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Tuesday, 12 March 2019

Community input sought on estate dispute 'claw-back' laws

Ensuring family members are 'properly provided for' following the death of a loved one can be a source of great conflict and turmoil.

Community feedback on the issue of inheritance is being sought by the Tasmania Law Reform Institute (TLRI), following the release **today** of its Issues Paper reviewing whether non-estate assets should be available to fund successful claims against a deceased person's estate.

In Tasmania, claims can be made against a spouse or parent's estate by family members who consider that they were not adequately provided for.

However, the only assets that can be claimed are those in the deceased's estate.

"Sometimes a person considered wealthy can in fact die without anything of substance in their estate," said TLRI research fellow, author Kate Hanslow.

"This has the effect of excluding assets from reach of challenge and in some cases, it can mean that family members are unable to proceed with family provision claims because there is no estate to claim."

New South Wales is currently the only Australian jurisdiction to have 'notional estate' laws, which allow the court to treat non-estate assets as though they were part of a deceased estate for the purposes of funding successful family provision claims.

Non-estate assets can include joint tenancy properties and accounts, superannuation, life insurance proceeds and trust assets, as well as certain gifts the deceased made within three years of their death, which under notional estate laws may be 'clawed-back' and treated as part of the pool of estate assets.

Hobart mother of two Nina Hendy, who was the instigator of the current review, failed to receive inheritance from the estate of her father - a prominent Launceston businessman, following his death in 2015.

“My father died with none of his considerable assets in his estate because it had been transferred out in the months before he died of brain cancer,” Mrs Hendy said.

“There is no law in place to protect people like my brother and I, who did not receive an inheritance - despite being loved by my father, and my brother having significant need for financial assistance.

“Notional estate laws would have given a judge the discretion to apply their own lens over the changes to our father’s estate and apply some common sense.”

Those opposed to notional estate legislation argue that the laws defeat the notion that people can choose who they want to receive their assets after death and can also create difficulties for asset protection, taxation and estate planning arrangements.

“Decisions about how an estate should be divided are often complicated by the existence of blended families and the need to balance the competing claims of spouses and children from previous relationships,” estate planning lawyer Kimberley Martin said.

“Introduction of notional estate laws will almost certainly lead to more litigation involving deceased estates and the complexity of these laws will inevitably increase legal costs for the parties involved.”

The Issues Paper, including an easy-read version, can be found here:

<http://www.utas.edu.au/law-reform/publications/ongoing-law-reform-projects2>

Community feedback is open until 24 May 2019.

The review, commissioned by former Attorney-General, Dr Vanessa Goodwin MLC, aims to make recommendations to the Tasmanian government about whether, and how, notional estate laws for Tasmania should be pursued.

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