

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P22 of 2012

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN:

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MONTEVENTO HOLDINGS PTY LTD
First Appellant



EUGENIO SCAFFIDI
Second Appellant

and

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GIUSEPPE DIEGO SCAFFIDI
First Respondent

MARIA SCAFFIDI BY GUARDIAN AD LITEM THE PUBLIC TRUSTEE
Second Respondent

APPELLANTS' SUBMISSIONS

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Part I: Certification for publication

- 1.1 The appellants certify that these submissions are in a form suitable for publication on the internet.

Part II: Statement of the Issues

- 2.1 Whether the Second Appellant (**Eugenio**) can appoint the First Appellant (**Montevento**), a corporate entity which he controls, as trustee of the Scaffidi Family Trust (**Trust**), if the effect of that appointment is that Eugenio will exclusively exercise the powers and

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rights exercisable by the Trustee.

- 2.2 A related issue is whether, having regard to the principles of construction of instruments in *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40] and *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 - 110, a court has the power to extend the language of clause 11.03 of the Trust Deed to permit a construction that precludes the appointment of Montevento as trustee, if the language used is unambiguous.

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Part III: Certification of compliance with Judiciary Act

- 3.1 The appellants have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903 (Cth)*, and certify that no notice should be given.

Part IV: Citation of Reasons for Judgment

- 4.1 The reasons of the Supreme Court of Western Australia have not been published in any report. The medium neutral citation is *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd & Ors (No.2)* [2010] WASC 180 ([CA]).
- 4.2 The reasons of the Western Australian Court of Appeal have not been published in any report. The medium neutral citation is *Scaffidi v Montevento Holdings Pty Ltd & Ors* [2011] WASCA 146 ([PC]).

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Part V: Statement of the Relevant Facts

- 5.1 Eugenio and the First Respondent (**Giuseppe**) are the only children of the late Antonio Scaffidi (**Antonio**) and his wife, the Second Respondent, Maria Scaffidi (**Maria**): CA [4].

- 5.2 On 2 May 1977 the Scaffidi Family Trust was established by a deed of settlement (**Trust Deed**) prepared by solicitors. The Trust Deed created a discretionary family trust: CA [11]. It was designed to regulate the acquisition, management and disposal of assets of the Scaffidi family: CA [14].
- 5.3 Antonio was settlor, appointor and guardian, and after his death Maria was to become the appointor and guardian. Giuseppe and Eugenio were the specific beneficiaries: CA [22]. Antonio and Maria were members of the class of additional beneficiaries.
- 10 5.4 From 2 May 1977 to 16 August 1995, Scaffidi Nominees Pty Ltd was the trustee: CA [32]. Giuseppe, Eugenio, Antonio and Maria were directors and shareholders of Scaffidi Nominees Pty Ltd during this period: CA [9].
- 5.5 On 1 July 1995 Scaffidi Holdings Pty Ltd replaced Scaffidi Nominees Pty Ltd as trustee of the Trust, and remained as sole trustee until 18 February 2009: CA [33]. Antonio, Maria, Giuseppe and Eugenio were the directors and shareholders of Scaffidi Holdings Pty Ltd: CA [8].
- 20 5.6 On 16 August 1995, a Deed of Variation of Trust Deed gave effect to the appointment of Scaffidi Holdings Pty Ltd from 1 July 1995 following the removal of Scaffidi Nominees Pty Ltd: CA [12].
- 5.7 Following the death of her husband Antonio on 29 August 2004, Maria became the appointor and guardian of the Trust: CA [44] – [45].
- 5.8 On 30 June 2006 Maria retired as appointor of the Trust, and as a director of Scaffidi Holdings Pty Ltd. She appointed Eugenio as appointor of the Trust in her place: CA [50].
- 5.9 On 27 March 2007 Montevento was incorporated with Eugenio as sole director and shareholder: CA [9].
- 5.10 On 18 February 2009 Eugenio exercised his power as appointor to

remove Scaffidi Holdings Pty Ltd as trustee and appointed Montevento as the trustee of the Trust: CA [13].

5.11 The Trust Deed did not confer on any of the beneficiaries a vested interest in the capital or income of the Trust Fund: CA [24].

5.12 Clause 11 of the Trust Deed made provision in relation to the appointment and removal of an individual or corporation as trustee: CA [30].

5.13 Specifically, clause 11.03 of the Trust Deed provides as follows:

10 *"If, and so long as any individual Appointor is a Beneficiary, that individual shall not be eligible to be appointed as a Trustee." CA [30]*

5.14 On 19 April 2010 Giuseppe challenged the validity of Montevento's appointment as trustee on the grounds that it was ineligible for appointment pursuant to clause 11.03.

5.15 On 9 June 2010 Heenan J dismissed Giuseppe's challenge, leaving the appointment of Montevento as valid. Giuseppe appealed to the Court of Appeal on 30 June 2010.

5.16 On 7 July 2011 the Court of Appeal by a majority declared that Eugenio's appointment of Montevento as the trustee of the Trust was
20 invalid as breaching the prohibition in clause 11.03 of the Trust Deed.

Part VI: Argument

Errors below

6.1 Murphy JA and Hall J in the Court below concluded that clause 11.03 appeared to be intended to serve 3 related purposes, namely:

6.1.1 ensuring that the office of trustee is seen as wholly separate from the position of appointor/beneficiary to avoid the risk that the appointor is treated as effectively owning or having a contingent interest in the Trust's property;

6.1.2 to maintain even-handedness in the treatment of Giuseppe and Eugenio under the Trust;

6.1.3 to provide express observance of the general law's most salutary rule that an appointor should generally not appoint himself or herself as trustee: **CA** at [158].

6.2 Essentially the error in the Court below lies in the findings that:

6.2.1 the language of the prohibition in clause 11.03 was wide enough to preclude an individual appointor, who is also a beneficiary, from appointing to the office of trustee a corporate entity which that individual controls: **CA** [163] – [165];

6.2.2 the intention and purpose of the settler reflected in clause 11.03 of the Trust Deed was to keep the trustee independent by prohibiting one person from exercising exclusive control over the Trust: **CA** [165] – [167].

6.3 These findings demonstrate an error of law by:

6.3.1 inferring a purposive construction that ignores both the natural and ordinary meaning of the words of clause 11.03;

6.3.2 assigning purposes which ignore the surrounding circumstances, namely the relevant legislative framework existing in 1977 which informed the drafters of the Trust Deed to include clause 11.03;

6.3.3 imposing on Eugenio as appointor an obligation that he did not have in law;

6.3.4 ignoring the separate legal entity of a corporation, or lifting the corporate veil contrary to law.

6.4 It is submitted that Buss JA (dissenting) correctly concluded (as did Heenan J in the primary court) that:

6.4.1 clause 11.03 did not contain any ambiguity: **CA** [92];

6.4.2 the natural and ordinary meaning of the language of clause 11.03 confines the prohibition to the appointment of a trustee who is an individual or natural person: **CA** [93];

6.4.3 clause 11.03 was not concerned with the control of corporate entities who occupy the position of trustee: **CA [94]**;

6.4.4 the drafter of the Trust Deed readily appreciated the distinction between an individual and a corporation, such that if it had been intended to extend the scope of clause 11.03 to embrace corporations (whether controlled by an individual appointor/beneficiary or not), such a provision would have easily been included: **CA [95]**.

10 Principles of Construction

6.5 The principles of construction of a clause in an instrument are set out in **Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd** (2004) 219 CLR 165 at [40]; [2004] HCA 52 and **Australian Broadcasting Commission v Australasian Performing Right Association Ltd** (1973) 129 CLR 99 at 109 - 110; [1973] HCA 36.

6.6 It was common cause in the Court of Appeal that consistent with these authorities, the words of clause 11.03 of the Trust Deed are to be construed according to:

20 6.6.1 their natural and ordinary meaning in the context of the language of the Trust Deed as a whole;

6.6.2 the surrounding circumstances known to the parties when the Trust Deed was executed;

6.6.3 the apparent purpose and object of any transaction created by or evidenced in the Trust Deed.

6.7 The proper construction of clause 11.03 was central to the decision of the Court below.

Construction of Clause 11.03

30 6.8 Whether the power given in an instrument to remove trustees and appoint new trustees is wide enough in scope to allow an appointor to

appoint himself or herself trustee, is a question as to the proper construction of the language of the power: **Montefiore v Guedalla** (1903) 2 Ch 723 at 725 – 726.

- 6.9 Despite the existence of a general legal proposition often described as the general law's most salutary rule against appointing oneself as a trustee, there is no absolute prohibition at law on such appointments, given the observations in **Montefiore** to the effect that such a power is to be exercised in special or exceptional circumstances: **Montefiore** at 725 – 726.

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Natural and Ordinary Meaning of the Words

- 6.10 The words of clause 11.03 are to be given the most appropriate meaning which they can legitimately bear. If the words used are unambiguous the court must give effect to them, even though the result may appear capricious or unreasonable, and notwithstanding that it may be suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered inconvenient or unjust: **Australian Broadcasting Commission v Australasian Performing Right Association Ltd** (1973) 129 CLR 99 at 109; [1973] HCA 36 (Gibbs J) at [3]. (emphasis added)

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- 6.11 Clause 11.03 does not contain any relevant ambiguity, either patent or latent.

- 6.12 There is a consistent pattern in clause 11 and the language of the Trust Deed as a whole making a clear distinction between “individuals” and “corporations” so that the word “individual” refers exclusively to a natural person (see also clauses 10, 11, 12, 13 and 14).

- 6.13 The language of clause 11.03, in its natural and ordinary meaning, confines the prohibition to the appointment of a Trustee who is an individual (i.e. natural person). It does not extend to the appointment of a corporation:

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6.13.1 that is controlled by an individual (who is both Appointor and beneficiary); or

6.13.2 in respect of which an individual (who is both Appointor and beneficiary) is the directing mind and will.

6.14 The Trust Deed does not contain any provisions excluding a corporation associated with an individual (who is both Appointor and beneficiary) from holding the position of a trustee.

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6.15 Equally there is no doctrine of law which prevents an Appointor appointing themselves as a trustee of a trust or the appointment of a corporate trustee in which an Appointor and beneficiary has an interest or holds office.

Surrounding circumstances

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6.16 It is apparent from revenue legislation relevant when the Trust Deed was executed in 1977 that solicitors drafting the Trust Deed were aware of adverse revenue consequences under estate and death duties legislation, and the need to ensure there was no reasonable possibility that powers of appointment over the capital and income of the Trust would be characterized by revenue authorities as general powers of appointment: See *Death Duty Assessment Act 1973 (WA)* s10, *Estate Duty Assessment Act 1914 (Cth)* s8, *Stamp Duties Act 1920 (NSW)* ss100 – 102. See also “A Comparative Analysis of Estate Planning Vehicles” (1977 – 78) 12 *Taxation in Australia* 222 summarised by Buss JA in the Court of Appeal.

6.17 Clauses such as 11.03 were commonly included in trust deeds out of concern that section 102 of the *Income Tax Assessment Act 1936 (Cth)* might have application – See *Drafting Trusts and Will Trusts in Australia*: Kessler & Flynn; Thomson Lawbook Co 2008 at [5.15].

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6.18 From the surrounding legislative or regulatory framework applicable to relevant business or ownership structures existing as at 2 May 1977,

as Buss JA found, it is highly likely that clause 11.03 was intended to only expressly prohibit an individual Appointor and beneficiary from becoming a trustee but not to prohibit a corporation from being appointed as a Trustee of the Trust, regardless of who controlled that corporation: CA [96].

Apparent purpose and object of clause 11.03

- 10 6.19 When a deed is couched so deliberately, it is difficult to apply some broad brush commercial approach to give it some meaning other than its literal meaning: **Pioneer Concrete Services v Yelnah Pty Ltd** (1986) 5 NSWLR 254 at 264B.
- 6.20 The absence of any disqualification upon a beneficiary being a director, shareholder or controller of a corporate trustee is a significant indication that no such prohibition was intended or created by clause 11.03: **Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd & Ors** [2010] WASC 180 at [34].
- 6.21 The words "as a Trustee" appearing in clause 11.03 are concerned with appointment to the capacity of Trustee, not control of corporate entities appointed as Trustee.
- 20 6.22 The Court below construed clause 11.03 of the Trust Deed contrary to the principles of construction in that:
- 6.22.1 the words of clause 11.03 are not ambiguous;
 - 6.22.2 the natural and ordinary meaning of the language of clause 11.03 confines the prohibition to the appointment of a trustee who is a natural person;
 - 6.22.3 clause 11.03 is not directed to the control of corporate entities;
 - 6.22.4 the context of the language of the Trust Deed as a whole consistently used the word "individual" exclusively to mean a natural person and not a corporation;
- 30 6.22.5 the surrounding circumstances known to the parties when the Trust Deed was executed on 2 May 1977 included the

provisions of the *Death Duty Assessment Act 1973 (WA)* and the *Estate Duty Assessment Act 1914 (Cth)* for which clause 11.03 was designed to ameliorate the effect thereof;

6.22.6 the most appropriate meaning the words could legitimately bear that produces an outcome that is not absurd, unreasonable or unjust and is highly likely to have been intended is that the prohibition from appointment as a Trustee is limited to a natural person who is also a beneficiary and appointor.

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Is the Appointor under the obligation or liability alleged?

6.23 Duties compel performance. Powers require the exercise of judgment fairly and honestly in accordance with the purpose for which the powers were bestowed. In this case, the settlor intended to establish a trust in which the trustee will be controlled by members of the specific and additional classes of beneficiaries of the Scaffidi family for whose benefit the Trust was established. The express limitation in clause 11.03 should be read strictly according to its terms.

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6.24 In the absence of any duties imposed upon the Appointor under the Trust Deed, no question of any liability or obligation on the part of Eugenio as the Appointor arises to ensure that any company controlled by him should not also be the trustee.

6.25 In the absence of any liability or obligation on the part of the Appointor, Eugenio did not have to observe the limitation in clause 11.03 *because that operated as a liability or obligation enforceable at the suit of a beneficiary.*

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6.26 A discretionary trust confers on the beneficiaries no more than a right of due administration of the trust against the trustee: *Kent v SS 'Maria Luisa' (No 2)* (2003) 130 FCR 12 at [59]. No authority is offered in support of the proposition that a beneficiary has the right to a suit as against an appointor in the manner contended by the Appellant.

Doctrine of separate legal entity – lifting the corporate veil

6.27 The Court below presumed that the first purpose of clause 11.03 of the Trust Deed was to ensure that the office of trustee is seen as wholly separate from the position of an appointor/beneficiary ([2011] WASCA 146 at [158]).

6.28 The subsequent determination of the Court below that an individual appointor and beneficiary who appoints as trustee a corporate entity controlled by that individual, means that the individual will exclusively exercise the powers and rights of the trustee:

6.28.1 ignores the doctrine of separate legal entity; and

6.28.2 effectively lifted the corporate veil so as to identify Montevento as being the same as Eugenio, when there was no basis at law to do so.

6.29 A corporation is a separate legal entity from those who control it, and the fact that practical control is exercised by one person is irrelevant: **Salomon v Salomon** [1897] AC 22 at 51; *Ford's Principles of Corporations Law*, Austin & Ramsay (14th ed. 2010) at [4.250] p137.

6.30 In Australia it is still impossible to discern any broad principle of company law indicating the circumstances in which a court should lift the corporate veil. The cases where the courts have been prepared to lift the corporate veil are "the exception rather than the rule": **Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd & Ors** [2010] WASC 180 at [29].

6.31 Circumstances when the corporate veil may be lifted include:

6.31.1 fraud:

6.31.2 where a company structure is being used for the sole or dominant purpose of evading an existing obligation: **Gilford Motor Co v Horne** [1933] Ch 935;

6.31.3 where it is necessary to prevent what amounts to fraudulent conduct: **Pioneer Concrete Services v Yelnah Pty Ltd** at 267B.

- 6.32 It is only if the court can see that there is a mere sham or façade that one lifts the corporate veil, but that principle does not apply where it appears that there was a good commercial purpose for having a separate legal entity: *Pioneer Concrete Services v Yelnah Pty Ltd* at 267F-G.
- 6.33 As Professor Ford points out in *Principles of Corporations Law*, Austin & Ramsay (14th ed. 2010) at [4.250] p135, the *Gifford Motor Co* decision depends on a finding by unrebutted inference that one of the reasons for creation was to evade a legal or fiduciary obligation.

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No basis to lift the corporate veil

- 6.34 The Court of Appeal effectively lifted the corporate veil in the interpretation of clause 11.03 of the Trust Deed to infer that because Eugenio is ineligible for appointment as trustee in his own right, by necessary inference, any company solely controlled by him will also be ineligible and that he used the corporate form to avoid the substance of the limitation in clause 11.03.
- 6.35 Having regard to the well established principle that a company is a separate legal entity from those who control it, the cases where the courts have been prepared to lift the corporate veil are “the exception rather than the rule”: *PC* at [29].
- 6.36 The learned Judge correctly summarised the authorities as establishing some circumstances when the corporate veil may be lifted, including:
- 6.36.1 where a company structure is being used for the sole or dominant purpose of evading an existing obligation: *Gifford Motor Co v Horne* [1933] Ch 935;
- 6.36.2 where it is necessary to prevent what amounts to fraudulent conduct: *Pioneer Concrete Services v Yelnah Pty Ltd* at 267.
- 6.37 It is only if the court can see that there is a mere sham or façade that

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one lifts the corporate veil, but that principle does not apply where it appears that there was a good commercial purpose for having a separate legal entity: **Pioneer Concrete Services v Yelnah Pty Ltd** at 267.

- 10 6.38 In **Gilford Motor Co**, the court considered whether the corporate veil should be lifted in support of a contention of evasion of a legal obligation. As Professor Ford points out in *Principles of Corporations Law*, Austin & Ramsay (14th ed. 2010) at [4.250] p135, the **Gilford Motor Co** decision depends on a finding by unrebutted inference that one of the reasons for creation of the corporate entity was to evade a legal or fiduciary obligation.
- 6.39 Murphy JA and Hall J in the Court below made no finding about any legal or fiduciary obligation that was evaded by the creation of Montevento or by its appointment as trustee, or that Montevento was created as a sham or façade such that the corporate veil should be lifted.
- 20 6.40 The Trust is a typical family discretionary trust similar to family trusts subsisting in Australia since the 1970s which envisaged beneficiaries holding positions as appointors and trustees. For the submission upheld in the Court below to be correct, the common law position that has stood for many years and been understood widely to be the position would be altered and a large number of trustee appointments would be invalid.
- 30 6.41 There is no authority for the proposition that there is at common law an absolute prohibition on an appointor who is also a beneficiary from appointing a corporation under his or her control as trustee. It is not for appellate state courts to entertain changes to the common law simply because it appears ill adapted to modern circumstances: **State Government Insurance Commission v Trigwell** (1979) 142 CLR 617 at [2] & [7] per Barwick CJ; Stephen J at [19].

Conclusion

6.42 By expanding the language of clause 11.03 of the Trust Deed to create a prohibition on the appointor having control of a corporate trustee, and thereby interpreting clause 11.03 as being directed to the control of corporate trustees, where the language did not expressly or by necessary implication permit of such an extension, the majority in the Court below ignored the well-established doctrine of separate legal entity of a corporation from its directors.

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Part VII: Applicable Statutes

7.1 The applicable statutes as they existed at the relevant time are included in Annexure A to these submissions. The provisions that are reproduced are:

7.1.1 *Death Duty Assessment Act 1973 (WA)*;

7.1.2 *Estate Duty Assessment Act 1914 (Cth)*;

7.1.3 *Stamp Duties Act 1920 (NSW)*.

7.2 All of those provisions have now been repealed, save for the *Trustees Act 1962 (WA)*. The details are contained in Annexure A to these submissions.

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Part VIII: Orders sought

The Appellants seek the following orders:

8.1 The appeal be allowed.

8.2 The orders of the Court of Appeal dated 27 July 2011 be set aside.

8.3 The appeal in CACV 70 of 2010 be dismissed.

8.4 The Appellant in CACV 70 of 2010 pay the costs of the Respondents in CACV 70 of 2010, including reserved costs, to be taxed if not agreed.

8.5 The First Respondent pay the Appellants' costs of the application for

special leave to appeal in P35 of 2011 and of this appeal, including reserved costs, to be taxed if not agreed.

Part IX: Estimated time for oral argument

The Appellants estimate the time required for presentation of the oral argument (including reply) is 1.5 hours.

Dated 9 August 2012

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ANNEXURE A (PT VII)

Death Duty Assessment Act 1973 (WA) - repealed on 15 December 1997 by the Statutes (Repeals & Minor Amendments) Act 1997.

10(1) For the purposes of this Act the estate of a deceased person comprises:

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- (a) his real and personal property in this State; and
 - (b) his personal property situate outside this State if he was domiciled in this State at the time of his death.

10(2) For the purposes of subsection (1) of this section the following shall be deemed to be property of a deceased person, that is to say –

- ...(i) any property over which the deceased person had at the time of his death a general power of appointment, if that power is exercised by his will.

20 Estate Duty Assessment Act 1914 (Cth) - repealed on 22 September 1999 by the *Statute Stocktake Act 1999 (Cth)*.

8(1) – Subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of deceased persons dying before 1 July 1979.

8(3) – For the purposes of this Act, the estate of a deceased person comprises:

- (a) his real property in Australia (including real property

over which he has a general power of appointment, exercised by his will);

- (b) his personal property wherever situate (including personal property over which he had a general power of appointment, exercised by his will) if the deceased was, at the time of his death, domiciled in Australia; and
- (c) his personal property in Australia (including personal property over which he had a general power of appointment, exercised by his will) including all debts, money, and choses in action receivable or recoverable by the administrator in Australia, if the deceased had, at the time of his death, a foreign domicile.

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Stamp Duties Act 1920 (NSW) – repealed by the *State Revenue Legislation Amendment Act 2008* No.67

100. In this Part and Part V and the Third Schedule hereto, unless the context or subject-matter otherwise indicates or requires,—

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" General power of appointment" includes any power or authority which enables the donee or other holder thereof, or would enable him if he were of full capacity, to appoint or dispose of any property, or to charge any sum of money upon any property, as he thinks fit for his own benefit, whether exercisable by instrument inter vivos or by will, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee.

102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of

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the following classes of property:—

(1) (a) All property of the deceased which is situate in New South Wales at his death ; and

(b) all property of the deceased mentioned in the next succeeding section to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

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(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general or special power of appointment, whether exercisable by the deceased alone or jointly with another person :
Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

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(b) Any property comprised in any gift made by the deceased within three years before his death, and whether made before or after the passing of this Act, including any money paid or other property conveyed or transferred by the deceased within such period in pursuance of a covenant or agreement made at any time by him without full consideration in money or money's worth...

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(j) Any property over or in respect of which the deceased had at the time of his death a general power of appointment.