Wood & Anor v McLean & Anor [2010] VSC 550 (8 December 2010)

ADMINISTRATION AND PROBATE – Deceased transferred property to daughter during his lifetime – Deceased's other children claim transfer was unconscionable – Other children are not beneficiaries – Other children have issued separate proceedings seeking provision under *Administration & Probate Act 1958* (Vic) Pt IV – power to set aside inter vivos gift in order to replenish an estate.

The strict jurisdictional limits of Part IV (Family Provision) of the Victorian *Administration & Probate Act*, 1958 to property in the estate at death continues to stand in stark relief to those in New South Wales where transfer of property by a testator up to three years prior to death can be tipped back into the estate for distribution.

The New South Wales *Family Provision Act* 1982 has long given NSW Courts the power to undo inter vivos attempts to thwart judicial capacity to make adequate and proper provision for those whom, a deceased had a moral obligation to provide. Its statutory successor the *Succession Act* 2006 continues to do so.

In *Wood v Mclean* the Plaintiff sought to rely on unconscionability to achieve the NSW statutory effect of notional estate and failed.

The decision was being appealed but has settled.

Background

The plaintiffs were two of the children the deceased who died on 18 September 2009. Prior to his death and on 18 February 2008, the deceased transferred a property in Croydon to his youngest daughter, the second defendant. The Property was the deceased's largest asset.
The deceased's last will dated 24 March 2009 made no provision for the Plaintiffs.

The Plaintiffs sought to impugn the pre-death gift on two grounds. Firstly that the deceased was so enfeebled at the time of the gift that the second defendant could not conscionably hold on to it. The second ground was that the gift had been directed to thwarting the proper claims of legitimate beneficiaries, namely the Plaintiffs under a Part IV claim.

The Plaintiffs sought that the transfer of the Property to Elizabeth should be set aside with the consequence that it would become is an asset of the deceased's estate and available for distribution. The Defendants sought to strike out the claim on the basis that it was hopeless.

The Plaintiffs claim was also attacked on the grounds of an absence of standing. Their claim that they were contingent beneficiaries by reason of a possibly positive future outcome in their Part IV claim was rejected by Sifris J. This case note is not concerned with that element of the application.

This second ground relied essentially sought to duplicate the operation of the “notional estate” provisions of the *Succession Act* 2006. These provide that the Court may make a “notional estate order" designating property transferred before death as notional estate of a deceased person.

The first threshold requirement is that full valuable consideration has not been given for the transfer of the property. The second is that the order is being made as part of a Family Provision proceeding. The third is that the deceased left no estate or if such estate exists it is insufficient for proper family provision.

If the inter vivos transfer was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order it can in effect be set aside if it occurred three years or less before the death of the deceased.
If the transfer was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction sought to be set aside then the Court can overturn the transaction if it occurred one year or less before death.

There are a number of checks on the Court‟s power. The Court must not designate as notional estate, property that exceeds that necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate, that necessary to pay the costs.

> Further the Court must not make a notional estate order unless it has considered the following:
> (a) the importance of not interfering with reasonable expectations in relation to property,
> (b) the substantial justice and merits involved in making or refusing to make the order,
> (c) any other matter it considers relevant in the circumstances."

However the power once exercised is significant. The effect of notional estate order is that a person's rights are extinguished to the extent that they are affected by a notional estate order: S 84.
In *Wood’s* case, in the absence of a Victorian equivalent the Plaintiffs had to take a more convoluted route.

The Victorian Court of Appeal in *Wood & Anor v McLean & Anor* [2011] VSCA 37 comprised of Mandie and Redlich JJA considered the question of standing might be further heard on appeal. It is unclear whether the claim to set aside the inter vivos gift might have also been considered. Now it will not be.
In the meantime, the NSW Supreme Court made 10 notional estate orders between February 2010 and May 2011. In the years before 2010 the number is in the hundreds. Its notional estate jurisdiction remains unique in Australia.
The breath of the notional estate powers including the powers are wide in the extreme as demonstrated by their application to joint tenancies and superannuation (nomination of, or failing to nominate, the recipient of superannuation death benefits may result in the superannuation death benefit being designated notional estates: *Kembrey v Cuskelly* [2008] NSWSC 262). The power possessed by NSW Courts is also possessed by English Courts under the *Inheritance Provision for Family and Dependants Act* 1975. English Courts can set aside transactions that occurred up to 6 years prior to death: s.10. The absence of these powers in Victoria remains a curiosity or alternatively a reflection of a purer belief in this state in the sanctity of those property rights inherent in the principles of freedom of testation.