



What is notional estate in NSW? Family provision claims and assets outside of the estate

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When a person passes away in New South Wales, some of their assets may not automatically form part of their estate to be dealt with under their Will. Jointly owned property, superannuation death benefits, and trust interests may pass outside the estate entirely, and this can have significant consequences for family members and other eligible claimants.

Unlike other Australian jurisdictions, NSW Succession laws recognise some of these assets as part of the deceased persons 'notional estate'. The provisions in the Succession Act 2006 (NSW) (Succession Act) allow the Supreme Court of NSW to designate certain assets that fall outside of the deceased's estate as part of notional estate [for the purpose of a family provision claim](#).

Notional estate claims can significantly affect the distribution of the deceased's estate, and the beneficiaries, executors, and recipients of transferred assets.

What is notional estate in NSW?

Notional estate refers to property that does not technically form part of the deceased person's estate on their death, but may be treated by the Court as if it were part of the estate in certain circumstances.

NSW is the only Australian jurisdiction with a comprehensive notional estate regime. The purpose of these provisions is to prevent what the Court may consider unfair outcomes where assets have been structured or transferred in a way that leaves insufficient provision for eligible persons.

When does notional estate become relevant?

Notional estate claims commonly arise where:

- The deceased person transferred or distributed assets within 3 years prior to their death without receiving payment in return, which reduced the estate pool. For example, if the deceased person transferred a property valued at \$1,000,000 to a close family member, and did not receive payment equal to \$1,000,000 from that family member;
- The deceased person could have made assets available to the estate but chose not to. For example, if the deceased person had superannuation death benefits or jointly held property that they could have altered to ensure it passed to the estate, but instead allowed the assets to pass outside the estate; or
- Where there are insufficient assets within the estate to satisfy a family provision claim against the estate.

Can assets already distributed from an estate be clawed back or recovered?

Under the Succession Act the Supreme Court NSW may designate property as notional estate if it is satisfied that one of the following has occurred:

- The transaction resulted in the property no longer forming part of the estate; and
- It is appropriate to make the designation to enable provision for an eligible claimant.

This may occur where:

- The deceased person transferred assets before death in an attempt to reduce the value of their estate;
- Estate assets were distributed shortly after death before a claim was made;
- Property was held jointly and passed automatically by survivorship;
- Superannuation death benefits were paid directly to beneficiaries outside the estate; or
- Assets were otherwise structured to sit outside the estate, including certain trust structures.

The Court's powers extend to making orders affecting recipients of those assets, even if they have received them lawfully. This can create significant legal and financial consequences for recipients, particularly where the recipient has already relied upon, or disposed of the asset.

In making any orders, the Court will consider factors such as the timing of the transaction, whether the transfer was made for full value, the intentions of the deceased, and the impact on the recipient.

How notional estate can expand the asset pool in family provision claims

In many family provision claim matters, any provision awarded to a successful claimant is typically paid from the assets of the estate.

In some estates, the actual estate may contain limited assets even though significant wealth may sit outside of the estate . Common examples of non-estate assets include superannuation, assets held in trusts, or jointly owned property passing by survivorship. This can leave the estate pool inadequate for provision to the plaintiff depending on the circumstances of the matter.

Where the estate itself is insufficient to make adequate provision for an eligible claimant, the Court may use the notional estate provisions to expand the pool of assets available.

This is particularly important in NSW family provision claims involving blended families, estranged children, second marriages, or complex asset structures.

What are the requirements for a notional estate order?

To designate property as notional estate, the Court must generally be satisfied that:

- The property was subject to a relevant transaction (generally including gifting, sale for less than market value, or omissions resulting in some assets not being included in the estate);
- The transaction occurred within the applicable statutory time limits. There are nuances to this, but it can include transactions up to 3 years prior to date of death; and
- It is appropriate to make the order for the purpose of providing for the claimant.

The Court must balance:

- The needs of the claimant making a family provision claim;
- The rights and expectations of the asset recipient; and
- The intentions of the deceased person.

The Court must also consider the competing rights and expectations of beneficiaries and third parties who may be affected by the order.

This often creates highly complex estate litigation involving detailed financial evidence and competing arguments regarding fairness, intention, and dependency.

Notional estate and estate planning risks in NSW

Notional estate provisions are an important consideration in estate planning in NSW.

Many people assume that transferring assets outside their estate will prevent claims being made against those assets after death. In New South Wales, that assumption may not always be correct.

[Careful estate planning](#) should consider:

- The structure and ownership of assets;
- Superannuation death benefit nominations;
- Joint ownership arrangements;
- Trust structures;
- Potential family provision risks; and
- The likelihood of future disputes.

Proper legal advice may help reduce the risk of unintended consequences and improve the prospects of achieving a person's estate planning objectives.

Key takeaways on notional estate in NSW

The notional estate provisions in NSW provide a mechanism to provide the Court with broad powers to address what some may consider to be unfairness in estate distribution.

Whether through clawing back assets or expanding a limited estate pool, these provisions can have a significant impact on the estate, executors, beneficiaries and claimants in family provision proceedings.

Notional estate claims are often legally and financially complex. Early legal advice is important to understand your rights, obligations, and potential exposure.

How we can help

If you are involved in a family provision claim, concerned about assets being treated as notional estate, or seeking advice about protecting assets as part of your estate planning, obtaining early legal advice is important.

At E&A Lawyers, our experienced team based in Mona Vale regularly assist clients across the Northern Beaches, greater Sydney and NSW with family provision claims, estate disputes, estate administration, and strategic estate planning advice. We can help you understand your rights, assess potential risks, and guide you through the process with clarity and confidence.

Contact us to discuss your situation and obtain tailored advice to protect your interests.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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