

Avoiding the SMSF Danger Zone.

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Acis.

Today's Speakers



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Today's Cases



- Katz & Grossman
- Moss Super & Hayne
- Re Narumon
- Marsella
- Wooster & Morris
- Munro & Munro
- Williams & Williams
- Soo & Soo

Katz & Grossman

- *Katz v Grossman* [2005] NSWSC 934
- Death benefit dispute prior to BDBN's
- Daniel Katz (brother) and Linda Grossman (sister)
- Dad died & probate was granted to both kids
- Dad had a non binding nomination to the kids equally
- Linda appointed her husband Peter as trustee and member
- She used her discretion to pay all the death benefit to herself
- Daniel's argument did not centre around her discretion
- But rather an invalid appointment of Peter as a Trustee

Who can Change the Trustee?

- The deed provided that a majority of members had the power to remove and appoint trustees
- The court accepted that under the deed membership continued beyond death (what does your deed say?)
- Hence dad had to appoint the new trustee
- But dad is dead?????
- So, who can do it?
- Executor – but there wasn't one as probate still hadn't been granted

All around the deed wording

- The deed that purported to appoint the new trustee was made by the continuing trustee
- The deed said:
 - By the power vested in her by the provisions in the trustee deed and by every other power enabling her to do so Linda appoints Peter as trustee (or words to that effect).
- She had no power under the deed
- But did she have another power?

Importance of the Trustee Act

- The Trustee Act provides how a trustee can be appointed

(4) The appointment may be made by the following persons, namely—

- (a) by the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or*
- (b) if there is no such person, or no such person able and willing to act, then by the surviving or continuing trustees or trustee for the time being, or by the legal representative of the last surviving or continuing trustee.*

- Court determined Dad was “unable” as there was no executor
- So, the words “by every other power enabling her” was paramount
- Without it the appointment of the trustee was invalid

Moss Super v Hayne

- *Moss Super Pty Ltd v Hayne* [2008] VSC 158
- Usual scenario, child and second spouse in conflict
- Trustee was changed after death of Dad to a company controlled by second wife
- The deceased's will gave half the money to the child
- If the trustee used their discretion the mum would likely pay herself
- The court was asked two questions
- First, is the money dealt with under the will or the trust deed
- Court said it was the deed

Dealing with the Trust deed

- Child did not want the company to be the trustee as it was controlled by mum
- Previously it was mum and dad's executors as directors of a company ('PMS')
- PMS sent a letter of resignation. This was deemed effective
- Ms Moss (second wife) as sole member then appointed her company as trustee by resolution
- Deed provided that the Founder had the power to appoint the trustee
- Ms Moss was also the Founder

Founder & Member the same person

- Ms Moss clearly had the power to appoint the new trustee
- But in her capacity as Founder, not as member
- Court determined that the appointment was invalid
- So the fund did not have a trustee
- Judge instructed the parties to come back to court when you do
- Next case does not appear to be reported
- This concept was confirmed in Williams & Williams (later on)

Re Narumon

- *Re Narumon Pty Ltd* [2018] QSC 185
- Three issues to be considered:
 - Did the 2014 ratification actually take effect and if so when?
 - Was the Lifetime Complying Pension Reversionary or not (not part of today)
 - Could your EPoA continue a BDBN or even make a new one (not part of today)
- Deed was amended by resolution in 2007
 - Because accountants hate spending \$300 to get a qualified lawyer to do it
- This error was ratified by subsequent deed in 2014
- Court determined that the provisions of the 2007 amendment took effect upon the 2014 ratification

The Estate of Helen Marsella

- *Wareham v Marsella* [2020] VSCA 92 (yes it went to appeal)
- All about the payment of a death benefit out of the fund
- Helen had an invalid BDBN to her grandchildren
- Helen's daughter was the now sole trustee of the SMSF
- Helen's husband attempted to prevent her paying a death benefit
- Lots of nasty letters between lawyers

The Estate of Helen Marsella

- On balance, the inference to be drawn from the evidence is that the first defendant acted arbitrarily in distributing the fund, with ignorance of, or insolence toward, her duties. She acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict. As such, she was not in a position to give real and genuine consideration to the interests of the dependants. This conclusion is supported by the outcome of the exercise of discretion.

The Estate of Helen Marsella

- 49 The judge held that it was appropriate in all the circumstances for Mr and Mrs Wareham to be removed as trustees of the fund, because they had failed to exercise the discretion afforded to them by not giving real and genuine consideration to the interests of the dependants. In distributing the proceeds of the fund to Mrs Wareham they had dealt arbitrarily with the entirety of the property subject to the trust, in the context of substantial personal conflict with Mr Marsella. As mentioned earlier, the judge made orders for further submissions to be filed in regard to a suitable replacement trustee.

Wooster & Morris

- *Wooster v Morris* [2013] VSC 594
- Mum & Dad trustees
- Dad died
- BDBN to kids from 1st marriage
- Mum decided BDBN was invalid
- Court disagreed (well, was an arbitrator first)
- Kids eventually got the money
- \$950k in the fund. Same amount in legal fees

Issues from Wooster & Morris

- LPR is NOT the trustee when you die
 - They need to be appointed formally
 - Make sure your deed protects them from other trustees
- BDBNs are good but not the only solution
 - Just because the BDBN was valid it didn't really help
- The trustees still hold a lot of clout
 - So, who is the trustee when you do and will they want to pay the money to your stated beneficiaries

Munro & Munro

- *Munro & Anor v Munro & Anor* [2015] QSC 61
- Solicitor made BDBN to “Trustee of Deceased Estate”
 - His accountant drafted the BDBN
- SMSF Trustees didn’t want to pay it that way
- Court said BDBN was invalid
- LPR & Trustee are different

Williams & Williams

- *Williams v Williams* [2023] QSC 90
- Dad (Anthony) died leaving a spouse (Gayle) and two sons (Paul & Mark)
- Gayle is the second wife
- Dad & Paul were the Trustees of Dad's SMSF
- Dad had BDBN to pay 50% to Gayle & 50% to the Estate
- Mark as executor wrote to Gayle to say the BDBN was invalid (he had not yet been appointed)
- By purported deed dated 25/3/22 Mark was appointed trustee of the SMSF

The Dispute

- Gayle sort the following orders:
 - that the BDBN was valid
 - to replace the trustees of the SMSF with professional trustees

BDBN Clause in the Deed

“If the Trustees are given a written notice by Member requesting that benefits be paid following the death of that Member to a person or persons or other permitted payees then the Trustees must:

- (a) by written resolution, accept the terms of the Member’s notice; or
- (b) give written notice to the Member of a proposed rule in respect of the death benefit specifying the terms thereof in accordance with the Member’s request

AND on the date of that resolution referred to in (a) or the date of the written acceptance by the Member of the death benefit referred to in (b), the Trustees are bound by those terms unless and until that member and the Trustees otherwise in writing agree or until a later binding nomination in accordance with the SIS Act is given to the Trustees or a later non-lapsing nomination is given effect under (a) or (b)”

Validity of the BDBN

- Trustee's argued that they were not given written notice
- Gayle argued that notice was given to one trustee (Dad) and that the singular should also be read as the plural
- The court disagreed and instead agreed that the BDBN was invalid

Deed of Removal & Appointment of Trustee

- Clearly a deed written either by the trustees or an accountant
- Dad was named as a party to a deed dated after his death????
- They claimed to remove him in the deed notwithstanding he was already removed by his death
- Deed of Appointment was made by a dead person, a continuing sole trustee and a new trustee
- SMSF Trust Deed provided 2/3 of members had to fill a trustee vacancy
- So, the appointment of the trustee was invalid

Behaviour of Paul as Trustee

- *“This confusing state of affairs is complicated further by the conduct of Paul Williams”*
- He signed an affidavit stating the member had been dishonest and as such his benefit can be forfeited under the provisions of the deed (Breach of SIS Rules)
- *“The actions of Paul Williams, referred to above, and the conflicts which appear to exist for both him and Mark Williams lead me to the view that that this is a case in which it is appropriate to remove the trustees and replace them with independent trustees”*

Soo v Soo

- *Soo v Soo* [2016] NSWSC 1666
- Mrs Soo is the trustee of a testamentary trust
- She needed to amend the provisions of the trust for tax efficiency
- But the provisions of the will provided:
 - *“To the extent permitted by law, and subject to this clause, the Trustee may amend the terms of the trust”*
- So, she sought Judicial Advice if she could amend it and if not, would they amend it for her

Soo v Soo

- Judges conclusion:
 - *“cl 15.17 does not give the trustee power to amend the terms of the Trust;”*
 - The law does not “permit” you to amend the provisions of a trust
 - Have you previously amended an SMSF deed that required the permission of the law to amend?

Key Takeaways



Key Takeaways

- Know your deeds (the biggest advantage of SuperDepot)
- Remember that specific wording is important
- Process is as just as important as documenting
- Structure your funds to assist with estate planning
- Behaviour is extremely important
- Leave the deed work to us (we get it)
- “It won’t happen to me” is only true until it does

SuperDepot

SuperDepot effortlessly manages updates to your SMSF deed's governing rules, eliminating administrative burdens. With SuperDepot, you can:



Streamline Administration



Mitigate Risk



Generate Passive Revenue



Assure Deed Compliance

Questions?

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