

#NC2019

# Workshop: Is your documentation up to it – the next frontier of SMSF and estate disputes

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#NC2019



## Scott Hay-Bartlem

Scott is a partner in Brisbane law firm Cooper Grace Ward. He and his team specialise in assisting clients and their other advisers including financial planners with tax and superannuation advice, estate planning, administration and disputes, business structuring, business succession arrangements, asset protection and restructuring. Scott has a particular interest in how these areas intersect with self-managed superannuation funds and the impact of and on these structures. He is a SMSF Specialist Adviser™, a Chartered Tax Adviser, a member of the Society of Trust and Estate Practitioners, and a Specialist Accredited Adviser with Family Business Australia. Scott been selected by his peers for inclusion in the Eleventh Edition of Best Lawyers in Australia in the practice areas of: Superannuation Law, Trusts and Estates and Wealth Management / Succession Planning Practice. He was named the 2016 Brisbane Wealth Management/Succession Planning practice Lawyer of the Year and the 2019 Superannuation Lawyer of the Year. Scott has been listed in Doyle's Guide for Queensland Tax lawyers as a recommended practitioner, and Estate Planning lawyers as a leading practitioner.

He has a Bachelor of Laws (Hons) and a Bachelor of Business (Accy) from the Queensland University of Technology. Scott also has also completed the Certificate of Superannuation Management and the Diploma of Superannuation Management run through ASFA and Macquarie University, and the Foundation Diploma of Financial Planning.

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## Clinton Jackson

As a partner in Cooper Grace Ward's commercial team, Clinton advises his clients on an extensive range of commercial and corporate matters, business mergers, acquisitions and sales, tax and structuring issues, self-managed superannuation, asset protection and succession, restructuring and exit strategies.

Clinton's unique range of expertise enables him to assist his clients with both their personal and business legal issues and to advise through all phases of the business/investment lifecycle – from start up, growth, expansion, transition and exit.

Clinton is an accredited specialist superannuation adviser with the SMSF Association and member of the Society of Trust and Estate Practitioners.

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## Contents

#INC2018



The importance of SMSF documentation!

The cases

Common problems and their consequences

Workshop scenarios!

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## The importance of SMSF documentation

#INC2018



Much can turn on what documents are in place

And what they say

Who is or appoints the trustee/directors?

Who can do what?

What is the benefit?

Who gets the death benefit?

How is the SMSF taxed?

ASIC is coming to help!

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## The cases

#INC2018



*Perry v Nicholson*

• Original trustee and later trustee fought about who made the death benefit payment decision

*Cantor Mgt v Booth*

• Trustee and executor argued about whether BDBN had been 'given to' the trustee

*Ioppollo v Conti*

• Children challenged whether the trustee could pay their mother's death benefit to himself, and whether they were appointed as trustees on her death

*Munro v Munro*

• Wife and children disputed whether wording of BDBN meant it could be ignored

*Narumon*

• Attorneys and BDBNs

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Problem 1 - Ori

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Problem 1 - Ori

#INC2018

Change of trustee

- resolution of members
- trust deed requires trustee
- not effective

Some interesting provisions

- 'the trustee may accept the trustee's resignation'
- (c), (e) and (f)

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*Perry v Nicholson*

#INC2018

Colin Maurice had SMSF  
 Jennifer Nicholson de facto spouse  
 Sonia Perry one of his children to earlier relationship  
 Daughter challenged change of trustee in April 2015

- She was still trustee (and made death benefit decision)
- BDBN invalid

Court upheld change of trustee (just)  
 If not, death benefit planning would not have worked

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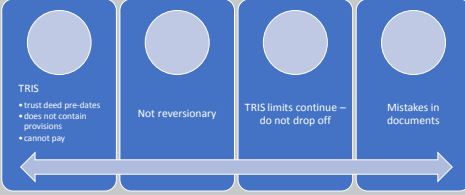
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### Problem 1 - Ori




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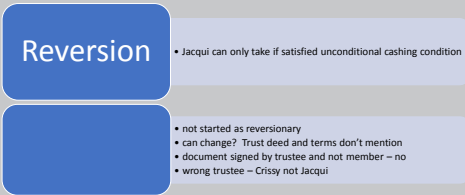
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### Problem 1 - Ori




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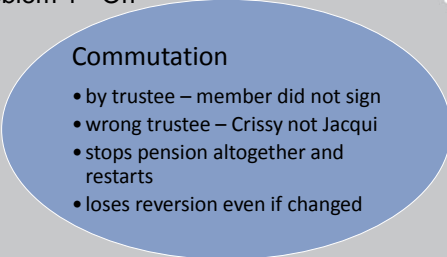
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### Problem 1 - Ori




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### Problem 1 - Ori

#INC2018



#### BDBN

- 'my estate' – No!
- Has information been provided as required by 4(a)?
- 4(c) and (d) – has trustee accepted? Crissy and Ori – deemed rejected
- 4(f) LPR can change, even after death
- 4(g) lapse after 3 years
- Typos

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### Munro v Munro

#INC2018



Mr Munro (a lawyer) died

BDBN to 'Trustee of Deceased Estate'

Wife and daughters executors

Wife co-trustee of SMSF

- Appointed her daughter as co-trustee
- Consider BDBN invalid as not comply Reg 6.17A
- Propose to pay to herself as spouse

Qld Supreme Court

- Reg 6.17A did not have to be complied with, so BDBN followed form requirements in trust deed
- 'Trustee of Deceased Estate' did not mean LPR (executor of estate)
- Did not have to follow BDBN

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### Cantor Mgt v Booth

#INC2018



Malcolm Cantor died

His brother Chris was director and shareholder of SMSF trustee company

Malcolm made a BDBN to 'Legal Personal Representative – Malcolm Cantor'

Executor was niece

Deed required BDBN to be 'given to' the trustee

Accountants held it, Chris did not know

Ultimately upheld as held at registered office of trustee

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### Problem 1 - Ori



**Ori dies**

- Ori ceases to be a trustee
- Leaves Crissy as the trustee
- Clause 2(j)(i) – executor becomes trustee – consent?

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### Problem 1 – Conclusion



Crissy is still a trustee	Jacqui is not
No reversion or valid BDBN	Crissy makes death benefit payment decision




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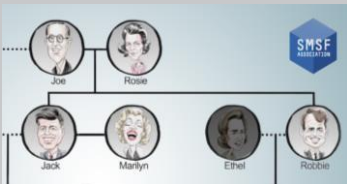
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### Problem 2 - Joe




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### Problem 2 - Joe

#INC2018



- Joe has lost capacity, but is he removed as a director?
  - No constitution
  - Replaceable rules do not remove him
- Joe remains a director, so can trustee make decisions?
  - Quorum – probably 2
- Remove Joe as a director
  - Shareholders
  - Can Jack as attorney vote to remove Joe?

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### Problem 2 - Joe

#INC2018



#### Compliance with s17A

- Attorney must become director in place of Joe
- How? – majority of shareholders
- Jack + Rosie
- 6 months to fix
- Wait out Joe's death so Rosie is decision maker?

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### *Ioppollo v Conti*

#INC2018



Benefit payment upheld  
 SIS does not require appointment of LPR as a co-trustee - compliance only  
 Follow trust deed/constitution  
 BDBNs had expired  
 Trustee had discretion  
 Trustee must take into account interests of others, but can decide to pay to self

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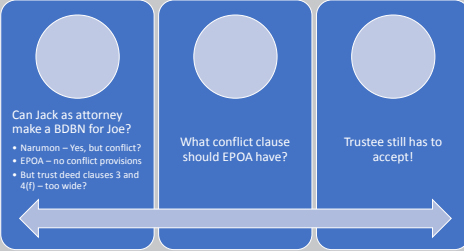
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### Problem 2 - Joe

#INC2018




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### Narumon

#INC2018



John appointed wife & sister as joint attorneys on incapacity  
 John lost capacity  
 Last BDBN about to expire  
 wife 47.5%  
 son 47.5%  
 sister 5%

Attorneys

- Renewed last BDBN
- Made a new BDBN (without sister – not dependant)

John dies

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### Narumon

#INC2018



Court upheld renewal of existing BDBN  
 Trust deed interpretation  
 Attorneys can extend existing BDBN (it is a 'financial matter', and not testamentary)  
 No conflict as extending (even though they were beneficiaries – only incidental)  
 History of making BDBNs in spouse's favour

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### Problem 2 - Joe



#### If Jack becomes a director then on Joe's death...

- ceases to be Joe's LPR as not executor
- S17A – Jack must come off and Robbie must go on – how?
- Clause 2(i)(iii) – 4 months after death, JORO stops being trustee
  - Even if directorship fixed later
- Clause 2(j)(ii) - ???

Jack and Rosie not executors – no *McIntosh* conflict issue

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### Problem 2 - Conclusion



Control of the SMSF hinges on documents

Joe's removal problematic

BDBN not effective

Rosie may end up with control of death benefit decision

Problem trust deed provisions

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### Problem 3 - Jack



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### Problem 3 - Jack



If BDBN was effective, does it work?

5% to grandchild – not a dependant

Does that make it non-binding?  
• Narumon – no  
• BUT (d) and (e)(ii) – must be to dependants or LPR

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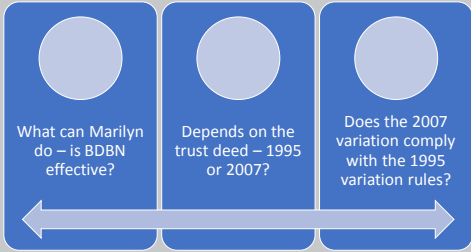
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### Problem 3 - Jack



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### Problem 3 - Jack



'Principal Employer may amend'

- includes Trump Corp
- and successors – who else has to sign?

'resolution in writing'

- is the document a resolution in writing?

(c) – unless the fund is an 'excluded fund'

- pre SMSFs
- half the members consented
- 'Member' includes a former member – Jacqui?
- 'employer sponsored fund' - what is that?

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### Narumon



Series of trust deed variations  
 Concerns about validity  
 Did new variation relying on variation clauses in all old deeds  
 Only original deed and last variation held to be valid

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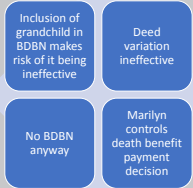
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### Problem 3 - Conclusion




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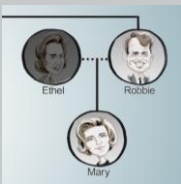
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### Problem 4 - Robbie




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### Problem 4 - Robbie



Robbie has made BDBN to estate

Testamentary trust is a good option

BUT could we use a child pension?

- keep in superannuation system
- tax benefits
- transfer balance cap
- BDBN rules that out

Can executor disclaim?




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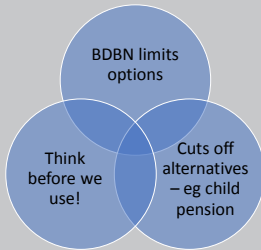
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### Problem 4 - Conclusion




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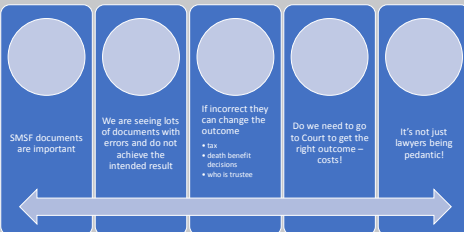
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### Summing up!




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## Disclaimer

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