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Here we go again – trust deeds and holistic estate planning: a dangerous combination

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The recent, high-profile, decision in *Cardaci v Filippo PrimoCardaci as executor of the estate of Marco Antonio Cardaci [No 5]* [2021] WASC 331 provides further context in relation to a line of cases focused on the need to "read the deed", whenever considering the extent of variation powers of a trust. The issues in this regard are particularly stark when considering variations that potentially impact on the ultimate control of a trust.

Arguably one of the leading cases in this regard is the decision in *Jenkins v Ellett* [2007] QSC 154, where it was held that an attempted variation to change an appointor was invalid. This was because the relevant power in the trust deed was crafted so that it could only be used in relation to the 'trusts declared', and in particular did not extend to varying the schedule to the trust deed.

The decisions in *Re Owies Family Trust* [2020] VSC 716 and *Mercanti v Mercanti* [2016] WASCA 206 similarly provided key insights in relation to the rules which are relevant in this area.

Overview

In *Cardaci*, while there were a myriad of issues in contention, the focus of the trust deed interpretation aspects concerned a trust where a party, who had since died, was the trustee, appointor, guardian and a primary beneficiary.

Relevantly, the guardian role was designed to protect the interests of the beneficiaries, by giving the guardian a "blocking" power in relation to trustee decisions concerning certain 'reserved' powers.

The reserved powers, meant that the trustee required the prior consent of the guardian in relation to the power to:

- pay, apply or set aside trust income to a general beneficiary on the first occasion;
- appoint trusts of capital in relation to the Vesting Day; and
- advance capital, or make loans, to a beneficiary.

The powers of the guardian did not confer any power of appointment or other dispositive power, such as the ability to determine when a beneficiary would receive income or capital of the trust, the extent of such benefits or the identity of the beneficiary. Rather, the powers conferred on the guardian were negative powers; that is, the guardian's consent was required before the trustee could carry out the relevantly restricted transactions.

Guardianship

While the aggrieved beneficiary was successful in having her former brother-in-law removed as a trustee (via his control of the relevant trustee company) of the trust, she was unsuccessful in her attempt to remove him as guardian.

Concerned that allowing the former brother-in-law to remain as guardian would create a real risk that the proper administration of the trust would remain impeded, the 2 key lines of argument advanced by the aggrieved beneficiary related to:

1. restricting the guardian's powers by the court appointing a receiver to the role;
2. showing that the former brother-in-law's appointment as guardian was invalid, due to trust law deficiencies in the relevant deed of variation or due to it destroying the substratum of the trust.

Receivership

The Court accepted that a receiver may be appointed by the court over trust assets, powers of revocation and interests under discretionary trusts.

It was also acknowledged however that there are difficult questions that may arise as to what rights or powers are "tantamount to ownership", so as to be capable of being the subject of a receivership.

The Court concluded that the powers conferred on the guardian by the trust were not tantamount to ownership, however wide a meaning was given to that notion. Rather, the powers conferred on the guardian were merely "blocking" or veto powers. Thus, the powers of the guardian were held to not be capable of being the subject of a receivership.

Power of variation – invalidity

As has been confirmed regularly by the courts in this area, the rules for the construction of contracts apply also to trusts (including in relation to the efficacy of deeds of variation, see for example *Mercanti*).

Relevantly, the power of variation in the deed here included the phrase "...the trusts provisions terms and conditions contained in this deed". The Court was comfortable to conclude that this language was intended to refer to the trusts created or declared by the trust deed and to the other provisions, terms and conditions of the trust deed, including the schedule of the deed.

Furthermore, the provisions of the schedule in which persons were named, described or defined as the guardian were to be read and construed as if they were embodied in the definition of guardian in the body of the trust deed. Therefore, the power of variation was held to extend to the ability to vary the definition or description of the guardian in the schedule.

As the relevant deed of variation was approved by the deceased in his role as guardian, it was held to be valid in its appointment of the deceased's brother as guardian.

Power of variation – substratum

The Court confirmed its view that it was difficult to discern any substratum or purpose of the trust beyond making " provision for the persons ... set out and in the manner ... set out" in the trust deed, that is to benefit persons and entities in various degrees of relationship to the deceased.

As the deceased was appointed from establishment as the guardian this gave him ultimate control of the trust (via the power of veto over the exercise by the trustee of the reserved powers) and the power to only replace the guardian with the guardian's consent.

The power of the trustee, with the consent of the guardian to replace the guardian was held to not destroy the substratum of the trust, given that this could only occur with the consent of the guardian.

Challenge against personal estate of deceased

As part of the decision handed down by the Court, it was also confirmed that 100% of the deceased's personal estate should pass to the aggrieved beneficiary. The relevant factors offered by the court supporting its decision in this regard were as follows.

- The couple had been married just over 3 years at the date of the husband's death, although they had been in a relationship for almost 5 years.
- The aggrieved beneficiary was aged 29 at the date of her husband's death (he was 49).
- By the time of the trial, the aggrieved beneficiary was 34 years old with one dependent, a newborn child.
- The aggrieved beneficiary was financially dependent upon the deceased for the "high standard of living" which she enjoyed during the whole of her relationship with the deceased.
- The aggrieved beneficiary left her home in Melbourne and moved to Perth to be with the deceased in 2012, and ceased work in early 2014 to look after him during the illness which led to his death.
- There were no other claims upon the estate.
- Although the deceased was a wealthy man in the sense that he had access to great wealth for his personal use, he held few assets personally and left a relatively modest estate.
- As the aggrieved beneficiary was 34 years old at trial, mature, legally trained and an experienced lawyer, there was no reason for these funds to be held for her on trust (ie she should receive the assets absolutely. Interestingly, there was no discussion in the judgment as to whether a testamentary trust would have been appropriate given it would likely provide asset protection and tax planning benefits).

Conclusion

Cardaci offers yet another blunt reminder of the need to adopt the "read the deed" mantra – as part of a holistic estate planning exercise.

A failure to embrace this mantra will invariably guarantee only one certainty in many situations, protracted (and costly) litigation – as appears to have been the case here.