CONTEXTUALISING (SOME) CONTESTED INTER VIVOS TRANSFERS

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Edited version of address to the Society of Trust and Estate Practitioners (STEP) Australia Conference, 28 March 2022, Sydney.

I INTRODUCTION

I have been requested to speak on 'contested inter vivos transfers'. This descriptor is broad enough to encompass scenarios divorced from trusts and estates. It could encompass any transaction, for any reason, provided it is intended to take effect some time during the transferor's lifetime. To more closely align the substance of my presentation with matters germane to trusts and estates practitioners, I have elected to focus on inter vivos transfers that are ostensibly motivated, whether directly or indirectly, to remove their subject matter from the testamentary net.

In so doing, I readily concede that the topics addressed in this paper, taken individually, will (hopefully) hardly be new to listeners — indeed, if they are, you are attending the wrong conference. Consistent with my brief, though, I have sought to bring them together under a broader umbrella, and thereby place them into a context. This commences with inquiry into the drivers for inter vivos transfers *in place of testamentary devolution*; family provision regimes, unsurprisingly, figure prominently. Some discussion of the role of lawyers in proffering advice in this regard follows. Constraints in seeking to circumvent the impact of family provision represents the next topic. The effectiveness of inter vivos transfers in this regard ensues upon identifying drawbacks of such dealings. The concluding, and lengthiest, section of the paper probes the contest underscoring the effectiveness of inter vivos transfers, and how this might conceivably frustrate the disponor's intention.

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II TESTAMENTARY DEVOLUTION

I commence with the trite observation that the law provides an avenue whereby succession to the property of a deceased is achieved. It enables a person to make a will, designed to take effect upon his or her death, stipulating the devolution of his or her estate. In line with the broader freedom, recognised by law, wherein a person can dispose of property as and when he or she wishes, the law interrogates the terms of the will with the object of discerning the testator's intention. Of course, no one is compelled to make a will, or to make one that envelopes his or her entire estate; intestacy legislation addresses any gap in (beneficial) ownership of the relevant estate. The latter, as is well known, prescribes an order of persons who may take, and the proportions they may receive, of the deceased's estate. It reflects a judgment of the legislature as to how a deceased may logically dispose of his or her estate.

The foregoing proceeds on the basis that what is distributed under a will, or pursuant to the rules of intestacy, is identifiable as the 'estate' of the deceased. Not everything owned by the deceased during his or her lifetime, including after making a will, necessarily forms part of that estate. A will, after all, is an 'ambulatory' document, meaning something that is not fixed but rather alterable or revocable. Moreover, the law does not, generally speaking, constrain how persons deal with their property inter vivos, whether or not pertaining to property that is the subject of a testamentary disposition. Accordingly, what comprises a deceased's estate is the property to which he or she is beneficially entitled on his or her death. It is this property that, subject to the satisfaction of liabilities, is available for distribution according to the terms of the deceased's will or pursuant to the intestacy rules.

To the extent that the law cherishes testamentary freedom, a testator can be confident when it comes to the implementation of his or her testamentary instructions (or, lacking a will, that the estate will be allocated as per the statutory intestacy order). This assumes, of course, that the testamentary dispositions are legally effective, whether as a matter of construction, policy or substance. This may not always be so. The devolution of a conditional testamentary gift could be frustrated by uncertainty; or a purpose gift could fail for being non-charitable. More fundamentally, a bequest may be thwarted because its subject matter has been adeemed, or otherwise insufficient remains within the estate to satisfy it.

It goes without saying that testamentary freedom relies upon the testator possessing the requisite capacity, evincing the necessary knowledge and

approval, and not being a victim of (testamentary) undue influence. Until not too long ago in the broader scheme of things, it also rested upon the strict fulfilment of formalities. The said freedom, reflecting a deceased's intentions, has since been enhanced by the now widespread statutorily-sourced judicial dispensing power.[1]

III INTER VIVOS DEALINGS

The above does not mean that, in every instance, a person wishes his or her property to be devolved upon death, whether by will or by intestacy. The general law does relatively little to constrain inter vivos dealings with a person's property. To the extent that these dealings function to detach property from the person's deceased estate, it is simply a manifestation of a broader freedom to deal with one's property.

There are manifold reasons why a person may *not* wish property to devolve upon death. The most obvious, and self-serving, is a choice to apply funds or property, for his or her own benefit, in the here and now. Indeed, the general law in no way expects or requires that persons leave *any* estate upon death. At the same time, many wish to benefit surviving loved ones via will or intestacy, which functions to constrain profligate inter vivos consumption of the estate. In the alternative, a person may elect to make inter vivos gifts to accelerate what may otherwise have been loved ones' inheritance. The opportunity to witness and experience the benefit emanating from these gifts may be of value and pleasure for the disponer.

Persons may wish to distribute inter vivos for other reasons. In years past, this may have been driven to reduce the incidence of death duties. Inter vivos dispositions (typically to family members) also represented a means for the disponer to secure or retain access to assets-tested social security benefits. Persons have also been driven to shrink their estate to secure government-supported places in assisted living facilities. Each of these avenues has been progressively constrained.

Nowadays a strategy of removing assets from a person's deceased estate is primarily used to circumvent the family provision jurisdiction (albeit qualified in New South Wales via notional estate provisions),[2] which vest

[1] See G E Dal Pont, *Law of Succession* (LexisNexis Butterworths, 3rd ed, 2021) 123–39.

[2] See below section, 'notional estate provisions'.

in courts a (guided) discretion to interfere with outcomes set out by will (and thus a testator's freedom of testation,[3] characterised by some in terms of a fundamental human right)[4] or intestacy legislation. Emerging from New Zealand before infusing various other parts of the common law world, family provision statutes premise this interference upon, in general terms, a court being satisfied that the deceased has not made adequate or proper provision for a person to whom he or she owed a 'moral' obligation. Most successful 'challenges' to wills involve applications for family provision, despite many laypersons' ignorance of this longstanding (and, over time, expanding) jurisdiction.

Accordingly, without targeted advice to this effect, relatively few testators might appreciate the prospect of their testamentary intentions being (at least partly) thwarted by the court, so as to benefit someone whom the testator has chosen to omit or benefit a person more generously than the testator contemplated.

Of course, this is not to say that a person's intentions expressed in a valid will necessarily reflect his or her wishes as at the date of death. A person's intentions as to the disposition of his or her property can shift in time,[5] but not translate to a (valid) testamentary instrument. This can be the product of a testator's shifting associations or relationship dynamics with one or more persons.[6] There may also be occasions where testators, had they turned their mind to the issue, may have altered their will to reflect the existence of new potential beneficiaries or to take account changed

[3] *Lieberman v Morris* (1944) 69 CLR 69, 91 (Williams J) (who described the legislation as placing 'an important limitation upon the right of a testator to dispose of his property by will in any manner that he may think fit. It makes the operation of his testamentary dispositions defeasible to the extent required to give effect to the purposes of the Act').

[4] See, for example, *Fung v Ye* [2007] NSWCA 115, [25] (Young CJ in Eq, Tobias JA [1] and Bell J agreeing at [35] ('basic human right'); *Grey v Harrison* [1997] 2 VR 359, 363, 366 (Callaway JA) (a 'notable human right' and an 'important human right').

[5] Cf the famous words of Bowen LJ, albeit in another context, that 'the state of a man's mind is as much a fact as the state of his digestion': *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483.

[6] In *Hawkins v Clayton* (1988) 164 CLR 539, for example, via her 1970 will the testatrix appointed the appellant as executor and primary beneficiary. But that will remained extant even following a dispute with the appellant in 1973, after which all contact between them evaporated. That the testatrix subsequently informed her solicitors (the respondents) of her intention to make a new will, but failed to do so prior to her death, against the backdrop of the said dispute might logically suggest that the testatrix's affections for the appellant, and with this her inclination to benefit him (and indeed entrust her testamentary wishes to him), may well have evaporated.

financial (and family) circumstances of one or more beneficiaries. At the same time, the family provision jurisdiction can be utilised as a vehicle to (at least partially) address these scenarios. Provision may be ordered for persons who have been born, or entered the deceased's life, after the date of the latter's will. The same may ensue where a claimant's financial circumstances have deteriorated in the interim.[7] Moreover, estrangement between the deceased and a claimant is a factor capable of reducing, or even denying, a moral obligation to make provision.[8]

IV (SCOPE OF) LEGAL ADVICE

Because relatively few laypersons fully appreciate the potential (adverse) impact of family provision regimes on their (perceived plenary) freedom of testation (or, indeed, freedom to allow the intestacy rules to dictate the devolution of their estate), the value of legal advice should not be discounted. But, against the backdrop of judicial discretion spinning off inherently factual and multi-faceted inquiries, advice of this kind often cannot be expressed in precise or unqualified terms. The resultant uncertainty infecting the full implementation of a testator's will-sourced intentions unsurprisingly raises a legitimate question as to what avenues may be available to stem this consequence (and thereby maximise freedom of testation). When legally advised of the potential impact of a family provision claim, a putative testator may opt to modify the terms of the will to (attempt to) fulfil his or her moral obligation to make proper and adequate provision for the prospective claimant.[9]

Of course, it remains within a testator's domain to spawn a testamentary instrument that is ripe for a family provision claim;[10] lawyers, after all,

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[7] A recent illustration is found in *Rathswohl v Court* [2021] NSWSC 356, where the testator's will left the family home to the deceased's daughter (the defendant), informed by the fact that, at the time of the will, the deceased's son (the plaintiff) had his own house and business. In the interim, the plaintiff's house and business were sold due to financial difficulty, leaving the plaintiff in need. An order for provision was made in the plaintiff's favour.

[8] See Dal Pont (n 1) 685–91.

[9] See, for example, *Schneider v Kemeny* [2021] NSWSC 524, [248]–[251] (Rees J) (who held that the deceased's implementation of legal advice on how best to prepare her will to make adequate provision for her estranged husband functioned to frustrate his subsequent family provision claim).

[10] It has been judicially observed, to this end, that the legislation 'does not impose any duty upon testators — there is no provision which imposes any sanction of any description upon

perform an advisory, not decisional, function. A testator may be adamant that his or her instructions should be followed, despite the possible consequences. He or she may be confident that those with a valid but unmet moral claim on the estate will not pursue it. But any such decision, even if 'pig-headed', must be fully informed. Accordingly, it behoves lawyers to alert testators to the risks in this regard. This will involve probing the testator as to the identity of persons who may have a moral claim on the estate, as well as the nature and extent of the testator's relationship and association with those persons.

The aforesaid remarks must be placed in the context of the High Court's well-known 2016 decision in *Badenach v Calvert*.[11] Delegates will recall that it involved a terminally ill client approaching the appellant lawyer for the purpose of drafting a new will, under which the entire estate would pass to the respondent (being his late de facto partner's son, whom the testator treated as a son). The appellant omitted to inquire whether any family members might be eligible to pursue a family provision claim, simply approaching the retainer as to perform the 'mechanical' task of drafting the will in line with the testator's instructions. The testator, it transpired, had an estranged daughter from his first marriage, who ultimately succeeded in securing provision from his estate.[12] This in turn substantially depleted the estate that the testator clearly intended, upon his death, the respondent to take.

The respondent sued the appellant, arguing that the latter owed him a duty of care to fulfil the testator's instructions. He contended that, in failing to advise the testator of the risk of a family provision claim, and consequently means whereby such a claim could be circumvented via an inter vivos transaction (namely conversion of ownership of land held by the testator and the respondent as tenants-in-common to a joint tenancy), the appellant had breached his duty not just to the testator but to the respondent. It will be recalled that both the trial judge[13] (Blow CJ) and a unanimous High Court of Australia were unwilling to extend the relevant duty of care to advice surrounding how any family provision claim, were it forthcoming,

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failure to make adequate provision for a testator's family': *Lieberman v Morris* (1944) 69 CLR 69, 81 (Latham CJ).

[11] (2016) 257 CLR 440; [2016] HCA 18.

[12] *Doddridge v Badenach* [2011] TASSC 34.

[13] *Calvert v Badenach* (2014) 11 ASTLR 536; [2014] TASSC 61.

could be stymied. Conversely, the Tasmanian Full Court, via three separate judgments, unanimously concluded the contrary on this pivotal point.[14] The division between the respective courts logically centred on questions surrounding the scope of the appellant's retainer and, attendant to this, whether the requisite causation could be established between the failure to advise on family provision and the loss suffered by the respondent.

The ultimate denial of the respondent's claim should not, however, be viewed as any ringing endorsement of the appellant's performance in taking instructions from the deceased. The High Court observed that, even without making a specific inquiry from the deceased, the appellant could 'readily have ascertained' the existence of the daughter; the appellant's firm, after all, had made two wills for the client in the past, the earlier of which contained a small legacy for the daughter.[15] Independent of this, as Blow CJ observed at first instance, the appellant could have simply asked the client whether he had any children.[16] As, on receiving the original instructions the appellant would have observed that no provision had been made for any family member, '[p]rudence would have dictated an enquiry about the client's family', opined French CJ, Kiefel and Keane JJ in the High Court.[17] Such an inquiry would have yielded information as to the existence of the daughter. In this event, their Honours perceived no dispute that the appellant 'would then have been obliged to advise the client that it was possible that a claim might be brought by her against the client's estate under the [applicable family provision statute]'.[18]

The relevant duty, arising out of the retainer, was 'to ensure that the client gives consideration to the claims that might be made upon his estate before giving final instructions as to his testamentary dispositions'.[19] On the facts, however, the High Court concluded, 'advice about *how to avoid* such a claim by inter vivos transactions with property interests' was not within the scope of the retainer.[20] As a result, their Honours were unwilling to accede

[14] *Calvert v Badenach* [2015] TASFC 8.

[15] *Badenach v Calvert* (n 11) [6] (French CJ, Kiefel and Keane JJ).

[16] *Calvert v Badenach* (n 13) [5].

[17] *Badenach v Calvert* (n 11) [27].

[18] Ibid.

[19] Ibid [30].

[20] Ibid [31] (emphasis in original).

to the respondent's argument that the appellant should have 'volunteered' advice of this kind, reasoning as follows:[21]

> … it is difficult to see how the [appellant] had a duty to do so merely because the [appellant] has informed the client of the possibility that a claim could be made by the daughter but that, absent further information, he could not be any more certain about it occurring. It cannot be reasoned from the fact that the daughter later brought a claim that the [appellant] should have appreciated that this was likely to occur. Even if he had done so, it is still difficult to see that the appreciation of this possibility would have warranted advice of this kind. Neither the [appellant] nor the client could have known with any certainty whether the claim would be successful and, if so, the extent of the provision that might be made for the daughter from the client's estate.

The court added that the client's initial instructions regarding the preparation of his will 'would not have been sufficient to convey to the [appellant] that the client would wish to take any lawful step to defeat any claim which was made by the daughter'.[22] After all, at this point the appellant could not know what view the client might take concerning whether the daughter had a claim upon him or his estate.

Importantly, though, no judge at any level in the court hierarchy doubted that a lawyer instructed to draft a testamentary instrument should, as a matter of good practice, inquire concerning any scope for the dispositions thereunder being (partly) frustrated by a successful family provision claim. If this reveals scope for a potential claimant, it logically follows that a lawyer must alert the client to the risk of a claim and its potential impact on the estate (and, with this, the implementation of the client's testamentary intentions). The client's inquiry as to potential avenues to circumvent such an outcome would trigger an obligation to advise on this point (stemming from a widened retainer). All this was accepted at first instance by Blow CJ and, as appears from the foregoing, hardly misaligns with the reasons of the High Court.

Lacking such inquiry, there is a legitimate question concerning whether a lawyer should alert the client regarding avenues to immunise an asset from

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[21] Ibid [32].

[22] Ibid [33].

a family provision claim. While the High Court in *Badenach* envisaged no obligation to 'volunteer' this information, the facts there revealed no such inquiry. Indeed, the client was not positioned to pursue this because the issue of family provision had not surfaced on the radar. Hence, *Badenach* may not preclude a potentially broader duty of care as between lawyer and client. The appellant in that case was perhaps fortunate not to have raised the family provision issue in the first place, as it avoided the need to assess not only whether further advice was necessary but also to investigate how the client may have responded thereto.

Badenach should accordingly not be seen as a wide constraint on the duty of care to client-testators. The argument can be made that the law expects lawyers to probe prospects for family provision applications when advising clients in will-drafting. And, having done so, circumstances can, and will, surface wherein this translates to an expectation to take additional steps and advise clients of avenues to maximise their testamentary freedom. Logically stemming therefrom may be the identity of those avenues and their advantages and drawbacks. Even were a court not to elevate lawyers' duty quite so high, the said expectations likely nonetheless align with what can be branded as good practice.

The basic proposition that informs advice here is that any beneficially owned asset[23] that forms part of a testator's estate is fair game from which to source an order for provision. Subject to the notional estate regime in New South Wales (discussed below),[24] the flipside is that any asset falling outside the estate escapes the family provision web. A legally effective inter vivos disposition of property thus places that property beyond the reach of the legislation.[25] This remains so even if the disposition is effected very close to the time of death.[26] This inherent limitation in the statutory

[23] To the extent to which property, though legally owned by the deceased, is subject to an equitable interest in favour of another person, it is not part of the deceased's estate: see, for example, *Sturits v Nicholls* [2011] NSWSC 599, [52] (Macready AsJ) (who noted that it was open to the applicant, who was the deceased's wife, to bring the proceedings despite the fact the deceased's interest in property has vested in the defendant (being the deceased's trustee-in-bankruptcy) because such an interest is subject to any equitable interest that might be asserted against the defendant).

[24] See below section, 'notional estate provisions'.

[25] *Barns v Barns* (2003) 214 CLR 169; [2003] HCA 9, [4] (Gleeson CJ).

[26] For instance, where the property is the subject of a gift in contemplation of death (*donatio mortis causa*), which at general law lies outside the deceased's estate, as it is disposed before death and outside of any will: see Dal Pont (n 1) 20–6. The position is modified by statute in Queensland: *Succession Act 1981* (Qld) s 41(12) (which, so far as the property available to meet family provision orders is concerned, declares any sum of money or other property

scheme aligns with the fact that a family provision order takes effect as a codicil to the deceased's will executed immediately before death.[27]

What ensues is that, in circumstances where this aligns with a client's objective, it is apt for a lawyer to advise as to inter vivos avenues to locate a client's assets outside the testamentary net. This will typically involve inter vivos dealings with those assets so as to deprive the client of beneficial ownership thereof from a testamentary perspective.

V CONSTRAINTS ON CIRCUMVENTING FAMILY PROVISION JURISDICTION

A No contracting out

Attempts to contract out of the family provision regime will *not* prove effective for this purpose. This has been long established, driven chiefly by a concern that the mischief to which the statutes are directed would otherwise be frustrated. In the leading Australian case, *Lieberman v Morris*,[28] the High Court ruled that a person cannot, by means of an (otherwise) enforceable agreement with the testator, contract out of standing to seek provision from the testator's estate. Although not every judge reasoned in precisely the same way, the following remarks of McTiernan J encapsulate the broader judicial thinking:[29]

> There is much difficulty in supposing it to have been the legislature's intention that a covenant not to apply would preclude an application to the court by a widow left without adequate provision for her proper maintenance by reason of the manner in which her husband disposed by will of the property which passed

received by any person as a *donatio mortis causa* made by the deceased to be part of the estate of the deceased). Equivalent provision is made in the relevant New Zealand, Ontario and English statutes: *Family Protection Act 1955* (NZ) s 2(5); *Succession Law Reform Act 1990* (Ont) s 72(1)(a); *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s 8(2).

[27] See Dal Pont (n 1) 712–13.

[28] (1944) 69 CLR 69.

[29] *Lieberman v Morris* (1944) 69 CLR 69, 88; see also, 85–6 (Rich J); 86–7 (Starke J), 92 (Williams J) (noting, moreover, that '[t]he contract would have to be made in the lifetime of the testator at a time when it would often be impossible to determine with any certainty what provision an applicant would require at the uncertain future date of the testator's death, and at a time when it would not be known who the other dependants of the testator would be or what would be the value of his estate'); cf 82–3 (Latham CJ).

> under it. A widow left in that condition is affected by the very mischief which the Act was passed to remedy: and it would frustrate the object and purpose of the Act to hold her to a covenant not to apply for an adequate provision for her proper maintenance. These considerations apply with equal force to a covenant by a child. A widower is given the same rights as a widow or child and the same considerations would apply to a covenant by him. Further, the powers which the Act confers upon the court are not exercisable by the court except on application by or on behalf of one, or members, of the family of the testator or testatrix, that is to say, widow, widower or child. It is to be presumed that the intention of the Act is not that the powers of the court should remain a dead letter: if they did there would be no remedy for the mischief at which the Act is aimed … The Act would not be effective to remedy the mischief if the persons affected could preclude themselves by covenant not to apply to the court to exercise its powers.

Parallel observations can be made vis-à-vis pre-nuptial agreements that purport to preclude a surviving party from making a family provision claim (except as allowed by the agreement) on the other's estate. The issue surfaces most commonly in the event of second (or subsequent) marriages, where the parties have children from their first (or earlier) marriages and bring assets and/or income to the marriage. The intention is, in the ordinary case, to facilitate the provision by the deceased party for his or her own natural children (or grandchildren).

The same reasoning translates to attempts to oust the court's jurisdiction in this context *by the terms of the will itself* as opposed to by (ostensibly) private agreement. So, for instance, in *Jones v Public Trustee*[30] the deceased's letter to the Public Trustee, stating that '[s]hould any member of my family contest my will, their share is to be revoked and given to the named charities', had no impact on the court's jurisdiction to make an order for family provision.

At the same time, the law does not outright proscribe a person from entering into a contract binding as to the testamentary disposal of his or her estate, or one or more assets therein.[31] The law of mutual wills, commonly as between husband and wife, recognises a duty binding the survivor to

[30] [2010] NSWSC 350.

[31] See Dal Pont (n 1) 27–8.

testamentarily dispose of the estate inherited from the deceased as agreed between the parties. What triggers this duty is a pre-existing contract, albeit one enforceable in equity following the first party's death.[32]

Again, though, the interrelationship between inter vivos contracts for the testamentary disposition of property and the court's statutory jurisdiction to order provision out of that property must be explored. Consistent with the tenor of the preceding observations, it stands as little surprise that a pre-existing contractual obligation relating to the property in question cannot, by itself, serve to withdraw it from the deceased's estate for the purposes of family provision. It did take, however, until 2003 for the point to be established in Australian law, via the High Court's ruling in *Barns v Barns*.[33]

Barns involved mutual wills executed pursuant to a deed between husband and wife. The issue was whether property the subject of the deed and wills came within the estate out of which provision could be ordered. In holding that it did, Gleeson CJ opined that a construction of the statute 'that permits a testator to nullify its operation by agreeing in advance to dispose of his or her estate in a certain fashion tends to defeat the purpose of the legislation'.[34] The other three judges in the majority endorsed the view that, as a promisee's rights to the property in question are drawn through the will — the promise is, after all, one to dispose of the property by will — they are, in principle, subject to any statute affecting testamentary succession, of which the family provision regime is an example.[35]

Consistent with earlier observations, though, a promisee's contractual (or, in mutual wills, equitable) entitlement to enforce a promise is not necessarily irrelevant to the exercise of the court's discretion to order provision out of the subject matter of the promise. Grounds can exist to take into account legitimate contractual claims in determining the extent and form of provision.[36] That the promisee has bargained for the

[32] Ibid 31–9.

[33] (2003) 214 CLR 169; [2003] HCA 9.

[34] Ibid [34].

[35] Ibid [115] (Gummow and Hayne JJ), [129] (Kirby J).

[36] See, for example, *Milillo v Konnecke* (2009) 2 ASTLR 235; [2009] NSWCA 109 (where Ipp JA noted that the rights of the testator's second wife (R) to make a family provision claim derived from statute and overrode the agreements the testator entered into with his first wife (M) (under which the testator agreed that he would bequeath the matrimonial home to

contractual entitlement and will have no claim for compensation should the property in question be directed (whether wholly or partly) instead to an applicant for provision, present further reasons not to ignore the contractual claim. But in each case, it cannot divert the court's attention from its obligation under the relevant legislation to determine whether, in the circumstances, the deceased has left an applicant with adequate provision for his or her maintenance, advancement or support.

B Notional estate provisions

As foreshadowed earlier, any discussion surrounding the scope for inter vivos transfers to take the transferor's property outside the testamentary net, and thus immunise it from a family provision claim, must be read subject to the 'notional estate' provisions found in New South Wales. Here is not the place for an exhaustive excursus, in part also because they will be well-known to local practitioners. I merely make the observations sufficient to qualify the substance of the remaining content of this paper.

First appearing in the *Family Provision Act 1982* (NSW),[37] before migrating to the *Succession Act 2006* (NSW), the 'notional estate' provisions provide for, inter alia, the designation of property as 'notional estate' for family provision purposes even though it does not form part of the deceased's estate. The concept of a 'notional estate' has been concisely described as 'property which would have become part of the deceased's estate, had it not been dealt with, or had it been dealt with, by the deceased in a particular way and in particular circumstances, prior to his or her death'.[38] 'Notional estate orders' accordingly aim to make available for family provision assets that no longer form part of the deceased's estate because they have been disposed before the deceased's death.[39]

Evidently, the legislation cannot sensibly extend the family provision net to *every* inter vivos dealing or disposition by a person. It uses the concept of a 'relevant property transaction', as a result of which property is not

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the daughters of his first marriage): at [87]; but that these agreements, nevertheless, were factors to which the trial judge was entitled to have regard: at [88]).

[37] *Family Provision Act 1982* (NSW) Pt 2 Div 2 (being the product of recommendations by the New South Wales Law Reform Commission: *Testator's Family Maintenance and Guardianship of Infants Act 1916* (Report No 28, 1977).

[38] *Galt v Compagnon* (SC(NSW), Einstein J, 24 February 1998, unreported) 21.

[39] New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision* (Report No 110, May 2005) 37.

included in the estate, which is defined broadly in s 76(2), unless full valuable consideration is given. Importantly, to be caught by these anti-avoidance provisions, s 80 imposes time constraints (one year or three years prior to death depending on the circumstances) on 'relevant property transactions' that can impact on the deceased's notional estate.

The above is an over-simplification of the regime, which in prescribing multiple 'checks and balances' to guard against potential overreach and, at the same time, avoiding injustice to persons owed a moral duty, is complex. This can in turn translate to challenges in giving advice to testators who wish to deal inter vivos with property so as to reduce (the likelihood of) a notional estate for family provision purposes. This complexity has not dissuaded recommendations for equivalent regimes elsewhere,[40] although the two most recent law reform body inquiries into the matter have recommended against this.[41]

In passing, it may be noted that a simpler approach to the mischief that propelled notional estate provisions is found in some Canadian provinces. The relevant statutes envisage that property disposed by a testator inter vivos can become subject to a family provision order to any extent that the value of the property, in the court's opinion, exceeds the consideration received by the testator under the contract.[42] In the United Kingdom, it is (partly) addressed by conferred upon the court the power to reverse the effect of contracts to leave property by will made with the intention of defeating an application for provision.[43]

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[40] Queensland Law Reform Commission National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (Miscellaneous Paper No 28, December 1997) 76-93; Victorian Law Reform Commission, *Succession Laws* (Report, August 2013) 132–3.

[41] South Australian Law Reform Institute, *'Distinguishing Between the Deserving and the Undeserving': Family Provision Laws in South Australia*, (Report No 9, December 2017) (recommendation 27: at xiii, 117); Tasmania Law Reform Institute, *Should Tasmania Introduce Notional Estate Laws?* (Final Report No 27, September 2019).

[42] *Wills and Succession Act 2010* (Alta) s 102; *Provision for Dependants Act 1973* (NB) s 16; *Testators' Family Maintenance Act 1989* (NS) s 16(1); *Succession Law Reform Act 1990* (Ont) s 71; *Dependants' Relief Act 1996* (Sask) s 10.

[43] *Inheritance (Provision for Family and Dependants) Act 1975* (UK) s 11.

VI UTILISING THE INTER VIVOS TRANSFER

The foregoing reveals, inter alia, that a testator — despite being of full capacity, having read and approved the will, and not a subject of testamentary undue influence — cannot be assured that the law will fully implement his or her testamentary intentions. The chief reason for this lack of assurance is, as noted, the potential impact of family provision regimes. And these regimes are not capable of being wholesale ousted either by agreement or the terms of the testator's will. It stands to reason, accordingly and somewhat ironically, that persons who wish to maximise what *would have been* their testamentary freedom may need to switch their dispositive actions (to give effect to their intention) to the inter vivos sphere. Even then, as has been noted, statute in New South Wales can impede the efficacy of such pursuits.

A Ethical interlude

The legal profession's role in fostering the dispositive intentions of their clients, which may typically enter the fray upon consultation for will-making, is hardly to be downplayed. There remains fertile ground, to this end, for advice on how to circumvent the impact of family provision statutes by removing assets from the testamentary net. In one sense, this is not devoid of ethical challenges. The client might be seeking to 'shirk' what society can perceive as his or her moral obligation to provide for one or more persons. Of course, there is no illegality in a lawyer advising as to how to facilitate such an outcome. To the contrary, rather; a failure to do so, in misaligning with the client's objectives and instructions, may constitute a breach of duty.

The foregoing is not, however, to preclude lawyers from raising with clients what the law might expect in the testamentary fulfilment of a moral obligation, and probing the drivers for clients' wish to structure their property affairs inconsistently with any such obligation. Admittedly, such a course traverses into the lawyer acting as counsellor, beyond a mere mechanical function. Yet this may be no bad thing, or devoid of potential beneficial legal impact on the client. As noted earlier, it might, for instance, translate to the client reassessing his or her testamentary intentions, possibly aligning these more closely with his or her moral obligations. Even if it does not, it might inform the provision of reasons in a will for confining or denying a testamentary bounty to certain individuals, which may be probative against a family provision application by one or more of

those individuals.[44] Or it might prove a catalyst for greater openness between the client and persons with an ostensible claim on his or her (testamentary) bounty. And perhaps more significantly, being apprised of the potential drawbacks to the client to attempts to immunise property from a testamentary claim — which, as elaborated below, forms part of the lawyer's obligation in this regard — may prompt the client to reconsider whether pursuing this option is provident in the circumstances.

B Effecting an inter vivos transfer

As foreshadowed earlier, structuring a client's affairs so as to remove assets from the testamentary (and thus family provision) net typically involves the client successfully divesting himself or herself of those assets before death (or, in New South Wales, so as to avoid triggering the notional estate provisions). The most extreme response here is for the client to simply spend all or most of his or her estate, thereby leaving little or nothing to which a family provision claim can attach.

A more likely scenario involves a client aiming to protect his or her testamentary estate from one or more specified individuals who might otherwise have a (family provision) claim upon his or her bounty. In this instance, the client may wish to deny such individuals any part of that bounty, or otherwise constrain it. However, family provision regimes do not allow a person to immunise his or her deceased estate from claims by 'undesirables' while concurrently making testamentary dispositions to 'favoured' ones. When it comes to a family provision claim, after all, the assets forming a deceased person's estate are 'pooled'; there is no quarantining as between assets in this regard. To the extent that 'undesirables' succeed in their claim, this correspondingly reduces the intended testamentary bounty to the 'favoured' ones.

Hence, a testator who wishes to effectuate such a differential allocation must reduce his or her testamentary estate — against which the 'undesirables' may claim — by inter vivos dispositions to the 'favoured' ones. In other words, he or she must accelerate the benefit to a person who would otherwise have taken under the disponor's will, and in so doing deprive the estate (and claimants thereunder) of that benefit. Typically, this may involve a fully constituted inter vivos transfer by way of gift (including by way of declaration of trust) or otherwise at an undervalue

[44] See Dal Pont (n 1) 697–700.

(which in turn explains why the New South Wales 'anti-avoidance' notional estate provisions target transactions without valuable consideration).[45]

C Drawbacks of an inter vivos transfer

While an inter vivos transaction of that kind may prove effective to immunise its subject matter from a family provision claim (subject to the notional estate regime in New South Wales), it is not without its drawbacks. Most fundamentally, its effectiveness rests on it depriving the transferor of the beneficial ownership of the property, asset or money in question, and with this any legal entitlement to recover or resume that ownership. In turn, this could render the transferor financially vulnerable. After all, as no one can predict precisely when a putative transferor will die, attempts to delay the effect of inter vivos transfers[46] so as to maximise ongoing financial security to the transferor run the risk of being triggered too late should the transferor die unexpectedly (or otherwise, in New South Wales, fall within the time frames stipulated for 'relevant transactions' vis-à-vis the transferor's notional estate). Moreover, the more proximate the transfer to the transferor's death, the greater the prospect that it will prove ineffective to reduce his or her assets for the purposes of social security entitlements or assisted living concessions. There are also transaction costs of transferring certain forms of property inter vivos that are not triggered[47] or are otherwise nominal[48] when devolved upon death.

While such a transfer can made on an understanding that the transferee will allow the transferor continued use of or access to the property or fund during the latter's lifetime, or otherwise pursuant to a promise to provide ongoing financial support to the transferor, any such understandings or arrangements may prove difficult to enforce at law. In any case, there is a prospect that any formalised understanding concerning access to and use of an asset might be construed as reflecting a (mutual) intention that the transferor retain beneficial ownership in the asset.[49]

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[45] *Succession Act 2006* (NSW) s 76(1).

[46] Including by way of giving transferees options to purchase one or more of his or her assets.

[47] See, for example, *Income Tax Assessment Act 1997* (Cth) s 128-10 (capital gain or loss disregarded upon asset-holder's death).

[48] Stamp duty presents as an obvious example.

[49] See, for example, *Pearce v Public Trustee* [1916] GLR 125 (where a mother who transferred real estate to her son upon an oral express trust was, despite the absence of

The foregoing explains why a typical form of property-holding in this context is via a joint tenancy. By converting ownership of property from a tenancy-in-common to a joint tenancy[50] the (subsequently) deceased joint tenant ensures (subject to the parameters of notional estate provisions in New South Wales) that his or her 'ownership interest' in the property vests in the surviving joint tenant. This immunises it from a family provision claim, but at the same time allows a joint tenant to retain an 'ownership interest' (with its implications) during his or her lifetime.

VII EFFECTIVENESS OF INTER VIVOS TRANSFER

Despite the drawbacks plaguing inter vivos transfers as a vehicle to quarantine assets from potential family provision claims, dispositions of this kind remain the primary vehicle to effectuate the transferor's dispositive intention, which could otherwise be (at least partly) frustrated should those be left to devolve (whether by will or intestacy) upon death.

In turn, this can raise questions surrounding the validity or enforceability of such transfers. As foreshadowed at the outset of this paper, the law strives to implement the intention of persons when it comes to the disposition of their property. Occasions will arise involving a transfer that misaligns with the transferor's intention. The transfer may have been the product of, say, mistake or deception (fraud) (incidentally, parallel observations can be made in the testamentary environment).[51] But it cannot be assumed that giving effect to a transferor's expressed intention always dictates the efficacy of a transfer. The law may impede the implementation of an expressed intention if the transfer has not been completely constituted by the transferor.[52] And, again as in the testamentary context, there are

writing, held to retain beneficial ownership therein because the evidence revealed that she continued to treat the property as her own; '[s]he continued to live in the house as if she were the owner, her children or most of them living there also', and '[s]he paid the rates and the insurance premiums, and the policy of insurance which was in her name originally was kept up in the same form by her': at 125 (Chapman J).

[50] To which no or nominal stamp duty applies and does not trigger a capital gains consequence (see *Income Tax Assessment Act 1997* (Cth) s 108-7).

[51] Wills can be vitiated by fraud / forgery and, under statute, rectified for mistake.

[52] In *Corin v Patton* (1990) 169 CLR 540, for example, the intended transfer was made to the deceased's brother (C), with a view to severing the joint tenancy held by the deceased with her husband (P), in anticipation of the deceased's death. The deceased was terminally ill at the time she executed the memorandum of transfer, and died five days later, before the transfer had been registered, by which time she had not yet authorised the mortgagee to

some inter vivos dispositions that the law declares void, such as those for an illegal purpose or otherwise contrary to public policy, or those incapable of being enforced (such as a non-charitable purpose gift), despite evident dispositive intention to the contrary.

A Effectiveness undermined by equity

Equity can also perform a role in vitiating inter vivos transactions — again potentially despite the expression of apparent intention to the contrary — including those ostensibly pursued with a view to attaining property from a person ahead of legitimate claims by others against that person's estate, whether under a will, the law of intestacy or pursuant to a family provision claim.

The doctrines of unconscionable dealing and undue influence in equity present as primary candidates here.[53] It is apt to observe that these doctrines have no application to invalidating testamentary dispositions; their operation is confined to the inter vivos sphere. The latter does not mean that the mischief to which these equitable doctrines is directed lacks any carriage in the testamentary environment. Both unconscionable dealing and undue influence, to a substantial degree, probe the validity of the transferor's *consent* to the transaction in question. In the testamentary realm, the issue of (true) consent is tested via the requirements of knowledge and approval of the contents of the will, coupled with the doctrine of suspicious circumstances. It is also implicit in the law surrounding testamentary undue influence despite, by reason of being characterised by coercion, having more in common with duress at common law than its namesake in equity.

Unconscionable dealing in equity is directed at preventing or remedying the exploitation by a stronger party of a weaker party's known special

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deliver the certificate of title to C as transferee (and so was found not to have done all that was required by her as transferor to render the transfer binding upon her). The deceased's acts were therefore not effective to sever the joint tenancy, which remained, meaning that P took the land as surviving joint tenant.

[53] These equitable doctrines may not exhaust scope for intervention in this context: see, for example, *Ip v Chiang* [2021] NSWSC 822 (where Lindsay J found that inter vivos transactions by a subsequently deceased transferor could, in addition to be being vitiated by unconscionable dealing, be impugned as breaches of fiduciary obligations: at [324]; see also his Honour's observations subsequently in *Hayward v Speedy* [2021] NSWSC 943 as to the confluence, on not dissimilar facts, between undue influence and breach of fiduciary duty: at [47]).

disadvantage.[54] The equitable doctrine of undue influence targets the improper use of an existing ascendancy by a stronger party over a weaker party so that the latter's acts do not represent the exercise of an independent will. The mere fact that the weaker party is found to have *intended* to enter the impugned transaction does not preclude a finding of either unconscionable dealing or undue influence (although it may form part of the relevant evidential milieu). Equity's concern surrounds *how* that intention was generated or produced; as noted above, unconscionability or undue influence may undermine a genuine consent informing the transaction.

B Case illustration — McFarlane v McFarlane

There are occasions where the evidence of unconscionability or undue influence is so compelling as to clearly infect the agreement in question. A recent illustration of this kind, *McFarlane v McFarlane*,[55] represented an inter vivos attempt by a son to secure title to his mother's principal asset (a home) ostensibly so as to remove that asset from the mother's testamentary estate (and thus deprive his sister of a share therein). The son became the registered proprietor of the property, pursuant to a transfer pursuant to 'natural love and affection', less than a year before the mother moved to an aged care home. Not long thereafter saw the appointment of State Trustees Ltd as the mother's administrator by reason of her declining mental capacity.

Richards J ruled that the transaction was vitiated by both undue influence and unconscionability. Regarding the former, her Honour found that the son held a position of ascendancy and influence over his mother because, inter alia:[56]

- the son was living alone with his mother as her carer for some years.

- while the mother was financially independent, she was dependent on her son to drive her to the shops and to medical and other appointments.

[54] It cannot be assumed, however, that the use of the term 'unconscionable' by statute necessarily translates to its meaning at general law: see, for example, *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1; [2019] HCA 18.

[55] [2021] VSC 197.

[56] Ibid [45].

- the mother had a long history of serious mental illness (including schizophrenia).

- on occasion, the son behaved towards his mother in an abusive manner.

- the mother felt sorry for her son because his father had abandoned him, conveying that this made it difficult for her to say no to him.

Her Honour found it 'significant', moreover, that the solicitor engaged by the son to effect the property transfer never saw the mother separately, and did not advise her of the consequences of the transfer or alternative means of providing for her son. Also, the mother received no independent financial or legal advice before signing the transfer, and did not understand that doing so would affect both her age pension and her future ability to pay for aged care accommodation.[57]

Richards J was equally satisfied that the transfer had been a product of unconscionable dealing. The mother's 'special disadvantage' existed by reason of the matters listed in the dot points above. In particular, 'due to her longstanding schizophrenia, she had impaired executive functioning and attention, and was not receiving the treatment for her condition recommended by her general practitioner', while also being 'emotionally and physically vulnerable to [her son]'.[58] The son was clearly aware of his mother's vulnerability and exploited this to his advantage, which conduct could be described as unconscionable. So even though the mother *knew* that she was transferring the home to her son and could be said to have *intended* to do so, the transfer was set aside because her consent had been compromised.

C No requirement for ulterior motive

McFarlane presents as a relatively easy case in that the son's behaviour was both reprehensible and opportunistic, against the backdrop of documented elder abuse. At the same time, it is important to recall that while equity unquestionably fixates on the conscience of the alleged

[57] Ibid [46].

[58] Ibid [51].

wrongdoer, a finding of undue influence or unconscionable dealing does not rest on proof of some ulterior motive by the stronger party. Mummery LJ elaborated the point, in the context of undue influence, in *Pesticcio v Huet*:[59]

> Although undue influence is sometimes described as an 'equitable wrong' or even as a species of equitable fraud, the basis of the court's intervention is not the commission of a dishonest or wrongful act by the defendant, but that, as a matter of public policy, the presumed influence arising from the relationship of trust and confidence should not operate to the disadvantage of the victim, if the transaction is not satisfactorily explained by ordinary motives … The court scrutinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient. A transaction may be set aside by the court, even though the actions and conduct of the person who benefits from it could not be criticised as wrongful.

And despite targeting unconscionable conduct by a stronger party, nor does the doctrine of unconscionable dealing, it seems, require proof of some active extortion of a benefit, an abuse of confidence, or a lack of good faith by that party. In *O'Connor v Hart*,[60] for instance, the Privy Council made the obiter remark that unconscionability 'can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.' The extent to which this might be taken, even when apparently inconsistent with the (allegedly) weaker party's articulated objective (and thus intention), was revealed by the judgment of the High Court of Australia in *Bridgewater v Leahy*,[61] where a majority endorsed a broad reading of *O'Connor v Hart*.

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[59] [2004] EWCA Civ 372 [20] (Jacob agreeing at: [25] and Pill LJJ agreeing at: [26]). In the Australian context see, for example, *Hayward v Speedy* [2021] NSWSC 943 (where Lindsay J ruled that inter vivos gifts received by a donee from her elderly parents, even if these involved simply the acceptance thereof rather than motive or intention, were the product of a position of (undue) influence over her parents: at [50], [349]).

[60] [1985] AC 1000, 1024.

[61] (1998) 194 CLR 457, 479 (Gaudron, Gummow and Kirby JJ) ('*Bridgewater v Leahy*').

D Bridgewater v Leahy

The case involved a transaction between the deceased (Bill) and his nephew (Neil), whom Bill viewed as a son, pursuant to which Neil secured farming property previously belonging to Bill at a significant undervalue. This was effected via an inter vivos transfer for full consideration (almost $700,000) coupled with a deed of forgiveness for approximately $550,000 of the purchase price. Neil had devoted his life to working and managing the properties of both his father and Bill. The evidence showed that Neil suggested the transaction to Bill, at the time 84 years of age, some 18 months preceding Bill's death in 1989. It also showed that Neil's suggestion aligned with Bill's wishes that Neil use the proceeds of the sale of land Neil owned (the Injune land) to buy Bill out, and was consistent with Bill's testamentary intentions expressed in his 1985 will, wherein Bill gave Neil the option to purchase his farming interests for $200,000, being well undervalue. It was also evident that the reason why Bill wished Neil to hold the land was to ensure that the properties remained part of a farming enterprise under reliable and experienced management. Prior to entering the transaction, Bill was examined by a doctor to confirm that he was of sound mind and capable of making decisions about his personal affairs. Bill's daughters sought to have this transaction set aside on the ground of unconscionable dealing. A majority of the court upheld the claim, reasoning as follows:[62]

> Bill had a goal of retaining the properties as an integrated farming enterprise under reliable and experienced management … The transfers and the deed, as a means of attaining that goal, involved an improvident transaction which was neither fair nor just nor reasonable … This transaction put it out of Bill's power to change his testamentary arrangements with respect to that portion of his assets … Bill's goal to preserve his rural interests intact and his perception that Neil was the candidate to provide reliable and experienced management thereof were significant elements in his emotional attachment to and dependency upon Neil. The initiative to utilise the circumstances of the sale of the Injune land (to the retention of which Bill had been opposed) for the irreversible implementation of Bill's wishes during his lifetime came from Neil. It is not an answer that there was no finding that Neil had pursued

[62] Ibid 492–3 (Gaudron, Gummow and Kirby JJ).

> the initiative to its implementation … with the motive or purpose of forestalling any change in Bill's testamentary intentions.

Having so reasoned, their Honours concluded that the relationship between Bill and Neil meant that, in discussing the use of the proceeds from the sale of the Injune land, they were meeting on unequal terms; Neil was taking advantage of this position to obtain a benefit 'through a grossly improvident transaction on the part of his uncle'.[63] Hence, '[i]t is unconscionable for Neil and his wife to retain the benefit of the improvident transaction by asserting the forgiveness of the whole of the debt which would otherwise be owing to Bill's estate'.[64]

The majority judgment in *Bridgewater v Leahy* lacks any reasoned analysis and application of the elements that form the doctrine of unconscionable dealing. The improvidence of the transaction, apparently, sufficed to characterise the supposed exploitation as unconscionable, notwithstanding uncontradicted evidence that Bill had a rational reason to transact as he did, and no suggestion he lacked mental capacity or understanding when he did so. Though couched in terms of unconscionability, it is difficult to find in Neil's conduct anything that merits the description 'unconscionable'. It appears, rather, that the transaction was set aside because it generated an unfair outcome ('substantive unconscionability'), which misaligns with the primary ('procedural') focus of the doctrine of unconscionable dealing.

If this is truly the upshot of the decision, it diluted the concept of 'special disadvantage'. Yet given the weight of High Court authority that explicitly recognises the importance of special disadvantage, and the practice of lower courts subsequent to *Bridgewater v Leahy* to continue to recognise and set a high threshold for that requirement, *Bridgewater v Leahy* should not be viewed as unduly attenuating this element. Indeed, subsequent High Court authority continues to target (exploitation of a known) special disadvantage as pivotal to the doctrine. The point appears from its unanimous judgment in *Kakavas v Crown Melbourne Ltd*.[65] There the appellant, a 'high roller' gambler, sought to recover some $20 million he had lost between 2004 and 2006 while gambling at the respondent casino. He alleged that the respondent had knowingly exploited his special disadvantage — claimed to be his inability, by reason of a pathological

[63] Ibid 493.

[64] Ibid.

[65] (2013) 250 CLR 392; [2013] HCA 25.

urge to gamble, to make rational decisions in his own interests while engaged in gambling — by allowing him to (continue to) gamble at its casino. In dismissing the appeal, the court ruled that a pathological interest in gambling was not a special disadvantage that made the appellant susceptible to exploitation by the respondent. The appellant, their Honours noted, 'was able to make rational decisions to refrain from gambling altogether had he chosen to do so'.[66]

Arguably the same could have been said of Bill York, who rationally made a decision to transfer land at an undervalue. Consistent with this line of thinking, the minority in *Bridgewater v Leahy*, Gleeson CJ and Callinan J, did not even reach the exploitation stage, finding that Bill suffered no special disadvantage in effecting the relevant transaction.[67] Their Honours contrasted the facts with those in earlier High Court authorities:

- *Wilton v Farnsworth*:[68] where a person who was 'markedly dull-witted and stupid' was persuaded to sign over to another his interest in his wife's estate without having any idea of what he was doing.

- *Blomley v Ryan*:[69] where the defendant took advantage of the plaintiff's alcoholism to induce him to enter a transaction when his judgment was seriously affected by drink.

- *Commercial Bank of Australia Ltd v Amadio*:[70] where the special disability of the guarantors included a limited understanding of English, pressure to enter in haste into a transaction they did not understand, and reliance upon their son.

- *Louth v Diprose*:[71] where the donee, with whom the donor was 'utterly infatuated', had threatened suicide, manufactured a false atmosphere of personal crisis, and engaged in a process of manipulation to which the donor was vulnerable (characterised as

[66] Ibid [135].

[67] *Bridgewater v Leahy* (n 61) 472.

[68] (1948) 76 CLR 646, 649 (Latham CJ).

[69] (1956) 99 CLR 362, 405 (Fullagar J).

[70] (1983) 151 CLR 447, 476 (Deane J).

[71](1992) 175 CLR 621, 637 (Deane J) (referring to the trial judge's observations).

> conduct 'smack[ing] of fraud'. (It should be noted, in passing, that this decision was itself criticised, by Toohey J in his dissenting judgment, for diluting the 'special disadvantage' threshold, given that the donor was a solicitor, and had ample time to consider the wisdom or otherwise of the proposed transaction).[72]

While conceding that 'it is the principles enunciated in those cases, and not their particular facts, which are of importance', Gleeson CJ and Callinan J noted that 'they are a long way removed from the facts of the present case'.[73] The trial judge's findings in *Bridgewater* established, wrote their Honours, Bill's 'independence of mind and capacity for judgment when he entered into the 1988 transaction; a transaction which can only be understood in a wider context, including the provisions of the 1985 will, and [Bill's] long and firmly held intention that [Neil] should succeed to his pastoral interests'.[74] These findings functioned to deny the existence of any special disadvantage in Bill, and to acquit Neil of unconscionable conduct.

(The foregoing is not to say that the 'substantive' improvidence of a transaction is irrelevant to 'procedural' unconscionable exploitation of a special disadvantage. It may form part of the evidence that goes to substantiate the impact of a special disadvantage in the circumstances. As the Singapore Court of Appeal recently observed, 'there is often an overlap between procedural fairness on the one hand and substantive unfairness on the other'.[75] The point saw some carriage by the High Court in *Thorne v Kennedy*.[76] There the husband, having paid for the appellant fiancé to come to Australia to live, only shortly before the nuptials required her to sign a manifestly improvident pre-nuptial agreement without which the marriage would not proceed. That the appellant depended on her husband-to-be both

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[72] Ibid 653–5.

[73] *Bridgewater v Leahy* (n 61) 472. Cf 490 (Gaudron, Gummow and Kirby JJ) (who cited *Louth v Diprose* as an illustration of the notion that '[t]he position of disadvantage which renders one party subject to exploitation by another such that the benefit of an improvident disposition by the disadvantaged party may not in good conscience be retained may stem from a strong emotional dependence or attachment'; though this then led the majority to view this as a foundation for judicial intervention in this context, the level of emotional impact coupled with the calculated mature of the donee's actions, surely serve to mark a distinction of substance between *Louth* and *Bridgewater*).

[74] Ibid 472.

[75] *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631, [98] (Andrew Phang Boon Leong JA, delivering the reasons of the court).

[76] (2017) 263 CLR 85; [2017] HCA 49.

financially and emotionally, and was by then emotionally invested in their relationship, made her 'unusually susceptible', Gordon J observed, to entering an improvident transaction.[77] The other judges were similarly influenced by the urgency and haste surrounding the signature of the agreement,[78] prompting a finding that she laboured under a special disadvantage when entering it.)

E Assessment of Bridgewater v Leahy

It is unsurprising that the majority's decision in *Bridgewater v Leahy* has been the subject of academic criticism. In 2012 one senior equity academic went so far as to brand the decision as 'the worst High Court decision of recent times'.[79] It is perhaps easy to conclude that the ruling was a 'one-off', of limited precedential value, influenced heavily by its facts. But this conclusion may be premature, as High Court authority subsequent to *Bridgewater* has not questioned the decision. (Indeed, more generally, the High Court appears loathe to cast doubt on the correctness of its previous rulings). A reason may be because the court has not since been presented with anything approaching a parallel scenario, one that remains significant to trusts and estates lawyers.

That *Bridgewater v Leahy* involved an inter vivos transfer of property late in the transferor's life, essentially with a view to depriving the transferor's deceased estate of that property (and, from the transferor's perspective, the adverse consequences that may ensue therefrom), serves to place it in a different context from other High Court unconscionable dealing decisions. (In passing, it should be noted that it also differs in another way: the said High Court cases involved applications by the victim of the unconscionable dealing to set aside the transactions in question. In *Bridgewater*, the alleged victim (Bill) had died, which explains why the application came from his wife and daughters. It may be queried, in view of Bill's sound mind (and

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[77] Ibid [117].

[78] Ibid [64] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); [74], [75] (Nettle J) (opining that '[i]n all likelihood, things would have been different if, instead of waiting until the eleventh hour, [the respondent] had made clear to [the appellant] from the outset of their relationship that his love for her was in truth so conditional that the marriage he proposed would depend upon her giving up any semblance of her just entitlements in the event of a dissolution of their marriage': at [75]).

[79] C E F Rickett, '*Bridgewater v Leahy* — A Bridge Too Far?' (2012) 31 *UQLJ* 233, 233 (although conceding that he had 'not read all the cases handed down by the High Court over the past 25 years' and was 'not versed in a broad enough span of legal knowledge to be able to make that assessment even if [he] had read all the Court's decisions').

intention to engage in the transaction), whether the wife and daughters would have had standing to set aside the transaction preceding Bill's death. As the Western Australian Court of Appeal remarked only a matter of weeks ago:[80]

> The law does not give a beneficiary under a will *of a living person* standing to seek to set aside a transaction entered into by the testator during his or her lifetime merely on the basis that the beneficiary's eventual inheritance may be greater if the transaction were to be set aside.)

Unlike *Bridgewater*, the older High Court cases in question do not thereby purport to straddle the inter vivos–testamentary divide. Of course, whether this should make any difference as a point of principle may well be queried. But it does appear to have influenced the majority's conclusion in this regard, as revealed by the following observations:[81]

> … the inter vivos transaction would remove from Bill's testamentary estate substantial assets which would otherwise have been available to be brought into account in the formulation of an order in favour of the appellants upon the Family Provision Application. Whilst it was plainly the case that Bill's goal was substantially to benefit his nephew, his scope to do so by testamentary provision was qualified by the possibility of such an order for provision out of his estate being made in favour of his widow and children.

Although these considerations may have assumed relevance in the context of an application for family provision, they are, with respect, extraneous to the question of special disadvantage in Bill. After all, it cannot be said that only persons suffering a special disadvantage would effect inter vivos transfers to (partially) frustrate otherwise valid family provision claims. Questions of fairness or otherwise to Bill's wife and daughters do not by themselves bespeak of a special disadvantage infecting Bill's rational wish to favour an ongoing farming enterprise, to which he had devoted his life's work, even if this would reduce his testamentary estate and the claims thereon.

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[80] *Litopoulos v Indiana Holdings Pty Ltd* [2021] WASCA 88, [22] (Mitchell and Vaughan JJA) (emphasis in original).

[81] *Bridgewater v Leahy* (n 61) 484–5 (footnote omitted).

(As an aside, nor are questions of fairness as between testamentary beneficiaries in any way determinative within the family provision jurisdiction,[82] had a claim thereunder been pursued. In any event, it is interesting to note the minority's reference to an occasion where Bill revealed the 1988 transaction to one of his daughters (who was co-executor of his will), in response to which she remonstrated with her father about his generosity to Neil. The evidence indicated that Bill 'justified his conduct, saying that he had made provision for his daughters in past years, giving details, and that he regarded the provision in the will as adequate', and 'explained his generosity towards Neil, saying that Neil was a capable manager of the land and that he had worked, and was still working, to help Bill'.[83] Whether or not the remaining testamentary provision was adequate, the evidence, to this end, reveals that Bill had given due consideration to the competing claims on his estate, including by balancing these against earlier inter vivos provision for the daughters. That the latter is a factor that may sway a court from interfering with a testator's wishes via a family provision claim might explain why such a claim was ultimately not pursued.)

Admittedly, potential unfairness to the Bill's wife and daughters was not the only or even primary foundation for the majority's finding of special disadvantage. It relied more heavily, it seems, on two other matters. The first of these was '[t]he closeness of the relationship between Neil and Bill, and the tendency of the older man to fall in with the wishes of the younger'.[84] Interestingly, this was not challenged by the minority, which accepted the trial judge's finding that Bill 'was fond of, and grateful to, his nephew, whom he regarded and treated as a son'.[85] While the closeness of a relationship between transferor and transferee could conceivably give rise to presumed undue influence or even evidence of actual undue influence,[86] to traverse towards unconscionable dealing requires that this closeness foster some form of special disadvantage. At the same time, emotional or familial closeness (and, in *Bridgewater*, also interconnections in a business context) may provide a compelling, and indeed rational, reason for an inter vivos transfer. If so, absent the spectre of incapacity or

[82] See Dal Pont (n 1) 548.

[83] *Bridgewater v Leahy* (n 61) 463.

[84] Ibid 489.

[85] Ibid 464.

[86] See, for example, *McIvor v Westpac Banking Corporation* [2012] QSC 404.

undue influence, it aligns with both policy and principle to give effect to the transferor's evident intention.

The second principal foundation for the majority's conclusion in *Bridgewater* was what was described, as extracted earlier, as 'an improvident transaction which was neither fair nor just nor reasonable … [which] put it out of Bill's power to change his testamentary arrangements with respect to that portion of his assets'.[87] It may be observed that any undervalue transfer made inter vivos *prima facie* smacks of improvidence to the transferor. The High Court cases to which the minority referred in contrast to the facts in *Bridgewater* each, perhaps unsurprisingly, involved an inter vivos dealing improvident from the plaintiff's perspective. But the case law maintains that improvidence (or even outright foolishness) of itself is no substitute for proof of the exploitation of a known special disadvantage.[88] The law is not so paternalistic as to proscribe improvident transactions or dealings.

Even so, can it genuinely be assumed that Bill's undervalue transfer to Neil was improvident from Bill's perspective? The evidence indicated that Bill was aware of the current value of the property in question, and understood that its transfer was at a significant discount. But, as both the majority and minority accepted, Bill was driven by justifiable concern to retain the farms as a single enterprise, which may not have ensued had the property in question ultimately formed part of his testamentary estate. The rationality underscoring the transfer must, moreover, be viewed in the context of Bill's age; his prescient anticipation of death dictated that any financial improvidence to him during his remaining lifetime was likely minimal. On the other hand, the assurance of an ongoing farming enterprise was very valuable to him. It may also be usefully approached from the perspective of Bill's 1985 will, likewise reflecting an intentional strategy of maintaining intact the farming business.

F Relief granted tells the story?

While the majority ordered that the deed of forgiveness be set aside on the grounds of unconscionable dealing, this was not the end of its purview. In what was perhaps a veiled acknowledgement that this outcome could be

[87] *Bridgewater v Leahy* (n 61) 492.

[88] *Familiar Pty Ltd v Samarkos* (1994) 115 FLR 443, 456 (Thomas J); *Micarone v Perpetual Trustees Australia Ltd* (1999) 75 SASR 1, 109 (Debelle and Wicks JJ); *Xu v Lin* (2005) 12 BPR 23, 131; [2005] NSWSC 569, [40] (Barrett J).

unduly detrimental to Neil, as well as misalign with Bill's evident intentions, their Honours probed appropriate remedial avenues. In framing relief, they wrote, 'weight has to be given to the testator's wish significantly to benefit his nephew'.[89] As an order setting aside the deed of forgiveness would mean that 'the substantial amount so retrieved by the estate would fall wholly into the residue divisible under cl 4 [of Bill's will] equally between Bill's daughters', Neil's exercise of the option would have yielded him assets valued at some $248,000 in exchange for the payment of $200,000', which 'would not reflect any significant level of benefaction to Neil by his uncle'.[90]

Their Honours remarked that had the deed of forgiveness not been set aside, Bill's daughters and his widow 'might reasonably have expected substantial [family] provision to be made by order in their favour'.[91] At the same time, though, in any such application, 'some significant weight would have to have been given to Bill's wish to benefit his nephew' via the testamentary option, which should be reflected in any relief granted now.[92] It followed that, in quantifying that relief, the majority envisaged a simulated analysis of the outcome from a family provision perspective, to be determined by the Supreme Court, despite the fact that any such claim had earlier been dismissed for want of prosecution. Their Honours then observed:

> The amount representing the valuation of the deemed provision under the Family Provision Application in favour of Bill's widow and daughters will be of great significance. It will indicate the benefit under the Will which would have been retained by Neil, freed from the impugned dealings, and after effect had been given to the operation of [the family provision legislation] upon Bill's testamentary dispositions. The estate must make provision for this element of benefaction to Neil by the testator if it is to have the assistance of equity by declaring the Deed [of forgiveness] to be of no effect. As we have indicated, the provision is made by an

[89] *Bridgewater v Leahy* (n 61) 494.

[90] Ibid 495.

[91] Ibid 496.

[92] Ibid.

> allowance in favour of Neil and [his wife] against the disallowance of the forgiveness of their indebtedness to the estate. [93]

In the final analysis, it follows that Bill's intention was not entirely frustrated, although it remains to ponder why it should have been frustrated at all. The majority's reasoning in gleaning a special disadvantage, counter-balanced by framing relief in a way that gave all claimants something, appears to smack of a balancing act between giving effect to a transferor's (and testator's) intention while at the same time being 'fair' to his widow and daughters. To the extent that this would be substantiated by reference to where the cards would possibly lie as a result of a notional family provision order may support an ostensible, and questionable, convergence between the object of relief in equity in an inter vivos context and what informs the jurisdiction to make a family provision order.

VIII CONCLUSION

If there is an underlying theme to this paper, it is that the dispositive intention of a disponor is not always effectuated by the law. And this is despite the core notion underscoring freedom of inter vivos or testamentary disposition. The principal impediment, of course, is the existence of family provision regimes. But attempts to circumvent the family provision jurisdiction via inter vivos transfers, even if not otherwise impermissible incursions into that jurisdiction, cannot be assured of success. And this is so despite the presence of an evident dispositive intention, if the upshot of *Bridgewater v Leahy* is accepted. To this end, one may be driven to conclude that while giving effect to such an intention represents an important policy objective, it is not necessarily the prevailing policy in each instance.

[93] Ibid 496–7.