

AT WHAT TIME IS A SETTLEMENT OR ADVANCEMENT VALUED FOR HOTCHPOT

This very simple question is capable of creating a great deal of confusion amongst legal practitioners as was recently witnessed at a mediation attended by the writer. The issue that was in dispute concerned the timing of the valuation of land.

The deceased who had died intestate had at different times transferred parcels of land of varying size and value to some of his children during his lifetime. Other children had not received any advancement or settlement from their father. The question that had to be answered was if the hotchpot principle applied under section 52 (1) (f) (i) of the Administration and Probate Act 1958 (“the act”) and these properties had to be brought into account in the distribution of the estate, at what time are these properties to be valued? Out of the confused discussion that followed amongst the nine lawyers present, three distinct views emerged. The first view was that the value of the land transferred had to be determined at the time it was transferred to the beneficiaries. The second view was that the value had to be determined at the date of the deceased’s death. The third view was that the value was determined at the date at which the residuary estate is ascertained in accordance with section 38 (4) of the act.

The answer to this question was important in view of the fact that the deceased had transferred the parcels of land to his children many years before his death. The land had appreciated considerably in value since the various parcels of land had been transferred to the children. If the first view was correct the recipients of the land would be at a considerable advantage in relation to the children that had not received any land. On the other hand if the second or third view was correct the children that had not received any transfer of land would stand to receive a greater proportionate distribution from the estate as compared to those that had received a transfer of land.

As it happened, the mediation was adjourned for other unrelated reasons and the lawyers present were spared the embarrassment of having their clients witness their further confusion over an apparently simple question.

The correct view I would submit is that since the insertion of the current S 50 of the act by s 9 of the Administration and Probate (Amendment) Act 1994 on 3 May 1994, the date of the valuation of the advancement or settlement to be brought into account in the distribution of the intestate estate of a person who died after the commencement of the amending act, is in the words of the section “... *the date on which the value of the residuary estate within the meaning of section 38 (4) is ascertained.*”

Section 50 of the act states:

“In determining values for the purposes of this Division, the date of valuation is to be the date on which the value of the residuary estate within the meaning of section 38 (4) is ascertained”

As section 52 (1) (f) (i) is within Division 6 of the act, section 50 would appear to apply to the timing of the valuation of an advancement or settlement and that consequently the appropriate date of the valuation of the advancement or settlement is the date on which the residuary estate of the intestate is ascertained.

The case of *Coleman v. Lake* (1903) 3 SR (NSW) 603 which has in the past been relied on as authority for the principle that the relevant date of the advancement or settlement was the actual date of the gift (See L McCredie *Wills Probate And the Administration of the Estates of Deceased Persons in Victoria*, (2nd ed, Butterworths, 1989 at paragraph [915]) was a case that was decided at a time when section 5 of the Statute of Distributions (1670) applied in New South Wales. That section did not specify the time of the valuation of the gift and the case cannot therefore have any application to the current interpretation of section 52 (1) (f) (i) of the act.

Unfortunately however there would appear to be no case law which has sought to define the operation of section 50 of the act so that the issue can be conclusively resolved.

It is interesting to note that in no other Australian jurisdiction is the date of valuation of an advancement or settlement fixed at the date of the ascertainment of the intestate's residuary estate.

Of the four other Australian jurisdictions that retain some form of hotchpot provision in their intestacy legislation , Tasmanian, A.C.T. and Northern Territory legislation specify that the date of the intestate's death is the date on which the value of the advancement is to be ascertained (see section 46 (1) (c) of the Administration and Probate Act 1935 (Tas), section 68 (4) of the Administration and Probate Act (NT) and section 49BA (2) of the Administration and Probate Act 1929 (ACT)); whereas South Australia fixes the valuation at the date of gift (see section 72K (2) of the Administration and Probate Act 1919 (S.A)).

In effect section 50 and by reference section 38 (4) of the act, specify a date for determining the value of advancements or settlements that will vary with each estate depending on how quickly the administrator is able to ascertain and pay or set aside monies for the payment of estate debts and liabilities. The section therefore lacks the objective certainty of the other hotchpot provisions.

A practitioner asked to advise a beneficiary about the appropriate time for the valuation of an advancement or a settlement, can do no better than state that the appropriate time will be no earlier than the intestate's death and should be no later than the grant of letters of administration of the intestate estate. The precise date will ultimately need to be provided by the administrator as he or she will be the only one in possession of the date at which they ascertained the residue of the intestate's estate in accordance with section 38 (4) of the act.

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