WILLS & ESTATES BULLETIN – ISSUE #11

Inside this issue:

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Re *Marsella*, the exercise of discretion by a trustee in paying benefits from an SMSF

***Re Marsella*: *Marsella -v- Wareham (No 2)* [2019] VSC 65**

1. On the death of a member of a self-managed super fund (**SMSF**), that deceased member has a death benefit which needs to be paid. When there is no binding nomination in place, the trustee of the SMSF generally (read the deed…) has discretion as to how to pay that death benefit amongst the eligible dependents of the deceased[1].

2. There is very little case law on how a trustee must exercise its discretion when making this decision. In practice trustees of SMSFs generally consider their discretion to be absolute and unfettered, and this view would generally be supported by their advisors.

3. This case looks at the exercise of that discretion and contrary to current practice imposes a substantial duty on trustees of SMSFs to give real and genuine consideration to eligible recipients, and to document such consideration.

Facts

4. Ms Helen Marsella was married for 32 years to Mr Ricardo Marsella. Ms Marsella had 2 adult children from an earlier relationship.

5. Ms Marsella and her daughter Ms Caroline Wareham were members and trustees of a super fund, the Swanson Superannuation Fund (**the Fund**).

6. Ms Marsella had made a death benefit nomination but it was no longer relevant because not only had it expired in accordance with the trust deed, but also that it attempted to name non-eligible persons as the beneficiaries, namely grandchildren.

7. Ms Marsella died on 27 April 2016.

8. As is usually the case in estate litigation, relationships between the parties were substantially strained. The wider context was that, in addition to this current case, Mr Marsella had commenced an application against the estate for further provision and Ms Wareham had made a claim that the main residence of the estate was held on trust for her.

9. Ms Wareham was the surviving trustee of the Fund after her mother's death and, after obtaining legal advice, she appointed her brother Mr Wareham as a co-trustee. The accountants for the Fund were urging that the death benefit be paid out because of the requirement of the Australian Taxation Office (**ATO**) that death benefits be paid as soon as practicable (which is generally considered to be within 4-6 months of the death of death). The 2 trustees of the Fund resolved the death benefit be paid to Ms Wareham and that the Fund be wound up immediately.

[1] Pursuant to the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**), the persons eligible to receive a death benefit from a deceased are the legal personal representative (i.e. their estate) and then spouse, children, financial dependants and persons who are in a relationship of inter-dependency with the deceased.

10. The solicitors for Ms Wareham asserted that, in correspondence to solicitors for Mr Marsella:

> "*You will know that a discretionary trustee is not required to give reasons for any decision and our client does not do so. You have asserted no foundation for an improper exercise of discretion. You refer to a conflict of interest but we fail to see how that allegedly arises. The trustee is permitted to exercise their discretion, to any eligible object, which includes herself. Our client owes no duty to the estate or other beneficiaries …*".[2]

11. Those assertions would be well supported by many estate planning practitioners based on earlier caselaw. Traditionally, a Court is reluctant to undertake any examination of the merits of an exercise of discretion of a trustee. This is one of the reasons why, in previous disputes over the payment of death benefits, the plaintiffs have often not challenged the exercise of discretion of the trustee of the SMSF but, instead, have attempted to attack other elements of the death benefit transaction, including the appointment of the trustee or whether a death benefit nomination was binding or non-binding. The parties in those cases assumed that it would be fruitless to attempt to challenge the actual decision made by the trustee when they were exercising a discretion held under the trust deed.

12. Justice McMillan examined the duties on trustees when exercising a discretion. The Court noted that the trustee, when exercising discretionary power, has "*a duty to exercise the power in good faith upon real and genuine consideration and for the purposes for which the power was conferred*"[3].

13. The Court said that the trustees had a duty to consider Mr Marsella and rejected an assertion that he had "no interest" in the Fund. Law students and lawyers alike fret and squabble over what the meaning of what an *interest* in a trust is. Justice McMillan here was satisfied that being a "*potential object of the exercise of discretion*" i.e. a potential recipient of the superannuation death benefit, gave Mr Marsella an interest in the Fund. This would be vehemently and, I suspect, unanimously rejected when considering whether he had interest in the Fund for particular tax, stamp duty or property law purposes. However, we are now deep in the waters of trust law and equity and our feet can no longer touch the bottom.

14. The following quote from Justice McMillan is a handy guide as to how equity operates in this area of law:

> "*While it is not the Court's role to consider the fairness or reasonableness of the outcome of the exercise of discretion and usurp the role of the trustee, the outcome itself, particularly where the result is grotesquely unreasonable, may form evidence that the discretion was never properly exercised, or was exercised in bad faith*."

15. The Court said that the circumstances of the case i.e. the other litigation and the apparent broken down relationship between the parties, combined with the outcome of the trustee's decision to pay the money solely to the deceased's daughter and to

[2] Quoted at paragraph 32
[3] At paragraph 47

no one else, supported "*the conclusion that there was a lack of real and genuine consideration*"[4].

16. The Court said that even though the deceased had apparently not chosen to nominate her husband as a beneficiary, it was a failure on the part of the trustee to take proper consideration of Mr Marsella as a potential beneficiary because there was no evidence that she considered the long relationship between the deceased and Mr Marsella and his relatively limited financial circumstances.

17. The Court was scathing of the actions of the trustee, describing her as being insolent towards her duties, and approaching her duties with ill-informed arbitrariness which amounted to bad faith.[5]

18. There must be some sympathy for the trustee. In the minutes of the meeting where it was resolved to pay the death benefit to herself, the trustee had included a statement that the trustee had considered "*the possible interests of all the dependants of the deceased member, the potential eligible beneficiaries of the member, and the member's estate*"[6]. However, the Court dismissed this as being merely formulaic consideration and not proper consideration of Mr Marsella as a potential beneficiary.

Identity of trustee

19. The Court also examined the decision to appoint the trustee's brother as the other trustee. Whilst Justice McMillan accepted that s.17A allowed for another relative to be appointed as trustee, the Court queried whether there was an obligation to appoint the executor as one of the trustees of the Fund i.e. whether Mr Marsella should have been appointed. I can confirm there is no such obligation in the Act.

20. The Court looked to a comment in another case[7] which provided that where the sole member of an SMSF with a corporate trustee has died, the executor must become director of the corporate trustee for the fund to remain compliant. It is not clear to me that that case is relevant given that there is no corporate trustee in this super fund. An ordinary reading of the text of the Act seems to dismiss the concerns of the Court in this regard.

Decision

21. The Court said that the current trustees had:

    (1) "*not given real and genuine consideration to the interest of the spouse and executor of the deceased;*

    (2) *dealt arbitrarily with the property of the Fund, being property subject to a trust; and*

    (3) *did this in the context of substantial personal conflict with Mr Marsella; and*

    therefore it is appropriate for the defendants to be removed as trustees[8]."

[4] At paragraph 51
[5] At paragraph 56
[6] At paragraph 54
[7] *Cantor Management Services Pty Ltd -v- Booth* [2017] SASCFC 122
[8] At paragraph 73.

22. The current trustees were removed, and their decision to nominate Ms Wareham as beneficiary was overturned on the basis of failure to properly consider other beneficiaries.

23. The Court invited the plaintiff to make further submissions as to who the new trustee of the Fund ought to be, keeping in mind the requirements of the SIS Act.

Lessons

24. This case potentially sets the law on how superannuation death benefits are paid from an SMSF on a different direction to the history of the law to date. Previously I would have been confident in telling you that the trustee of an SMSF is entitled to nominate themselves as the sole beneficiary of the assets of the Fund regardless of any ongoing litigation or any other potential beneficiaries, so long as they complied with the Act and the trust deed.

25. However, the reasoning from this case suggests the law maybe more similar to that found within family provision cases. The trustee must at least to some degree, act as if in the role of an equity judge assessing a family provision claim and consider the relative merits of each potential beneficiary. Therefore, the trustee must consider the deceased's children and spouse, including:

    (1) their relationship with the deceased;

    (2) their relationship with the trustee and particularly whether there is any ongoing conflict;

    (3) the financial circumstances of each potential beneficiary;

    (4) how the deceased has already provided for the respective beneficiaries under their will or other estate entities such as family trusts; and

    (5) the potential conflict in the trustee paying themselves.

26. When circumstances similar to this case arise in the future, i.e. where the trustee is a step-child of a surviving spouse and there is litigation ongoing (which is the common scenario in death benefit dispute cases!), then the very fact that the surviving spouse is not the recipient of the death benefit may itself warrant the removal of the trustee from the Fund. One wonders what would happen if the new trustee of the Fund made the same decision?

27. If we are acting for a claimant seeking the superannuation, we now have a powerful new precedent in our litigation toolkit.

How to determine a death benefit beneficiary securely?

28. It used to be said, including in this publication, that control of the fund is the most critical aspect of securing a death benefit. This was because in the event of failure of a nomination, the trustee could determine who they desired as beneficiary with substantial freedom. This no longer holds true.

29. Now, the greatest path to certainty where there may be competing beneficiaries, particularly in blended families, is to have a valid non-lapsing binding death benefit

nomination. The trustee then has no discretion, but a simple duty to pay the death benefit as directed.

30. Other planning options include (with varying degrees of utility and practicality):

(1) death benefit agreement/s; or

(2) hardwiring the terms of the trust deed.

31. I expect that providers of SMSF trust deeds will now review carefully any provisions in their trust deeds about how the trustee must exercise their discretion to nominate a beneficiary in the absence of a binding nomination. Presuming we want the trustee to have as much discretion as possible, the trust deed should unequivocally state this. However, the deed in question in this case provided:

> *the Trustee shall have ... an absolute and unfettered discretion and is not bound to act subject to the direction of any other person unless otherwise expressly provided by the Act*

32. The trustee's duty to consider all beneficiaries in exercising their discretion will remove much of the arbitrariness suggested by provisions similar to that outlined above.

33. Perhaps of greatest benefit could be varying the trust deed to limit the classes of beneficiaries, so that trustee has no duty to consider them at all. There is no requirement that all SIS Act dependants be beneficiaries under the trust deed – this is done as a matter of convenience by SMSF Deed providers so that 'one size fits all'. Tailored SMSF Deeds may be worth considering.

34. If on death there is no binding death benefit nomination in place and there is a high likelihood of a claim on the superannuation:

(1) consider appointing an independent party as director/trustee of the fund to remove the potential conflict of interest;

(2) obtain as much information as possible about the financial circumstances of the respective competing beneficiaries and document the consideration in detail*[9]; and/or

(3) obtain evidence as to the wishes of the deceased, if any.

35. Interestingly in this case the Court was not satisfied that continuing the apparent estate plan of the testator was a reasonable exercise of discretion (the deceased had previously not nominated her husband as a beneficiary so the trustee argued she was complying with the deceased's wishes by not paying him). Therefore, a letter of wishes or non-binding death benefit nomination may not convince a Court that a proper exercise of discretion would be to follow those wishes.

[9] This is a double edged sword. If the preferred beneficiary is financially secure, and the claimant is financially strained, then for the trustee to document this prior to making a decision is likely to be in favour of the claimant.

Discretionary trusts

36. The application of aspects of the reasoning of this case to ordinary family trusts could have far reaching consequences. It would suggest that the trustee of a family discretionary trust must consider in exquisite detail, each and every one of the (typically) many extended relatives and charities which are found as beneficiaries in the family trust deed.

37. However it may be that future decisions limit the precedential value of this case to the context of self managed superannuation where there are substantially fewer potential claimants.

A comment on identity of the trustee in such instances

38. In determining the identity of the new trustee, the Act would require that the executor or relative be trustees or directors of the corporate trustee. However sub-section (4) of s.17A allows a period of 6 months to "put your house in order" in relation to the identity of the trustee – so it may be that an independent person such as an accountant or solicitor could be nominated as the trustee or director of a corporate trustee who could then resolve to pay out the death benefit and wind up the fund prior to the 6 month period elapsing.

Further development

39. I recommend maintaining a careful eye on caselaw in this area, as there may be more developments to come.

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Generous attorneys: the limits on attorneys benefitting themselves

Introduction

1. Section 32 of the *Powers of Attorney Act 1998* (**Act**) provides that an attorney is able to do anything that the principal could lawfully do by attorney (if the adult had capacity for that matter).

2. This means the starting point for considering what powers attorneys have to execute a transaction, is that attorneys can exercise any power of the principal except those prohibited by the Act or common law. This article examines what those prohibitions and limitations are.

3. There is a range of personal powers that an attorney is not able to exercise on behalf of the principal, including, by way of example:

    (1) an attorney cannot make a will of the principal;

    (2) an attorney cannot vote in an election for Members of Parliament or council;

    (3) an attorney cannot undertake a non-delegable personal role of the principal, such as their role as an employee or act as director of a company;

    (4) an attorney cannot consent to the marriage of the principal or enter into a contract of marriage on behalf of the principal; and

    (5) an attorney cannot act in the role as a parent of a child of the principal.

Prohibitions under the Act

4. The Act expressly prohibits an attorney:

    (1) entering into a conflict transaction except with the express consent of the principal; and

    (2) making substantial gifts of the principal's property but can make limited reasonable gifts of a seasonal nature or in relation to a special event (the Act cites birthdays and weddings as examples) or the gift is a donation the principal would be reasonably expected to make provided the gift or donation is not more than was reasonable having regard to the circumstances and the principal's finances.

Overarching duty – fiduciary duties

5. However, it is misleading to look at the powers of an attorney within the strict confines of the express authority provided under the Act and the express prohibitions under the Act. An attorney's powers must be considered in the context of their overarching duty to the principal, which is to always act in the best interests of the principal.

6. This duty is supported by a large number of specific duties; namely:

   (1) the attorney must act honestly in all matters;

   (2) the attorney must keep reasonable records of any expenditure on behalf of the principal;

   (3) the attorney must keep their property separate from the property of the principal (note under the Act this does not apply to property owned jointly or as tenants in common with the principal. For example, if the attorney and principal are spouses and own their house together.);

   (4) fiduciary duties under the common law arising from their role as a fiduciary for the principal.

7. Being an attorney for someone is considered to be a voluntary office. An attorney must not gain a benefit and remuneration is only permitted if expressly authorised in the document. The attorney has a duty to avoid conflicts of interest unless with the fully-informed consent of the principal. The attorney will have a liability to account to the principal, or their estate, for any reward or profit they have gained through their role as attorney.

Authorising conflicts of interest

8. It is common practice for solicitors to prepare enduring powers of attorney documents which include an authority from the principal to the attorney to enter into conflict transactions. The purpose of this authority is to allow parties who either have, or are likely to have, intertwined financial arrangements (such as spouses) but also including parents and children where there is a family business or perhaps even business partners on rare occasions, to act with freedom even where a potential conflict of interest arises.

9. Note that the Act already allows for an attorney to deal with co-owned property on behalf of the principal without that being considered a conflict transaction. The drafters of the Act had anticipated that, where 2 people own property together, there is a high likelihood that they will be attorneys for each other and, in the event the property needs to be sold or refinanced, they will need to be able to act even if their partner has lost capacity. The power to enter into conflict transactions primarily arises when dealing with property which is solely owned by the principal, rather than property which is co-owned with the attorney.

10. In my practice I recommend that all people who currently share their finances or have joint financial arrangements consider authorising each other to enter into conflict transactions. It is not possible to predict with any certainty when a conflict transaction may arise and clients regularly do not have a good understanding of the ownership position of their particular assets, so allowing spouses to enter into conflict transactions can be practical and sensible.

11. Because gifts and conflict transactions are dealt with separately in the Act, a power to enter into a conflict transaction does not mean that the attorney has power to make substantial gifts of the principal's property. If that was desired, then there would need to be an express authority for this in the power of attorney.

12. *Gifts* are not defined under the Act. Therefore, it would be wise to assume that any transaction which is not done for market value is either a gift or includes a component of consideration (i.e. the amount less than the market value) as a gift. For example, the purchase of a motor vehicle with a value of $50,000 for the price of $1 should probably be considered to be a gift of $49,999.

What does the authority authorise?

13. The Court will strictly and narrowly construe the breadth of any authorisation to enter into conflict transactions. That is, if it is not clearly within the scope of what was contemplated by the parties when the power of attorney was drafted, then it will not be authorised. This is because the duty to act in the best interests of the principal takes primacy.

14. I think we all have an understanding of what acting in *the best interests of the principal* means. It is more than acting in good faith. It is actively promoting the interests of the principal. From a financial sense, the duty to act in the best interests means that you are acting in way which expands, rather than contracts, the property available to the principal at any time. Therefore, it would rarely, if ever, be acting in the best interests of a principal to enter into any transaction where their estate is diminished. In the case of *Re MC*[10], the Court noted that "*the best interests must include the welfare, health and wellbeing of the person in a wider sense than is suggested by the protection from neglect, abuse or exploitation*".

15. In the case of *Reckitt -v- Barnett*, the Court provided that "*whilst a power of attorney may give a person authority to rob the donor, that does not make robbing the donor something they should not be accountable for*".

16. These matters generally come before the Court after the act of generosity by the attorney has already been completed. The Queensland Civil & Administrative Tribunal (**QCAT**), in its role of reviewing the acts of attorneys, must consider when a gift by an attorney was within the power and authority of the attorney and, further, whether it was in the best interests of the principal.

17. In the English case of *Re W* [2000] 1 All ER 175, there was a proposal to make a substantial gift of the principal's money to the principal's children. The reasoning given was that it would substantially reduce the tax burden on the family as a whole because of inheritance taxes. The Court accepted that it was in the best interests of the family as a whole because it reduced the taxation burden. However, the Court could not accept that it was within the principal's best interests because their estate was being diminished. The Court did not authorise the gift.

18. The lesson from this case is that a Court will not authorise the acceleration of an estate plan. If the principal needs to undertake particular gifts, transfers or other transactions in order to fulfil their estate plan, they need to it whilst they have capacity as the Court won't authorise such transactions once they have lost capacity.

[10] *Re MC* (1989) 3 VAR 87

No community property

19. The New South Wales Supreme Court rejected the concept that spouses have "community property" in the case of *Smith*[11].

20. In this case a second spouse had been appointed as an attorney for her husband. She undertook a range of transactions between herself and her husband which demonstrated that she believed she could treat her husband's property as her own or that she considered it was community property of the relationship. The Court said:

> "*There is no licence for a fiduciary to enjoy (in, and for the due performance of her fiduciary obligations towards an incapable person) anything other than a small benefit incidental to the incapable person's enjoyment of his or her own property.*"

21. The relationship of spouses is not of itself authority to enter into conflict transactions or to gift property of the principal.

Two QCAT cases – context is critical*

22. ***RJG* [2016] QCAT 127**

(1) The principal had a history of making $50 and $100 gifts to her grandchildren. After she had lost capacity, her attorney (being her daughter) was her enduring attorney.

(2) The attorney made two gifts of $5,000 each to the principal's grandchildren (the attorney's children) as Christmas gifts.

(3) In reviewing the transaction, QCAT found that the gifts were excessive and not in keeping with what the principal would have gifted when she had capacity. Therefore the gifts were a breach of s.88 (in relation to gifts) of the Act. QCAT ordered the attorney to repay the money to the principal within 30 days. Note that the obligation to make this repayment/reimbursement was on the attorney rather than on the recipients of the gifts.

23. ***BME* [2014] QCAT 67**

(1) In this case there was a long history of the principal substantially benefiting the attorney and the attorney's daughter. The principal had paid for school fees and school trips for her granddaughter totalling more than $100,000 over 9 years. Whilst the gifts might have been benefiting the granddaughter, they were of substantial assistance to the attorney as well in assisting him with household expenses.

(2) The principal had a large estate and the Court noted that the principal was receiving in excess of $100,000 per year from dividend income.

(3) The attorney gifted $25,000 to himself from the principal after the power of attorney had been activated. It was unclear to QCAT as to whether the principal had lost capacity at that point.

[11] *Smith -v- Smith* [2017] NSWSC 408

(4) In addition to the gift of $25,000:

(a) the attorney purchased the principal's car for above market value;

(b) the attorney did not keep adequate records of the principal's property; and

(c) there was no authorisation of conflict transactions in the enduring power of attorney.

(5) The Adult Guardian had applied for the attorney to be removed as an attorney because of the breaches of the Act.

(6) Before reading any further, a reader could be forgiven for expecting the attorney to be slammed by the Court for egregious breaches of duty and be required to repay the gifted money.

(7) The Court examined all of the attorney's conduct in significant detail (including review of investment activity by the attorney for the principal) and was satisfied that, despite the gift and failure to keep adequate records, the attorney acted honestly and with reasonable diligence to protect the principal's interests. Whilst the Tribunal found that he had failed to comply with some of the provisions of the Act, he had not breached the gifting or conflict transaction rules. On its face, this result is difficult to reconcile with the facts as recorded, until the wider context is considered.

(8) The Court explained that:

(a) the transactions were consistent with the pattern of transactions by the principal when she had capacity and the Tribunal was satisfied that she would have made those transactions herself had she been in a position to do so; and

(b) the principal had the necessary means to make the transactions.

(9) The Court said:

> "*I find him honest and to have intended to act always in his mother's best interests, taking account of her expressed wishes*".

(10) The Court did not require the attorney to repay any money and did not remove the attorney as attorney for his mother. The Court said that it was satisfied that the decision-making arrangements currently in place would be likely to be affected to protect her financial interests moving forward. The Tribunal did order that, moving forward, he provide better accounts and records for his mother. The Tribunal also noted the gifts were not appropriate to be made after the principal had moved into a nursing home.

**If anyone wishes to discuss applicable NSWCAT cases then please let us know.*

How then do we draft enduring powers of attorney to allow conflict transactions?

24. Case law shows that it is possible for a principal to authorise an attorney to undertake conflict transactions, including those which substantially benefit the attorney, provided

that the authorisation is fully informed and abundantly unambiguous. The QCAT cases show that context is critical. It would be substantially more difficult for a principal to authorise an attorney to make gifts which are contrary to the transaction history between the parties compared to if the principal is merely authorising what he or she already did when they had capacity and managed their own affairs.

25. The Tribunal will take into account the express wishes of the principal. Therefore, if the principal intends to benefit an attorney in a particular way, it will be helpful to have the principal's wishes set out in a statement of wishes or in the power of attorney document itself.

26. I suggest however that if the power of attorney document authorises substantial gifts, then there will be a closer examination than perhaps otherwise of the following issues in relation to the execution of the power of attorney document:

    (1) Did the principal have capacity when the power of attorney document was signed?

    (2) Was the attorney exercising undue influence on the principal in arranging for the principal to authorise these gifts and benefits for the attorney in the document?

    (3) Was it unconscionable for the attorney to accept appointment in the circumstances and on its terms?

27. The advice of a solicitor will assist in overcoming the above challenges. The solicitor should not act for both principal and attorney and preferably should not be the longstanding solicitor of the attorney.

28. The *Re Narumon* case provides authority for the proposition that a properly authorised attorney may make a binding death benefit nomination on behalf of the principal, including a nomination which nominates the attorney themselves. I would recommend principals consider where they are nominating someone as their death benefit beneficiary, whether part of their estate plan should include an authorisation in their enduring power of attorney for that attorney to make or renew death benefit nominations, including nominating themselves.

Cameron Cowley

April 2019

SMSFs: Lessons from the Narumon Case

Re Narumon Pty Ltd (2018) QSC 185

29. Although Cameron has already referred to this case in his above article, it really is a cracker in the sense that it deals with a number of issues and principles applicable to SMSFs.

30. The case dealt with a fund established by John Giles, who died with a small estate of $200,000 and $4,000,000 in his SMSF account. Of that figure, $3,000,000 was meant to be in a reversionary pension for his second wife (Narumon).

BDBNs

31. John had 4 children from a previous marriage and had made a number of Binding Death Benefit Nominations (BDBNs). All of his BDBNs had omitted his children from his first marriage, and mainly focused on providing for his second wife and their son, Nicholas.

32. John lost capacity in August 2013, and his last BDBN was lapsing in June 2016, so his attorneys purported to make two nominations for him – one "renewing" the lapsing nomination and the other removing part of the nomination which was invalid (attempting to give 5% to his sister who was not eligible).

33. The Court found that the renewal was valid despite benefiting the attorney. This was on the basis that the principal's (John) interests coincided with the attorney's interests, as she was merely renewing what he already wanted. Context is everything in determining whether a BDBN will be valid in this respect.

34. As the renewal was valid, the Court did not make a determination on the subsequent BDBN which removed the invalid gift.

35. That meant that a further question was also determined. Would part of a BDBN being invalid render the whole BDBN invalid, or would the "good" part be preserved? The Court came to the latter conclusion, and stated that the part that was invalid was now subject to the Trustee's discretion, but the other parts of the BDBN remained binding on the trustee.

36. This is useful in salvaging what remains in terms of BDBNs that are improperly prepared, but prevention is always better than an uncertain outcome from a trustee's discretion. Seek expert advice in relation to BDBNs! Don't let you client's estate plan fall apart with poor advice and carelessness.

Pension Issues

37. The documents establishing the reversionary pension of some $3,000,000 could not be located. Disaster. The pension had always been accounted for, but the foundation was missing.

38. Narumon's solicitors were able to scrape together evidence in the form of correspondence between advisors from around the time the pension was established,

particularly with an actuary to establish that the pension did indeed exist. There was no evidence that the pension was changed.

39. If it was not a reversionary pension, then it is unlikely that such correspondence would have existed.

40. So the lesson is obviously make sure you have retained proper documentation! If Narumon lost $3M in pension funds because her advisor lost or didn't keep the papers, then you can guess who she'd be looking to hold responsible.

Deed changes

41. Like most SMSFs, the case involved one which underwent regular changes to its rules to keep pace with changes to the super environment.

1992	**SMSF established**
1995	Terms of deed varied
1999	Terms of deed varied
2000	Change of trustee
2004	Terms of deed replaced entirely
2007	Terms of deed varied*
2014	Deed of Ratification and Variation

42. Unfortunately there was a missing link in the chain.

43. The 2007 deed was not executed properly. The fund had a corporate trustee, and John signed the 2007 deed of variation as the "authorised representative" not as a Director.

44. This mistake was discovered in 2014, and the accountant sought to fix the problem by a deed of ratification (ratifying the error) and varying the deed to include the previous rules.

45. Deeds of ratification have been used widely. But the Court determined that an error in a SMSF deed cannot be ratified as a matter of law. Therefore the rules were only saved by the inclusion of a variation within the same deed.

Therefore, if you discover an error in a deed of variation, you should arrange the execution of a new deed of variation rather than ratifying the error. But prevention is better than a cure…..

46. You should also perform regular audits of your chain of deeds to ensure that such errors are not overlooked and become fodder for litigation by dissatisfied family members.

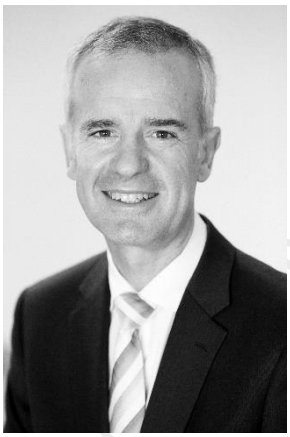
Richard Morris

April 2019

Our Estate Planning Team

Cameron Cowley

- Wills
- Testamentary trusts
- Trusts
- Superannuation including SMSFs
- SMSF nominations
- Taxation issues of estate planning
- Deeds of family arrangement
- Corporate succession



Greg Moin

- Wills
- Powers of Attorney
- Appointment of Enduring Guardians
- NCAT Reviews
- Farm succession
- Advanced Care Directives
- Corporate succession
- Aged Care Law
- SMSF nominations

Richard Morris

- Wills
- Deceased Estates
- Family Provision Claims
- Complex Estates
- Foreign Wills
- Capacity claims
- Informal Will cases
- SMSF nominations
- Special Grants
- Probate/ Administration

We stand by all of the legal information in this bulletin. However it is important to understand that it is not legal advice for you. Advice must be tailored to your circumstances, and every client's circumstances are unique. If you try to apply the above information to your circumstances it may not lead to the outcome you seek. We would be most happy to provide tailored advice for you suited to your circumstances.