



Chat Legal Pty Ltd
ABN 64 621 391 553
letschat@chatlegal.com.au
GPO Box 989, Brisbane, QLD 4001
Level 16, 97 Creek Street, Brisbane, QLD 4000
<https://chatlegal.com.au>

Let's chat

Case update (Death and Taxes plus Trusts) – October 2023

With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd

Let's have a chat

- Axiom88 ATF Axiom88 Trust v Chief Commissioner of State Revenue [2023] NSWCATAD 252
- Review of surcharge NSW land tax assessments for 2017 to 2021 land tax years issued on 11 February 2021
- Related to residential land owned by trust in which underlying persons used as a principal place of residence
- Applicant argued surcharge land tax not payable as:
 - 'nominated beneficiaries' did not fall with categories of foreign person;
 - company trustee is exempt from land due to the operation of a specific clause (*not applicable as it is a refund clause where new home is constructed which was not the case here*);
 - Alternatively, 'it is unfair and unjust to make the Applicant liable for surcharge land tax' as trust deed was amended not long after 31 December 2020

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd
Let's have a chat

- Trust deed defined beneficiaries as:
 - Persons named in the schedule as nominated beneficiaries; and
 - The persons who are members of any of the related beneficiary classes specified in the schedule
- Included the following persons of a nominated beneficiary:
 - Spouse and domestic partner;
 - Issue and children;
 - Parents, brothers and sisters and the children of those brothers and sisters;
 - Uncles and aunts of the named beneficiaries and the children of those uncles and aunts
 - Related trusts and companies
- Standard discretionary trust otherwise but no clause excluding foreign persons

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd
Let's have a chat

- Letter sent to Applicant on 11 November 2019 requesting updated details as to foreign status of the trust
- Letter sent to Applicant on 22 January 2020 confirming trust is a special trust (not a fixed trust)
- Letter sent to Applicant on 14 October 2020 informing of surcharge land tax and discretionary trusts and requesting copy of amending trust deed that irrevocably excluded foreign persons
- Assessment issued on 11 February 2021
- Deed of variation **executed on 24 February 2021** to amend trust deed to exclude any foreign person
- Applicant lodge a variation and OSR noted variation accepted for future land tax years (the Applicant subsequently objected which was rejected)

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd
Let's have a chat

5D Surcharge land tax—discretionary trusts

(1) The trustee of a discretionary trust is taken to be a foreign person in that capacity for the purposes of section 5A if the trust does not prevent a foreign person from being a beneficiary of the trust.

(2) If a discretionary trust prevents a foreign person from being a beneficiary of the trust, the trustee is not in that capacity a foreign person for the purposes of section 5A.

(3) A discretionary trust is considered to prevent a foreign person from being a beneficiary of the trust if (and only if) both of the following requirements are satisfied—

(a) no potential beneficiary of the trust is a foreign person (the no foreign beneficiary requirement),

(b) the terms of the trust are not capable of amendment in a manner that would result in there being a potential beneficiary of the trust who is a foreign person (the no amendment requirement).

(4) A person is a *potential beneficiary* of a discretionary trust if the exercise or failure to exercise a discretion under the terms of the trust can result in any property of the trust being distributed to or applied for the benefit of the person.

Note.—

A potential beneficiary is not limited to persons named in the trust instrument and extends to the members of any class of persons to whom or for whose benefit trust property can be distributed or applied pursuant to the discretions of the trust.

(5) For the removal of doubt, a person is not a potential beneficiary of a discretionary trust if the terms of the trust prevent any property of the trust from being distributed to or applied for the benefit of the person.

(6) In this section, *property* includes money, and a reference to the distribution or application of property includes a reference to the payment of money.

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd

Let's have a chat

66 Amendments relating to discretionary trusts

(1) Section 5D of the *Land Tax Act 1956* applies to the assessment of land tax liability in respect of the 2017 land tax year and subsequent land tax years.

(2) If the trustee of a discretionary trust is liable in that capacity as a foreign person for surcharge land tax in respect of the 2017, 2018, 2019 or 2020 land tax year—

(a) the trustee is exempt from that land tax if the terms of the trust have been amended, before payment of the land tax is due and before midnight on 31 December 2020, so that the trust prevents a foreign person from being a beneficiary, or

(b) if that land tax has been paid, the trustee is entitled to a refund of that land tax if the terms of the trust have been amended, before midnight on 31 December 2020, so that the trust prevents a foreign person from being a beneficiary.

(3) A trust that satisfies the no foreign beneficiary requirement under section 5D of the *Land Tax Act 1956* immediately before the commencement of that section is considered for the purposes of that section to prevent a foreign person from being a beneficiary of the trust (without having to satisfy the no amendment requirement under that section).

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd
Let's have a chat

- Tribunal noted facts not contentious
- Also noted that the legislation does not give a discretion to waive, wholly or partially, the land tax surcharge liability
- 'General notions of unfairness and appeals of leniency or natural justice are not relevant when considering the validity of assessments'
- 'Instead, the Chief Commissioner...is required to administer the law in accordance with its terms so as to not unfairly disadvantage other taxpayers who have complied with their obligations under the same law

Discretionary trust 'foreigner surcharge' (NSW)



Chat Legal Pty Ltd
Let's have a chat

- Comments to note:
- Reminder 'foreign surcharges' complex
- Every State has different rules
- Discretionary trust providers include a general exclusion clause as they do not know where accountant's clients will acquire property
- Some drafted to the standard of FIRB exclusion as well (the broadest)
- If want to reduce risk, proper advice should be obtained to tailor clauses (this something accountants be advising on?)



Residency of individual

- PQBZ and Commissioner of Taxation (Taxation) [2023] AATA 2984
- Applicant is a citizen of PNG and was born in Malaysia
- Came to Australia in 1994 and obtained a student visa in 1997 before marrying an Australian citizen in 2000 (now with three children)
- Applicant commenced working at father's business in PNG in 2003
- During the 2013 and 2016 financial years, the Applicant spent time in both Australia and PNG
- Application relates to income tax returns for financial years ending 30 June 2013 to 30 June 2016
- Tax returns prepared by Applicant on basis he was not a resident of Australia and receipts were not income and not assessable



Residency of individual

- Audit conducted in March 2017 (including title and asset searches and obtaining information from financial institutions)
- Applicant purports:
 - Not Australian citizen and postal address was a post office box in Springwood with a home address at a Queensland residential property
 - 2012/2013 income year - ~\$23K rent receipts with ~\$14K capital deductions
 - 2013/2014 income year - ~\$42K rent receipts with ~\$19K deductions
 - 2014/2015 income year - ~\$40K rent receipts with ~\$23K deductions
 - 2015/2016 income year - ~\$40K rent receipts with ~\$23K deductions
- Following the audit, the ATO reassessed tax payable to be \$3,314,793 plus shortfall and general interest charges noting they decided the Applicant was an Australian resident for tax purposes during those income years



Residency of individual

- Noted there had been ‘significant deposit transactions through [his] bank account which were used to fund [his] lifestyle and acquire assets’
- ATO’s position:
 - 2012/2013 - \$1.48m income
 - 2013/2014 - \$880K income
 - 2014/2015 - \$1m income
 - 2015/2016 - \$414K income
- ATO determined this through the ‘Asset Betterment’ method



Residency of individual

25. *This method is based on the principle that if your net assets (assets less liabilities) as at 30 June of a particular year are compared with your net assets as at 30 June of the previous year, the increase (or betterment) will represent your correct taxable income for that particular year, after adjustments have been made for Items which may have affected the increase, e.g. private expenditure, non-taxable receipts, capital gains or losses.*



Residency of individual

- Noted Applicant was registered owner of four properties (two residential and two commercial)
- Noted Applicant appeared to be the owner of the following motor vehicles between 2010 and 2016 (holding at least 6 at the same time for a period):
 - Audi Q7, 2010
 - Porsche, Cayenne, 2010
 - Lamborghini Gallardo, 2008
 - Mercedes-Benz, C63 AMG, 2012
 - Lambhorgini, Huracan, 2014
 - ForTwo, Smart Car, 2008
 - Mini, Cooper S, 2011
 - Landrover, Range Rover, 2011
 - Cabo 10.6m, 2008



Residency of individual

- Applicant also had 'private loans' within the family.
- Applicant argued:
 - He resides in PNG to run a business established by his father
 - He meets his taxation obligations in PNG
 - He maintains assets in Australia which are utilised by himself and the family members when in Australia
 - He intends to remain in PNG as a resident whilst he discharges his paid role in the family's business affairs
 - He remains connected to Australia but considers it to be a place of opportunity and security for his family to be raised
 - Money received from his father (a citizen of Malaysia and resident of PNG) were gifts or loans, not income



Residency of individual

- Tribunal considered whether 'asset betterment' approach was suitable before considering resident tests
- Decision references *Harding* decision



Residency of individual

The 'Ordinary Concepts' or 'Resides' Test

61. Courts have held that in order to be taken to have resided in Australia one needs to consider “*the nature, duration and quality of physical presence [of a person] in a particular place as well as [their] intention*”. [\[37\]](#).
63. In *Harding v Commissioner of Taxation* [2018] FCA 837; 108 ATR 137 (**Harding**) (at [\[46\]](#)) the Court referred to topics that “constitute indicators or objective facts” which are often considered relevant “to the determination of the nature and quality of a person’s presence in or association with a particular location” such as: [\[40\]](#).
- (a) the person’s physical presence in Australia;
 - (b) the person’s nationality;
 - (c) the history of the person’s past residence and movements;
 - (d) the person’s mode of life and habits;
 - (e) the frequency, regularity and duration of the person’s visits to Australia;
 - (f) the person’s purpose for visiting or leaving Australia;
 - (g) the remaining family and business ties with Australia in comparison to any other foreign country; and
 - (h) the maintenance of the place of abode.
64. Derrington J said these factors are not a “rigid formula for the determination of whether a person is a resident”. [\[41\]](#).
65. A person can have two residences concurrently. [\[42\]](#).



Residency of individual

The 'Domicile and Permanent Place of Abode' Test

66. Section 10 of the *Domicile Act 1982* (Cth) provides:

The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.

67. The expression a 'place of abode' "has been equated with the concept of home or residence": *Harding*, at [124]. In *Harding*, at [34], Derrington J said:

"the concept of 'continuity of association' is an evaluative tool to be applied...to ascertain whether a person has a retained usual place of abode in a place or 'lives' where he is not usually located".

68. In *Commissioner of Taxation v Executors of the Estate of Subrahmanyam* [2001] FCA 1836; 116 FCR 180, 197-198 [78] Emmett J explained:

When comparing two places of abode of a particular person, in order to determine whether one is the usual place of abode, it is necessary to examine the nature and quality of the use to which the person makes of each particular place of abode. It is then possible to determine which is the usual one, as distinct from the other or others which, while they may be places of abode, are not properly characterised as the usual place of abode.

(emphasis added).



Residency of individual

The '183 Day' Test

69. While an applicant may have been in Australia for more than half of a financial year, this will not be sufficient to satisfy the 183-day test, when their usual place of abode is outside Australia and where they have no intention to take up residence in Australia.
70. The Explanatory Notes on Amendments Contained in a Bill to Amend the *Income Tax Assessment Act 1922 -29* (Cth) (**the *Income Tax Assessment Bill 1930* (Cth)**), provided that this qualification was enacted “*in order that there may be no danger of treating as residents persons who are purely visitors*”. [\[43\]](#).
71. In *Harding (Full Ct)* Davies and Steward JJ said (at [39]) that the 183-day test:

... is, initially, concerned with a person who is physically present in Australia for most of a given year of income. The exception to it probably applies to a person who is physically present in Australia for the required number of days but who would not be considered to be an Australian [resident] because he or she is only a temporary visitor of this country for a period of time. That period might even extend to a term of years.

72. Davies and Steward JJ referred, with approval, to the judgment of Sheppard J in *Applegate v Commissioner of Taxation* [1978] 1 NSWLR 126; 8 ATR 372 where he said (at 134):

... “place of abode” may mean the house in which a person lives or the country, city or town in which he is for the time being to be found. I am of the view that the latter is the meaning of the expression used in s 6(1) of the Act..



Residency of individual

- Decision also noted the tax treaty with PNG noting Article 4 of the treat regarding 'Residence':

- For the purposes of this Agreement, a person is a resident of one of the Contracting States:*
 - in the case of Australia, if the person is a resident of Australia for the purposes of Australian tax; and*
 - in the case of PNG, if the person is a resident of PNG for the purposes of PNG tax.*
- A person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State.*
- Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Contracting States, then the status of the person shall be determined in accordance with the following rules:*
 - the person shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the person;*
 - if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a resident solely of the Contracting State in which the person has an habitual abode;*
 - if the person has an habitual abode in both Contracting States, or if the person does not have an habitual abode in either of them, the person shall be deemed to be a resident solely of the Contracting State with which the person's personal and economic relations are the closer.*
- Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then its status shall be determined in accordance with the following rules:*
 - it shall be deemed to be a resident solely of the Contracting State in which its place of central management and control is situated;*
 - if its place of central management and control is not situated in either Contracting State, it shall be deemed to be a resident solely of the Contracting State in which it was incorporated..*



Residency of individual

- Main issue related to deposits totalling \$2.6m received by the Applicant from his father
- Applicant contending deposits were gifts 'toward the expenditure associated with the need to ensure the safety of the most vulnerable members of the family, prior to their eventual return to PNG' and were not consideration for goods or services.
- Father noted although size of gifts seem large, the father had the financial capacity to do so



Residency of individual

- Atypical of the Malaysian family operating in PNG
- Son to eventually take over the father's family business but having family based in Australia for schooling and safety (noting an assassination attempt on the father in 2010 and moving to and from PNG, Singapore and Australia)
- Applicant noted extended stays in 2013 and 2015 related to a skiing accident and his wife's post-natal depression
- Various familial actions taken – car put in the name of a trust so that if parents were fined, it would not be in the Applicant's name
- Various pages of evidence (over 100+ page case) event references to 'Chinese Red Packets' (paragraph 256)



Residency of individual

- ATO argued evidence as inadequate and unreliable with no corroborative documentation
- Noted many witnesses had no independent recollection of relevant transactions and produced no bank accounts
- Noted gifts did not accord with AUSTRAC records
- Noted no trust documents verifying what assets the trust holds have been produced (hence unreliable) and various other contentions



Residency of individual

- Held:
 - Applicant was a tax resident within the ordinary meaning in all 4 years in dispute as he maintained a sufficient continuity of association or connection with Australia during the relevant income years and his visits to Australia should be regarded as 'return visits to the place regarded as [his] home'
 - Note Tribunal considered declaration on incoming passenger cards as immaterial
 - Amendment assessments deemed excessive as on the balance the accumulated wealth were largely gifts of money and assets from the Applicant's family
 - Stack of witnesses gave 'credible' evidence which went uncontradicted
- Lost on residency but the argument of amended assessments based on asset betterment did not get up



Lost trust deed

- Trust established by deed on 8 January 1980 with Mr and Mrs Taylor as trustee
- Trust deed amended by deeds dated 27 May 1996, 28 June 2002, 3 May 2004 and 13 December 2021
- Change of trustee dated 30 September 1981 retiring Mr and Mrs Taylor and appointing NBT Pty Ltd
- Change of trustee dated 13 December 2021 appointing 'BCS Pty Ltd' as trustee over a property located in Godfreys Creek, NSW



Lost trust deed

- Original trust documentation lost
 - Can the Trustee manage and administer the trust per a copy of the trust deed and supplemental deeds?
 - Was NBT Pty Ltd validly appointed pursuant to the terms of the change of trustee?
 - Where Mr and Mrs Taylor validly removed as trustee pursuant to the change of trustee?
 - Was a charity validly appointed as a beneficiary on 28 June 2002?
 - Can the Trustee manage the Trust so that Mr and Mrs Taylor (and any company in which Mr and Mrs Taylor have any actual or contingent beneficial interest) are not excluded as beneficiaries?
 - If so, requesting to deleting an existing clause replacing it with the words 'Any person being the Settlor' as well as another clause and replacing it with 'It is hereby declared that the Settlor is specifically excluded from all or any benefits whatsoever under this Trust Deed'
 - Was the Trustee able to vary the 'Vesting Day' by deleting a clause?



Lost trust deed

- Acting on a copy of the trust deed?
 - Original unable to be located and all searches have been exhausted
 - Required to establish copy is an accurate copy of an original trust deed (requiring clear and convincing evidence)
 - What is required will depend on various circumstances:
 - Sometimes a fully executed and others an unexecuted copy by drawing an inference as to the form the executed copy took (*Re Cleeve Group Pty Ltd* at [33])
 - Sometimes the presumption of regularity may be invoked (*Re Thomson* [2015] VSC 370 at [24])
 - Photocopy is signed and evidence establishes that the parties concerned have always acted on the basis that it sets out the terms of the presumed trust (*Sutton v NRS(J) Pty Ltd* [2020] NSWSC 825 at [16]-[18])
 - Original contains full execution as well as stamp duty imprint
 - Therefore highly likely document was presented to the Commissioner of Stamp Duties and therefore the document represents a true copy
 - Noted a handwritten note in a clause – but acknowledged subsequent deed revokes such clause



Lost trust deed

- Appointment and removal of trustees valid?
 - Original deed appears to have been validly executed
 - Copy of deed also contains a certification of a clerk of the accounting firm certifying the copy
 - Change of trustee document only had one signature of Mr Taylor, so query whether Mr Taylor signed in capacities as trustee **and** as principal
 - Court noted that the change of trustee deed recognised that the 'Principal of the Trust desires....to appoint' the new Trustee (in recital C)
 - Note issue may have arisen if deed of change of trustee did not acknowledge Principal power or contain the Principal signature



Lost trust deed

- Valid appointment of beneficiary?
 - Variation power allowed the Trustee to 'vary all or any of the powers or provisions herein declared concerning the Trust Fund with the exception of the Vesting Day (ii) Add any persons, corporations, Trustees of trusts or classes of persons as Beneficiaries'.
 - Variation power initially validly exercised to amend terms of the deed (in this case by changing the entire deed otherwise than a few provisions).
 - Subsequent new powers enables appointment of additional beneficiaries



Lost trust deed

- Former trustees excluded as beneficiaries?
 - Primary Beneficiaries defined to not include “any person being the settlor or the Trustee hereof”
 - Trustee defined to mean ‘the Company, person or persons named as such in the Schedule or any other Trustee or Trustees for the time being of the Trust Fund’
 - Clause 24 stated that ‘It is hereby declared that the Settlor or any person from time to time being the Trustee hereof or any corporation in or under which any Trustee has any actual or contingent beneficial interest are specifically excluded from all or any benefits whatsoever’
 - Judge adopted interpretation of Trustee means such Trustee or Trustees for the time being.



Lost trust deed

- Vary vesting day?
 - Variation power (previously outlined) does not enable vesting day to be varied



Lost trust deed

- Learnings:
 - Court rectification best
 - Case provides example of issues that may arise regarding old trust deeds with defective issues and noting that a different Judge may adopt a different interpretation based on minor changes to the wording of matters
- Rectification:
 - Acknowledging cases where the person controlling the trustee's intention is factored in (as the settlor is merely acting on instructions) – *Sanwick Pty Ltd v Kalyk* [2016] NSWSC 100
 - *Benaroon Pty Ltd v Larmar* [2020] QCA 62 noting 'the settlor in that case had no relevant intention...it should be taken that the settlor's intention was whatever Mr Larmar...wanted'



Lost trust deed

- *Application of DEK Technologies Pty Ltd as trustee for DEK Technologies Unit Trust & Ors [2023] NSWSC 544*
- Trust deeds lost but at the time of establishment the accountant prepared a detailed letter of advice outlining the establishment of the unit trust with the family trusts as unitholders and setting out other various details as well as a diagram
- Parties could not recall receiving or signing a copy of the documentation
- Court heard accountant always used trust deed prepared by ASIS Services Pty Ltd without any changes made to the template
- Former employee of ASIS Services Pty Ltd noted the template and relevant terms as well as order forms, all retained on the database.
- Copy accepted



Lost trust deed

- *BAGI Pty Ltd trading as atf Nick Ristevski Family Trust v Marka Ristevski* [2023] NSWSC 567
- Original 1989 deed could not be found from the bank and trustee made further enquiries
- A 'confirmation deed' was signed on 2015 as a replacement deed
- Incomplete copy of 1989 deed found in 2020 noting different beneficiaries to the 2015 deed
- Court sought to rectify 2015 deed provided parties could show common intention that the 2015 deed was to reproduce the 1989 deed
- Note: Risk of 2015 deed as a stamp duty trigger



Family provision application

- *Temple v Temple* [2023] QDC 145
- Son seeking provision from estate of deceased father
- Son given \$5,000 cash gift
- Residuary left to the brothers
- Deceased noted that he had not seen the Son for over 10 years and that the brothers had maintained the property affairs
- Son subsequently sought to seek additional provision
- Judge to consider if provision was inadequate based on deceased's own financial position, relationship of deceased with the Son and the deceased's relationship with the brothers as of the date of death of the deceased



Family provision application

- Deceased estate approximately \$865,000
- As of the date of hearing, estate approximately \$754,000 after noting legal expenses and potential capital gains tax
- Son is 62, single with 5 adult children. He was a self-employed tow-truck driver but after a decrease in jobs, his current income is between \$300 and \$600 per week
- Son living with a friend and does not pay rent or board
- Son has a factor where he stores relevant items as part of his business
- Son does not have any savings
- Son has some medical problems suffered when young which continues to impacts



Family provision application

- Son relationship with Deceased estranged and dysfunctional on basis Son believes he was treated harshly and less favourably
- Complex family history of moving out and moving back in but about 20 years ago an altercation occurred where Son was shoving deceased out of Son's property and swearing at him to never return
- Note Court relied on brother evidence as they did not consider Son's evidence as sound (due to inconsistencies)
- Court ultimately noted (after considering the evidence about various funerals and the deceased's final days in hospital) that the Son had no relationship with the deceased for a period of well in excess of 10 years
- Court noted the Son made no sacrifices for the benefit of the deceased and made no contribution to the deceased's estate, going to the extent of denying the deceased his love and comfort when the deceased was grieving the loss of a partner



Family provision application

- Case referenced *Camernik v Reholc* [2012] NSWSC 1537 at [159]:

“In relation to a claim by an adult child, the following principles are useful to remember:

(a) The relationship between parent and child changes when the child leaves home. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.

(b) It is impossible to describe in terms of universal application, the obligation, responsibility, or community expectation, of a parent in respect of an adult child. It can be said that, ordinarily, the community expects parents to raise, and educate, their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, where that is feasible; where funds allow, to provide them with a start in life, such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set his, or her, children up in a position where they can acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation.

(c) Generally, also, the community does not expect a parent to look after his, or her, child for the rest of the child's life and into retirement, especially when there is someone else, such as a spouse, who has a primary obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death if he or she is able to do so. But where a child, even an adult child, falls on hard times, and where there are assets available, then the community may expect a parent to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute.

(d) If the applicant has an obligation to support others, such as a parent's obligation to support a dependent child, that will be a relevant factor in determining what is an appropriate provision for the maintenance of the applicant. But the Act does not permit orders to be made to provide for the support of third persons to



Family provision application

whom the applicant, however reasonably, wishes to support, where there is no obligation to support such persons.

(e) There is no need for an applicant adult child to show some special need or some special claim.

(f) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration. Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life, is relevant. In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased.

(g) The applicant has the onus of satisfying the court, on the balance of probabilities, of the justification for the claim." (citations omitted)



Family provision application

- Court noted the Son managed to forge a living and invest wisely such that he has an unencumbered title to a commercial property valued at \$1.2 million (despite the health issues)
- Court noted the Son chooses to reside in his factory to the degree that he chose to sell his residential property in 2016.
- Therefore, any argument that the Son needs adequate provision to provide him with a financial buffer is discarded – he has sufficient means in his ability to sell the commercial property and use of motor vehicles (his tow-truck) to generate income
- Court accepted it was the Son who commenced the estrangement and continued the estrangement by failing to attend to the deceased's partner



Family provision application

- Referencing *Darveniza*:

“Section 41 does not give a court carte blanche to remake a will in a way that may appear to be more just. It is a power that should be exercised with the restraint dictated by the terms of the section. The predicament in which a court finds itself has been commented upon many times. In Pontifical Society for the Propagation of the Faith v Sales Dixon CJ observed that it was never intended by the legislation that freedom of testamentary disposition should be so encroached upon that a testator’s decision expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court. Consideration of these applications must always proceed with the understanding that the capacity of a court to make an assessment is necessarily limited, as the deceased cannot explain his or her reasons for the disposition of the estate or respond to the claims of an applicant “

- Court held Son did not establish any financial need for further provision out of estate. Further, Court not satisfied that a just and wise testator *‘knowing what I know now about [Son]’s financial position, would have considered themselves duty bound to provide for [Son] to any greater extent than has been.’*



Family provision application

- Note regarding use of statutory declarations
- *Speechley v Willemyns* [2023] QDC 154 at [63]

It may be seen that the admission of the statutory declaration of the deceased is particularly in relevance to this issue of his relationship with the applicant. It is not a matter of simple adjudication upon the sufficiency or quality of the reasons provided by the testator for not making any provision from the Estate for the applicant, because the statute allows for such provision to be made despite any such testamentary intent and entirely upon the considerations identified in s 41 of the *Succession Act*. However, and as further discussed below, the expression of testamentary intent, whether enlarged upon, as in the statutory declaration here, or not, remains relevant and particularly to the ultimate question as whether it is proper to make some particular provision from the Estate.

Contact details

Darius Hii

Tax and estate planning lawyer; Chartered Tax Advisor; and Director at
Chat Legal Pty Ltd

darius@chatlegal.com.au

0403923374