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Recent  
succession  
planning cases  
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development  
bulletin

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# Recent succession planning cases & ATO's property development bulletin

## Introduction

In the presentation, I cover a number of issues, including a discussion of *Marsella v Wareham (No 2)* [2019] VSC 65. Often when discussing this case, people ask why it has such a different outcome to *Katz v Grossman* [2005] NSWSC 934. This is the issue I want to focus on in this paper.

## **Katz v Grossman facts and findings**

This case involved a dispute between a brother (Daniel Katz) and a sister (Linda Grossman) over who technically were the trustees and members of their deceased parents' super fund (and therefore who had control over their deceased father's \$1 million plus benefit).

Prior to their deaths, the father (Ervin Katz) and the mother (Evelin Katz) were the trustees and members of the fund. After his wife's death, Ervin appointed Linda as the other trustee of the fund on 18 March 1999 relying on the powers conferred upon him by the *Trustee Act 1925 (NSW)* ('TA').

On 19 September 2003 Ervin died. Probate was not obtained until 5 August 2004 (probate was granted to his son and his daughter).

Shortly after Ervin's death, Linda appointed her husband (Peter Grossman) as trustee of the fund on 5 December 2003. Linda had refused to follow her late father's non-binding nomination (an equal sharing between her and her brother Daniel).

Daniel argued that Linda had not been validly appointed as trustee as Ervin did not have the authority to do so because:

- Ervin and the estate of Evelin (ie, the majority of members – the court accepted that under the deed membership did not cease upon death) should have appointed the new trustee under the deed.
- There was no power for the continuing trustee (ie, Ervin) to appoint under s 6(4)(b) of the TA because that provision only comes into force where the

people mentioned by the trust instrument (ie, the majority of members) did not exist.

The court rejected Daniel's arguments because, since it took so long for Probate for Evelin to be obtained, it can be said that 'there is no person having the power ... who is able and willing [sic] to act.' Therefore s 6(4)(b) applied and the continuing trustee (ie, Ervin) did have the power to appoint Linda.

The court also upheld Linda's husband's appointment as trustee, also based upon the power of the surviving trustee (Linda) to appoint a trustee under s 6(4)(b) of the TA.

There is no reference to an actual or purported payment of death benefits in *Katz v Grossman*. The case rather related to determining who the trustee was (and thus controlled the fund). There was no challenge to a trustee's decisions.

### **How is this different to *Wareham v Marsella*?**

In *Wareham v Marsella*, the decision relating to death benefits had already been made by Mr and Mrs Wareham and this case considered whether the trustees had exercised their powers in a proper way. A trustee has various duties they must comply with in the exercise of their powers. The Court of Appeal in *Wareham v Marsella* confirmed the trial judge's finding that Mr and Mrs Wareham had failed to exercise their power in good faith, upon real and genuine consideration, and for the purposes for which it was conferred.

While *Katz v Grossman* considered who the trustee of the fund was, *Wareham v Marsella* instead considered whether the trustees had acted properly. Relevantly, we do not actually know how the trustee in *Katz v Grossman* decided to pay the death benefits. (Most incorrectly think that a fact of is that *Katz v Grossman* that Linda and her husband determined to pay the death benefits to Linda: although this might have occurred, it is certainly **not** a fact that is stated in the judgement.)

### **Conclusion**

Conflict and litigation can easily arise when dealing with the payment of death benefits. Trustees must ensure they comply with their strict obligations when exercising their powers as failure to do so could invalidate their decisions and see them removed from office.

*Wareham v Marsella* shows that trustees should seek expert advice in relation to the exercise of their powers when dealing with death benefits. There are a number of steps that can be taken to evidence a trustee's proper exercise of power and reduce the risk of challenges to the trustee and the fund. Unless advice is sought and these steps are taken, a trustee's decisions may be open to challenge.