




**THE NEXT FRONTIER OF SMSF
AND ESTATE DISPUTES**

Clinton Jackson, Partner, Cooper Grace Ward Lawyers


#NC2020



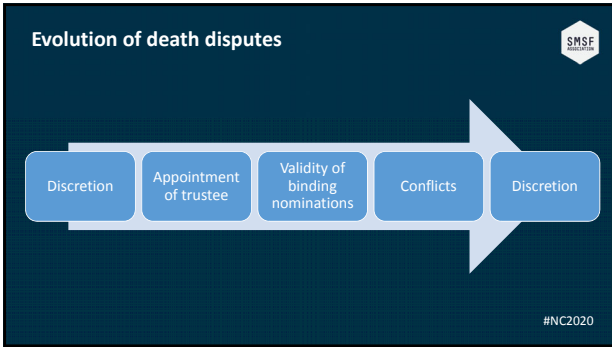
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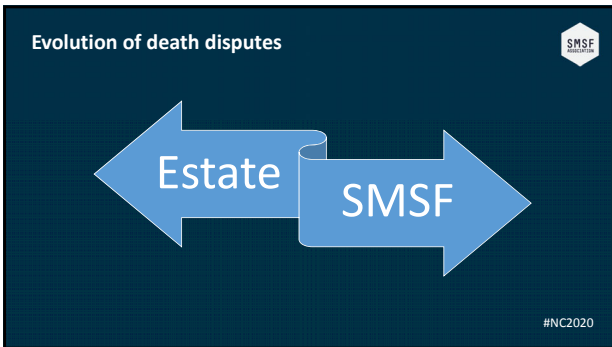


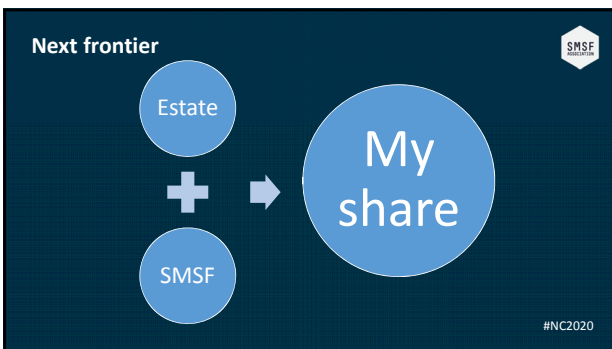
As a partner in Cooper Grace Ward's commercial team, Clinton advises his clients on an extensive range of commercial and corporate matters, business mergers, acquisitions and sales, tax and structuring issues, self-managed superannuation, asset protection and succession, restructuring and exit strategies. 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 has been selected by his peers for inclusion in *Best Lawyers in Australia* in the practice areas of Superannuation Law and Wealth Management / Succession Planning Practice, is a recommended Wills, Estates & Succession Planning lawyer by Doyle's and is an accredited SMSF Specialist Advisor with the SMSF Association and member of the Society of Trust and Estate Practitioners.





TIME FOR VOTING









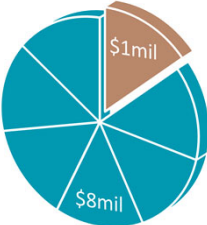

Next frontier - case study 






Successful accountant

Estate	SMSF
\$9 million	\$3.2 million


Next frontier – case study 
Estate


Next frontier – case study 
SMSF


Next frontier – case study
Disgruntled beneficiary



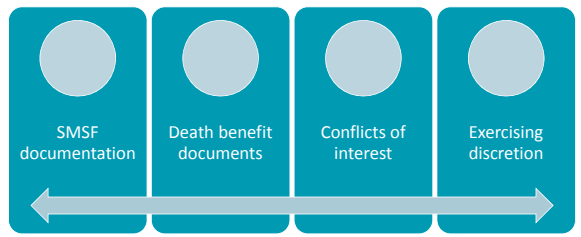
HARRY




TIME FOR VOTING
Poll - What are Harry's chances of success?

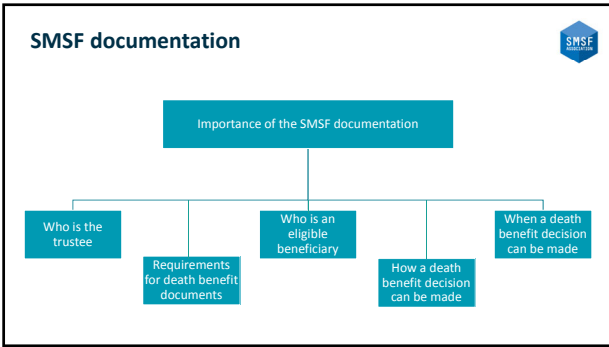


SMSF death benefit disputes



SMSF documentation Death benefit documents Conflicts of interest Exercising discretion





SMSF documentation
Who is the trustee?

Perry v Nicholson


- 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

SMSF documentation
Who is the trustee?

Dawson v Dawson

- Peter and Estelle trustees of SMSF
- Peter lost capacity so his son Tony became trustee instead
- Peter died and George was his executor
- George and Estelle argued
 - Tony was removed as trustee because of Peter's death
 - George became trustee on Peter's death
- Who is trustee – Tony or George?


SMSF documentation
Who is the trustee?



Dawson v Dawson

- **Decision**
 - Tony remains as the trustee until removed under the trust deed
 - George does not become trustee until appointed under trust
 - That had not happened
 - Tony continued as trustee
- George and Estelle had power under the trust deed to remove Tony and appoint George
- Tony still decision maker


SMSF documentation
Terms of the trust deed



Re Narumon

- Missing change of trustee
- Typographical errors in dates
- The 2007 variation was signed as 'authorised representative'
- 2014 deed complied with either 2004 or 2007 variation power


SMSF documentation
Things that can go wrong



Don't follow the variation power	Follow the deed	Get the parties wrong
<ul style="list-style-type: none"> • Who does it • Who must consent • Beyond limits • What documents are required 	<ul style="list-style-type: none"> • Need to get deed history right • What is the current deed 	<ul style="list-style-type: none"> • Miss a change of trustee • Who were the members at the time? • Incorrect signing

SMSF documentation

What about Harry?



HARRY

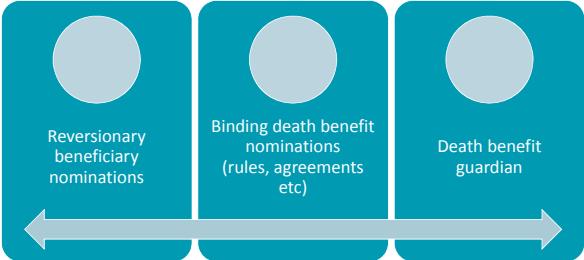
Request all relevant info in relation to the SMSF

Review SMSF documents in detail

- Who is the trustee
- Requirements for death benefit documents
- Who is an eligible beneficiary
- How a death benefit decision can be made
- When a death benefit decision can be made

Goal = Make it difficult for Camilla to pay the death benefit

Death benefit documents

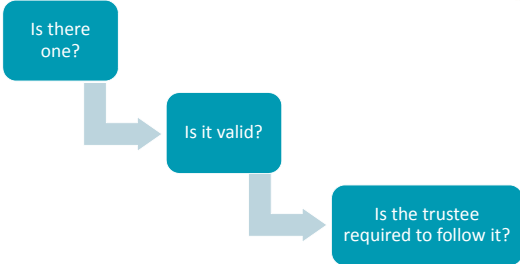


Reversionary beneficiary nominations

Binding death benefit nominations (rules, agreements etc)

Death benefit guardian

Death benefit documents



Is there one?

Is it valid?

Is the trustee required to follow it?

Death benefit documents

The cases

- Wooster v Morris
- Donovan v Donovan
- Munro v Munro
- Cantor Mgt v Booth
- Narumon

Donovan v Donovan

Statutory Requirements:

- "a Member may make a [BDBN] in the form required by the Statutory Requirements"
- "the requirements imposed under any law or by any Statutory Authority which must be satisfied by a superannuation fund in order to qualify for income tax concessions"

Munro v Munro

- 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
- Old 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

Cantor Mgt v Booth



- 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

Re Narumon



Nominated Beneficiary:

- "a Dependant or other person nominated in writing...in the form specified in the Superannuation Law for the mandatory payment of Death Benefits"

Superannuation Law:

- "the SISA, SISR, Tax Act and any other laws that the Fund must comply with to be a regulated fund"

Re Narumon




Ineligible Beneficiary:


- 5% to sister
- Does this invalidate whole nomination?

Attorney made nomination

- Is this within the attorney's power?
- Is there a conflict?
- Compare to *SM case*

Death benefit documents 

What about Harry?



Goal = Make it difficult for Camilla to pay the death benefit


Request all relevant docs in relation to pension, binding nomination etc

Review pension documents in detail

- Was the pension validly commenced?
- Does the trust deed allow for reversionary beneficiary nominations?
- Is the trustee required to pay to the nominated reversionary beneficiary?

Review binding nomination in detail


- Is the trustee required to follow the binding nomination?
- Does the binding nomination comply with the trust deed?
- Has the binding nomination been properly completed?

Death benefit documents 

Example binding nomination clause

Charles made a binding nomination in favour of Camilla. Is Camilla required to pay Charles' death benefits in accordance with a binding nomination?

If the Trustee holds a Binding Death Benefit Nomination for the deceased Member the Trustee must pay such Benefits in the manner and form as are nominated in that Binding Death Benefit Nomination of the deceased Member. However, the Trustee is not required to make a payment under a Binding Death Benefit Nomination if that payment may result in the Fund becoming insolvent.

Time for voting 

Death benefit documents

Example binding nomination clause



If the Trustee **holds** a Binding Death Benefit Nomination for the deceased Member the Trustee must pay such Benefits in **the manner and form** as are nominated in that Binding Death Benefit Nomination of the deceased Member. However, the Trustee is not required to make a payment under a Binding Death Benefit Nomination if that payment may result in the Fund becoming insolvent.

Death benefit documents

Example binding nomination clause



A Binding Death Benefit Nomination:

- must be in writing;
- must require the Trustee to provide any benefits in respect of the Member on or after the death of the Member, to a Legal Personal Representative or a Dependant of the Member;
- must be signed, and dated, by the Member in the presence of two witnesses, being persons each of whom has turned 18 and neither of whom is a person mentioned in the notice; and
- must contain a declaration signed, and dated, by the witness stating that the notice was signed by the Member in his or her presence.

Unless sooner revoked by the Member who gave the Binding Death Benefit Nomination a Binding Death Benefit Nomination ceases to have effect after the end of the period of **three years** after the day it was first signed or last confirmed or amended by the Member.


Death benefit documents

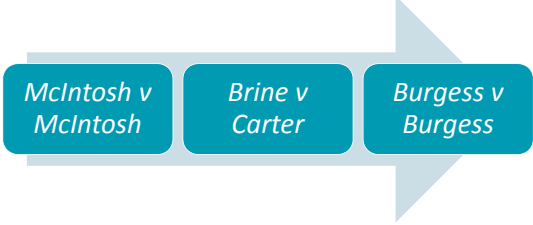
Example binding nomination clause




The Trustee **must** provide a Member with that information that the Trustee **reasonably believes** the Member **reasonably needs** prior to submitting a Binding Death Benefit Nomination.

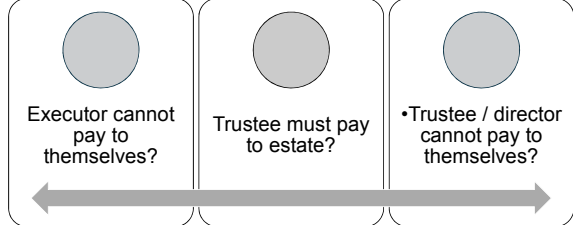
The Trustee **may accept or reject** a Binding Death Benefit Nomination. If the Trustee accepts a Binding Death Benefit Nomination the Trustee shall be bound to act in accordance with that Binding Death Benefit Nomination. If the Trustee does not accept a Binding Death Benefit Nomination **within six months** of receiving it, it is **deemed to have been rejected**.

Conflicts of interest 





McIntosh v McIntosh *Brine v Carter* *Burgess v Burgess*

Conflicts of interest
What do the cases mean? 




Executor cannot pay to themselves? Trustee must pay to estate? •Trustee / director cannot pay to themselves?

Conflicts of interest 



Executor Trustee / director Beneficiary

Conflicts of interest
 What about Harry?



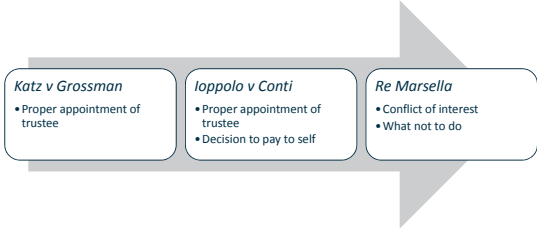
Goal = Make it difficult for Camilla to pay the death benefit

If Camilla wearing more than 1 hat:

- She cannot pay to herself
- Must pay to estate?
- Must pay to another dependant?

HARRY

Exercising discretion



Katz v Grossman

- Proper appointment of trustee

Ioppolo v Conti

- Proper appointment of trustee
- Decision to pay to self

Re Marsella

- Conflict of interest
- What not to do

Exercising discretion

Karger v Paul followed by Finch v Telstra Super

No reasons = court unable to review

Except:

- Failure to act honestly and in good faith
- Failure to give genuine consideration to the decision
- Discretion not exercised with due consideration of purpose

Trustee duty to properly inform themselves

Re Marsella



Mrs Marsella died

She and her daughter Caroline trustees of her SMSF

Caroline appointed her husband as co-trustee and paid death benefit to herself

Lapsed BDBN to grandchildren

Tone and content of correspondence from Caroline's advisers to Mr Marsella

Mr Marsella challenged death benefit payment decision

- Caroline had a conflict
- Trustee not exercised discretion in good faith and giving proper consideration to the interests of all beneficiaries

Exercising discretion



Re Marsella

- Did not understand the role of trustee
- Denied eligibility
- Attempting to add second trustee
- Failed to seek advice
- Actual conflict

Ioppolo v Conti

- Sought advice
- Wishes of deceased equivocal
- Nothing other than mere inference of conflict

Exercising discretion




Make and document enquires

- Advice on role
- Advice on trust deeds
- BDBN enquiries
- Beneficiary enquiries

Seek applications

- Relationship
- Financial position
- Need as a dependant

Exercising discretion
What about Harry?



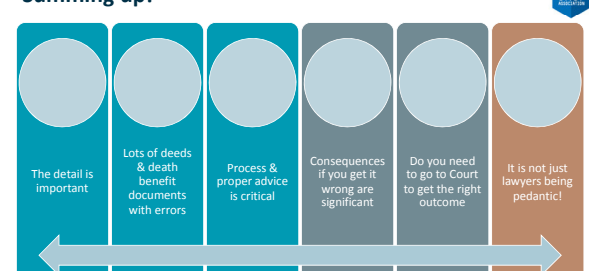
Goal = Make it difficult for Camilla to pay the death benefit

Has Camilla exercised her discretion properly?

- Has Camilla followed the proper process?
- Has she given genuine consideration to Harry (& others)?
- Has she considered all relevant information?
- Does she understand her obligations?

TIME FOR VOTING
Poll - What are Harry's chances of success?

Summing up!



- The detail is important
- Lots of deeds & death benefit documents with errors
- Process & proper advice is critical
- Consequences if you get it wrong are significant
- Do you need to go to Court to get the right outcome
- It is not just lawyers being pedantic!

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