

The Courts are getting tough – deeds can be dangerous

*with Grant Abbott, Abbott & Mourly Lawyers
and LightYear Docs*



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The logo for LightYear Docs, featuring a stylized lightning bolt icon followed by the text "lightyear" in a lowercase, sans-serif font, and "docs" in a smaller, lowercase, sans-serif font to the right.

What's coming up at LightYear Docs

- Vesting of unit trust, discretionary trust and SMSF deeds with resolutions now available - \$129 or included in your subscription package
- Launch of LightYear Training Group in October 2022 with six Accreditation programs from Trusts and Companies intensive, SAPEPAA Adviser Accreditation course, SMSF specialist adviser course, Advanced estate planning and Family Advisory Board certification plus ten half day courses with range of qualified trainers
- SAPEPAA Fiji Conference - 12 - 14 November 2022 - contact ash@sapepaa.org.au for full details
- Three-hour accreditation Estate Planning 101 for Accountants and Planners in mid October - live and streamed - watch for details

Courts are getting aggressive using Equity Law

- **Commissioner of Taxation v Bosanac [2021] FCAFC 158**
- Mr and Mrs Bosanac acquired a family home and as part of an asset protection strategy the property was placed in the wife's name
- The deposit came from a joint bank account
- There was no documentation on why it had been done
- ATO argued that there was a resulting trust where Mrs Bosanac was the trustee on behalf of Mr Bosanac for 50% of the property
- Mr Bosanac's counsel argued that there is a presumption of advancement – equity for gifting for spouses that is settled law
- The Full Federal Court held that there was a resulting trust with Mr Bosanac's 50% open to pay ATO debts

Old Deeds or Modern Deeds



Why Deeds are important?

- They are the law of the land – whether it is a unit trust, SMSF, discretionary trust, bare trust or court imposed resulting trust
- They provide the Trustee with powers including:
 - What to invest in – watch for limitations
 - What the Trustee can do – run a business, act as agent, hold a power of attorney, engage in property development
 - Who to distribute to for a discretionary trust or no BDBN/SMSF Will or inoperative one
 - How to vest the trust and what is the vesting period – who are the vesting beneficiaries
 - How to upgrade the deed without a resettlement
- The deed must be followed, or a wide range of equitable penalties may apply such as making a trust distribution voidable upon argument before the Court or the Trustee being replaced

Facts: Mother passed leaving a trust for the benefit of her children. The mother's friend was the Trustee and provided limited benefits to the family, who were looked after by their father (who she could not stand) and would not let them move to Brisbane for children's schooling. Trustee removed!!

Conclusion on primary application

- [142] That the trustee was entrusted with her role by the mother and that replacing her with a solicitor will increase the costs of administering the trust are weighty considerations in favour of the status quo. Regrettably, despite those considerations and as righteous and loyal to the mother as the trustee doubtless thinks her conduct has been, the trustee's conduct compels the conclusions that the jurisdiction to remove and replace her has been enlivened and that it should be exercised.
- [143] The trustee's dual pattern of a lack of respect for the importance of the father's position in the children's lives and her disinterest in genuinely attempting to consult him about major decisions bearing upon the children's contemporary welfare has adversely affected her approach to properly informing herself as to the children's welfare for some time now. Just how adverse the coalescing impact of that pattern had become was incontrovertibly exposed by the manner of the Brisbane refusal.
- [144] When the trustee is making decisions of the highest importance to the interests of the beneficiaries, who are minors being raised in a sole parent family, it is inescapable that the central, most important source of relevant knowledge about those interests is the person in the position of their sole parent. The trustee has proved herself so unwilling to give that position the weight it deserves vis-à-vis the children's interests that when making such decisions she fails to even attempt to sufficiently inform herself about those interests by trying to consult the father. Her failure to try and sufficiently inform herself about what was in the children's best interests was inconsistent with her obligation to administer the trust for their benefit.

JPD as
Guardian v
DMS as
Trustee [2022]
QSC 181

Wareham v Marsella (2022) 61 VR 262

Dealing with a SMSF death benefit paid out to daughter who was a trustee of the fathers SMSF but paid all to herself not to the estate where it would be shared with the deceased's husband of 32 years who was the Executor of the estate. Trustee removed!

45. The judge concluded:

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.^[14]

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.^[18] As mentioned earlier, the judge made orders for further submissions to be filed in regard to a suitable replacement trustee.

Owies v JJE Nominees Pty Ltd [2022] VSCA 142

- Parents set up a Trust for the benefit of their three children – Michael, Paul and Deborah
- The parents – Eva and John who were not Primary Beneficiaries but included as General Beneficiaries loved their son Michael but were estranged from Paul and Deborah
- The trust deed was varied three times for the purpose of changing appointors and trustees with the family solicitor Mr Sampson becoming a director of the Trustee company
- *The deeds of variation were held invalid as the variation clause allowed the trust rules to be varied but NOT the appointor or Trustee. This had to be done separately as a Deed of Appointment not a variation*

Owies v JJE Nominees Pty Ltd [2022] VSCA 142

- For a period of from 2011 to 2018 income years income distributions on the \$23M trust were 40% to John, 40% to Michael and 20% to Eva with the distribution in 2019 all to John after Eva had passed and there was notification of an estate challenge

82 A trustee in the exercise of its fiduciary discretions is under constraints that do not apply to adult individuals disposing of their own property.⁴⁸ In *Scott v National Trust for Places of Historic Interest or Natural Beauty*,⁴⁹ Robert Walker J said:

Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever.⁵⁰

The Guide to making Trust Distributions

- 110 In considering the nature of the power to distribute annual income, the starting point must be the nature and purpose of the trust having regard to the terms of the trust deed. The trust deed is by settlement, and as the preamble records, the settlor settled the sum 'being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries'.
- 111 Given its terms, it would have been expected that the class of general beneficiaries would not be particularly large and would continue to revolve around the three Owies children. An obvious, but unstated, premise on which the trustee would be expected to discharge its duties is that it would generally be informed about the differing circumstances, needs and desires of each beneficiary as an incident of the familial bonds that underpin the trust and explain its purpose. It is not to be supposed that, when those familial bonds become strained or broken, the purpose of the trust to provide for the family as a whole would change or that the trustee would be relieved of the obligation to properly inform itself.

Removing the Trustee

- 154 In order to justify a removal of a trustee, the Court ‘must find something which induces the Court to think either that the trust property will not be safe, or that the trust will not be properly executed in the interests of the beneficiaries’.⁹⁴ The justification may be found in a lack of impartiality as between beneficiaries.⁹⁵ It would be unrealistic however, in the context of many family trusts, to ignore the fact that the trustee will often be imbued with the vagaries of the family dynamic, its antagonisms and alliances. Impartiality does not require the trustee to bring a blank slate to the exercise of its powers.
- 158 We are well satisfied that it is necessary to remove the trustee. In our view, the trustee has, over a number of years, failed to act impartially, failed to give real and genuine consideration to the interests of two of the primary beneficiaries, and relations between the beneficiaries and those involved in managing the trustee are, at least from this vantage point, irreconcilably damaged, such that it is not in the best interests of the beneficiaries for the trustee to continue in office.

Some important takeaways

- What do your clients discretionary trust deeds state as to income distribution, capital distribution and also who are Primary Beneficiaries
- It is important to exclude beneficiaries if there is a falling out, but they may bring an action if they were originally primary beneficiaries
- Trust resolutions are crucial and the methodology just as important for the trial judge in Owies relied on the accountant's recall re the Trustee Eva and John making the resolutions BUT the actual signed resolutions could not be found!!!
- Be careful as to who is a Primary Beneficiary
- ***The solution is a Leading Member discretionary trust where the Leading Member appointor is the only primary beneficiary – and it may extend to spouse, bloodline children, grandchildren, entities they control and charities. Plus, casual beneficiaries can be introduced for a time.***

**Get your
Copy to
know your
Deed**

THE GUIDE TO
SMSF TRUST DEEDS
PLUS STRATEGY
REVIEW



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THE GUIDE TO SMSF TRUST DEEDS PLUS STRATEGY REVIEW

Strategy One = Get your Deed Strategic

- 1. Ensuring six members of a family can become members** of the SMSF making it a true family Family Super fund.
- 2. Different SMSF investments for different generational members:**
 - not limiting younger members to a general investment strategy enables the younger member or members to hold their own assets in the fund.
 - likewise older members in pension phase can have the trustee set aside investible assets that more meet the cash flow requirements of a pension rather than the growth objective of younger members of the fund.

Get your Deed Strategic

3. **Bloodline Limitations on benefit payments:** the Trustee under an Abbott & Mourly SMSF trust deed, like our discretionary trusts, has the ability, if the member has chosen to limit the payment of superannuation benefits on the death of a member to the deceased member's lineage or bloodline. This includes via a payment through the deceased member's estate.

4. **Saving tax on Death Benefits:** where a death benefit is paid to an adult child on the passing of the senior members of the fund, it may be subject to a 17% tax and in some cases, if paid with insurance monies, a 32% tax unless the adult child is a financial dependant of the deceased member.

Get your Deed Strategic

5. **Wide range of Contributions:** the deed enables the Trustee of the Fund to accept a broader category of contributions for fund members, particularly retired fund members.

6. **Special Strategy Options for Incapacity:** the ability to implement a SMSF Living Will. This specialist document which provides directions to the Trustee of what is to happen in the event the member is incapacitated with a sickness, quarantined, or has dementia.

7. **No dangerous BDBN but a SMSF Will:** A special purpose SMSF Will. This document provides directions to the Trustee on what is to happen in the event of the member's death. It is far stronger, more secure and better optioned than a BDBN as it provides bloodline limitation, asset transfers and the possibility of a SMSF Death Benefits Trust - a testamentary trust to protect dependants.

Upgrade Deeds now

- We have separate emails that can be sent to clients on the reasons why they need to update their discretionary trust or SMSF trust deed
- You set the pricing and if you are on subscription, you can recover your subscription price 10X over or more
- For discretionary trust deeds look at TD 2012/21 where the Commissioner stated that there is no new trust, no new settlement provided the variation terms of the deed are complied with. We will do a pop-up webinar on this in LightYear Training Group shortly
- If you don't want to do them in-house, engage Abbott & Mourly Lawyers who can do in bulk for very low cost including change to Leading Member discretionary trust if needed

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