years before the testator's death, and transfers to the discretionary trust more than 3 years before the testator's death.

The central issue is the testator's control – the testator's *ability* to transfer property from the trust back to the testator's personal estate but the testator not doing so, may be characterised as the testator not doing an act that results in property being held without full valuable consideration being given to the testator for not doing so.

In *Kavalee v Burbidge*,[43] the testator transferred his assets to a Liechtenstein stiftung. The stiftung was managed by a board of directors but the founder had the power to designate the beneficiaries and to determine the distribution, and the founder was *obliged* to act in accordance with the testator's directions, and the testator could remove the founder or appoint a new founder. On the testator's direction, the founder made a special by law which designated as beneficiaries the persons that the testator had nominated in a "memorandum of wishes". The Court of Appeal said that there were three "prescribed transactions". First, the Deceased executed a memorandum of wishes, caused it to be incorporated into a special by-law on 15 March 1988 and left it unrevoked. Handley JA said that it was the testator's omission to exercise power to cause the founder to cancel the special bylaw, whereas Mason P (with whom Meagher JA agreed) said it was the testator's capacity to *compel* the founder to apply the assets in accordance with the memorandum of wishes. The second was the testator executing the memorandum of wishes, the making of the bylaw and failing to direct the stiftung to appoint property to persons other than the stiftung so that property was held by "another person", the stiftung. Third, the testator's omission to exercise the power to appoint or dispose of the stiftung's property, and as a result of the omission and his death the property became held by the stiftung free of the deceased's control and the founder became entitled to exercise the power of designation and distribution of assets. Even though the power to appoint or dispose of property was vested in the founder, the testator had the legal right to direct the founder how the founder should exercise its power, and the testator had the power to replace the founder or could have appointed himself as founder.

In *Flinn v Fearne,*[44] the testator was the appointor (the "nominator") with power to remove the trustee and appoint a replacement trustee, and designate "nominated beneficiaries" from the class of "eligible beneficiaries". This gave the testator de facto albeit indirect control. However, Master McLaughlin said that that the testator's failure to transfer the trust assets to himself did not constitute a prescribed transaction. He distinguished *Kavelee v Burbidge* because there was no legal duty imposed upon the trustee to act in accordance with the testator's directions.[45] He considered that the testator's power to remove the trustee and appoint another trustee was "very different" from the power of *de facto* control of the trust asserted by the plaintiffs, and assumed that the testator would be able to find an amenable trustee who would be willing to disregard the trustee's fiduciary duties. At most, he could appoint as a new trustee a person or entity whom the testator *might have expected* would act in accordance with his direction. There is a suggestion that the testator appointing a corporate trustee controlled by the testator may have contravened

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[42] *Wardy* supra n33 at [141] per White J
[43] *Kavalee v Burbidge* (1998) 43 NSWLR 422
[44] *Flinn v Fearne* [1999] NSWSC 1041
[45] ibid at [23]

the deed of settlement of the trust. [46] In *Belfield v Belfield*, Campbell JA said that *Flinn* depended upon the terms of the particular trust documentation and noted that it was not fully revealed by the reasons. [47]

In *Belfield v Belfield*,[48] the corporate trustee held company shares on trust for two discretionary trusts. The testator and the corporate trustee had entered into a deed of appointment pursuant to which "in broad terms" the corporate trustee agreed to act in accordance with the testator's directions concerning certain matters connected with the operation of one of the trusts. The plaintiff claimed that the testator had had the power, pursuant to the Deed of Appointment, to require the beneficial interest in those shares to be dealt with as she directed, including by transfer to herself, and her failure to give any such direction fell within the definition of "prescribed transaction". The testator's legal rights under the Deed of Appointment were similar to the testator's rights to direct the founder of the stiftung in *Kavelee v Burbidge*. Notably, the testator had severe dementia from 2000, more than 3 years before she died. Therefore, any prescribed transaction resulting from her failing to exercise powers under the Deed of Appointment would have occurred too early to have enabled the court to make an order designating any notional estate. However, the plaintiff could rely on the testator's attorney failing to exercise the power of attorney to exercise powers under the Deed of Appointment.

In *Frisoli v Kourea*, the testator was the controlling shareholder and the director of the corporate trustee, and the parties conceded it was notional estate, even though the testator's widow had a power of appointment.[49]

In *Wardy v Salier*,[50] the appointor of the trust was not the testator – he had originally been the appointor and nominated his son. The testator resigned more than 12 months before he died, and there was no evidence that he resigned to frustrate any family provision order. The corporate trustee always had two directors, the testator and his son. However, the corporate trustee *sole shareholder was the testator*.

White J held that there was a relevant property transaction by omission. The testator could have appointed the property of the trust to himself without the other co-director's concurrence by exercising his power as sole shareholder to remove the other co-director and exercising his power as a director to appoint the property to himself. It was no answer that the appointor could have removed the corporate trustee, because the testator may have exercised his powers without notice to the appointor, so he could have exercised his power before any step could be taken by the appointor to remove the corporate trustee as trustee.[51]

White J said that there was a relevant property transaction even though there was no "change" in the ownership if the property. He said that it is necessary to compare the position as it actually is with the position that would have been had the act or omission not occurred, if the act had been done rather than omitted, if the testator had exercised a power to appoint or dispose of the property. The property has "become held" by a person even though there has been no change in the holding of the property.[52]

White J said that the omission to exercise a power did not need to be the sole cause of property becoming held by another, and it was sufficient that it was a contributing cause.[53]

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[46] ibid at [26]
[47] *Belfield* supra n2 at [74] per Campbell JA
[48] *Belfield* supra n2
[49] *Frisoli* at [6] to [7] per Slattery J
[50] *Wardy* supra n33
[51] *Wardy* at [117] per White J
[52] *Wardy* at [136] per White
[53] *Wardy* at [115] per White J

Conclusion

Clients should be advised that disposing of assets and accumulating assets in discretionary trusts may not provide a magic shield from family provision claims. The notional estate provisions are deliberately designed to capture the full range of benefits and advantages controlled by testators and are liberally interpreted.

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