Tax and estate planning in 2021: where are we at?

by Matthew Burgess, CTA, Director, View Legal

In light of ongoing changes to the taxation regime and the expanding wealth of Australia's ageing population, there has for many years been a growing need for estate planning to utilise appropriate structuring. Estate planning related areas have largely been outliers from radical simultaneous rule overhauls. Since 2018, this historical position appears to have changed with a range of announcements, possibly permanently. Subsequent years have seen evolution in a number of areas, including trust vesting, trust splitting, testamentary trusts, excepted trust income and family trusts. One year on, however, the question needs to be asked: what has been the impact? With the post-baby boomer intergenerational wealth transfer wave gathering pace, the ongoing developments create significant risk for advisers and their customers in the tax and estate planning arena.

Introduction

In light of ongoing changes to the taxation regime and the expanding wealth of Australia's ageing population, there has for many years been a growing need for estate planning to utilise appropriate structuring.

This time last year, an article in this journal argued that 2018 had seen more changes in key estate planning areas in that calendar year than in each of the previous 30 years combined — and yet, 2019 had seen somewhat of a stagnation in relation to a number of key issues.[1] In particular, the article explored potentially important shifts in approaches across a range of issues, including the following areas:

– trust splitting;

– testamentary trusts and excepted trust income;

– the ongoing saga that is arguably the highest profile estate planning exercise in Australia's recent history (involving Lang Hancock, Gina Rinehart and her children);[2]

– the application of the so-called "safe harbour rule" under the small business restructure roll-over rules in Subdiv 328-G of the *Income Tax Assessment Act 1997* (Cth) (ITAA97); and

– the use of (binding) financial agreements.

Twelve months on, this article examines the status of each of the above areas (particularly trust splitting and excepted trust income where there have been important developments), while also exploring the following key estate planning related developments in 2020:

– the ability to structure testamentary trusts to minimise the risk that assets will be attacked on the relationship breakdown of a beneficiary;

– the latest guidance from the High Court in relation to the deeming rules that can apply to assets otherwise registered as owned as a joint tenancy;

– the use of enduring powers of attorney to manage superannuation death benefit nominations; and

– the impact of lost trust deeds of an inter vivos discretionary trust.

Trust splitting

In July 2018, the ATO released its views on trust splitting in TD 2018/D3.

As explored in previous articles in this journal,[3] there were a range of concerns with TD 2018/D3 for all tax and trust advisers. These issues were only partially addressed by the final ruling that was released in December 2019 as TD 2019/14 — a close to Christmas release date that continues what some advisers suggest is an apparent tradition of the "last ATO officer out the door has to issue an attack on trusts and then turn off the lights".

Critically, TD 2018/D3 assumed a single factual matrix which is very specific, and it lists a number of line items that may, or may not, be a part of a trust splitting arrangement.

Many trust splitting arrangements involve a change of trustee in relation to specific assets and few (or indeed none) of the other features listed in TD 2018/D3 (for instance, no changes to the appointors, right of indemnity or range of beneficiaries).

Given the extended delays in finalising TD 2018/D3, there must be a legitimate question as to its correctness in relation to the one example included in the draft. This is particularly the case since the ATO conveniently:

– ignores both High Court and Full Federal Court authority in decisions such as *FCT v Commercial Nominees of Australia Ltd*[4] and *FCT v Clark*[5] when making conclusions about trust resettlements; and

– makes unsubstantiated and unexplained assumptions about how a trustee may or may not act following a trust split.

Interestingly, the ATO does specifically explain its reasoning in relation to the above two points (and a range of other industry concerns) in a related publication to TD 2019/14, namely, its trust splitting *Public advice and guidance compendium*.[6] In particular, the ATO confirms its view (among the 39 "question and answers") that, in relation to the above two points:

– the decisions in *Commercial Nominees* and *Clark* considered whether a trust comes to an end and all of the assets of the pre-existing trust are settled on terms of a new trust. The question of whether a particular trust split arrangement causes a CGT event to happen in respect of the assets vested in the separate trustee is conceptually a different issue. As such, these decisions are of limited

assistance when determining the tax implications of a trust split; and

- the observations about the expected outcome of a challenge by an aggrieved beneficiary are invoked as a convenient "check" on the conclusion otherwise reached as to the effect of the arrangement (namely, the creation of a new trust over assets transferred to the new trustee).

Ignoring the arguably questionable reasoning set out above, more positively, TD 2019/14 does include two key changes that address other serious issues that many specialists in this area had raised with regard to TD 2018/D3:

- a second example has been included which suggests how the ATO believes that a form of trust split may be able to be implemented, without causing a resettlement; and
- the ATO has appeared to effectively abandon its previous attempt to make TD 2019/14 retrospective by acknowledging that its view of the potential CGT implications of the arrangement discussed in this determination may have been subject to conjecture prior to the publication of TD 2018/D3 on 11 July 2018. The Commissioner will not devote compliance resources to apply the views expressed in this determination to arrangements entered into before this date.

The second example included in TD 2019/14 essentially confirms that a trust split will not be a CGT resettlement, so long as:

- if each trustee keeps separate accounts in respect of the assets that they hold, the results are consolidated for the entire trust fund and a single tax return is prepared for the trust as a whole;
- there is no attempt to apply for a separate tax file number;
- there is no amendment of beneficiary classes;
- there is no narrowing of the right of trustee indemnity (ie each trustee must continue to have recourse to all of the assets of the trust to satisfy its right of indemnity);
- there are no changes to the trustee who remains in control of assets not subject to the trust split; and
- the trustees of each "split" trust must still act jointly in relation to issues such as choosing an accountant, incurring joint expenses, amending the trust deed, and determining an earlier vesting date.

Based on the second example in TD 2019/14, all other aspects of a trust split are permissible, for example:

- amending the trust deed to allow the trust split to occur (assuming there is an adequate power of variation);
- appointing a new trustee (and replacing the previous trustee) to certain assets that are to be subject to the trust split;
- changing the appointor or principal in relation to the assets the subject of the trust split; and
- updating third party records (eg the land titles office, share registries etc) in relation to the change of trusteeship.

Certainly, proceeding with a trust splitting, even if it corresponds exactly with the second example in TD 2019/14, will not of itself necessarily provide a complete solution in relation to the estate and succession planning objectives.

While there are a range of additional complementary steps that may need to be taken, arguably, one of most prevalent is the simultaneous implementation of so-called "gift and loan back" arrangements.[7]

While a detailed analysis of the gift and loan back strategy in the context of a trust splitting is outside the scope of this article, briefly:

- there is the establishing of a new trust;
- the relevant split trust makes a gift of a sum of money to the new trust equal to the market value of the assets of the split trust;
- the trustee of the new trust then makes a loan of the gifted sum of money to the split trust; and
- the trustee of the new trust secures the loan by taking a charge for the sum of money over the assets of the split trust.

"... the ATO has appeared to effectively abandon its previous attempt to make TD 2019/14 retrospective."

2018 federal Budget attack on excepted trust income

The announcement in the 2018 federal Budget[8] that "the concessional tax rates available for minors receiving income from testamentary trusts will be limited to income derived from assets that are transferred from the deceased estate or the proceeds of the disposal or investment of those assets" was, for many, a surprise.

Thus, as flagged in last year's article,[1] advisers in the estate planning industry should likely continue to be concerned about what the government means by suggesting that the mischief to be addressed is that "some taxpayers are able to inappropriately obtain the benefit of [a] lower tax rate by injecting assets unrelated to the deceased estate into the testamentary trust".

With the unexplained retrospective effect from 1 July 2019, the new rules are set out in s 102AG(2) ITAA36 (with a new subs (2AA)) and were crafted as follows with the one (very key) change to the rules as compared to what was originally proposed shown by the mark up below:[9]

> "(2AA) For the purposes of paragraph (2)(a), assessable income of a trust estate is of a kind covered by this subsection if:
>
> (a) the assessable income is derived by the trustee of the trust estate from property; and
>
> (b) the property satisfies any of the following requirements:
>
> (i) the property was transferred to the trustee of the trust estate to benefit the beneficiary from the estate of the deceased person concerned, as a result of the will, codicil, intestacy or order of a court mentioned in paragraph (2)(a);

(ii) the property~~, in the opinion of the Commissioner,~~ represents accumulations of income or capital from property that satisfies the requirement in subparagraph (i);

(iii) the property~~, in the opinion of the Commissioner,~~ represents accumulations of income or capital from property that satisfies the requirement in subparagraph (ii), or (because of a previous operation of this subparagraph) the requirement in this subparagraph."

Thankfully, the somewhat bizarre approach (given that our tax system is founded on the concept of self-assessment) originally to make two-thirds of the rules turn on the "Commissioner's opinion" was removed in the final version of the enacted legislation.

In an area that already has substantial compliance costs, if the hardwiring of subjective tests into the law had been implemented, it would have guaranteed further significant costs to taxpayers and, indeed, would have been likely to lead to increased administrative issues for the Commissioner.

The combination of the final legislation, explanatory memorandum (EM) to the Bill that became the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*,[10] and subsequent ATO observations in the publication QC 16509[11] make it clear that, at least from the perspective of the revenue authorities, the style of assets of a testamentary trust that are able to generate excepted trust income will be narrower than was previously the case.

Three specific examples, sourced from the EM and QC 16509, are set out below in relation to:

– a distribution from a family trust to a testamentary trust;
– the reinvestment of testamentary trust income; and
– acquiring an asset of a testamentary trust with funds sourced from an estate, a family trust distribution and borrowings.

A distribution from a family trust to a testamentary trust

On 1 July 2019, testamentary trust ABC is established under a will of which a minor is a beneficiary.

Pursuant to the will, $100,000 is transferred to the trustee from the estate of the deceased.

Shortly after the testamentary trust is established, a related family trust makes a capital distribution of $1,000,000 to the testamentary trust. The resulting $1,100,000 is invested in ASX-listed shares on the same day. Dividend income of $110,000 is derived for the 2019-20 income year.

The net income of the trust is $110,000 and the minor is presently entitled to 50% of the amount of net income. The minor's share of the net income of the trust is $55,000. $50,000 is attributable to assets unrelated to the deceased estate and is not excepted trust income. $5,000 is excepted trust income on the basis that it is assessable income of the trust estate that resulted from a testamentary trust, derived from property transferred from the deceased estate.

Reinvestment of testamentary trust income

Following on from the above example, the minor's share of the net income of the trust (being $55,000, comprising $5,000 excepted trust income and $50,000 not excepted trust income) is not paid to the minor by the trustee but is invested for their benefit in ASX-listed shares shortly after the commencement of the 2020-21 income year.

For the 2020-21 income year, that investment derives income of $5,500, and the minor is presently entitled to the entire amount. $5,000 is attributable to assets unrelated to the deceased estate and is not excepted trust income. $500 is excepted trust income on the basis that it is assessable income of the trust estate that resulted from a testamentary trust, derived from income that was previously excepted trust income.

Acquiring an asset of a testamentary trust with funds sourced from an estate, a family trust distribution and borrowings

Johnston Trust is a testamentary trust established under a will into which $500,000 is transferred from the deceased estate on 22 August 2019.

A trustee of a family trust then makes a capital distribution of $500,000 to Johnston Trust.

The trustee of Johnston Trust borrows $1m from a bank and purchases a rental property for $1.9m.

The remaining $100,000 is used as working capital for the rental property. In the 2019-20 income year, the trustee of Johnston Trust receives $50,000 of net rental income.

The net income of the trust for that year is $50,000.

Michael, who is under 18 years old, is made presently entitled to 50% of the $50,000 net income, being $25,000. Michael's excepted income is $6,250.

This amount is the extent to which the $25,000 of income resulted from the $500,000 transferred from the deceased estate (worked out as $500,000 ÷ $2m × $25,000).

The remaining $18,750 of income is attributable to assets unrelated to the deceased estate and is not excepted income.

Superannuation death benefit payments

When introducing the changes to the way in which the excepted trust income rules are to operate, the EM confirmed that the new measures were believed to have a "small unquantifiable gain to revenue over the forward estimates period".[12] This admission (leaving aside the obvious question of why the changes were in fact needed in the first place) may indirectly provide comfort for willmakers wanting superannuation death benefits to pass to a testamentary trust.

In particular, there have been concerns that the rules do not address how assets (such as a superannuation death benefit) that are acquired by a testamentary trust as a consequence of the willmaker's death, but are not directly from the willmaker personally, will be treated.

Aside from the asset protection benefits offered by testamentary trusts, the issues from a tax planning perspective in relation to superannuation death benefit payments are critical. This is because, if superannuation death benefits are not caught by the new rules, future income distributions sourced from the capital contribution to the testamentary trust to an infant beneficiary will be treated as excepted trust income.

Arguably, the rules in relation to superannuation death benefit payments are not as clear as they could be. That said, the preferred interpretation appears to be that, so long as a death benefit is paid to the legal personal representative of an estate before passing to a testamentary trust, this should be sufficient to ensure that any income later derived will be excepted trust income.

In contrast, if a death benefit passes directly from a superannuation fund to a legal personal representative in their capacity as the trustee of a testamentary trust, there is a material risk that the death benefit will be deemed to be "injected" into the testamentary trust in a manner that is caught by the new rules. This is because the payment would not strictly pass via the estate of the deceased willmaker.

Practically, most specialist holistic estate planning advisers tend to recommend against death benefit payments being made directly to any type of trust. This is due to the potential difficulties with meeting the legislative requirement for a superannuation death benefit payment to only be made to dependants or to the legal personal representative.

Accessing excepted trust income in relation to superannuation death benefits

The conservative view is that the reference to "legal personal representative" in relation to the legislative requirement for a superannuation death benefit payment to only be made to dependants or to the legal personal representative, is of the estate, not a testamentary trust established under the estate. Adopting the conservative interpretation should therefore, counterintuitively, help to ensure that superannuation death benefits can be the source of future concessional excepted trust income distributions.

Furthermore, superannuation death benefits have been a longstanding and arguably significant source of excepted trust income distributions for those utilising testamentary trusts as part of a holistic estate plan.

Removing the ability for superannuation death benefits to continue to be a source of excepted trust income would fundamentally contradict the admission in the EM that the new measures will have a small unquantifiable gain to revenue.

Tracing will be key

Particularly where there are tax dependants who are potential beneficiaries of a testamentary trust, there has been a recognised need to ensure a "tracing" of superannuation death benefit proceeds paid to a deceased estate.

The new rules are likely to further heighten the need for methodical tracing in relation to superannuation death benefits, as highlighted by the examples from the EM and QC 16509 outlined above.

For example, assuming that the original death benefit can be used to validly create excepted trust income, and given the likelihood that the death benefit payment will be converted into other assets, there will be a need to demonstrate that the source of funds for those assets was the death benefit. In turn, future income will need to be traced to the original death benefit payment in order to be able to be treated as excepted trust income.

Testamentary trusts and family law

Previous articles in this journal have explored numerous aspects of the ability for the Family Court to "look through" trust structures and attack the underlying assets.[13]

Testamentary trusts are, however, one form of trust where there have been a limited number of reported decisions. At least anecdotally, some believe that this is because the Family Court is less inclined to consider that assets held via testamentary trusts are exposed to division on a property settlement.

The decision in *Bernard & Bernard*[14] seems to add weight to this line of reasoning, assuming that the testamentary trust is properly structured and administered appropriately. In this case, a testamentary trust was set up under the will of the husband's father, who died three years before the husband and wife separated.

Broadly, the testamentary trust (which was named after the husband) was structured as follows:

- the husband was the primary beneficiary;
- the appointor was a third party and, although not disclosed in the case, may have been a trusted adviser;
- the husband's sister was the sole trustee; and
- the range of beneficiaries was relatively "standard", although not limited to the bloodline of the willmaker in that the husband's wife was a potential beneficiary.

There was also a second testamentary trust for the husband's sister, structured on mirror terms.

While the (notorious) family law decision in *Kennon v Spry*[15] was mentioned by the court, it was largely only to observe that the *Spry* situation was entirely different to the facts of this case, other than for the fact that there was a trust in existence.

In holding that the assets of the husband's testamentary trust did not form part of the matrimonial pool, the court mentioned the following key aspects of the trust:

- the husband was not the settlor (rather, his father was);
- the husband was not the trustee;
- the trustee retained complete and unfettered discretion to administer the trust;
- the husband was not the appointor;
- while the husband was a primary beneficiary, this of itself created no legal title to the property of the trust; and
- there was nothing to support a suggestion that the testamentary trust may be a sham.

The court also confirmed that the trustees of each of the two testamentary trusts had been scrupulous in their dealings and in their promulgation of resolutions, in ensuring the accumulation of funds to carry out the activities of the trustee, in the holding of meetings and in the filing of tax returns, and in their distinct roles as trustee and beneficiary. Indeed, the court stated that "rarely [does it] see a family law matter where tax returns and disclosure is so up-to-date and thorough, as has been in this matter".

While the testamentary trust assets were still considered a financial resource, this meant that they could only be factored into the final property settlement in an indirect manner.

Joint tenancy and partnership assets

As is well understood by specialist advisers, assets that are owned as a joint tenancy (as opposed to tenants in common) pass automatically to surviving owners on the death of a joint tenant. However, for tax purposes, joint tenancy assets are deemed to be owned as tenants in common, in equal shares.[16] This means that the conversion from one ownership mode to the other has no tax consequences. It also means that the death of a joint tenant owner will cause a tax event.

Importantly, from an estate planning perspective, even where title records indicate that an asset is owned as joint tenants, if it is a partnership asset, it will be deemed to be effectively owned as tenants in common. If this deeming rule applies, the death of a partner essentially causes the value of their interest to pass under their estate plan, and not automatically by survivorship (as is the case generally with assets owned as joint tenants) to the other owners.

The decision of the High Court in *Commissioner of State Revenue v Rojoda Pty Ltd*[17] further highlights the way in which these rules operate. Interestingly, the High Court's decision reversed a decision of the Court of Appeal, which in turn had reversed a decision of the State Administrative Tribunal.

The High Court decision relevantly confirmed that:

- Australian Partnership Acts, like the 1890 United Kingdom counterpart, reflect the equitable principle that, subject to the terms of any partnership deed, partners hold legal rights to the partnership property on trust for all of the partners;
- this means that, if property is acquired as partnership property (even if this is done in the name only of one partner), it will be held on trust for the partnership;
- furthermore, the legal estate or interest in land which is partnership property devolves not according to the general rules of law but "in trust so far as necessary for the persons beneficially interested in the land";
- the rules in this area do not create any new trust in relation to land. Rather, they give statutory recognition to the equitable principle that legal title to partnership property is held on trust for all partners;
- this means that each partner will have a non-specific interest in relation to all of the partnership freehold titles (as well as all of the current assets of the partnership), with a right, on dissolution, to compel the sale of the freehold titles in order to realise a fund from which, at the conclusion of the winding-up of the partnership, a vested share can be claimed;
- in this case, a deed where a partner confirmed that they held freehold titles of a partnership on trust for each former partner or their successors created a fixed trust. This is because the confirmation in the deed extinguished the unique equitable rights of the partners in the landholdings and instead created new fixed trusts; and
- the creation of the fixed trusts over land had adverse (and unexpected) stamp duty (ie the declaration of a trust) and tax (ie CGT event E1, being the creation of a trust) consequences.

As flagged in the High Court decision, the Partnership Acts in most states codify the rules in this regard.[18] These rules generally state that, unless the contrary intention appears, property bought with money belonging to the partnership is deemed to have been bought on account of the partnership and is considered partnership property.

The rules in this area were perhaps best explained historically in the case of *Spence v FCT*.[19] In this case, it was relevantly held:

> "It is … a mistake to say she got it simply by virtue of her joint tenancy. The legal estate devolved in accordance with the joint tenancy. To that extent the maxim which was mentioned — 'ius accrescendi inter mercatores locum non habet' — does not apply.[20] But it is applicable in equity; partners who hold as joint tenants in law hold beneficially as tenants in common. That is an old rule. It is more exactly stated today in terms of the Partnership Acts:[21] the legal estate devolves according to its nature and tenure but in trust so far as necessary for the persons beneficially interested; and as between partners land which is partnership property is to be treated as personal estate."

The "old rule" reference in the quote above comes from cases such as *Lake v Craddock*.[22]

Binding death benefit nominations and incapacity

Re Narumon Pty Ltd[23] was a widely reported superannuation death benefit case[24] which, in essence, considered the key issues that arise in relation to binding death benefit nominations (BDBNs).

While the case allowed an enduring power of attorney (EPA) to be used to refresh a BDBN, there are many aspects that meant this outcome was not necessarily the "standard" position.

In a factual matrix where the member of a self-managed superannuation fund (SMSF) had made a lapsing BDBN and then lost capacity, the key BDBN-related issues revolved around attempts to both "refresh" the lapsed BDBN and create a new BDBN to remedy the member's error of purporting to nominate a non-*Superannuation Industry (Supervision) Act 1993* (SIS) dependant in the BDBN.

In summary, the court confirmed:

- the provisions of the trust deed for a superannuation fund are critical to the outcome of whether an attorney may validly make a BDBN, noting that practically for industry or retail funds, interested parties must contact the trustee to access the relevant trust instrument;
- the persons nominated under the BDBN need to be SIS dependants in order to be entitled to receive any part of a death benefit;
- depending on the deed, it may be that the nomination of a non-dependant will not invalidate the balance of the BDBN;
- it will be much easier (and hopefully avoid court proceedings) if the deed and the EPA grant the attorney the right to sign a BDBN;
- in this case, there was no such power in the deed or in the EPA. However, the power of attorney legislation (in Queensland) was held to give the power to refresh

the stale BDBN. That said, the Queensland legislation is unique in this regard and the position is likely different in other states.

- it is critical, however, that there is a conflict of interest clause in the EPA if the attorney is to be nominated under a new BDBN, which is not standard in government EPA forms in any states (including Queensland). This is because, unless a conflict of interest clause is included in an EPA, it is likely impossible for anything other than a "refreshing" of a BDBN to be done, and even a refreshing of a previous BDBN may not in fact be possible; and
- while the Superannuation Complaints Tribunal decision D07-08\030[25] (in which it was also accepted that an EPA can permit an attorney to complete and sign a BDBN) was mentioned, it was also noted that this decision did not provide any detailed discussion.

It should be noted that, in case there has ever been any doubt, estate planning is more than a will. Here, the SMSF death benefit was more than 95% of the deceased's entire wealth.

Despite the above conclusion, there is at least one more recent case (by an inferior court) that reached the opposite conclusion.

The relevant case is *SM*.[26] Importantly, the court stated that it did not need to comment on whether an attorney can make a BDBN for the issues in question in the case, which in turn meant that the comments were not binding on other courts. That said, the court confirmed that, in its view, a BDBN is often a testamentary act and therefore cannot be delegated.

In particular, the court concluded that a BDBN is a testamentary disposition where the member of a superannuation fund has a present equitable entitlement to the money and the BDBN was not made further to a contractual right.

Having said this, in later cases, superior courts have largely ignored the reasoning and conclusions in *SM*.[26]

The decision in *Re SB; Ex parte AC*[27] provides further confirmation of the view that (subject to the terms of the relevant documents) an attorney can make a BDBN. In particular, the case confirms:

- the key question ultimately is: is a non-lapsing nomination a revocable disposition of property intended to take effect at death (ie akin to a will)? The court confirmed that the answer to this question is "no";
- as confirmed in *Re Narumon Pty Ltd*,[28] although the making of a BDBN under a superannuation fund has the effect of dealing with the payment of benefits following death, it is not a testamentary act, and so is not captured, by analogy, by the restriction against delegating to an attorney the making of a will;
- in *McFadden v Public Trustee for Victoria*,[29] it was also confirmed that the right to nominate a beneficiary was not a testamentary act; rather, it was the exercise of a contractual right;
- similarly, in *Re Application by Police Association of South Australia*,[30] it was confirmed that a BDBN is merely a right in the nature of a power of appointment; and
- thus, ultimately, the execution of a non-lapsing nomination is not a testamentary act. Rather, it is an act pursuant to a contract between the trustee and the member. The interest that a member has in a trust fund terminates on their death, and the nomination does not dispose of property but, by the exercise of a contractual right, directs the trustee on how the death benefit should be dealt with.

Therefore, a member's attorney will generally have the right to complete a BDBN for a principal, unless otherwise prohibited by the terms of the trust deed or attorney documentation.

Lost trust deeds

A previous article in this journal explored a range of issues in relation to the topic of lost trust deeds.[31] Briefly, the article explained that, where a trust's rules are uncertain due to the loss of the original deed, there is a threshold issue of a likely breach of the trustee's duty to ascertain the terms of the trust. This can, in turn, have a significant impact on the trustee's future ability to administer the trust, particularly from a tax perspective. The article set out a number of reported decisions that provide guidance as to what steps can be taken by trustees who are unable to locate an original, wet-signed trust instrument.

In *Sutton v NRS(J) Pty Ltd*,[32] the trustee provided the court with what appeared to be a full photocopy of a trust deed, dated on establishment in 1972. At all times, all relevant parties had acted on the assumption that the photocopy was indeed a true and full copy of the original deed (which had been misplaced).

A financier for the trust, operating under the "know your customer" policy, mandated production of the original trust instrument for sighting to ensure that the trust's constituent documents were in order.

As the trustee was unable to produce the original deed, an application to court was made, with part of the evidence including a further photocopy of the deed that was located with the law firm which originally drafted the trust deed.

In summary, the court confirmed:

- generally, in the absence of evidence to the contrary, it can be presumed from the taking of the action that the formalities have been complied with, that is, a presumption of regularity may apply to the effect that, where an act is done which can be done legally only after the performance of some prior act, proof of the later act carries with it a presumption of the due performance of the prior act;[33]
- in this case, however, there was no need to prove by inference that any formality had been complied with — the photocopy of the deed was signed and the evidence established directly that the parties concerned had always acted on the basis that it set out the terms of the trust;
- in this type of situation, it was held that the court should assist those responsible for the administration of the trust by ensuring that they can continue to administer it as if the photocopied deed was the trust's constituting document; and
- the way that this was achieved was for the court to formally order that the trustees of the trust were justified

in administering the trust on the basis that the photocopy of the deed that was annexed to the court order was a true copy of the original trust deed.

Conclusion

In modern estate planning, significant complexities from the interaction between the legislation relating to tax, trusts, bankruptcy, family law and superannuation have been omnipresent.

To coin a related estate planning phrase, rumours of the death of key tax and estate planning strategies such as trust splitting, testamentary trusts and superannuation have been somewhat exaggerated.[34]

While the level of ongoing income tax flexibility in a number of key areas will undoubtedly be lessened by changes from 2020, the reality is that there are still significant advantages from an income tax planning perspective despite the changes — not least of which because, with proper tracing and accounting, testamentary trusts should still be a legitimate source of excepted trust income distributions.

Furthermore, there are fundamental reasons why most people value the key structuring issues explored in this article, other than simply accessing the excepted trust income regime. For example, asset protection, limited liability, flexibility in asset management and access to the 50% CGT discount afforded to all forms of trusts.

Matthew Burgess, CTA
Director
View Legal

Acknowledgment

The assistance of the team at View Legal in the preparation of this article is gratefully acknowledged. Parts of this article are based on material that originally appeared in the Thomson Reuters *Weekly Tax Bulletin* and a number of state-based seminars presented for The Tax Institute.

References

1 M Burgess, "Tax and estate planning in 2020: what has changed?", (2020) 54(7) *Taxation in Australia* 372-379.

2 *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13.

3 M Burgess, "Tax and estate planning in 2020: what has changed?", (2020) 54(7) *Taxation in Australia* 372-379, and M Burgess, "2018: the biggest year in estate planning in a generation", (2018/2019) 53(6) *Taxation in Australia* 307-313.

4 [2001] HCA 33.

5 [2011] FCAFC 5.

6 Available at www.ato.gov.au/law/view/document?LocID=%22CTD%2FTD2019EC14%2FNAT%2FATO%2F00001%22&PiT=99991231235958.

7 For an analysis of the gift and loan back structure (in the context of a law firm seeking to patent the arrangement; the patent application was denied by the court) see *Grant v Commissioner of Patents* [2006] FCAFC 120.

8 Available at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22library/budget/2018_15%22.

9 *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*. Available at www.legislation.gov.au/Details/C2020A00064.

10 Available at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6466_ems_d1533a9e-7be7-4f4f-b619-2d1d9b3db016%22.

11 Australian Taxation Office, *Your income if you are under 18 years old*. Available at www.ato.gov.au/Individuals/Investing/In-detail/Children-and-under-18s/Your-income-if-you-are-under-18-years-old/.

12 Available at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6466_ems_d1533a9e-7be7-4f4f-b619-2d1d9b3db016%22.

13 M Burgess, "Bust-proofing trusts", (2014) 49(2) *Taxation in Australia* 85-93.

14 [2019] FamCA 421.

15 [2008] HCA 56.

16 S 108-7 ITAA97.

17 [2020] HCA 7.

18 S 24 of the *Partnership Act 1891* (Qld); s 21 of the *Partnership Act 1892* (NSW); s 25 of the *Partnership Act 1958* (Vic); s 21 of the *Partnership Act 1891* (SA); s 26 of the *Partnership Act 1963* (ACT); s 26 of the *Partnership Act 1891* (Tas); s 31 of the *Partnership Act 1895* (WA); s 25 of the *Partnership Act 1997* (NT).

19 [1967] HCA 32 at [23].

20 See NL Lindley, *Lindley on Partnership*, 11th ed, Sweet & Maxwell, 1951, p 428.

21 S 24 of the *Partnership Act 1891* (Qld); s 21 of the *Partnership Act 1892* (NSW); s 25 of the *Partnership Act 1958* (Vic); s 21 of the *Partnership Act 1891* (SA); s 26 of the *Partnership Act 1963* (ACT); s 26 of the *Partnership Act 1891* (Tas); s 31 of the *Partnership Act 1895* (WA); s 25 of the *Partnership Act 1997* (NT).

22 [1732] EngR 132.

23 [2018] QSC 185.

24 S Backhaus and D Butler, "Executors, SMSFs and conflicts of duty", (2019) 54(1) *Taxation in Australia* 41-44.

25 [2007] SCTA 93.

26 [2019] WASAT 22.

27 [2020] QSC 139.

28 [2018] QSC 185.

29 [1981] 1 NSWLR 15.

30 [2008] SASC 299.

31 M Burgess, "Lost trust deeds", (2016/2017) 51(6) *Taxation in Australia* 310-316.

32 [2020] NSWSC 826.

33 See, for example, *Harris v Knight* (1890) 15 PD 170, and *Re Thomson* [2015] VSC 370 where an unsigned SMSF trust deed was assumed to have been properly adopted, even though the relevant trustee had subsequently died.

34 The quote attributed to Mark Twain that, "The reports of my death are greatly exaggerated".