



If I give away assets before I die, will it defeat claims against my estate?

Not necessarily is the answer. A common misconception is that Willmakers who are concerned about a potential Family Provision Claim being made against their estate can avoid that claim by transferring assets before their death to their intended beneficiaries so that when they die there is nothing, or very little, in their estate to be attacked.

The Succession Act 2006 (NSW) ('the Act') allows a Court in a Family Provision Claim (which normally must be made within 12 months of the deceased's death) to treat property that is not actually part of a deceased estate as still notionally part of the deceased estate. This is so that the family provision principles are not frustrated by the Willmaker's financial manoeuvring.

The Act provides that the Court can make a family provision 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 in a Willmaker's Will.

Who is an eligible person?

There are 6 categories of persons who are eligible to make a Family Provision Claim:

1. A wife or husband of the deceased person at the time of their death;
2. A person who is living in a de facto relationship (including same sex partners) with the deceased person at the time of their death;
3. A child of the deceased person;
4. A former husband or wife of the deceased person;
5. A person who was at any particular time wholly or partly dependant on the deceased, and is a grandchild or a member of the deceased's household at any particular time;
6. A person who was living in a close personal relationship with the deceased at the time of their death (a close personal relationship is a relationship, other than a marriage or de facto relationship, between 2 adult persons, whether or not related by family, who are living together where one of them provides the other with domestic support and personal care without fee or reward).

What is Notional Estate?

A person making a Family Provision Claim usually makes a claim for provision out of assets which are owned in the deceased's sole name at the time of the deceased's death (ie **Actual Estate**).



In special circumstances, it is also possible to claim provision out of assets which are not directly owned by the deceased at the time of his or her death, or which have been distributed (ie **Notional Estate**).

For assets to be notional estate, the transfer of those assets away from the deceased must have occurred in a particular way. The deceased must have transferred the assets through direct or indirect action, or by inaction, to another person (including a company) or to a trust without receiving full valuable consideration in exchange for the transfer.

Types of Notional Estate

There are 4 circumstances when assets (called property) may be designated as notional estate:

1. If the relevant property transaction took effect or is to take place on the deceased's death, such as jointly owned real estate transferring to the joint owner by survivorship, or life insurance proceeds or superannuation benefits being paid to a nominated beneficiary. The inaction of the deceased which makes these transactions notional estate is the deceased's failure to sever the joint tenancy or to alter the nominated beneficiary.
2. If the relevant property transaction took effect within one (1) year before the deceased's death and was entered into when the deceased had a moral obligation to make adequate provision for the proper maintenance, education or advancement in life of an eligible person which moral obligation was substantially greater than the moral obligation of the deceased to enter into the transfer transaction that he did (eg generous cash gifts, or transfers of real estate).
3. If the relevant property transaction took effect within 3 years before the deceased's death and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the deceased's estate for the maintenance, education or advancement in life of an eligible person.
4. If the deceased's estate has already been distributed so that there are no assets left in the estate and property needs to be clawed back to meet the family provision order made for an eligible person. In this case it is possible to designate any of the assets of the person who received the distribution as notional estate even if those assets are not the assets distributed from the deceased's estate.

When will a Court make a Notional Estate Order?

The Court will not make a notional estate order simply because one of the 4 relevant property transactions took place. A Notional Estate Order will only be made if:

1. a family provision order would already have been made in favour of an eligible person; and
2. the deceased left no actual estate, or the actual estate that has been left is insufficient to satisfy that Order, or there are other persons entitled to apply for family provision orders, out of the actual estate that has been left.

The Court must be satisfied that the transfer of the property:

1. directly or indirectly disadvantaged the eligible person or the deceased's estate; or
2. involved the deceased doing, or failing to do something that if it wasn't done, or wasn't omitted to be done, could have resulted in a benefit to the eligible person or the deceased's estate.



The Court will also only make a notional estate order if it considers the need for making it outweighs the importance of not interfering with reasonable expectations of how a person is entitled to deal with his or her property and how that property is owned.

Once property is designated as notional estate, it is dealt with for practical purposes as if it were property in the actual estate in the deceased's name. The notional estate order extinguishes (to the extent of the order) the property rights of the person who held that property before the order was made.

Lessons

Willmakers in making their Will, have to give consideration to their obligations to adequately provide for the proper maintenance, education and advancement in life of eligible persons regarding their estate. Failure to do so could give rise to a Family Provision Claim against their estate. Divesting, themselves of ownership or control of their assets before they die not only might result in a notional estate order but might also result in the loss of capital gains tax and stamp duty concessions that might otherwise be available to their estate.

Conclusion

If you require advice regarding a Family Provision Claim or a notional estate order or need assistance in the preparation of your Will, please contact [Lisa Delalis](#) or [Ken Gray](#) on 02 4731 5899 or email willsstates@batemanbattersby.com.au.