Tax and estate planning in 2024: what's "hot" right now?

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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 tax structuring. Holistic 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. Near the start of a new calendar year, it is timely to explore a number of the most critical developments in the tax and estate planning arena over the last 12 months – or, in the vernacular of the movie *Zoolander*, what's so hot right now?

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 holistic estate planning to utilise appropriate tax structuring.

Around this time last year, an article in this journal[1] explored a number of key tax and estate planning related changes, including:

- trust distributions and trustee duties;
- regulating the assets of related entities;
- asset protection and the "gift and loan back" strategy,[2] particularly in light of the decision in *Re Permewan No. 2*;[3] and
- superannuation.

Twelve months on, this article examines the following key tax structuring and estate planning related developments in 2023, namely:

- lost trust deeds;
- loans, gifts and books of account;
- trusts and asset protection in family law situations; and
- a further key development in relation to superannuation and estate planning.

Lost trust deeds

As explored in previous articles in this journal,[4] lost trust deeds are a critical issue for all tax advisers and their clients.

The issues in relation to lost trust deeds appear to have intensified in recent years, at least in part driven by financiers complying with the "know your customer" regime.[5]

In the equivalent article last year in this journal, the decision of *Mantovani v Vanta Pty Ltd (No. 2)*[6] was explored in relation to the fiduciary duties owed by trustees, including in relation to securely retaining custody of the original, wet-signed, trust instrument and all variations.[7]

Fiduciary trustee duties are generally seen as the most onerous of all legal duties and, where they apply, they require a person to act solely in another party's interests.[8]

The decision in *Jowill Nominees Pty Ltd v Cooper*[9] underlines the importance of two of the key fiduciary trustee duties of any form of trust. That is, the duty of a trustee to know the terms of the trust deed, and to keep the original and, at least before November 2021, wet- (not electronically) signed trust instrument safe and secure.

Broadly, the factual matrix involved a trust that was established in 1976 and had, for many years, had as its substantive asset shares in Coopers Brewery Ltd. The original trust deed was unable to be located and there was also no copy of the document.

There was, however, an advice letter from a lawyer in 2007, based on a review of the original trust deed, that explained a number of key provisions, including the range of beneficiaries. Other aspects were also able to be reverse-engineered, such as the probable perpetuity period and the fact that the deed likely permitted capital distributions.

The capital distribution power was assumed to exist by the court on the basis of the lawyer's evidence that, if it did not, this would have been flagged in the advice letter, particularly because the lawyer confirmed that no trust deed read in 45 years of practice failed to contain such a provision.

The court confirmed that, under the relevant state-based Trustee Act, it could vary the trust deed (effectively adopting a new deed here), so long as the following tests were met (all of which were met, primarily due to the evidence of the lawyer that provided the 2007 advice letter):

- there is good reason to make the proposed exercise of powers;
- the proposed exercise of powers is in the interests of beneficiaries;

- the proposed exercise of powers will not result in one class of beneficiaries being unfairly advantaged to the prejudice of another class (here, it was critical that all beneficiaries were represented before the court);
- the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust;
- the proposed exercise of powers will not disturb the trust beyond what is necessary to give effect to the reasons for the revocation or variation; and
- the application is not substantially motivated by a desire to avoid or reduce the incidence of tax.

The deed approved by the court was based on a precedent as at 1978 of the firm that had likely drafted the trust deed, adjusted to align with the advice from 2007.

While the court did consider a request to simply revoke the trust, it ultimately confirmed its preference to approve the varied, adopted trust deed as it was the least disruptive approach. The court confirmed that the trustee could choose to exercise its discretion to make a capital distribution of the assets of the trust and subsequently vest the trust, relying on the terms of the court-approved deed.

The original decision in the case of *Mantovani v Vanta Pty Ltd (No. 2)*[10] and the appeal decision in *Vanta Pty Ltd v Mantovani*[11] starkly demonstrate that serious consequences flow where a trustee fails to maintain, and be familiar with the terms, of the full original trust deed.

In a factual matrix that centred around a trust where, despite extensive searches, only the schedule of key details could be located, the court considered the following six key issues (with the conclusion also noted briefly, before being explored in more detail below):

- Question 1: Was the trust deed lost? Answer: Yes.
- Question 2: Could secondary evidence be relied on to prove the existence and contents of the lost trust deed? Answer: No, although this conclusion was reversed on appeal.
- Question 3: Could the presumption of regularity be relied on to save the trust from failing? Answer: No.
- Question 4: Did the trust fail for uncertainty? Answer: Yes, although again this conclusion was reversed on appeal.
- Question 5: Should a declaration be made that the trustee held the trust property on a resulting trust for the settlor (or their estate)? Answer: Yes, although this conclusion was essentially made irrelevant due to the appeal decision determining that the trust had not failed for uncertainty.
- Question 6: Should an order for the taking of accounts and payment of moneys by the trustee owed to the settlor be made? Answer: Yes again, however, this was a conclusion which was reversed on appeal, given the trust was held to have not in fact failed.

On the basis of evidence showing that reasonable searches and inquiries had been made with all relevant persons, legal and accountancy firms, and third-party authorities that could have been expected to hold a copy of the trust deed, without success, the court concluded that the deed was lost.

Although a number of cases were discussed in relation to the secondary evidence requirements, arguably, the leading case for where a trust deed has been lost is *Maks v Maks*.[12] In this case, the court concluded that, where secondary evidence is being relied on to prove the existence of a trust, there must be clear and convincing evidence not only of the existence of the trust, but also of the terms of the trust.

In particular, as confirmed in *Chase v Chase*,[13] there needs to be evidence to satisfy the “three certainties of a trust”, that is:

- the identity of the beneficiaries;
- the property the subject of the trust; and
- the nature of the trust (ie whether fixed or discretionary).

Generally, to satisfy these tests, the successful cases are those where the text of the missing document has been able to be reproduced in full.[14] Furthermore, the court must be “vigilant, being fully cognisant of the dangers of error and fraud, and the gravity of the consequences flowing from any finding made”.[15]

In *Mantovani v Vanta Pty Ltd (No. 2)*,[16] the court in the initial trial confirmed that, while the schedule provided some basic information about the trust, it fell well short of providing clear and convincing proof of the contents of the trust deed. Therefore, the trust necessarily failed for uncertainty.

On appeal, however, the court concluded that the adoption of the “clear and convincing” proof test can produce two anomalies, namely:

1. it imposes too high a burden on the party endeavouring to prove the existence of the relevant facts, rather than respecting the reality that there can be a range of secondary evidence (oral and written) which assists in establishing the contents of a missing document, provided the facts and inferences to be drawn are established on the balance of probabilities; and
2. in a number of cases (including the initial trial judgment in this case), the emphasis on the strictness of this test conveys that, in the case of a missing document, only a facsimile or duplicate of the original document in its entirety will suffice in establishing sufficient proof of the terms of the document, which is incorrect given it essentially implies that almost all (if not all) of the terms of the deed need to be proven to avoid a finding that a trust has failed for uncertainty.

Instead, the key question is whether there is sufficient proof of the essential terms of the deed such that the missing deed does not cause the trust to fail for uncertainty. In the absence of a full copy of the deed, proof of the relevant facts and inferences (to be drawn from those facts) can be established on the available secondary evidence.

In what is arguably a timely reminder for all trust advisers, the trial judge confirmed that the obligation to act in strict

conformance with the terms of a trust deed is "perhaps the most important duty" of a trustee.[17]

Where, as here, the deed has been lost, there is a material risk that a trustee will be held to be unable to discharge this overriding obligation and will be held to be acting in breach of trust.

At the initial trial, it was concluded that the trust must be held to have failed due to the lack of certainty of its terms. Indeed, the court confirmed that any decision by it that permitted the trustee to continue to deal with trust assets and administer the trust would effectively have amounted to sanctioning further breaches of trust.

On appeal, however, in direct contrast to the trial judge, the court confirmed that:

- there was sufficient evidence available as to the essential provisions of the trust to hold that it subsisted and remained valid;
- the court has the power to make orders or give directions as to the further administration of a trust, including adducing further evidence, determining the likely duration of the trust, and making orders as to the scope of the trustee's management powers;
- the court can also make any other orders to ensure that the trust is administered as intended; and
- a conclusion that a trust remains validly in existence is a far more preferable approach if it is consistent with the accepted evidence of the key parties (eg the settlor and the trustee), and the court should generally be reluctant to declare a trust as failing for uncertainty.

However, the fact that the lost trust deed caused both the initial trial and the appeal case (with each reaching radically different conclusions on the key issue) should be a stark warning to all trustees and their advisers. Indeed, what would, in all likelihood, have been material costs of the court cases further reinforces the adverse consequences that can flow from lost trust deeds.

As is the case in every lost trust deed situation, all of the issues that arose in this case would have been avoided had the trustee discharged its duty of ensuring not only that the original trust deed was kept securely, but that it was also read and complied with.

In other words, in addition to securely storing constituent trust documents, the trustee (and its advisers) should have embraced both of the "read the deed" and "heed the deed" mantras.

The appeal decision in this case does seem to provide some comfort for those involved with lost trust deeds, particularly given cases such as:

- *Re Cleeve Group Pty Ltd*,[18] where it was confirmed that, if there is a full copy of the deed (even if unexecuted), there is either no need to prove the terms through "clear and convincing" evidence, or if there is a need, the terms of the draft documents provide that "clear and convincing" evidence. Subsequent cases have also reached the same conclusion;[19] and
- *DR McKendry Nominees Pty Ltd*,[20] where a lost trust deed was accepted as being in the form of a solicitor's usual pro forma deed from the relevant era.

Loans, books of account and gifts

In estate planning arrangements, there are a range of relevant issues where two parties potentially owe mutual liabilities or obligations, including documenting the arrangements through books of account.

The case of *Horn v GA & RG Horn Pty Ltd*[21] provides a useful summary of the key principles to be considered in relation to loans, book entries and gifts.

In relation to loans and book entries, the court specifically confirmed the principles summarised below.

A loan is ordinarily understood to be an advance of money, coupled with a contract for its repayment.[22]

The intention of the parties to a loan, usually, is that ownership in the funds passes to the borrower and the lender is left with an in personam right, secured or unsecured, of repayment.[23]

Statutory provisions may extend the concept of a loan beyond that understood under the general law. For example, the provisions of Div 7A of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) define a "loan" as including: not only an advance of money, but also a provision of credit or any other form of financial accommodation; a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; and a transaction (whatever its terms or form) which in substance effects a loan of money (s 109D(3) ITAA36).

The party asserting that a loan exists bears the onus of proving that the payment of moneys should be characterised as a loan or in some way other than as a gift.[24]

The aforementioned onus is not discharged by mere proof of the payment itself.[25]

A payment of money may be made by making a journal entry in books of account where there is agreement by the relevant parties that payment be made by that means.[26]

Often a journal entry is simply shorthand for money or a cheque being handed across the table and money or a cheque being handed back.[27]

Conversely, a payment of money (purportedly) made by making a journal entry in books of account without reference to, or without the agreement of, the persons said to be the recipients of the money is ineffective in establishing a debt or any payment of money in discharge of such debt.[28]

Sometimes an agreement may be inferred between related companies to make payment by book entries, for example, where the companies were or are part of a wholly-owned group, share common directors, the group business is operated through a single bank account, the companies' accounts are all the subject of declarations by directors under the *Corporations Act 2001* (Cth) stating that they give

a true and fair view of the financial position of the entity in question, and like (or similar) directions are made by independent auditors.[29]

That said, the existence or otherwise of an enforceable agreement depends ultimately on the manifest intention of the parties, objectively ascertained. Where mutual promises are sought to be inferred, the conduct relied on must, on an objective assessment, evince a tacit agreement with sufficiently clear terms. It is not enough that the conduct is consistent with what are alleged to be the terms of a binding agreement. That is, the evidence must positively indicate that both parties considered themselves bound by that agreement.[30]

A loan may arise where it is within the scope of the authority of an accountant to characterise a payment as a loan. Thus, as an example, in *Di Lorenzo Ceramics Pty Ltd v FCT*,[31] a loan was found to exist where:

- none of the directors or members of the relevant companies had given close attention to the legal character that the payments made by company A on account of the liabilities of a trustee company (being a trustee of a unit trust) was to bear;
- there was no evidence of an express agreement that the amounts were to represent either a loan or a subscription for additional units (and there was no suggestion that they were intended to be a gift);
- there was no agreement that the amounts were to be repaid by a particular date;
- there was no agreement that any particular number of additional units was to be issued; and
- the directors were content to leave the proper characterisation of the payments to the accountant as he saw fit and to prepare the company's and the unit trust's financial statements and tax returns accordingly. The evidence of an express instruction in the form of reference to a loan to the trustee company written against entries in company A's bank statements that were provided by a director to the accountant were able to be regarded as her acquiescence in the course that the accountant was already taking.

In relation to gifts, the court also confirmed:

- there is a presumption that a parent who provides money to a child (including adult children) has advanced the money as a gift;[32]
- in family or domestic transactions, there is always a preliminary issue for the party seeking to challenge a payment as to whether it is accompanied by any intention to create or affect legal relations;[33]
- it is no longer presumed that, in domestic transactions, the parties do not intend to create legal relations. The modern principle is that the issue is one of onus of proof for the plaintiff, who must prove that there was an intention to create legal relations;[34]
- a payee cannot, by subsequently describing an advance in language consistent with a loan, alter the status of the advance if it was in fact a gift, although the payee can gift (or forgive) moneys that were originally the subject of a loan;[35] and
- generally, once moneys are gifted, they cannot be recalled.[36] That is:

  "Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. [Therefore], where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor."

Ultimately, particularly in tax and estate planning situations, the factual matrix and evidence will be critical. For example, in *Russell and Dunphy v Dunphy*,[37] various alleged loans by a will-maker to an adult child were all held to be unsubstantiated. This conclusion was at least partly due to the fact that, essentially, the only evidence of their existence were handwritten Post-it notes pinned to a cork board on the floor next to the will-maker's desk.

The court confirmed that the Post-it notes made no reference to a loan, and the relevant child denied both having been shown the Post-it notes and borrowing the amounts mentioned. Therefore, the Post-it notes did not establish a loan.

> "… serious consequences flow where a trustee fails to maintain … the full original trust deed."

At most (assuming that the Post-it notes purported to record a loan), they were evidence of an uncommunicated, subjective intention harboured by the will-maker and therefore could play no part in the objective assessment of whether there was a contract of loan.

A further element in relation to a number of the alleged loans was that any potential cause of action was statute-barred long before the proceedings began, despite the parties alleging the loans arguing that the cause of action of a loan on demand arose when demand was given.

However, the court confirmed that it is well established that a loan of money on request creates an immediate debt (ie repayable on demand) — and the debt which constitutes the cause of action arises instantly on the creation of the loan, not on any subsequent demand for repayment.[38]

Trusts and asset protection in family law situations

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.[39]

The decision in *Balken & Vyner*[40] provides an important reference point as an example of the approach that the Family Court takes in relation to family trusts, and one that we have seen adopted in subsequent situations that have been settled prior to trial.

Broadly, the factual matrix in this case was as follows:

- a couple, both previously married, had a period of perhaps a few years as de factos prior to their marriage (there was a debate as to when a de facto relationship may have started);
- the couple were married for six years;
- the majority of the asset pool was owned via trusts; and
- the majority of the trusts were created by, and the assets held via them contributed by, the husband's father (who died shortly before the couple married).

There was significant disagreement between the spouses on almost every substantive issue before the court, including the overall value of all assets, with the wife's estimate ($63m), more than double the husband's ($31m).

Specifically in relation to the level of control of the trusts that the husband had (and therefore, in turn, the ability for the court to apportion assets held via the trusts to benefit the wife), the key comments outlined below were made.

The husband was not the sole appointor of key trusts, nor the sole director or shareholder of the trustee companies.

The husband's father had left a letter of wishes[41] addressed to the directors and shareholders of the trustee company setting out his instructions.

There were independent directors of the trustee companies, and these persons were also appointors. The directors held regular meetings and exercised their discretion in relation to the income and capital of the trusts in accordance with the letter of wishes and there was no evidence which suggested that they would not continue to do so.

The accepted evidence was that the directors of the trustee had always acted, and would likely continue to act, in accordance with the wishes.

This meant that the husband had a present entitlement to 40% of the income and 40% of the capital, but only on the trusts vesting, as opposed to the 100% immediate entitlement to all income and capital of the trusts suggested by the wife.

The court confirmed that the evidence clearly demonstrated that the husband did not control the trusts, nor could he use the assets of the trusts for his own purposes.

In particular, there were regular meetings of the directors of the trustee companies. The husband reported to those meetings and was required to account to the other trustees and justify his actions.

To the extent that the husband was responsible for the day-to-day management, an independent director (a consultant to the group) reviewed the accounts and queried the husband about particular transactions. The husband was required to justify his actions to the other directors (which included a partner at a law firm) and ultimately to the beneficiaries.

The evidence also demonstrated that, if the husband received more than he was entitled to, according to the terms of the letter of wishes, any amount over and above was debited against his loan account and he was either required to repay those amounts or pay interest on any loan account balance.

Ultimately, the asset pool was decided to be in the region of $35m, which effectively excluded a number of assets held in the trusts due to the practical limitation on the husband's potential entitlements imposed by the letter of wishes.

The husband suggested a 85%–15% split in his favour. The wife suggested 65%–35% in the husband's favour.

In a detailed balancing of the contributions, the court made a primary allocation of 77.5%–22.5% in favour of the husband, with a further adjustment to benefit the wife, making the final allocation 75%–25% in favour of the husband.

Despite the above points highlighted by the court, advisers must be mindful of the fact that the significant emphasis placed on the letter of wishes and the fact that the Family Court held that the trustee directors essentially considered themselves bound by it need to be considered in light of wider trust principles. For example, the potential tax and stamp duty consequences of the letter of wishes, perhaps causing the various trusts to be amended, were not explored.

Furthermore, neither the rules against trustees fettering their discretion,[42] nor whether the trustee directors were otherwise discharging the three key obligations on a trustee exercising a discretion, were explored, namely:

- to do so in good faith;
- on a real and genuine consideration (a requirement that is so obvious that it is often not mentioned); and
- in accordance with the purpose for which the discretion was conferred.

A key development regarding superannuation and estate planning

Perhaps the most controversial intersection of tax, estate planning and superannuation laws is "fast death tax".

So-called "fast death tax" arises where funds that could otherwise be withdrawn tax-free by the member of a superannuation fund during their lifetime, remain in the fund at the date of death of the member and are then subject to tax on the distribution from the fund.

There are generally three potential pathways to manage this form of death tax:

1. ensure that the funds are withdrawn prior to death, while the member has capacity;

2. implement a complementary enduring power of attorney, allowing an attorney to withdraw funds if a member loses capacity and ensuring that the withdrawal is completed before the member's death; and
3. the member could sign a direction as to future withdrawal, with the effective date defined as being (say) one day prior to their death. In relation to this approach, if a complementary enduring power of attorney is in place, the attorney could sign such a direction.

The first two approaches appear to be accepted by the ATO. The third approach had historically been approved in a number of private binding rulings[43] issued by the ATO, but not publicly.

This approach relies primarily on s 307-15 of the *Income Tax Assessment Act 1997* (Cth) which provides:

"(1) This section applies for the purposes of:

(a) determining whether a payment is a ***superannuation benefit***; and

(b) determining whether a superannuation benefit is made to you, or received by you.

(2) A payment is treated as being made to you, or received by you, if it is made:

(a) for your benefit; or

(b) to another person or to an entity at your direction or request."

While, generally, a death benefit is defined as being a payment made to someone due to the death of another person, a payment under s 307-15 would seem to create a pathway that allows a payment to be held to have been made to a member, despite the fact that they have died.

A key aspect to supporting an argument along the lines outlined above, based on the private binding rulings issued by the ATO, is that the direction signed by the member must be drafted to specifically confirm reliance on s 307-15.

Furthermore, it should be noted that the private binding rulings issued by the ATO do not consider whether the anti-avoidance provisions under Pt IVA ITAA36 may be applicable to a direction as to future withdrawal designed to effectively sidestep the potential triggering of fast death tax.

The robustness of the above summarised approach is also subject to the ATO publication *Paying superannuation death benefits*,[44] which is outlined below.

If a member requests an amount to be paid from their fund before they die, but dies before they receive it, it may be a member benefit in some "limited" cases. The outcome in this regard is said to be "determined by the facts and circumstances surrounding the payment".

The relevant facts and circumstances listed by the ATO are set out as including:

- the terms of the request from the member;
- the terms of the trust deed and any other governing rules;
- the knowledge of the trustee at the time the payment is made (including whether the trustee is aware that the member has died);
- the entity that the payment is being paid to (eg the member's personal account or an account in the name of the member's legal personal representative);
- the circumstances and timing of the payment; and
- whether the payment is made because of, and in line with, the request made by the member.

Critically, the examples provided[43] by the ATO draw particular distinctions on the following items, apparently making them key factors in determining whether a payment after death is a member benefit or a death benefit:

- whether the trustee was aware that the member was deceased at the time of the payment (with the trustee being unaware supporting a conclusion that the payment is a member benefit); and
- whether the payment was made to an account in the name of the member or in the name of the member's legal personal representative (with payment to the member's account supporting a conclusion that the payment is a member benefit).

As flagged in the examples, this seems to indicate that the ATO believes that SMSFs will be unlikely to substantiate payment of a member benefit (as opposed to a death benefit) post-death (since the trustee is almost certain to be aware that the member has died) as compared to an APRA or retail fund where the trustee may be unaware of the member's death at the date of payment.

Furthermore, unless the purported member benefit payment is supported by the trust deed and implementation documentation and is made to the bank account of a member, any payment following a member's death is likely to be treated by the ATO as a death benefit.

These conclusions are arguably confirmed by subsequent ATO private binding rulings. For example, in two separate rulings where requests for withdrawal to retail funds were submitted on the day of, but before, the relevant member's death, the ATO reached following conclusions:

- with the first situation, the payment was treated as a member benefit, primarily on the basis that the trustee of the superannuation fund was not aware of the member's death before it paid the lump sum benefit;[45] and
- in the second factual matrix, the payment was treated as a death benefit, as the original request was held to be invalid on the basis that it was an electronic (as opposed to a wet-signed) request (wet-signed requests being a requirement for valid instructions under the rules for the fund), and the subsequent wet-signed request was sent after the date of death at a time when the trustee was aware that the member had died.[46]

The ATO approach appears to reinforce its view that SMSFs will never be able to rely on a withdrawal request made, but not completed, before death. That said, based on the reasoning in the above private binding rulings, it may in fact

be the case that a payment after the death of a member by an SMSF could be a member benefit where the SMSF is administered by an external adviser (eg an accountant or an SMSF administrator).

A subsequent ruling[47] also provides context as to the approach that the ATO is taking in this area.

While it is unclear, under the later ruling, whether the fund was an SMSF, the key elements of the factual matrix were as follows:

- the relevant member lacked legal capacity and, as there was no enduring attorney document, the member's niece and niece's husband were appointed by a state tribunal as administrators;
- the administrators completed a withdrawal and account closure form for the member's account-based pension, and submitted it to the fund before the member's death; and
- payment of the benefit into the member's personal bank account was made one day after their death.

Applying reasoning similar to that summarised above, the ATO concluded that the payment was a member benefit, based specifically on the following:

- an assumption that the benefits were paid in accordance with the trust deed and other governing rules;
- the lump sum was paid into the member's personal bank account, the trustee was unaware of the member's death and payment of the lump sum was paid one day after death, and therefore the trustee made the payment with the expectation that the member would be alive to receive it; and
- the timeframe between the trustee becoming aware of the member's death shortly after it occurred and the payment being made one day after the member's death indicated that the payment was made because of, and consistent with, the member's request (via their administrator) as a member benefit payment.

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, "in this world nothing can be said to be certain, except death and taxes"[48] – and, arguably in Australia, changes to the superannuation regime.[49]

As has been the case in each of the last few years, there are fundamental reasons why specialist tax and structuring advice will remain critical components of any holistic estate planning exercise.

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References

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2 Interestingly, another productised version of the gift and loan back arrangement promoted to self-managed superannuation funds (SMSFs) gained the attention of the ATO in its publication *SMSFs and schemes involving asset protection*, QC 71175, 22 December 2022.

3 [2022] QSC 114.

4 M Burgess, "Tax and estate planning in 2021: where are we at?", (2021) 55(7) *Taxation in Australia* 357, and M Burgess and H Dunnett, "Lost trust deeds", (2016–17) 51(6) *Taxation in Australia* 310.

5 As enforced by AUSTRAC in accordance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and the *Financial Transaction Reports Act 1988* (Cth).

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8 *Loughnan v McConnell* [2006] QSC 359.

9 [2021] SASC 76.

10 [2021] VSC 771.

11 [2023] VSCA 53.

12 (1986) 6 NSWLR 34, and again see M Burgess and H Dunnett, "Lost trust deeds", (2016–17) 51(6) *Taxation in Australia* 310.

13 [2020] NSWSC 1689.

14 See, for example, *Barp Nominees Pty Ltd* [2016] NSWSC 990.

15 See *Orifici as Executor of the Estate of Rosaria Giuseppe Orifici v Orifici* [2007] WASC 74.

16 [2021] VSC 771.

17 See *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15.

18 [2022] VSC 342.

19 See, for example, *Willmington Investments Pty Ltd v Sarich* [2023] WASC 191 and *Application of NBT Pty Ltd* [2023] NSWSC 919.

20 [2015] VSC 560.

21 [2022] NSWSC 1519.

22 See *Papas v Co* [2018] NSWSC 1404.

23 See *Ying v Song* [2010] NSWSC 1500.

24 See *Heydon v Perpetual Executors Trustees & Agency Co (WA) Ltd* [1930] HCA 26.

25 See *Schmierer v Taouk* [2004] NSWSC 345.

26 See *Manzi v Smith* [1975] HCA 36.

27 See *Re York Street Mezzanine Pty Ltd (in liq)* [2007] FCA 922.

28 Again, see *Manzi v Smith* [1975] HCA 36.

29 See *De Vries v Timbercorp Finance Pty Ltd (in liq)* [2021] VSCA 265.

30 See *Adnunat Pty Ltd v ITW Construction Systems Australia Pty Ltd* [2009] FCA 499.

31 [2007] FCA 1006.

32 See *Calverley v Green* [1984] HCA 81.

33 See *Voce v Deloraine* [2012] NSWSC 1187.

34 Again, see *Steiner v Strang* [2016] NSWSC 395.

35 See *Jukka Pekka Kemi v Peter Hedley Wood* [2013] NSWSC 180.

36 See *Ogilvie v Littleboy* (1897) 13 TLR 399.

37 [2023] NSWSC 282.

38 See *Ogilvie v Adams* [1981] VR 1041 and *Fischer v Nemeske Pty Ltd* [2015] NSWCA 6.

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

40 [2020] FamCA 955.

41 The letter of wishes is reproduced in the judgment and provides compelling reading for advisers in this area. Please make contact with the author if you would like access to the extract, without needing to read the entire case.

42 See *Dagenmont Pty Ltd v Lugton* [2007] QSC 272.

43 See, for example, PBR 1051437446368 and PBR 1051914995135.

44 Australian Taxation Office, *Paying superannuation death benefits*, QC 45254, 10 February 2023.

45 PBR 1052091672127.

46 PBR 1052097327812.

47 PBR 1052162946778

48 Attributed to American statesman Benjamin Franklin.

49 Arguably attributed to most specialist advisers.

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