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Costs can escalate exponentially when estate planning issues are ignored

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

A recent private binding ruling serves as a stark reminder of complexities that can arise when estate planning is overlooked and an SMSF member loses capacity, according to legal expert Matthew Burgess.

Mr Burgess said the decision profiled recently in SMSF Adviser, Re Rentis Pty Ltd [2023] QSC 252, ultimately confirmed that an attorney may use the powers under an EPA to make a binding death benefit nomination (BDBN) on behalf of an incapacitated member.

"Implicit in the decision, however, was the fact that material costs would have been borne by the member and the ultimate beneficiaries to achieve clarity about the legal position," he said.

Arguably, the vast majority of these costs would have been avoided had a robust holistic estate plan been implemented before the member lost capacity."

A more recent decision OSD; SMA & Anor v FJX & Anor; OSD & Anor v ABJ [2023] QSC 264 again showed how important it is for an estate plan to be implemented before a member loses capacity.

This instance involved a key party with personal wealth exceeding $14.5 million who had not adequately arranged estate planning.

Despite some historical estate planning steps, the court found certain documents, including the enduring power of attorney (EPA), to be less than ideal. Mr Burgess noted: "For example, an EPA which was, on any view, nonsensical or as the beneficiaries' counsel described it in their written submissions, absurd."

He added that the EPA also had the discretion to arrange the transfer of assets to an inter vivos trust that was non-existent in contemplation of the succession plan as a whole but did not identify nor refer to any document that might advise the terms of such a plan.

Moreover, in court, the wills were described by the various parties as both "impenetrable and stiflingly complex".

"The court confirmed the wills were 'bound up' in trusts and discretions, directions and wishes," Mr Burgess said.

"The circumstances in which one of the wills was made were held to be 'somewhat concerning and slightly bizarre'." These complexities resulted in protracted legal proceedings, involving six barristers, including three king's counsels and four specialist law firms.

"Given the age and state of health of the willmaker at the time, there were serious questions about whether they knew and approved of the contents of the will and whether they understood the effect of the will," Mr Burgess said.

"The likely inability to understand the will was particularly stark given the extraordinarily broad discretions granted to the trustee under the terms of the will."

Mr Burgess explained that these discretions enabled the trustee to effectively dispose of the willmaker's assets in a manner which could exclude their only surviving blood relatives, and generally on any terms, which the trustee had a complete discretion to ascertain.

He also noted that the court sidestepped the provisions of the will and endorsed an approach that saw the attorneys permitted to cause certain inter vivos trusts to be established.
"The attorneys were also permitted to transfer the willmaker's assets, valued at about $13.4 million, to one of those trusts and to retain about $1 million in her bank account," he added.

Earlier decision

Although it is not mentioned in the decision, Mr Burgess said it may be that the will in this instance was similar to that in the case of James v Douglas [2016] NSWCA 178.

"In this case, the court observed that 'the will was of great length and greater complexity' – apparently incorporating many of the potential testamentary trusts set out below," he said.

"The court confirmed its view that the will had 'all the hallmarks of a document constructed from a precedent containing general and specific provisions which were to be adopted, completed and amended, depending on the circumstances of the particular (willmaker's) wishes'."

The decision continued that "in such a case, when construing the will it is not obvious that if there was a simpler or clearer means of recording the (willmaker's) wishes, the draughtsperson necessarily would have adopted it".

"Here, the court accepted the lawyer who prepared the will did discuss with the willmaker at least in outline, what he thought were the significant provisions of the draft will," Mr Burgess said.

Furthermore, the court concluded that the willmaker would also not have been informed of the powers that were vested in the appointor.

"This meant, the purported exercise of powers by those who thought they were validly named as appointors required two court cases to resolve that they, in fact, were not the appointors of the relevant trust," he said.

"Another clear example of material costs being caused by the direct consequence of an inappropriate estate plan."