

FACT SHEET 1: Notional Estate Laws

Current laws in relation to estates

There are laws that allow a deceased person's spouse and children, or their parents if they do not have a spouse or child, to claim a share (or a larger share) of a person's estate after their death. In Tasmania, these are contained in the *Testator's Family Maintenance Act 1912* (Tas).

A person may make a claim because they were not left anything under a will, or they may think that what they were provided under the will is not adequate or proper. It is also possible to challenge entitlements set out in intestacy laws where a person dies without a valid will.

A person making a claim must convince the Supreme Court that they have been left without adequate provision for their proper maintenance and support. The Court will consider a range of factors, such as:

- the size of the estate
- the relationship between the applicant and the deceased
- competing claims of beneficiaries
- the financial need of the applicant
- any reasons given by the deceased for how they wished to allocate their estate.

If the Court is satisfied that an applicant meets the test outlined, it can make an order that they receive an amount (or additional amount). In all Australian jurisdictions other than New South Wales, orders can only be made from the deceased's estate.

It is possible for a person who might be considered 'wealthy' to die with very little (if anything) in their estate. This might occur where a person owned property with others as a joint tenant, or where assets are held in superannuation funds or trusts. A person may make gifts before their death, with assets gifted then ceasing to form part of their estate. Assets may also pass to beneficiaries outside of an estate, for example, where superannuation or life insurance proceeds are paid directly to beneficiaries.

Some examples are provided below.

These arrangements may exist for a range of reasons – for example, for asset protection or taxation purposes, or to reward or compensate assistance given (in the case of gifts). On the other hand, they may be deliberate in order to reduce what is available to claim. The effect, however, is the same: the way assets are held and dealt with can significantly reduce, and sometimes eliminate, the possibility of an applicant receiving provision from an estate, because there is simply no estate to claim.

Applicants must lodge a claim within three months of a Grant of Administration, although the Court may extend this period. If after this period a legal personal representative has not had notice of any claims, they may commence distributing an estate to the beneficiaries. Assets distributed in these circumstances cease to be part of an estate. Because of this, they are also unable to be used to fund provision for a successful applicant.

Notional estate laws

Legislation in New South Wales is intended to address these issues. It enables the court to deem assets that are not within a person's estate as part of their estate – called their 'notional estate.' The court can then utilise these assets when making provision for a successful applicant. These laws are not unlike those applying to bankruptcy, where assets may be 'clawed-back' where they are disposed of within certain timeframes before the commencement of a person's bankruptcy. Similarly, in the family law context, superannuation is included in the parties' 'asset pool', with the Family Court able to make orders splitting superannuation between partners. In some circumstances, trust assets may also be considered a financial resource of a party to a relationship for the purposes of family law property orders despite those assets being held in a trust and not owned personally.

In broad terms, the New South Wales Supreme Court may only make a notional estate order if an applicant is successful, and only if there are otherwise insufficient assets available. Only transfers or dealings within three years of death (or that occur upon or after a person's death) may be treated as notional estate. These provisions apply equally to acts and omissions. So, if a person fails to do an act – like sever a joint tenancy or make or change a binding death benefit nomination or make a distribution from a trust – then those 'transactions' may also be captured. Before designating property as notional estate, the Court must consider the importance of not interfering with reasonable expectations in relation to property, the substantial justice and the merits involved and any other matter it considers relevant.

Should Tasmania introduce notional estate laws?

Notional estate laws enable provision to be made for successful claimants from a much broader pool of assets than are currently available in Tasmania.

On one hand, extending the Court's reach to assets not currently available imposes a further restriction on a person's ability to choose how they want their estate distributed after their death.

On the other hand, current laws provide scope for people to structure their affairs in ways that may undermine the objective of making sure that adequate provisions are made for a person's spouse and children after their death.



The Institute has been asked to provide advice to the State Government about whether Tasmania should introduce notional estate legislation.

For more information about the Institute's review, go to <http://www.utas.edu.au/law-reform/publications/ongoing-law-reform-projects2>

Examples

EXAMPLE 1: Pre-death gifts

Mr Smith has three adult children. His only substantial asset is a dairy farm at Deloraine. His daughter helps with the farming operations as well as living with Mr Smith and assisting him with domestic tasks. Mr Smith does not have a close relationship with his two sons who live interstate.

Mr Smith wants his daughter to take over the farm on his death. He is adamant that he does not want the farm to be sold and is worried that this might happen if his sons were to claim a share of his estate after his death.

Mr Smith therefore decides to transfer (gift) the farm to his daughter during his life. The effect is that, on Mr Smith's death, the farm does not form part of his estate. It is unable to be claimed by his sons via a TFM claim.

EXAMPLE 2: Superannuation

Barry has superannuation with ABC Superannuation Fund with \$450,000 in his member account. He wants his five children to receive his superannuation when he dies and does not want any of it to be claimed by his partner.

Barry completes a binding death benefit nomination that directs all of his superannuation to his five children equally. The nomination means that, on his death, Barry's super must be paid to his children, which is what the fund ultimately does. His partner is unable to claim provision from any of the superannuation when making a TFM claim under the Act.

EXAMPLE 3: Life insurance

Jenny takes out a life insurance policy to ensure that there will be enough money for her daughter, Tamika, to complete her education if Jenny were to die young. Jenny does not want there to be any possibility that the proceeds of the policy could be paid to anyone else and wants them used solely for Tamika's benefit.

Jenny therefore nominates Tamika as the beneficiary of her life insurance policy. The effect is that the life insurance company must pay the proceeds to Tamika and they are unable to be affected by any claim that might be made under the Act.

EXAMPLE 4: Family trusts

Mr Nguyen is the sole appointor and trustee of the Nguyen Family Trust. The trust has in excess of \$1m net assets. Despite having terminal cancer and knowing of his imminent death, Mr Nguyen does not appoint any capital of the trust to himself as a beneficiary. The \$1m of net assets therefore remain within the trust following his death.

The Trust Deed sets out how Mr Nguyen can pass control of the trust to successors in the event of his death. Before his death, Mr Nguyen exercised this power by including a clause in his will which nominated Mrs Nguyen.

Mr Nguyen's children are worried because they have no guarantee that they will receive any distributions from the trust. The terms of the trust give the trustee a broad discretion in relation to decisions about distributions of income and capital. Mr Nguyen's children are unable to claim any of the assets held in the Nguyen Family Trust if they decide to bring a TFM claim against Mr Nguyen's estate.

EXAMPLE 5: Joint tenancy properties

Lucinda and Gary commence a relationship in their 60s. Both have children from previous relationships. Lucinda owns a house at Smithton in her sole name which she received from her late husband's estate.

Lucinda wants to make a will that leaves the property to Gary.

Lucinda learns that her children will be able to challenge a gift of the house to Gary her will. She also learns that, if the property was held by them as joint tenants, Gary will automatically receive it and it will not form part of Lucinda's estate able to be challenged. She therefore decides to transfer the house so that she and Gary own it as joint tenants.

On her death, Lucinda's children are unable to claim any share of the house as Gary automatically receives the property as the surviving joint tenant.