

## Appointor succession - some timely reminders for SMSFs

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As explored in other articles in SMSF adviser, generally from a trust law perspective, it is possible for the appointor or principal provisions of a trust deed to be amended.

This said however, any intended change must be permitted by the trust instrument, meaning the starting point will always be to 'read the deed' – the ubiquitous trust adviser's mantra.

The principles derived from trust related cases in this area are relevant for SMSFs also; even those that do not otherwise incorporate an ultimate control role (such as an appointor, principal or guardian).

The decision in *Lin & Ors v Lin & Ors (No 2)* [2022] VSC 542 provides helpful context in this regard.

### Deed extracts

The relevant extracts from the trust deed in this case were as follows:

1. the trustee had power, with the written consent of the appointor, to revoke, add to or vary any or all of the provisions of the deed of settlement – that is the power to vary was very wide.
2. the appointor, and on his or her death, such other person or persons as appointed to act as appointor (or his or her legal personal representative in default of any such appointment), were entitled at any time by instrument in writing to:
  - (a) remove any trustee;
  - (b) appoint any additional trustee or trustees;
  - (c) appoint a new trustee in place of any resigning trustee or trustee that ceased to be a trustee by operation of law.
3. on establishment of the trust, the appointor was named as the 'father' of the family unit, with the following conditions in the schedule of the deed:
  - (a) [the father] but only during his lifetime PROVIDED THAT [the father] may by Deed or Will (whether revocable or irrevocable) nominate any person or persons in substitution for himself to exercise all of the said powers during any period (whether or not extending beyond the life of [the father]).
  - (b) After the death of [the father] THE PERSON OR PERSONS NOMINATED BY HIM as herein before provided.
  - (c) After death [sic] of [the father] and in default of such nomination by Deed or Will as aforesaid THE LEGAL PERSONAL REPRESENTATIVE of [the father] (or in the event of a dispute between those persons constituting the legal personal representative of [the father]).
4. by deed of variation a clause was inserted into the deed that provided for the legal personal representative of an appointor to act as appointor in circumstances where the appointor became incapacitated, for the duration of their incapacity.

### Decision

In so far as the decision focused around the purported change of appointor by way of deed the court confirmed:

(a) there was clearly an express power for an appointor to appoint a new appointor in the schedule. Furthermore there was a power for an appointor to appoint a new appointor implicitly acknowledged within the language used in the relevant clause of the trust deed (that is 'The Appointor and on the death of the last surviving Appointor such other person or persons as shall have been appointed to act as Appointor...');

(b) the resignation by the father as appointor was effective and the relevant written notice was provided via the change of appointor deeds being signed by the original trustee companies, which in effect and explicitly provided for the father's resignation as appointor;

(c) on a proper construction of the schedule, the appointment of a successor appointor by the father did not lapse upon the death of the father. That is, the schedule did not require that any nomination of a substitute appointor stipulate a defined period for such nomination to operate nor specify whether that nomination was intended to extend beyond the life of the father. Specifically, the words 'during any period' were facilitative, rather than mandatory, and the words 'whether or not extending beyond the life of [the father]' were held to be of a similar nature.

Therefore the deed appointing a successor appointor to the father, which set out his desire to resign as appointor and irrevocably appoint his successor with immediate effect, were effective.

The word 'irrevocable' in this context was held to be sufficiently clear for the period of successor appointor appointment being indefinite, and thus intended to extend beyond the life of the father.

## **Contrasting decision**

The decision *Re Owies Family Trust* [2020] VSC 716 further reinforces the rules in this area, noting that conclusions below were not changed by the appeal decision in *Owies and Owies v JJE Nominees Pty Ltd* (ACN 004 856 366) (in its capacity as trustee for the Owies Family Trust) [2022] VSCA 142.

The case here had a factual matrix that was slightly nuanced from the *Lin* decision, although arguably very similar to a number of earlier cases, including *Mercanti v Mercanti* [2016] WASCA 206. In particular, a deed of variation purporting to change the nominated appointor and guardian set out in the schedule to the trust deed was held to be invalid.

For ease of reference, the full variation clause is set out at the end of this article. It is drafted in a similar manner to the wording that appears in many older trust deed precedents by some providers, and can be seen to be significantly narrower than the variation power in *Lin*.

In summary, unlike in the *Lin* decision, the variation was held to be void because:

1. The variation power included in the deed referred only to the 'trusts hereinbefore' declared - as distinct from a general power to vary the terms of the trust deed. The Settlor could have readily given the trustee such an expansive power of variation by the inclusion of plain and express terms in the trust deed if that was in fact intended;
2. The use of the above mentioned phrase created a trust deed that expressly distinguished between 'the trusts' upon which the trustee was to hold the trust fund, on the one hand, and the 'powers and provisions hereinafter expressed concerning the same', on the other;
3. Given the clear distinction made this strongly supported the conclusion that the power of variation under the deed did not extend to the powers available to the trustee in respect of the operation of the trust or, more generally, the other provisions of the trust deed which applied to the exercise of those powers;
4. As there was no duty or obligation on the trustee to amend the definitions of appointor (and guardian) in the schedule of the trust deed, those roles were not a 'trust' and accordingly not within the reach of the variation power under the trust deed;

5. Furthermore, any attempt to craft the purported variations as rather simply the 'declaration of new powers' would also have failed to the extent that they had the effect of actually changing the relevant provisions of the schedule to the trust deed; and

6. Ultimately, a power to vary a trust is different to a power to declare a new trust or a new power (these powers were also granted by the relevant clause). It does not follow simply from the co-location of these powers within the same provision of a trust deed that those powers should in effect be dissolved into one overarching power of amendment of a trust deed.

## **Owies deed extract**

The relevant variation power in the Owies case was as follows:

The Trustees for the time being may at any time and from time to time by deeds with the consent of the Guardian if alive revoke add to or vary all or any of the trusts hereinbefore limited or the trusts limited by any variation or alteration or addition made thereto from time to time and may by the same or any other deed or deeds declare any new or other trusts or powers concerning the Trust Fund or any part or parts thereof the trusts whereof shall have been so revoked added to or varied but so that the law against perpetuities is not thereby infringed and so that such new or other trust powers discretions alterations or variations:

- (i) may relate to the management or control of the Trust Fund or the investment thereof or to the Trustees' powers or discretions in these presents contained;
- (ii) shall not be in favour of or for the benefit of the Settlor or result in any benefit to the Settlor but shall otherwise be for the benefit of all or any one or more of the General Beneficiaries or the next of kin of any of them or the next of kin of the Primary Beneficiary or Primary Beneficiaries or any of them;
- (iii) shall not affect the beneficial entitlement to any amount set aside for any Beneficiary prior to the date of the variation, alteration or addition.

