



Précis Paper

Notional Estate Orders

A thorough overview of the principles relating to notional estate orders.

Discussion Includes

- What is a notional estate order?
- Historical background and overview to family provision legislation
- Notional estate legislation and position under common law
- Requirements of the NSW notional estate legislation
- Distributed property
- Advice for practitioners administering an estate

Précis Paper

Notional Estate Orders

1. In this edition of BenchTV, Michael Willmott SC (13th Floor St James Hall, Sydney) and Dr Hayley Bennett (Barrister, New Chambers, Sydney) discuss the requirements and procedures for notional estate orders.

What is a Notional Estate?

2. The notional estate of a deceased means property designated by a notional estate order, within the context of a family provision claim. The area of law is important for practitioners to understand, both in terms of advising clients in estate planning matters, administering estates, and family provision claims.

Historical Background and Overview to Family Provision Legislation

3. Family provision legislation applies to certain categories of persons, principally spouses and children, who might have a moral claim to the bounty of a deceased person. Where a deceased fails to make adequate testamentary provision in this respect, the Court is empowered to make an order out of the estate for the person's maintenance, education and advancement in life of the applicant.
4. The first statute enacting a family provision scheme was in New Zealand. In NSW, the *Testators and Family Maintenance Act 1912* (NSW) introduced family provision claims, initially in relation to widows and infant children. That Act continued until the introduction of the *Family Provision Act 1982* (NSW), which was in turn replaced by Ch 3 of the *Succession Act 2006* (NSW).

Notional Estate Legislation

5. Initially, the statutes only gave the court the power to make claims against the estate of the deceased person, i.e. the property vested in the executor at the time of probate or administrator at the time of the grant of letters of administration. Where there was a lawful transaction during the deceased's lifetime that had the effect of removing the asset from the estate, the court had no power to deal with that asset.
6. There were differing views of the extent to which family provision legislation allowed the courts to deal with property that no longer formed part of the estate. In *Dillon v Public Trustee of New Zealand* [1941] AC 294, the Privy Council suggested that the court could look beyond the actual estate. However in *Schaefer v Schuhmann* (1972) 46 ALJR 82, the Privy

Council, in contrast, took the view that the court could not consider assets no longer forming a part of the estate.

7. Today, in NSW, notional estate is a creature of statute. The NSW legislation specifically empowered courts to look at certain transactions that the testator had been involved in in his or her lifetime, including transactions where the testator had failed to do something that would have caused property to come into the testator's estate, or transactions where the testator had made a disposition which had the effect that the property was no longer part of the estate. In *Kavalee v Burbidge* (1998) 43 NSWLR 422, this was described as the long arm of the law clawing back property to bring it into the province of a family provision claim.
8. The *Family Provision Act 1982* and *Succession Act 2006* are largely the same in their provisions relating to notional estates.
9. In other jurisdictions which do not have notional estate legislation, Mr Willmott SC advised practitioners to look at the case of *Barns v Barns* [2003] HCA 9; 214 CLR 169, which considered whether notional estates can arise under the common law.
10. The notional estate provisions are contained in Part 3.3 of the *Succession Act 2006*. Section 3 defines "notional estate" of a deceased person as property designated by a notional estate order as notional estate of the deceased person. In essence, the Court must consider:
 - (a) Whether there has been a relevant property transaction; and
 - (b) Whether to make an order in relation to the property that has been designated notional estate as arising from that relevant property transaction.
11. Section 63(5) enables the Court to make a family provision order in relation to property that is not part of the estate of the deceased, if that property has been designated as notional estate.
12. Part 3.3 is divided into three divisions, setting out (1) what constitutes a relevant property transaction; (2) when notional estate orders will be made; and (3) restrictions and protections relating to notional estate orders.
13. Section 75 of the *Succession Act* provides:

(1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:

(a) held by another person (whether or not as trustee), or

(b) subject to a trust,

and full valuable consideration is not given to the person for doing or not doing the act.

14. The notional estate provisions therefore apply to either a positive act or a failure to act, and the underlying question is whether full valuable consideration was provided. The Court takes a common sense approach to this question, and looks at whether the consideration approximates or is it broadly commensurate with what has been given. There is an open question as to whether personal services can constitute full valuable consideration.
15. Section 76 of the *Succession Act* gives examples as to what constitutes relevant property transactions for the purposes of s 75. These situations include the example of where a person is entitled to exercise a power to appoint or dispose of property, and the person does not exercise the power, with the result that property does not come into that person's estate. This will often occur in relation to family discretionary trusts, where the deceased has the power to dispose of property in the trust. Other scenarios set out in s 76 include the failure to sever a joint tenancy; binding nominations made in respect of superannuation funds; and contracts entered into which have the effect of disposing of property out of the person's estate.
16. A further restriction regarding the application of Part 3.3 to inter vivos contracts is found in s 80, which provides that the Court can only make an order designating property notional estate if:
 - (a) the transaction took effect within 3 years before the date of death and was entered into with the intention of denying or limiting provision for any person; or
 - (b) the transaction took effect within 1 year before the date of death and at the time, the deceased had a moral obligation to make adequate provision for a person entitled to a family provision order, which was substantially greater than the moral obligation to enter into the transaction.
17. The "intention" under (a) above goes further than mere contemplation, and it is the intention of the testator that is relevant, not the effect of the transaction. Paragraph (b) above implies a balancing of competing interests.
18. Merely because there has been a relevant property transaction does not mean that the court will designate the property as notional estate; a number of restrictions are embodied in Part 3.3. First, under s 78, the Court will not designate property as notional estate unless

there is no actual estate or insufficient estate for the making of the family provision order. Second, under s 83, the Court must not make a notional estate order unless satisfied that the relevant property transaction disadvantaged the estate.

19. Third, under s 87, the Court must not make a notional estate order 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, (c) any other matter it considers relevant in the circumstances. The expectations referred to are the expectations of the person who is the current holder of the property in question (see *Phillips v James* [2014] NSWCA 4).
20. Pursuant to s 89, the Court must consider a number of factors, including the value and the nature of the property; the value and nature of any consideration given in the transaction; whether the property has been used to obtain income since the transaction was entered into; and the circumstances of the recipient.
21. Once a notional estate order is made, the person's rights in relation to the property are wholly extinguished.

Distributed Property

22. Section 79 gives the Court the power to make a notional estate order if satisfied that the property was held as a result of the distribution of the estate. In addition, nothing in s 79 requires the property designated as notional estate to be the same property as the distributed estate.
23. Section 93 gives the executor or the administrator protection where the property is distributed at least 6 months after the deceased's death; the legal personal representative has given notice in the approved form; the time specified in the notice is not less than 30 days after the notice is given; that time has expired; and the legal personal representative does not have notice of any application for a family provision order.
24. In conclusion, this is an important area of the law for all practitioners to understand, but also to have in the back of their mind in relation to estate planning and estate litigation, particularly in light of the relative ubiquity of things like joint tenancies.

BIOGRAPHY

Michael Willmott SC

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Michael Willmott SC was called to the NSW Bar in 1973 and appointed Senior Counsel in 2003. Michael specialises in equity, trusts, wills and estates, and has been recognised as leading Senior Counsel in Wills and Estate Litigation by Doyle's Guide. Additionally Michael is a member of the College of Law's Board of Studies to oversee the syllabus for the Master's Degree and Post Graduate Diploma in Succession and lectures extensively in the area

Dr Hayley Bennett

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Dr Hayley Bennett was called to the NSW Bar in 2009, having worked previously as a clinical and research neuropsychologist. In this field Hayley has numerous qualifications, including a PhD in Clinical Neuroscience. She has sat on the (then) Guardianship Tribunal of NSW and also provided expert opinion on issues of mental capacity in various proceedings. As such she is a recognised expert at the intersection of neurobiology and the law and has also been recognised in Doyle's Guide of leading Wills and Estate Litigation Barristers.

BIBLIOGRAPHY

Cases

Dillon v Public Trustee of New Zealand [1941] AC 294
Schaefer v Schuhmann (1972) 46 ALJR 82
Kavalee v Burbidge (1998) 43 NSWLR 422
Barns v Barns [2003] HCA 9; 214 CLR 169
Phillips v James [2014] NSWCA 4

Legislation

Testators and Family Maintenance Act 1912 (NSW)
Family Provision Act 1982 (NSW)
Succession Act 2006 (NSW)