# Succession planning workshop…


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# Succession planning workshop... How to implement the lessons from new court cases in your practice to best help clients

## Introduction

In this session I look at 11 cases.

These cases are, in the order in which they appear in the slides for the slides:

1. *Lambie Trustee Limited v Addleman* [2021] NZSC 54
2. *Sutton v NRS(J) Pty Ltd* [2020] NSWSC 826
3. *M & L Richardson Pty Limited* [2021] NSWSC 105
4. *Re Narumon Pty Ltd* [2018] QSC 185
5. *Crane Distribution Ltd v Recorder of Titles* [2009] TASSC 68
6. *Barry McMahon Nominees Pty Ltd* [2021] VSC 351
7. *Burgess v Burgess* [2018] WASC 279
8. *G v G (No. 2)* [2020] NSWSC 818
9. *Marsella v Wareham* [2019] VSC 65 (and *Wareham v Marsella* [2020] VSCA and *Re Marsella* [2020] VSCA 118)
10. *Hill v Zuda Pty Ltd* [2021] WASCA 59
11. *Moss Super Pty Ltd v Hayne* [2008] VSC 158

In this paper, I will consider three of these cases in some detail, namely *Sutton*, *Marsella* and *Zuda*.

# *Sutton v NRS(J) Pty Ltd* [2020] NSWSC 826

## Introduction

The recent decision of Sutton v NRS(J) Pty Ltd [2020] NSWSC 826 highlights the importance of having original executed copies of all constituent trust documents. It has tremendous relevance for SMSFs.

Facts

The facts of the case were as follows:

In 17 August 1972, a discretionary trust ('Trust') was established for the benefit of the family of the plaintiff, Mr Neil Raymond Sutton.

The Trust was established with a settled sum of $100 and then was essentially left dormant for a period of over 30 years. However, from around 2007 onwards Mr Sutton decided to activate the Trust. Accordingly, a portfolio of properties and businesses were subsequently settled on the Trust.

Mr Sutton and his advisors had a photocopy of the signed original deed for the Trust and acted on the basis that the Trust was validly constituted and governed by the terms of the photocopied deed.

The original signed deed for the Trust could not be located.

Several of the banks used by the Trust wished to sight the establishment deed for the Trust to determine that the Trust's constituent documents were in order as part of their "know your customer" policy.

Due to the inability of the trustees of the Trust to produce the original deed, one bank account used by the Trust was frozen until the deed could be produced.

In seeking to obtain an original copy of the deed, Mr Sutton solicitor made enquiries to Clayton Utz (as the relevant law firm who had acted both for Mr Sutton and his father at the time the Trust was established). As a result of these inquiries, a packet of documents was discovered containing an original will of Mr Sutton prepared for him by Clayton Utz and signed on 17 August 1972, and a separate photocopy of the Trust deed. The photocopy was the same as the photocopy already in Mr Sutton's possession.

Mr Sutton sought a declaration from the Court as follows:

> *An* order *that the photocopy of a Deed made the 23rd day of October 1972 BETWEEN Frederick Walter Sutton (the Settlor) of the one part AND Laurie Frederick Sutton, David Bruce Sutton and Neil Raymond Sutton of the other part identified in the Affidavit of Neil Raymond Sutton filed in these proceedings is a true copy of the original Deed made the 23rd day of October 1972 BETWEEN Frederick Walter Sutton (the Settlor) of the one part AND Laurie Frederick Sutton, David Bruce Sutton and Neil Raymond*

> *Sutton of the other part identified in the Affidavit of Neil Raymond Sutton filed in these proceedings.*

## The decision

Counsel for Mr Sutton argued that a 'presumption of regularity' should apply in the circumstances — see, eg, Re Thomson [2015] VSC 370 where the presumption was applied in relation to an unsigned SMSF deed.

In Harris v Knight (1890) 15 PD 170, 179–80, Lindley LJ described this presumption as follows:

> *The maxim, 'Omnia praesumuntur rite esse acta,' is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried in effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.*

However, the Court considered it was unnecessary to rely on this presumption. Parker J noted ([17]–[19]):

> In Re Thomson the missing trust deed was evidenced only by an unsigned copy, but in the present case there is no particular need to prove by inference that any formality has been complied with. The photocopy Trust Deed is signed and the evidence establishes directly that the parties concerned have always acted on the basis that it sets out the terms of the Presumed Trust.
>
> In my opinion, the evidence makes it overwhelmingly likely that the photocopy Trust Deed is indeed a copy of an original which now cannot be found. This conclusion is supported in particular, by the recent discovery of an identical copy of the Trust Deed in the records of Clayton Utz dated from 1972.
>
> *In these circumstances, the Court should assist those responsible for the administration of the presumed trust by ensuring that they can continue to*

*administer it as if the photocopied Trust Deed were the trust's constituting document.*

The question for the Court was how to achieve the practical relief sought by Mr Sutton. The Court considered that there were two difficulties in providing declaratory relief in the form sought by Mr Sutton as follows:

1. The Court noted that declarations are used to determine formally a legal state of affairs. They are not to determine a mere matter of fact.

2. The Court considered that it was not appropriate to make a declaration which may affect the status of property (ie, the property of the Trust) unless all interested parties have had an opportunity to be heard.

Thus, as an alternative to the declaratory relief sought by Mr Sutton, the Court exercised its advice power under s 63 of the Trustee Act 1925 (NSW), to provide advice as follows:

*1. The trustees of the trust settled by Frederick Walter Sutton by Deed of Trust dated 23 October 1972 are justified in administering the trust on the basis that the document annexed to this order and marked "A" is a true copy of that Deed.*

*2. The costs of all parties to these proceedings be paid out of the assets of the trust.*

This advice meant the trustees of the Trust were effectively entitled to treat the photocopy of the deed possessed by Mr Sutton as the Trust's constituting document, subject to the original ever turning up.

## Implications

This decision of the New South Wales Supreme Court reinforces the importance of having original executed copies of all constituent trust documents, as judicial intervention was required in this case to address third-party bank concerns and a frozen bank account.

The case also highlights that judicial advice under the trustee legislation in the relevant jurisdiction (there are equivalents to s 63 of Trustee Act 1925 (NSW) in other jurisdictions) may be an appropriate alternative to seeking declaratory relief, eg, where the uncertainty arising is more a question of fact rather than a question law, and where all interested parties are not able to be included in the proceedings.

As SMSFs are merely a type of trust, the case is also relevant for SMSFs. For example, an SMSF trustee could seek judicial advice under the relevant trustee legislation in relation to reliance on a photocopy or scan of a signed SMSF deed where the original could not be located, particularly where multiple photocopies or scans exist, as they did in Sutton, such that it was 'overwhelmingly likely' that the copy relied upon is a true copy of the original.

# *Wareham v Marsella* [2020] VSCA 92

The Victorian Court of Appeal handed down *Wareham v Marsella* [2020] VSCA 92. This judgement represents the appeal of *Marsella v Wareham (No 2)* [2019] VSC 65.

In brief, the appeal was dismissed. The appeal judgement illustrates that trustees (including SMSF trustees) are held to very high standards, and when performing their duties, they must act very carefully to ensure that they are acting in good faith, upon real and genuine consideration, and for proper purposes. If the trustees fail to do so, a court might reverse key decisions the trustees have made and remove the trustees.

This case is very relevant in the context of death benefit payments.

## Facts

In 1981 Mr and Mrs Swanson were a married couple and had two teenaged children when Mr Swanson died in a motor vehicle accident. In 1984 Mrs Swanson married Mr Marsella. In 2003, Mrs Swanson commenced a self managed superannuation fund. Mrs Swanson was the sole member. The trustees of her fund were herself and one of her children from her prior marriage (Mrs Wareham). This structure continued until Mrs Swanson's death on 27 April 2016. Upon Mrs Swanson's death, the death benefit payable from the fund was $450,416. Mrs Swanson did not leave a binding death benefit nomination upon death. She did leave a will appointing her second husband (ie, Mr Marsella) as executor.

Relations between Mr Marsella (her second husband) and Mrs Wareham (the daughter from Mrs Swanson's prior marriage) were strained. There was evidence of a physical altercation between Mr Marsella and Mr Wareham on 9 July 2016 in connection with a disputed clock which Mrs Wareham removed from the marital home that the late Mrs Swanson and Mr Marsella had lived in together during their 32 years of marriage.

Despite the fact that Mr Marsella was his late wife's executor, he did not control the SMSF following her death. Rather, it appears that under the particular SMSF deed, Mrs Wareham was left in control of the fund.

On 17 April 2017, Mrs Wareham as the sole trustee determined to distribute all superannuation death benefits to herself. On the same day, Mrs Wareham also appointed her husband as a co-trustee and then the two of them made the same determination again (ie, to distribute all superannuation death benefits to Mrs Wareham).

On 24 April 2017, Mr Marsella became aware that assets of the SMSF were being sold. His solicitors wrote to the solicitors acting for Mrs Wareham seeking an explanation. On 27 April 2017, Mrs Wareham's solicitors replied, stating (among other things):

> *Your client is neither a Member, Trustee or Beneficiary of the Fund, and as such our client is not required to consult with him on any matter relating to the administration of the Fund, nor to provide any undertakings or accounting as requested in your letter of today's date.*

On 4 May 2017, Mrs Wareham's solicitors sent another letter stating (among other things) that no conflict of interest arose and that Mrs Wareham was permitted to exercise her discretion in favour of any eligible object including herself. The letter also stated that Mrs Wareham owed 'no duty to the estate or other beneficiaries'.

Mr Marsella commenced a proceeding seeking orders removing Mr and Mrs Wareham as trustees of the fund and appointing a substitute trustee. He also sought an injunction restraining distribution of the fund and an order requiring the applicants to repay any sum already distributed. Mr Marsella was successful in doing so. See *Marsella v Wareham (No 2)* [2019] VSC 65 where the trial judge held, among other things:

> *The ill-informed arbitrariness with which [Mrs Wareham] approached her duties also amounts to bad faith. The dismissive tenor of the correspondence from [Mrs Wareham's solicitor], the willingness to proceed with the appointment and distribution in the context of uncertainties and significant conflict and the lack of specialist advice … all support the conclusions that her conduct was beyond 'mere carelessness' or 'honest blundering'.*

The trial judge reversed the Warehams' decisions to pay the superannuation death benefits to themselves, and remove them as trustees.

## The appeal

The Warehams appealed on 10 separate grounds. Those grounds included items such as that '[t]he learned primary judge erred in setting aside the exercise of discretion by the applicants as trustees of the Swanson Superannuation Fund … and in concluding that the applicants exercised that discretion without real and genuine consideration of the interests of the dependants of the fund'.

We do not describe all of the grounds of the appeal here as the Court of Appeal dismissed the appeal.

## Practical implications

The Court of Appeal's judgement reinforces many of the lessons from the original Supreme Court's judgement. In particular, we note that trustees are subject to very strict duties. These duties include the duty to properly to inform themselves. Further, trustees must take great care to ensure they exercise discretions in good faith, upon real and genuine consideration, and for the purposes for which the discretion was conferred.

If in doubt, it is entirely appropriate (and dare we say desirable) for trustees to seek specialist legal advice. Whether or not Mrs Wareham had received specialist legal advice was an issue that received significant discussion in the Court of Appeal's judgement. The Court of Appeal was not satisfied that Mrs Wareham had received specialist legal advice.

# *Hill v Zuda Pty Ltd* [2021] WASCA 59

## Introduction

The Western Australian Court of Appeal recently handed down its decision in Hill v Zuda Pty Ltd [2021] WASCA 59.

It provides a strong answer to the question of how long a binding death benefit nomination (BDBN) can last for in ALL Australian jurisdictions.

## Facts

Ms Hill was the only child of Alec Kumar Sodhy (Deceased). The Deceased was in a de facto relationship with Ms Murray.

In 2011 the Deceased made a document purporting to be a BDBN. The BDBN was in favour of Ms Murray.

The Deceased died in 2016. Importantly, the Deceased died more than three years after making the BDBN.

## Key issue

Ms Hill brought an action. She contended, among other things:

[the binding death benefit nomination] was signed more than three years prior to the deceased's death, and so had ceased to have effect under reg 6.17A(7)(a) of the SIS Regulations.

## Why is this still an issue?

Many people might be surprised to hear that this is still an issue.

After all, the ATO commented on this issue in Self Managed Superannuation Fund Determination SMSFD 2008/3. Namely, the ATO stated:

> *… the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A of the SISR.*

In other words, the ATO confirmed that it is possible for an SMSF's deed to be drafted to enable a BDBN to last for more than three years.

However, the ATO is (broadly speaking) not a lawmaking body. All SMSFD 2008/3 can really stand for is that the ATO will not treat a non-lapsing BDBN as causing a contravention of the Superannuation Industry (Supervision) Act 1993 (Cth) or the Superannuation Industry (Supervision) Regulations 1994 (Cth), from a regulatory compliance viewpoint.

A court, on the other hand, effectively is a lawmaking body. There have been certain supreme court decisions holding that it is possible for an SMSF's deed to be drafted to enable a BDBN to last for more than three years. See, for example, the decision of the Queensland Supreme Court in Munro v Munro [2015] QSC 61, and Re Narumon Pty Ltd [2018] QSC 185.

That being said, Australia is a federation of states. What one judge decides in one state (eg, Queensland or South Australia), is not binding in other states (eg, Western Australia or Victoria).

This is a very important point to bear in mind, especially in, for example, Victoria, where there is no Victorian case law directly on point.

## What did the Court of Appeal decide?

The Court of Appeal pointed to the High Court decision of Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, where the High Court stated:

> *Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.*

Therefore, the Court of Appeal:

> *… accept[ed] the construction adopted in Cantor Management until such time as the decision is overruled by the High Court. On that basis, we regard ourselves as bound to construe reg 6.17A of the SIS Regulations as not applying to self managed superannuation funds.*

In other words, the Court of Appeal held that it is possible for an SMSF's deed to be drafted to enable a BDBN to last for more than three years and that this is the position in all Australian jurisdictions (including, for example, Victoria).

## Concluding thoughts

It is difficult to think of a situation where a client would want a three year lapsing BDBN. Naturally though a client should always regularly review and consider whether their BDBN is still appropriate for their current circumstances.

Therefore, it is important that an SMSF deed expressly and clearly allows for non-lapsing BDBNs. Further, SMSFs with BDBN provisions that rely on reg 6.17A should be updated as a matter of urgency.

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This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.