



THE TAX INSTITUTE

THE MARK OF EXPERTISE

NOTIONS, POTIONS AND MAGIC CHARMS

Therese Catanzariti
13 Wentworth Chambers

- Testators Family Maintenance and Guardianship Act 1916
- Family Provision Act 1982
- Chapter 3, Succession Act

- **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 – s59

- Eligible person – s57
 - wife/husband, de facto, child, ex-spouse
 - grandchild/member of household + dependant
 - close personal relationship + living together at death

“full range of benefits and advantages controlled by testators”



THE TAX INSTITUTE
THE MARK OF EXPERTISE

power of appointment



joint bank accounts

company director

discretionary trust

house as joint tenants

Gorton companies

SMSF

-
- 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 – s75
 - onus on person asserting NO full valuable consideration
 - valuable consideration – may be non-cash
 - full – not just some consideration

- takes effect **on death** – s80(2)(c)
 - joint tenants take on survivorship
 - superannuation nomination
 - life insurance

- takes effect within **one year** + moral obligation – s80(2)(b)

- takes effect within **three years** + intention to limit family provision claims – s80(2)(a)

- distributed estate – s79

- only used to pay family provision orders + costs – s78
- can't be used to pay expenses or other legacies

- only to extent necessary to make provision – s88,89(2)
- Only if insufficient in estate or “other special circumstances”

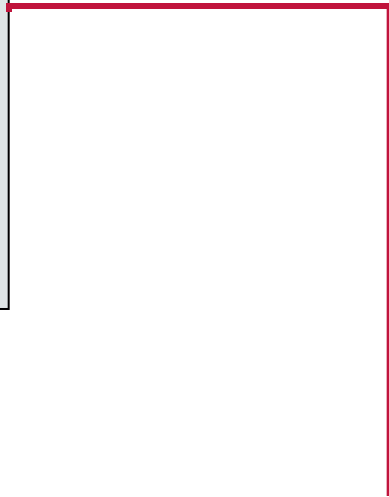
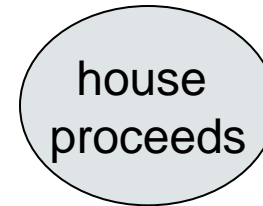
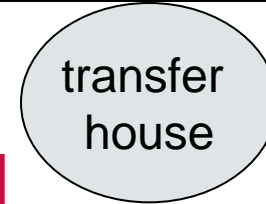
- court must consider – s87
 - importance of not interfering with reasonable expectations in relation to [property](#),
 - the substantial justice and merits involved in making or refusing to make the order,
 - “any other matter it considers relevant”

-
- court grant leave on **sufficient cause** being shown– s58(2)
 - *and if seeking distributed estate as notional estate*
 - not designate property as notional estate unless the property is held on trust or there are “**special circumstances**” – s90

tracing not required



THE TAX INSTITUTE
THE MARK OF EXPERTISE



investment property
bank account
house renovations
purchase shares

- testator *omitted* to do act – relevant property transaction by omission

- testator as trustee
- testator has power to transfer assets to own name

- corporate trustee
- testator as trustee sole director
- testator has power to transfer assets to own name

- independent trustee/independent directors
- testator as settlor
- settlor can change trustee to trustee amenable to testator's wishes

- independent trustee/independent directors/independent settlor
- testator as sole shareholder
- testator can remove director to director amenable to testator's wishes



THE TAX INSTITUTE

THE MARK OF EXPERTISE

© Therese Catanzariti 2014

Disclaimer: The material and opinions in this paper are those of the author and not those of The Tax Institute. The Tax Institute did not review the contents of this presentation and does not have any view as to its accuracy. The material and opinions in the paper should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests.