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# Repeated warning: Super assets are subject to the NSW notional estate rules

***by Matthew Burgess, Director, View Legal, 20 May 2022***

The 'notional estate' rules that apply in New South Wales, provide that in certain circumstances assets or estates that have a connection to New South Wales, that are not owned personally by a deceased, can still be subject to attack when the estate itself is challenged.

A number of previous SMSF Adviser articles have considered the potential range of assets at risk under the notional estate regime, as highlighted by the decision in *Benz v Armstrong; Benz v Armstrong; Benz v Armstrong* [2022] NSWSC 534.

In a situation where the personal assets of the deceased that would have passed to children from his first marriage under the will were negligible, the application of the notional estate provisions instead created a pool of available assets in the region of $18M.

While the second wife of the deceased (who would have otherwise received all wealth) retained more than half of the assets, 4 adult children from the first relationship received amounts in the region of $1M (2 children) and $2M (2 children, noting that one child appears to have secured their payment by calling in a credit loan owed by a family trust (controlled by the deceased) to that child, that was held to be repayable on demand).

The allocations to the adult children were despite the fact that the court concluded that all children had a relatively privileged childhood, including attending private schools and receiving a university education. Further none of the children had particularly dire financial or medical issues.

The court confirmed its view that the deceased's testamentary intention was that his children receive an inheritance from him. Furthermore, given the deceased had a moral obligation to his children, it was extraordinary to think that (absent some far more serious fracture in the relationship with his children) the deceased would have intended his children to obtain nothing at all from his very large estate, particularly when the second wife had already obtained substantial wealth both through the relationship and under the will.

Specifically in relation to the notional estate regime the court confirmed:

1. All parties appear to have accepted that the family trust fell within the description of 'a paradigm case for the intended application of the notional estate provisions', however given (following the repayment of the credit loan) there would likely be a deficit in the trust, this aspect was not considered further.

2. In relation to the deceased's superannuation entitlements (that were in the region of $13M, and were subject to a valid binding death benefit nomination within 3 years of the date of death), the court also concluded these should form part of the notional estate.

3. The court acknowledged that in the case of *Carr v Douglass* [2016] NSWSC 854, it was held that the failure to renew a binding nomination could trigger the notional estate rules as at the date of failure (not at the date of death) as it denied the estate the benefit of the deceased's interest in the superannuation fund. However, the relevant date being the date of failure (as opposed to the date of death) meant that under the rules the necessary intention to defeat a notional estate claim also needed to be proved.

4. The court also quoted the decision in *Wardy v Salier* [2014] NSWSC 473 (a case involving a failure to exercise the power to appoint or dispose of property in relation to trust assets) that the purpose of the notional estate provisions is to extend the powers of the court in NSW to the full range of benefits and advantages controlled by willmakers and

therefore, insofar as any question of construction presents a choice, an approach that promotes this purpose is preferred.

5. Thus, here the deceased's failure to revoke his death benefit nomination and give a replacement nomination (in favour of his legal personal representative, to ensure the entitlements passed into the estate for distribution under the will) was a transaction within the meaning of the notional estate rules, and would also have been caught had there been a failure to make any nomination at all (see *Kelly v Deluchi* [2012] NSWSC 841).

6. Ultimately the court concluded that the omission to revoke a nomination was analogous to an omission to sever a joint tenancy (another situation subject to clawback under the notional estate rules), in light of the fact that the deceased's nomination could have been revoked at any time prior to death, therefore it was not until the moment of death that the failure took effect.

7. While this conclusion was acknowledged to perhaps be inconsistent with the reasoning in *Carr v Douglass*, a distinction was drawn between the omission to renew a nomination which was said to take effect when the nomination lapses and the failure to revoke or change a nomination (which subsists up until the date of death).

8. Furthermore the reasoning in *Carr v Douglass* was questioned, given other cases where the absence of a valid nomination meant that the transaction took effect upon the resolution of the trustee to distribute the death benefits following the death of the superannuation member. In other words, it was held unnecessary to establish that the failure to revoke was with the intention (wholly or partly) of denying or limiting provision out of the estate within the meaning of the notional estate regime.

In the context of this case it seems clear that only removal of funds from superannuation, or a binding nomination that is non-lapsing and 'double entrenched' in the trust deed (ie unable to ever be changed) - and in each instance implemented at least 3 years before the date of death - will be outside the NSW notional estate regime.