



## Fact Sheet 7 – Notional estate and clawback provisions

### What is a 'notional estate' and what do 'clawback' provisions do?

In most States and Territories, including South Australia, it is possible to avoid the reach of family provision laws such as the *Inheritance (Family Provision) Act 1972 (SA)* if, before the person dies, he or she gives away, or otherwise disposes of, his or her property.

However, in New South Wales, laws existed that allowed the court to treat property that was disposed of prior to death in order to avoid family provision claims, as part of the person's estate when they died. In other words, a house or car given to son A by his father could be included by the court as part of the father's 'notional estate' when making family provision orders in favour of son B after the father's death. So, too, could more complex transactions like moving property into superannuation, setting up trusts and holding property jointly with another person.

These laws are sometimes called 'clawback' provisions or 'anti-avoidance' provisions because their purpose is to allow the court to 'claw back' property disposed of by a testator in his/her lifetime or where a testator fails to take a step to ensure that property over which a testator has control in his/her lifetime becomes an asset of his/her estate.

Under these laws, the person who received the property from the person prior to death will no longer have any rights to that property, if the court orders that it be given to a successful family provision claimant.

However, the court must consider a range of factors before it makes orders concerning a deceased person's notional estate, including having regards to the importance of not interfering with reasonable expectations in relation to property, the substantial justice and merits involved in making or refusing to make an order, and any other relevant matters.

These laws also set out in some detail what types of property transactions fall under the umbrella of 'notional estate' (for example see *Family Provision Act 1982 (NSW) s22(1)*). The time when a prescribed transaction takes effect is an important consideration.

### Should South Australia consider clawback provisions as part of its family provision laws?

The National Committee for Uniform Succession Laws has recommended that provisions be implemented based on these previous New South Wales laws (*Family Provision Act 1982 (NSW) ss 21–29*, now replaced by *Succession Act 2006 (NSW) Pt 3.3*), to ensure that the primary object of the family provision laws (that is, to provide for dependent family members) cannot be frustrated by people disposing of all of their property immediately prior to their death.

However, other reform bodies such as the Victorian Law Reform Commission received mixed views about the way in which people should be permitted to deal with their property while they are still alive. In its review of relevant family provision laws in Victoria, the Commission noted that '[t]here are many reasons why a person may deal with their property in a certain way during their lifetime, including to minimise tax and to provide for their family during their lifetime. The Commission does

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not have any evidence that people are dealing with their assets during their lifetime in order to deprive their family of provision or inheritance'.

SALRI is interested in your views on this topic, and in particular on the extent to which people currently deal with their assets to minimise property in their estates and thereby frustrate the operation of family provision laws.

## Discussion Questions

1. To what extent do people deal with their assets during their life in order to minimise the property that is in their estate and frustrate the operation of family provision laws? What are some examples of this?
2. Should people be entitled to deal with their assets during their lifetime to minimise the property that is in their estate?

**Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service or the South Australian Legal Services Commission's [Legal Advice Helpline](#) on 1300 366 424.**

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