Tax and estate planning in 2025: strategies and risks

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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 appropriate tax structuring in all estate planning related areas. At its heart, therefore, "holistic" estate planning is predicated on a deep understanding of tax-related second order consequences. In recent years, holistic estate planning has seen a constant 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 again explore a number of the most common strategies utilised in the holistic tax and estate planning arena over the last 12 months and to consider the risks associated with those strategies.

Introduction

Considering 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 several key tax and estate planning related changes, including:

- 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 – in particular, in relation to binding nominations.

Twelve months on, this article examines the following tax structuring and holistic estate planning related developments sourced from 2024 (and particularly highlights some important hazards that advisers should actively seek to avoid) as the foundation for the year ahead in 2025, namely:

- (unnecessarily) complex testamentary trusts;
- gift and loan back strategies;
- estate equalisation and "hotchpot" arrangements; and
- superannuation and binding death benefit nominations (BDBNs).

(Unnecessarily) complex testamentary trusts

Implicit in many estate planning arrangements that derail is the fact that material costs are borne by the ultimate beneficiaries under the estate to achieve clarity about the legal position.

Arguably, most of these costs can be avoided where a willmaker proactively invests to implement a robust holistic estate plan, while taking equal care to avoid the pitfall of unnecessarily complex arrangements.

The decision in *Re OSD; SMA v FJX; OSD v ABJ*[2] starkly highlights this point.

In a relatively complex factual matrix, the key party had lost capacity and had not adequately implemented arrangements in relation to personally owned wealth that exceeded $14.5m.

In proceedings that evolved over a number of years, the decision involved:

- six barristers, including three King's Counsel; and
- four specialist law firms.

While some estate planning steps had been taken historically, the court commented that a number of the documents in place were less than ideal. For example:

- an enduring power of attorney which was, on any view, nonsensical and incomplete or, as the beneficiaries' counsel described it in their written submissions, "absurd".[3] For example, it referred to:
  - a will that did not exist at the time it was executed;
  - a trust, the terms of which also did not exist when the enduring power of attorney was signed; and
  - a discretion to arrange the transfer of assets to an inter vivos trust that was non-existent "in contemplation of my succession plan as a whole"[4] but did not identify nor refer to any document which might advise as to what the terms of such a plan were; and
- conversely, wills which were "well described by the various parties as both impenetrable and stiflingly complex".[5] For example:
  - the court confirmed that the wills were "bound up" in trusts and discretions, directions and wishes;
  - the circumstances in which one of the wills was made were held to be "somewhat concerning and slightly bizarre";[6]
  - the wills were unduly complex and, given the age and state of health of the willmaker at the time, there were serious questions about whether the willmaker knew

and approved of the contents of the wills and whether they understood the effect of the wills; and

- the likely inability to understand the wills was particularly stark given the extraordinarily broad discretions granted to the trustee under the terms of the wills which enabled them to effectively dispose of the willmaker's assets in a manner which could exclude her only surviving blood relatives, and generally on any terms which the trustee had a complete discretion to ascertain.

In effectively sidestepping the provisions of the final will, the court endorsed an approach that saw the attorneys permitted to:

- cause certain inter vivos trusts to be established; and
- transfer the willmaker's assets valued at about $13.4m to one of those trusts and to retain about $1m in her bank account.

While not mentioned in the decision, it may be that the wills here were similar to that in the case of *James v Douglas*.[7] In this case, the will was of great length and greater complexity — apparently incorporating many of the potential testamentary trusts mentioned in the above decision.

It appears that the approach of the lawyers drafting the wills in the abovementioned cases may have been similar to one that has been popular from time to time, and that is to allow for the potential establishment of a vast array of testamentary trusts, and then to permit the trustee of the will to decide which (if any) of the trusts will in fact be utilised. Versions of this precedent often have over 12 different potential forms of elective testamentary trusts set out under the will.

The number and description of testamentary trusts in this style of precedent is largely dependent on the approach of the lawyer who drafts the base precedent.

Examples of the types of testamentary trusts included in the one will document are as follows:[8]

- cascading testamentary trusts;
- beneficiary controlled testamentary trusts;
- capital reserved (or protected) testamentary trusts;
- asset specific testamentary trusts;
- accommodation fund testamentary trusts;
- special disability testamentary trusts;
- other protective testamentary trusts;
- all needs protective testamentary trusts;
- superannuation proceeds testamentary trusts;
- special needs testamentary trusts;
- contribution fund trusts;
- restricted life estate testamentary trusts;
- GST (or generation skipping) testamentary trusts;
- insurance proceeds testamentary trusts;
- parallel testamentary trusts;
- more restricted testamentary trusts;
- capital reserved non-fixed testamentary trusts;
- split fixed testamentary trusts;
- income reserved non-fixed testamentary trusts;
- optional testamentary trusts;
- perpetual charitable trusts; and
- life interest funds.

From an estate planning perspective, there is a threshold risk with this type of will-drafting approach that allowing the trustee to determine what, if any, trusts are utilised may be a delegation of the willmaker's power.

Ignoring this potential issue, there is also the risk that errors will be made in the drafting process that may remain undiscovered until it is too late.

As noted, the case of *James v Douglas*[9] is an example in this regard. The court confirmed its view that the will had:

> "47. … 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. 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 that 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. However, the court also stated that, given the lengthy and complex nature of the document, the lawyer would not have given any explanation, or made any comment, about one of the main aspects of the will that was in contention, namely, who was to be the appointor of one of the trusts established.[10]

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

Gift and loan back strategies

The asset protection strategy often referred to as a "gift and loan back" arrangement (and various iterations of it) has arguably had a chequered history[11] and often seen branding developed to conveniently label the steps involved, for example:

- beta strategy (which was the subject of a failed patent application in the case of *Grant v Commissioner of Patents*[12]);
- legacy protection strategy;
- secured loan arrangement;
- synthetic transfer;

- capital protection strategy using a lineal descendent or bloodline trust; and
- 100% security strategy to protect assets from thieves, such as the tax man.[13]

One purported version of the "synthetic" wealth transfer approach has attracted particular attention in recent years (but for all the wrong reasons) and provides a "cautionary tale" for advisers in relation to a range of issues, including marketing strategies, effective legal drafting, and reliance on artificial intelligence.

Branded as the "Vestey Trust" or the "Master Wealth Control Package", the arrangement in question was promoted as part of a wider property and investment offering that promised advice on "how to locate and invest in undervalued property, undertaking property developments, locating undervalued businesses, renovating for profit, and how to secure and grow your wealth".[14]

In 2021, concerns about the approach were publicised on the television program *A current affair*.[15]

In April 2022, ASIC banned the individual promoter of the strategy (Dominique Grubisa[16]) for four years following findings that she claimed to hold Australian financial services and credit licences when she did not, and that she was not a fit and proper person to engage in financial services or credit activities.[17]

The AAT subsequently set aside the ban on the basis that, while it was satisfied that grounds existed to make the banning orders, it was not satisfied that the discretion should be exercised. In reaching this conclusion, the tribunal was clear in not excusing "the applicant's problematic behaviour that has been uncovered through ASIC's diligent investigations", rather that "the issues she presents are issues for a different decision-maker".[18]

In December 2022, a productised version of the arrangement gained the attention of the ATO, and it confirmed its view that, as a threshold issue, the arrangement promoted was unnecessary because the superannuation system already protects SMSF assets from creditors.[19] The ATO then went on to detail a range of tax and superannuation concerns with the solution.

In April 2024, the ACCC has successfully attacked all key aspects of the approaches of the DG Institute in the Federal Court decision of *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd*.[20]

A significant portion of the case was focused on the strategy that the ACCC summarised as follows (accepted as accurate by the court) and promoted as the "Real Estate Rescue" program (which generated circa $8.9m[21] in revenue over four years):

- identifying homeowners who may be in financial distress, including by monitoring court lists to identify possession, divorce or probate proceedings;
- contacting such homeowners with a view to reaching agreement for the program participant to purchase the homeowner's property below market value, or being authorised to sell the property and retain the proceeds above a certain amount; and
- the strategy was promoted as being one which would allow participants to acquire a property below market value and sell it for a higher amount, while allowing the homeowner to receive the benefit of part of the value of the equity held by the homeowner in the property, which the promotional materials indicated the homeowner would not otherwise receive in the event of a forced mortgagee sale.

The court concluded that the scheme was knowingly in contravention of Australian consumer laws and made representations which amounted to false and misleading conduct.

In relation to the tax-effective asset protection product prompted via the "Master Wealth Control" program (which generated circa $9.2m[22] in revenue over four years) of setting up a structure described by the DG Institute as an "impenetrable Vestey Trust" or "asset protection trust", the court similarly accepted the concession during the trial by the defendant that the obvious flaws in the solution meant that the representations promoting it were also false and misleading.

In particular, the court observed:

- while not raised by the ACCC, the strategy was noted as being wrongly attributed to the well-known Vestey family from the UK, who never entered into arrangements analogous to those promoted;
- a purported assignment made without consideration validly assigns any existing debts or other choses in action but is ineffective to assign any rights in relation to mere expectancies or possibilities of future entitlement;[23]
- the Vestey Trust scheme was summarised, at its most basic level, as follows:[24]
  - a discretionary trust would be created and controlled by the client;
  - all future income of the client was intended to be assigned to the trustee and paid into the trustee's bank account, although, as a matter of law, that was only valid to the extent of existing debts at the time the notice of assignment was given;
  - the client would then withdraw money from time to time from the trustee's bank account to meet personal expenses of the client, thereby borrowing money from the trustee free of interest and with no obligation of repayment for at least 50 years; and
  - that loan would be secured by the equitable mortgage and would also be the subject of a caveat on the title of any real property and could be the subject of registration in respect of personal property on the Personal Property Securities Register;
- there was an obvious flaw with the structure, stated to be designed to protect the client's property from creditors, in that in fact it only afforded protection to the extent of the amount of the secured loan by the trustee

to the client. In the early stages of the structure, the amount of the loan would be relatively small. That is, the amount of the loan would be limited by the amount of the existing debts assigned to the trustee and would be limited further by the amount of the withdrawals from the trustee's bank account to meet personal expenses of the client. Despite this fact, the program claimed to provide clients with complete and immediate protection from creditors to the extent of all their net worth;

- Grubisa demonstrated a lack of legal competence with the arrangements, including:[25]
  - the claim in promotional material that the trust deed contained a prohibition on the trustee borrowing (which did not in fact appear in the deed);
  - the failure to appreciate that the assignment would be effective only in relation to existing debts and not in relation to all future income; and
  - the infelicity of referring in a "declaration and acknowledgment" and elsewhere to a mortgage only over the client's "equity in the property";
- despite the above errors perhaps being able to be overlooked, the overriding obvious flaw (of most of the client's equity in their property not in fact being protected by the scheme) was held to be a "matter of commonsense which would be readily appreciated by anyone with elementary legal knowledge";
- in particular, the fact that the loan secured by the equitable mortgage would be most unlikely to reach the value of the client's assets for a very substantial period of time (if ever) was so obvious that it was held that Grubisa must have been aware of it when conceptualising, drafting and implementing the structure;
- while it was accepted that clients were encouraged to consult their accountants (an important part of the defence against liability), this aspect was held to be irrelevant to Grubisa's culpability. This was because accountants for clients were only provided a "briefing paper"[26] which made no reference to the loan by the trustee to the client or how it would arise over time, other than to state that "Available equity will effectively be mortgaged to the hilt to the Trust". A statement that was false, and reflected the obvious flaw in the structure, although that flaw would have only been apparent to an accountant if they had also been given the whole package of transaction documents and associated commentary (rather than merely the briefing paper);
- the promotional claim that the Vestey Trust approach had been approved by the decision in *Sharrment Pty Ltd v Official Trustee In Bankruptcy*[27] was also held to be false and misleading; and
- in particular, in the *Sharrment* decision, it was held that the disputed transactions were not shams but real transactions, and in order for the acts or documents to be shams, the parties must intend that the acts or documents are not to create the legal rights or obligations which they give the appearance of creating. There was no suggestion of any express arrangement or understanding that the transactions were not to take effect according to their terms, and there was a real debt created – attributes essentially missing from the Vestey Trust arrangements as documented. Further, the *Sharrment* case did not consider any of the types of key documents featured in the Vestey Trust arrangement (such as promissory notes, declaration and acknowledgments, notices of assignment or caveats).[28]

In the subsequent penalty decision,[29] the court imposed a range of sanctions including the following, although, strikingly, due to (an apparent) failure by the ACCC to consider who to seek penalty orders against, it would appear that less than $1.5m (and possibly less than $500,000) of the financial penalties will in fact be recovered, pending any successful actions by liquidators:

- $6m in fines payable to the Commonwealth;
- a five-year ban on making any representations in the supply or promotion of programs offered by the DG Institute;
- disqualifying Ms Grubisa from managing corporations for a period of five years;
- the organisation making an offer to redress each student who enrolled in the programs in the period April 2017 to November 2022 (estimated to be in the region of $14.7m);
- the organisation providing a refund (in an amount equal to the course registration fee paid by each student plus interest from the date the student paid the course registration fee to the date the refund is provided) to each student who had historically provided their bank account details; and
- the organisation widely publishing a notice substantially in the form directed by the court.[30]

> "… the only certainty for specialist advisers is that there will be no slowdown in changes …"

The notice that the court required is radically different to that proposed by Grubisa, which was held to be misleading and deceptive. Interestingly, part of the suggested approach by Grubisa contained (apparently due to an oversight) the wording "use British spelling please, ChatGPT".

In relation to the use of artificial intelligence by advisers, the court confirmed:

- the use of artificial intelligence was not something that should be regarded as a significant matter since the relevant resolution did not require the exercise of significant legal skills or judgment, and instead "appeared to be the kind of thing which artificial intelligence is capable of producing effectively";

- artificial intelligence does have a role to play in certain aspects of legal drafting; and
- the important aspect, in circumstances where artificial intelligence is used, is that any such draft is scrutinised and settled by a legal practitioner.

Estate equalisation and "hotchpot" arrangements

In a sentence, the objective of a "hotchpot"[31] clause is to equalise the ultimate entitlements of beneficiaries under a will, taking into account pre-death advances.

The term is said to be derived from the French word "hochepot", meaning "a dish shaken up". The analogy is that the approach operates by putting all of the property of the willmaker and all of the gifts and settlements made before death into one pot and then doling out the mixture in accordance with the formula set out in the will.

Traditionally, hotchpot provisions focused on loans made to beneficiaries prior to the death of a willmaker. However, in modern, holistic tax and estate planning, hotchpot provisions can mandate adjustments for a range of issues, including:

- gifts;
- the time value of money, that is, inflation (and deflation);
- the investment performance of different categories of assets (particularly where certain assets have been transferred to certain beneficiaries prior to death);
- assets that may have been received by beneficiaries from another estate, for example, from the spouse (including a former spouse) or parents of the willmaker;
- assets that do not strictly exist at the time of crafting the will (for example, life insurance); and
- tax attributes, particularly where certain assets have an embedded tax impost compared to those which may be tax-free (for example, superannuation benefits passing to a tax dependant, a property which meets the main residence definition, and assets that were acquired by the willmaker prior to the introduction of CGT).

Arguably, the threshold issue in relation to hotchpot clauses is the legal interpretation of the provisions under a will, and there are several hazards in this regard.

As explained in one of the leading decisions (*Re Tennant; Mortlock v Hawker*[32]), the main interpretation principles can be summarised as follows:

- when a disposition requires that a fund should be distributed equally among a class and then goes on to provide that those members of the class who have received advancements should bring them into hotchpot, the effect is to qualify the statement that the shares in the fund are to be equal;
- further, the will should direct a method of calculation, which may be expected to result in some other proportions;
- generally, the purpose of directing the hotchpot is to ensure that children obtain from their parent, by advancement and under the will, equal portions or equality of benefit;
- ultimately, however, any hotchpot clause operates according to its own terms; thus, if the language of the relevant hotchpot clause discloses that the willmaker intended that some advancements, but not others, are to be brought into account, the language and intention are to be given effect to; and
- this can mean, as one example, that a particular hotchpot clause may be crafted to require some, but not all, advances made during the willmaker's lifetime to be brought into account.

In another leading decision (*Prichard v Prichard*[33]), the following further principles were confirmed:

- the common law principle on a total intestacy that the deceased's children are obliged to bring substantial advancements made at any time into account when calculating their entitlement on the intestacy, does not apply directly to the construction of a hotchpot clause in a will;
- this means that, when applying the legal principles governing the construction of wills, a hotchpot clause must be construed according to its terms and considering the circumstances in which it was made;
- "advancement" has a particular meaning at law and usually denotes payments made by a parent, early in a child's life, to establish the child in life or to make provision for the child. This means that casual or small payments to a child are not considered to be "advances" in the legal sense of the word;[34] and
- thus, a willmaker may use the words "advance" and "advanced" in a manner that is not the same as the strict legal definition.

When applying the principles from *Prichard v Prichard*,[35] the court concluded that the willmaker sought to identify with particularity *some*, but not *all*, payments which were to be brought into hotchpot, despite the fact that there was no evidence that the payments were an "advancement" in the legal sense.

Indeed, the decision is an example of a further key risk in hotchpot situations, that is, practically, whether there is the evidential material available to allow the requested adjustments to be accurately calculated.

The relevant hotchpot clause in *Pritchard v Pritchard* was as follows:

> "22 … I DECLARE that every advance of money or property made by me as set out in the paper writing kept with this my Will and signed by me to any child of mine and every sum of money or property advanced by me to any child of mine shall be brought into hotchpot by such child upon the division of my residuary estate at the value at the time of such advance and be accounted for accordingly and shall be brought into account as

against all persons interested in such share (the hotchpot clause)."

Bound with the will was a typed list, on a separate page (the schedule), with the date, the name of each child, the amount advanced, and the signature of the willmaker.

A copy of the schedule bound with a copy of the will was found among the willmaker's papers. This copy had two further advances noted, added in handwriting by the willmaker.

None of the advances made after the execution of the will were noted on the schedule with the final signed will. Some, but not all, of the advances which were made after the execution of the will were noted on the amended copy of the schedule found with the willmaker's personal papers.

The court confirmed that, based on the factual matrix, there were six possible interpretations of the hotchpot clause, namely, that the amounts to be brought into hotchpot were those:

1. set out in the schedule of the signed will (and only those amounts);
2. set out in the schedule, together with the additional amounts added to the amended copy of the schedule by the deceased;
3. specified in the schedule and any additional amounts advanced by the deceased to a child after the date of the will, not limited to and not necessarily including the amounts specified in the amended copy of the schedule;
4. specified in the schedule, the additional amounts added to the amended copy of the schedule, and any other additional amounts advanced to a child after the date of the will, irrespective of whether they were specified in the amended copy of the schedule or not;
5. specified in the schedule to the will, the additional amounts added to the amended copy of the schedule, and any other additional amounts advanced to a child after the willmaker stopped keeping records of advances; or
6. specified in the schedule and any amount advanced to a child before or after the date of the will, irrespective of whether it was included in the schedule or the amended copy of the schedule.

In concluding that, based on the drafting of the clause and all available evidence, the correct approach was interpretation (2) (that is, the schedule in the final will, together with the additional amounts added to the amended copy of the schedule), the court confirmed:

- it is not for a court to rewrite a will to align with its view of a family's financial history;
- the clause here was ambiguous on its face because, on a plain reading, it described two groups of advances which were to be brought into hotchpot, but the manner in which the latter group was described appeared to include in that group all of the first group of advances;
- this uncertainty justified the court having regard to extrinsic evidence in construing the clause; and
- ultimately, the description of the second group of advances to be brought into hotchpot needed to be discarded for uncertainty.

Following on from above, the steps an executor must take to ensure that a hotchpot clause can be adhered to (managing these risks) may mean that a court application is required, specialist advice obtained, or written agreement documented between all beneficiaries.

At a minimum, however, an executor — and their advisers — should be satisfied of the accuracy of the factual matrix and the correct interpretation and calculation of the hotchpot clause based on consideration of the will and:

- financial records (including accounting statements) of the deceased;
- loan agreements (whether or not secured);
- deeds of gift;
- bank account records;
- any running ledgers maintained by the willmaker or trusted adviser (eg in handwriting, Excel or Word);
- written statements (including statutory declarations) by the willmaker, any beneficiary or trusted adviser; and
- the intended treatment of second order consequences, particularly taxation.[36]

In relation to calculating the consequences of a hotchpot clause, the accepted principles are explained in *Re Tennant; Mortlock v Hawker*[37] as follows:

If there is a distribution of corpus being adjusted, this is done by adding the aggregate amount of the advancements made by the willmaker to the amount of the corpus of the willmaker's estate and then dividing the total equally; this approach gives a prima facie share from which the amount advanced to each respective beneficiary must be deducted to obtain their distributable share in the estate; and alternatively, the same result can be achieved in another way. Namely, out of the willmaker's estate, each unadvanced beneficiary and each beneficiary who has been advanced in less degree than the beneficiary who has received the greatest advancement may be credited with amounts which will bring them all up to an equality — and then the remainder of the estate is divided equally.

When applying one of the above approaches, the following points are important:

- to ascertain the proportionate shares of corpus which, in any given case, an advanced and an unadvanced beneficiary are to take, it is necessary to express in money both the value of the respective advances and of the willmaker's residuary or other fund to which the hotchpot provision applies;
- usually the advancements are expressed in monetary terms, and if the hotchpot clause covers gifts of property in specie, often the will supplies the value or a means of fixing it; and

- in the absence of any other indication, there must be a valuation as at the date of the gift.

The necessity of reducing the residuary estate to monetary expression is a cause of potential difficulties and complexity.

The choice is between waiting for the actual realisation in money of all of the assets comprising the estate, or fixing the values by estimation as at some earlier point of time.

If the former course is adopted, the proportional or fractional shares in the residuary estate, a result of the operation of the provision for hotchpot (and the direction to divide equally between the beneficiaries), will not be ascertained until actual conversion into money is completed; a step often not required except for the purpose of final distribution.

In contrast, if the latter course is adopted, the fact that the value of property does not remain constant means that the proportional or fractional shares taken by the beneficiaries will vary according to the period chosen for fixing them by means of valuation.

Superannuation and BDBNs

As is the case in many areas of holistic estate planning, perhaps the only certainty for specialist advisers is that there will be no slowdown in changes in the superannuation rules, and therefore no slowdown in workflow.

Perhaps too will the litigation lawyers running matters disputing aspects of BDBNs become increasingly busy, further supporting a conclusion that, unlike the Benjamin Franklin reflection of death and taxes being the only two certainties, there is in fact a third certainty for holistic advisers (namely, superannuation-related advisory work) which may be equally perilous.

Historically, the decision in *Walter William Nespolon v Lindy van Camp*[38] provided a stark example of the above observations. In this case, a surviving spouse was alleged to have coerced her de facto less than 24 hours before he died to sign a BDBN in her favour.

One of the reasons the deceased was said to have been interested in a BDBN was that, after speaking with his accountant, he believed that there would be tax advantages achieved by signing a BDBN — despite the fact that, of itself, a BDBN has no impact on the tax outcome.

While the judgment did not resolve the dispute, the court was blunt in confirming that it would be wholly inappropriate for the trustee of the SMSF to pay the death benefit into court. That is, if the purported BDBN was ultimately held to be unenforceable or set aside, the trustee would be required to exercise its discretion and determine how to pay the death benefit. The trustee was not entitled to abrogate that responsibility by simply paying the death benefit into court.

In the subsequent decision of *van Camp v Bellahealth Pty Ltd*,[39] the court concluded that the BDBN was in fact valid and instructed the trustee to arrange payment of the death benefit of over $4.5m (including $3m of life insurance proceeds) to the surviving de facto spouse.

While, during the early stages of the proceedings, there were suggestions that the BDBN was invalid for a failure to comply with reg 6.17A of the *Superannuation (Industry) Supervision Regulations 1994* (Cth), the court was blunt in dismissing this suggestion, citing *Hill v Zuda Pty Ltd*[40] as authority for the fact that this regulation does not apply to SMSFs.[41]

Instead, the court had to determine whether the:

- member lacked capacity to make the BDBN; and
- the BDBN was liable to be set aside by reason of unconscionable conduct by the de facto.

In summary, the key elements of the factual matrix were as follows:

- the SMSF was a sole member fund;
- the member and his de facto shared two infant children together and had been in a relationship for around seven years;
- as part of the wider estate plan, the member had created a testamentary trust will, with flexibility for a special purpose “superannuation proceeds trust” to be established (ie a form of testamentary trust whereby the range of beneficiaries is limited to tax dependants to ensure that the concessional tax treatment otherwise afforded to death benefits paid directly to tax dependants could be accessed);
- the trustees of the testamentary trust appear to have been the de facto, the member’s brother and the member’s lawyer, acting by majority;
- a key driver for the structure of the will was the member’s concerns that his de facto was not a good saver and that the assets should be protected for the long-term benefit of the children, particularly given the assumption that his de facto would re-partner;
- the accountant for the SMSF had advised that, unless the death benefit was paid to the de facto, there would be adverse tax outcomes; and
- the lawyer for the estate plan had flagged that, given the commercial objectives, it should still be possible to achieve most of the desired tax outcomes even if the benefits were paid to the legal personal representative and formed part of the estate.

In deciding that the member had sufficient capacity to validly make the BDBN, the court confirmed:

- unlike the member’s will, the BDBN itself was not complex in this case; rather, it was a short document and straightforward in its terms;
- thus, the main consideration was simply whether the member had the capability of understanding that all of his member benefits would be paid directly to his de facto and would not be used by the executors in accordance with the terms of his will, which required only a general understanding and not an overly

complicated explanation in the circumstances of this case;

- this was particularly so, given the member was educated in business as well as medicine, a director of various companies and experienced in dealing with his financial affairs and businesses, and had received advice about the nature and effect of making a BDBN from his lawyer historically, and his accountant immediately before it was signed;
- the question of capacity was determined not by reference to what the member, in fact, understood but instead whether he would have had the capacity to understand if the matter had been explained to him;
- in all of the circumstances, the member was held to have either understood, or been capable of understanding, that his member benefits would not be available to his estate or to his executors to pay debts (in which case, tax would have likely been payable);
- the fact that the two doctors who witnessed the BDBN considered it was reasonable to do so, without doing a formal cognitive assessment, supported a conclusion that the member's mental functioning was not so obviously impacted by the medications being administered so as to raise real reservations or concerns about his capacity; and
- as the member's lawyer had experience in estate planning, her observations that, during a very short phone call with the member shortly before the BDBN was prepared, the member seemed "drugged up" were not critical, particularly given that:
  - the discussion was not an in-person meeting, where the court held that she could have more properly observed and tested the issues with him (although compare with *Drivas v Jakopovic*[42]);
  - the lawyer did not contemporaneously relay any concerns to the other partner working on the matter; and
  - nothing was raised by the lawyer about capacity issues in the cover email sending the BDBN for signing.

In deciding that the de facto had not acted unconscionably in relation to the BDBN, the court confirmed:

- the conclusion that the member did not lack mental capacity to make the BDBN did not mean automatically that he could not be in a special disadvantage, that is, disadvantage may be situational or relational, have been created or exacerbated by an absence of advice or explanation, and may coexist with a "full understanding" of the disputed transaction;[43]
- the fact that the de facto printed the BDBN without giving a copy of the lawyer's email of advice to the member or explaining the advice to him, was not due to some contrivance on her part or focus on her own material gain, and while this was not of itself determinative of the question of unconscionable conduct, it did point to an absence of a predatory state of mind and conscious victimisation or taking advantage;
- there was insufficient evidence to support a conclusion that the de facto actually knew, or ought to have known, of the existence and effect of a special disadvantage being endured by the member, that is, she did not know or suspect that the member was confused, could not recall things, or was in a very vulnerable state in relation to decision-making concerning his financial affairs; and
- thus, the BDBN was not signed as a result of the de facto taking unconscionable advantage of any known special disadvantage of the member.

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 an increasingly prevalent estate planning heuristic, "estate planning always needs to be more than a will".[44]

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 – with any will merely one part of a much wider tapestry.

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References

1 M Burgess, "Tax and estate planning in 2024: what's 'hot' right now?", (2024) 58(6) *Taxation in Australia* 325.

2 [2023] QSC 264.

3 [2023] QSC 264 at [21].

4 [2023] QSC 264 at [21].

5 [2023] QSC 264 at [22].

6 [2023] QSC 264 at [26].

7 [2016] NSWCA 178.

8 While the author is unaware of a will containing all 22 forms of testamentary trust, many templates contain at least 12, although a material question might be whether some purported trusts have any substantive difference, other than the "branding".

9 [2016] NSWCA 178.

10 [2016] NSWCA 178 at [48].

11 See, for example, the decision in *Re Permewan No. 2* [2022] QSC 114, as explored in M Burgess, "Tax and estate planning in 2022: the year ahead", (2022) 56(7) *Taxation in Australia* 423.

12 [2006] FCAFC 120.

13 See Ed Burton and his "Diamond Inner Circle Coaching and Mastermind Alliance" as part of the "Vital Link Financial Education" Group circa 2004 (please contact the author if further information is required in relation to this material).

14 Strictly, the scheme was offered by the "DG Institute"; however, this entity was founded by solicitor and barrister Dominique Grubisa.

15 See https://9now.nine.com.au/a-current-affair/selfproclaimed-aussie-property-guru-preying-divorcee-clients/7412dc89-9a86-4725-aa0c-08f4509c7ef8.

16 Dominique Grubisa, director of the DG Institute.

17 Australian Securities and Investments Commission, "Dominique Grubisa receives four-year ban", media release no. 22-079MR, 5 April 2022.

18 *Grubisa and Australian Securities and Investments Commission* [2023] AATA 3328.

19 ATO, *SMSFs and schemes involving asset protection*, QC 71175, 22 December 2022.

20 [2024] FCA 344.

21 [2024] FCA 344 at [3(b)].

22 [2024] FCA 344 at [4(c)].

23 *Norman v FCT* [1963] HCA 21.

24 [2024] FCA 344 at [83].

25 [2024] FCA 344 at [88].

26 [2024] FCA 344 at [89].

27 [1988] FCA 266.

28 [2024] FCA 344 at [100].

29 *Australian Competition and Consumer Commission v Master Wealth Control Pty Ltd (Penalty)* [2024] FCA 795.

30 [2024] FCA 795 (see Sch 1).

31 Sometimes, erroneously, referred to as "hotchpotch."

32 [1942] HCA 3.

33 [2015] WASC 170.

34 See *Taylor v Taylor* (1865) LR 20 Eq 155, and *Re Hayward (dec'd); Kerrod v Hayward* [1957] 2 All ER 474.

35 [2015] WASC 170.

36 The leading recent cases in this regard are, arguably, *Todd v Todd* [2021] SASC 36 and *Craven v Bradley* [2021] VSC 344, as explored in M Burgess, "Tax and estate planning in 2022: the year ahead", (2022) 56(7) *Taxation in Australia* 423.

37 [1942] HCA 3.

38 [2022] NSWSC 1190.

39 [2024] NSWSC 7.

40 [2022] HCA 21.

41 The implications of this decision were also explored in detail in M Burgess, "Tax and estate planning in 2022: the year ahead", (2022) 56(7) *Taxation in Australia* 423.

42 [2019] NSWCA 182.

43 See *Mentink v Olsen* [2020] NSWCA 182, citing *Bridgewater v Leahy* [1998] HCA 66.

44 Arguably attributed to most specialist, holistically aware, advisers.

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