



WEEKLY TAX BULLETIN

www.thomsonreuters.com.au/tax



Failed trust distributions: First adviser warning for 2025

by Matthew Burgess, Director, View Legal

The issues in relation to failed trust distributions appear to be a permanent feature of the trust related litigation arena.

The decision in *Re Estate of Stagliano* [2025] VSC 39 provides a stark example across two key trust distribution areas.

Was estate a potential beneficiary

First, the court needed to consider whether an intended 'beneficiary' was in fact a valid recipient of an attempted distribution.

In particular, there was an attempted distribution to a deceased estate of a deceased beneficiary.

The trust deed included a beneficiary class as follows 'Secondary trust: the trustee or trustees of any trust, whether now existing or hereafter created, ('the secondary trust') of which a beneficiary or discretionary object thereunder is a beneficiary of the trust and where the provisions of the secondary trust require a vesting in interest of the trust property prior to the termination date ...'

interestingly, the decision did not consider whether the recipient 'trust' may have been an invalid nomination based simply on the requirement that it have shorter vesting date - a restriction often not included in specialist trust deeds, so as to ensure the benefits under the 'wait and see' rule can be accessed (explored in previous articles in this Bulletin, for example see 2016 WTB 25 [799]).

Instead the court focused on whether listing 'the estate' came within the beneficiary definition under the trust deed.

In concluding the purported distribution failed the court confirmed:



WEEKLY TAX BULLETIN

www.thomsonreuters.com.au/tax



1. A deceased estate was not a 'trust' within the meaning of the trust deed, nor in any relevant sense under general law.
2. At a threshold level the definition of beneficiaries did not include trusts themselves, rather only 'the trustee or trustees of any trust' - there was no legal basis on which an estate could be a trustee.
3. Furthermore, the status of the interests of a deceased person's property following their death and until completion of the administration of the estate was confirmed in *Re Constantinou* [2013] Qd R 219) as follows:

'On death the entire interest in property (legal and beneficial) owned by a deceased person passes to the deceased person's executor for the purpose of administration under the will. While the estate remains in the course of administration, no person entitled under the will has any proprietary interest in any particular asset.

While an estate remains unadministered, persons entitled under the will have a chose in action to require the deceased's estate to be duly administered, and that right is disposable and transmissible. It carries with it the right to receive the fruits of the chose in action when they mature. It is recognised by the law that this is an inchoate interest of a kind in the assets of the estate. But that interest can be defeated by the executor using the assets to pay the liabilities of the estate. No doubt, from the time of demise the executor was subject not only to duties as executor but fiduciary duties in respect of the trusts established by the will.

However, it is not until the executor has completed the administration of the estate and assents that property passes to those entitled under the will. Those taking property at that point in time take under the will, not by reason of the assent, but the dispositions of the will become operative because of the assent.

(Where an) estate is still under administration, the executor has not assented ... the executor still holds the entire legal and beneficial interest in all the property and there is no property the subject of the will trusts. There cannot be any extant trusts because, as yet, there is no property held on trust'.

4. The reference to the 'assent' is to the power of the executor or administrator to agree to the vesting in other persons of interests in the deceased's real and personal property. The effect of an assent is to vest in the person the estate or interest in which the assent relates.



WEEKLY TAX BULLETIN

www.thomsonreuters.com.au/tax



5. Thus, prior to administration of the deceased estate, there is no specific property capable of constituting the subject property of any trust in favour of a beneficiary (see Official Receiver in *Bankruptcy v Schultz* (1990) 170 CLR 306).

6. Certainly prior to probate or letters of administration being granted the administration of the estate will not have commenced, and even during administration the estate will still not constitute a trust - here the resolution was prior to a grant of administration and therefore the attempted distribution failed as the estate did not fall within the beneficiary definition (see *Re Roth* [2022] VSC 511).

Second order consequences of failed distribution

The other key issue considered by the court related to the second order consequence of the defect in the resolution of failing to nominate a potential beneficiary.

The court noted that while it was not asked to rule on the issue, the following principles were relevant, from leading authorities such as *Pitt v Holt* [2013] UKSC 26, *Owies v JJ Nominees Pty Ltd* [2022] VSCA 142 and *Lewin on Trusts* (Volume II) (Thompson Reuters, 12th Ed):

(a) it is important to distinguish between those cases where the disposition is plainly beyond power and those dispositions that are within power, but in respect of which there has been some breach of duty;

(b) an example of the first category (referred to as 'excessive execution') is a purported distribution to an entity that is not a beneficiary under the trust - a fraud on the power, where the power is exercised ostensibly within the terms of the trust but for an improper purpose is a specific example in this regard;

(c) an example of the second category (referred to as 'inadequate deliberation') is a distribution that is made to a beneficiary within the terms of the trust, but where there has been a failure by the trustee of its duty to give proper consideration to relevant matters or its duty to give real and genuine consideration to the power;



WEEKLY TAX BULLETIN

www.thomsonreuters.com.au/tax



(d) an offending part of a resolution may be severable, on the basis that it is possible to 'distinguish the boundary between the valid and the invalid'; that is, a distinct distribution to a beneficiary may not fail by reason that there is also a purported distribution in excess of power to a non-object;

(e) however, it could also be argued that where a resolution distributes percentages of the trust income to two intended objects and one distribution fails as being beyond power, it has an effect on the entirety of the resolution;

(f) in the case here, the relevant resolution was prefaced as being 'pursuant to the powers vested in the company in the Trust Deed', but the powers in the deed did not empower the trustee to set aside the income as stated, thus arguably it would have been inappropriate to sever parts of the resolution - rather the whole resolution should be held to be ineffective;

(g) furthermore, even if a part of a resolution is severable, consideration is required as to whether the trustees would not have exercised the power at all, or would have exercised it differently, if they had been properly instructed as to the limits on the power;

(f) where a resolution as a whole is void (including because it is voidable at the insistence of an aggrieved beneficiary), the result will be that the entirety of the income for the relevant financial year would be dealt with in accordance with a (valid) default distribution clause, or be retained in the trust (and the trustee taxed, at the top marginal rate) - consequences also explored regularly in this Bulletin (for example see 2014 WTB 43 [1426]).

